A Plainly Obvious Need for New-Fashioned Municipal Liability: The Deliberate Indifference Standard and Board of County Commissioners of Bryan County v. Brown

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A PLAINLY OBVIOUS NEED FOR NEW-FASHIONED MUNICIPAL LIABILITY: THE DELIBERATE INDIFFERENCE STANDARD AND BOARD OF COUNTY COMMISSIONERS OF BRYAN COUNTY v. BROWN

INTRODUCTION

Abner Louima, a Haitian immigrant, alleges that on August 9, 1997, New York police officers from the seventieth precinct sodomized him with the wooden handle of a toilet plunger and then forced the handle down his throat.1 Officers arrested Louima outside of a dance club after a fight broke out.2 They charged him with disorderly conduct, obstructing governmental administration, and resisting arrest.3 Louima suffered numerous injuries, resulting in his hospitalization.4


2. Kocieniewski, supra note 1, at B1. Louima claims the officers arrested him after a fight between two women broke out outside of the club and someone else punched Officer Justin Volpe in the face. McAlary, supra note 1, at 124, 153. He also stated that the officers made racial comments to him. Id. at 153.


4. Id. Officers who brought Louima to Coney Island Hospital in Brooklyn stated that homosexual activity outside of a gay bar caused his injuries. John Kifner, Nurse Tells of Retaliation for Efforts in Louima Case, N.Y. TIMES, Sept. 24, 1997, at B4. Owners of Club Rendez-Vous, the bar outside of which the officers arrested Louima, stated that they played Creole music the night of the arrest and catered to all audiences. Latest Developments, PORTLAND OREGONIAN, Aug. 21, 1997, at A14. Louima left the hospital on October 10, 1997 with a damaged colon and a loss of forty pounds since the attack. Garry Pierre-Pierre, After 2 Months, Beating Victim Is Out of Hospital, N.Y. TIMES, Oct. 11, 1997, at B1. His doctor stated that Louima's condition did not clearly demonstrate whether he will ever fully recover. Id. at B3. As of the date of publication, the officers involved received indictments on federal charges, and Louima filed a $155 million lawsuit against the city. Garry Pierre-Pierre, Louima Voices a Measure of Defiance, N.Y. TIMES, Feb. 27, 1998, at B5; see Joseph P. Fried, In Louima Case, Dream Team and Perhaps Overkill, N.Y. TIMES, Nov. 9, 1997, § 1, at 37, 41 (discussing "overkill" of famed attorneys Johnnie Cochran, Jr., Barry Scheck, and Peter Neufeld agreeing to handle Louima's civil case). In addition, federal prosecutors charged a sergeant with attempting to cover-up the incident by falsifying an arrest report. Joseph P. Fried, U.S. Takes Over the Louima Case: 5th Suspect, a Sergeant, Is Indicted, N.Y. TIMES, Feb. 27, 1998, at A1.

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Louima’s case represents a highly publicized and extreme example of how many officers abuse their authority. The incident sparked nu-

5. Louima’s case clearly involves abuses based on racial hatred and possibly other prejudices. See HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 275 (1998) (finding a frequent “racial or ethnic component” to New York City police abuse cases); Jungwon Kim, Protesters Target Police Brutality: Aim at Brooklyn 70th Precinct, NEWSDAY, Aug. 24, 1997, at A28 (quoting protesters at a demonstration on August 23, 1997 as asserting that New York police officers’ racial discrimination remains a systemic problem). This Comment will not examine the issue of racial motivation in police abuse cases or the complex factors behind officers’ misconduct. For some recent articles on the interplay of police misconduct and race relations, see Robin D. Barnes, Blue by Day and White by [K]night: Regulating the Political Affiliations of Law Enforcement and Military Personnel, 81 IOWA L. REV. 1079, 1091 (1996) (“Klan-cops have operated solo and in groups while conspiring to harass, intimidate, and even kill members of minority communities . . . . A few of today’s self-identified white supremacists admit that they actively pursue employment in law enforcement agencies.”); Paul Hoffman, The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America, 66 S. CAL. L. REV. 1453, 1455-61 (1993) (arguing that the Reagan and Bush administrations failed to combat police abuse and that the Rodney King beating demonstrates the need for a more active federal government in this area); Sheri Lynn Johnson, Race and the Decision to Detain a Suspect, 93 YALE L.J. 214, 237-50 (1983) (criticizing judicial acceptance of the use of race as a factor justifying reasonable suspicion for an arrest); Tracey Maclin, “Black and Blue Encounters”—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 262-78 (1991) (contending that the Court should consider race in dealing with the constitutionality of a police confrontation); Adina Schwartz, “Just Take Away Their Guns”: The Hidden Racism of Terry v. Ohio, 23 FORDHAM URB. L.J. 317, 360-75 (1996) (arguing that the disparity between races in stop and frisks should be a factor in formulating racially neutral standards for police action); Robert V. Ward, Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a “Reasonable Person,” 36 HOW. L.J. 239, 253-58 (1993) (finding that the Supreme Court’s “reasonable person” test for consenting to searches and seizures promotes police abuse against minorities and that a more subjective standard should be applied).

The motivations behind officers’ backlash against certain members of society may result from more than racial tensions, however. See, e.g., FRANK DONNER, PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESsION IN URBAN AMERICA (1990) (tracing various forms of police abuse aimed at persons speaking out against the government, the poor, and minorities); HUMAN RIGHTS WATCH, supra, at 34-35 (finding weak civilian review boards, leadership failure, ineffectual civil remedies, and a lack of criminal prosecutions as all factors contributing to police misconduct); Irving Joyner, Litigating Police Misconduct Claims, 19 N.C. CENT. L.J. 113, 113 (1991) (“Some victims of police misconduct, however, are persons with outstanding backgrounds and credentials who simply have had the misfortune of having a conflict or disagreement with overzealous, brutal or sadistic police officers.”); Anthony S. Winer, Hate Crimes, Homosexuals, and the Constitution, 29 HARV. C.R.-C.L. L. REV. 387, 401-17 (1994) (finding gay men and lesbians among the most common victims of hate crimes).

Of course, one cannot deny the prevalence of minority victims harmed by police misconduct. See HUMAN RIGHTS WATCH, supra, at 39 (“Race continues to play a central role in police brutality in the United States.”); Hoffman, supra, at 1469 (“It is unusual to meet an African-American or Latino male from Los Angeles who has not been singled out for attention, and often abuse, by law enforcement officers because of his race.”); Alison L. Patton, The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality, 44 HASTINGS L.J. 753, 756 (1993) (describing the typical victim of police abuse as a young African-American or Latino male who is poor and has a criminal record); Emily J. Sack, Police Approaches and Inquiries on the Streets of New York: The Aftermath of People v. DeBour, 66 N.Y.U. L. REV. 512, 538 n.164 (1991) (finding race as a factor “overwhelmingly used against minorities, particularly Blacks and
merous discussions on police discretion, the results from New York Mayor Rudolph Giuliani's "crack down" on crime, and the reasons for police abuse. As a result of these discussions and others arising from the Rodney King beating, many have come to recognize the systemic problem of unjust police officers. This problem thus requires a

6. For example, criticism of New York City's Internal Affairs' failure to act on the Civilian Complaint Review Board's complaints on police misconduct and brutality led a state lower court to force the police department to allow the city's Public Advocate to examine officers' files when the board presents complaints against them. Kit R. Roane, Public Advocate Wins a Look at Suspected Officers' Files, N.Y. TIMES, Oct. 16, 1997, at B3. This decision occurred despite Mayor Giuliani's Commission to Combat Police Corruption's finding that 87% of Internal Affairs' complaints were conducted satisfactorily. Id. Internal Affairs did not begin investigation of Louima's case until 36 hours after the incident was reported. Lewis, supra note 5, at 14 ("[I]nvestigations into abuses remain shrouded in secrecy while internal disciplinary reports are kept strictly confidential.").

7. While a 50% decrease in the city's crime rate occurred since 1990, the number of complaints against the New York Police Department has increased by 56% from 1993 to 1996. Bad Cops, Good Cops, NEW REPUBLIC, Sept. 8, 1997, at 7, 7 (arguing that present criticism of Mayor Giuliani should not lead to "unpoliced criminality"). "Cops and liberties are not zero-sum rivals; a strong and effective police force is not a corrupt or an abusive police force; good street policing does not oppress and brutalize the poor: it benefits the poor, who are overwhelmingly the victims of street crime, above all." Id.; Only a Minority, supra note 1, at 19 (demonstrating that approximately four out of five complaints are made by minorities); see HUMAN RIGHTS WATCH, supra note 5, at 39 ("In New York, complaints citywide rose more than 37 percent from 1993 to 1994, after the new police 'quality of life' initiatives took hold.").

8. See, e.g., Edward Conlon, Men in Blue: Why Do Cops Go Berserk?, NEW YORKER, Sept. 29, 1997, at 10, 10-11 (arguing that the analogous circumstances of war and police work demonstrates similar psychological results and violent reactions).

This Comment will employ the following definition of police abuse: "any action by a police officer without regard to motive, intent, or malice that tends to injure, insult, trespass upon human dignity, manifest feelings of inferiority, and/or violate an inherent legal right of a member of the police constituency in the course of performing 'police work.'" Alexa P. Freeman, Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality, 47 HASTINGS L.J. 677, 685 (1996) (quoting Thomas Barker & David L. Carter, A Typology of Police Deviance, in POLICE DEVIANCE 4, 7 (Thomas Barker & David L. Carter eds., 1991)). This definition recognizes the broad scope of how officers can exceed their authority and physically, mentally, and emotionally harm others. Id. at 686.

9. See, e.g., Giuliani Targeted in Protest Over Cops: N.Y. Mayor Feels Heat Over Alleged Brutality, CHI. TRIB., Aug. 30, 1997, § 1 (quoting Richie Perez of the Congress of Puerto Rican Rights as stating that Mayor Giuliani did not confront the systemic problem of police brutality);
legal path open to victims that allows them to challenge police departments as contributors to their injuries.10

In contrast to this necessary path, current legal doctrines impose a strict, antiquated method for obtaining compensation resulting from police abuse. 42 U.S.C. § 1983 creates a cause of action against state and local officials who violate federal law.11 The Supreme Court interpreted this statute to allow suits against municipalities in certain situations.12 Despite this opening of the statute, the Court erected high hurdles that plaintiffs must clear in order to prevail in their cases against local entities.13 A critical manifestation of these hurdles arose in cases claiming a municipality’s failure to train or supervise officers adequately, as the Court required the responsible official to be “deliberately indifferent” to the problems that could occur.14

This Comment will explore the history of this judicial development of § 1983 and demonstrate how the current standard of “deliberate indifference” ignores social realities for cases involving supervisory officials who fail to prevent potential police abuse situations. Part I will present a comprehensive explication of § 1983 doctrines for municipal liability. After examining the history of the statute and its intended purpose,15 this Part will focus on the Court’s creation of municipal liability16 and the various legal hurdles the Court formed to limit this liability.17 Board of County Commissioners of Bryan County v. Brown18 presents the most recent example of the Court’s adherence to traditional formulas in the context of hiring an employee with a criminal background. As a result, this Part will provide a detailed examination of this case and its focus on the deliberate indifference standard.19

Part II will analyze the problems with the high deliberate indifference standard in light of current battles police abuse victims face when presenting a suit against municipalities. First, this Part will demon-
strate the deficiencies of the deliberate indifference standard in the context of Brown. This Part will then present the various legal problems police abuse victims face in these situations and show how the Court's stance in Brown failed to acknowledge these problems. Finally, a proposal for respondeat superior liability will be presented as a more viable doctrine for compensating police abuse victims without arbitrarily imposing costs on local entities.

I. BACKGROUND

A. The History and Purpose of Section 1983

Title 42 U.S.C. § 1983 originated from the Civil Rights Act of 1871, which Congress intended to be "remedial" and "in aid of the preservation of human liberty and human rights." Specifically, the rampant violence by the Ku Klux Klan in the South caused the Reconstruction Congress to develop a way of enforcing the Fourteenth Amendment and impose federal intervention on abuses by state authorities. Congressional members recognized the threat to the federal-state balance resulting from this legislation but found the

20. See infra notes 218-52 and accompanying text.
21. See infra notes 253-85 and accompanying text.
22. See infra notes 286-301 and accompanying text.
23. The statute states, in relevant part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
26. Monroe v. Pape, 365 U.S. 167, 171 (1961); CONG. GLOBE, 42d Cong., 1st Sess., app. 72 (1871) (statement of Rep. Blair) ("The courts are powerless to redress these wrongs, and the State Governments fail to afford protection to the people. . . . In many instances [members of the KKK] are the State authorities. And if you deny to the General Government the authority to interfere, then there is no remedy anywhere."). Id. at app. 78 (statement of Rep. Perry) ("Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices."). Congress acted in response to President Grant's message recognizing the threat to "life and property" and recommending legislation to protect these interests. Id. at 244.
desperate nature of contemporary conditions to require federal action.27

Given this historical context, the Court interpreted the statute to provide a federal remedy when state laws failed to support theoretical or practical solutions.28 In Monroe v. Pape,29 the Court examined the full legislative record and discerned three main goals for enacting the statute: (1) to strike down state laws that denied citizens federal rights and privileges;30 (2) to provide a "remedy where state law was inadequate;"31 and (3) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."32 Later, the Court characterized the function of the statute as deterring unconstitutional uses of state power.33 As a result, the Court moved beyond the specific attack against the Ku Klux Klan in 1871 and applied the statute's broad language to modern problems by allowing an action against a local official's abuse of position.34

27. See CONG. GLOBE, 42d Cong., 1st Sess., at app. 67 (statement of Rep. Shellabarger) ("The measure is one, sir, which does affect the foundations of the Government itself, which goes to every part of it, and touches the liberties and the rights of all the people, and doubtless the destinies of the Union."); see also Randall R. Steichen, Comment, Municipal Liability Under Section 1983 for Civil Rights Violations after Monell, 64 IOWA L. REV. 1032, 1040-41 (1979) (showing that "municipal apathy and tacit complicity" in contemporary violence remained the legislation's focus). In addition, Congress passed this statute at a time when the common law began to evolve and federal judicial power increased. Harold S. Lewis, Jr. & Theodore Y. Blumoff, Reshaping Section 1983's Asymmetry, 140 U. PA. L. REV. 755, 766 (1992).

29. Id. at 167.
30. Id. at 173.
31. Id.
32. Id. at 174.
34. Monroe, 365 U.S. at 172. The case involved a complaint that 13 Chicago police officers entered Monroe's home without a warrant, searched every room, and further infringed his rights through interrogation at the police station for 10 hours. Id. at 169.

One may criticize the Court's broad reading as straying from the legislators' intent and thus improperly expanding the role of federal courts. See, e.g., id. at 237 (Frankfurter, J., dissenting) (arguing that the Reconstruction Congress assumed that the states would "remain the primary guardians" of individual rights and only allowed federal intervention when a specific state law, custom, or usage barred relief). Regardless of the factual merits of this argument, the changing needs in society, exemplified by the civil rights movements in the 1960s, support a more liberal interpretation of the statute that requires balancing legislative intent against these needs. See Gene R. Nichol, Jr., Federalism, State Courts, and Section 1983, 73 VA. L. REV. 959, 996 (1987) ("In the broadest terms, section 1983 was designed to provide a federal cause of action that assures state constitutional compliance. It is certainly possible . . . that if the statute is interpreted in too intrusive a fashion, the final result would be a remedy that is less rather than more effective.").

Indeed, one must recognize that defining legislative intent necessarily includes the interpreter's perspective within the context of current social relations and power structures. Richard A. Matasar, Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis, 40 ARK. L. REV. 741, 787 (1987) ("[Personal] values shape the very context in which history
In contrast to this expansive reading, Monroe also excluded municipalities from liability.\textsuperscript{35} By examining the legislative history of the Ku Klux Act, the Court concluded that Congress did not intend to hold municipalities liable for officers’ violations of the statute.\textsuperscript{36} While this reading soon reached a critical reexamination, the decision to treat municipalities differently than individual officers pervaded all of the Court’s later decisions.\textsuperscript{37}

\textbf{B. The Overruling of Monroe’s Immunity of Municipalities}

Seventeen years later, the Court readdressed the role of municipalities in a § 1983 claim and overruled the holding in Monroe that they
must remain immune.\textsuperscript{38} In Monell \textit{v. Department of Social Services},\textsuperscript{39} female employees of New York City's Department of Social Services and Board of Education brought an action against the city for having an official policy of compelling pregnant employees to take unpaid leaves of absence before medical necessity required them to stop working.\textsuperscript{40} The Second Circuit Court of Appeals denied the employees relief, as \textit{Monroe} precluded liability against the municipality.\textsuperscript{41}

1. \textit{A New Historical Picture}

The Court fully explored the history behind the Civil Rights Act and the Sherman Amendment\textsuperscript{42} and concluded that congressional members could foresee liability against municipalities when approving the Act.\textsuperscript{43} First, the Court found that supporters of the amendment believed that remedies against municipalities could ensure protection for individuals under the Fourteenth Amendment.\textsuperscript{44} By contrast, opponents to the amendment argued that the federal government could not constitutionally require local governments to enforce the law against citizens, and thus the creation of a remedy imposed too much obligation upon municipalities.\textsuperscript{45} Despite their opposition, these members could perceive the distinction between the federal government creating new obligations on municipalities and imposing liability against municipalities that fail to conform to state law.\textsuperscript{46}

In addition to the debates on the Sherman Amendment, the Court analyzed jurisprudence at the time of the Act and found support for establishing municipal liability.\textsuperscript{47} Federal courts at the time of the Civil Rights Act had the power to enforce the Constitution against

\begin{itemize}
\item \textsuperscript{38} Monell \textit{v. Department of Soc. Servs.}, 436 U.S. 658, 701 (1978).
\item \textsuperscript{39} 436 U.S. 658.
\item \textsuperscript{40} \textit{Id.} at 660-61. The district court held the plaintiffs' claims moot, as the city changed the policy to only force a pregnant employee to leave her job when she became medically unable to perform her job. Monell \textit{v. Department of Soc. Servs.}, 394 F. Supp. 853, 855 (S.D.N.Y. 1975). The plaintiffs argued that they deserved backpay, but the court found \textit{Monroe} precluded liability against the city. \textit{Id.}
\item \textsuperscript{41} Monell \textit{v. Department of Soc. Servs.}, 532 F.2d 259, 265 (2d Cir. 1976). The court of appeals held that the individual board members could be held liable as "persons" under \textsection 1983, but the city would ultimately have to pay damages, and this result would contradict \textit{Monroe}. \textit{Id.} at 264-65.
\item \textsuperscript{42} See \textit{supra} note 36 for an explanation of the Sherman Amendment.
\item \textsuperscript{43} \textit{Monell}, 436 U.S. at 665-90.
\item \textsuperscript{44} \textit{Id.} at 672 (citing \textit{CONG. GLOBE}, 42d Cong., 1st Sess. 751, 760 (1871) (statements of Rep. Shellabarger & Sen. Sherman)).
\item \textsuperscript{45} \textit{Id.} at 673-74 (quoting \textit{CONG. GLOBE}, 42d Cong., 1st Sess. 795 (1871) (statement of Rep. Blair)).
\item \textsuperscript{46} \textit{Id.} at 679-80 (quoting \textit{CONG. GLOBE}, 42d Cong., 1st Sess. 794-95 (1871) (statements of Reps. Poland & Burchard)).
\item \textsuperscript{47} \textit{Id.} at 680-81.
\end{itemize}
municipalities that violated federal rights. As a result, congressional members could foresee courts enforcing the Act against local entities that violated federal constitutional rights. The Court also found that the members who supported the Civil Rights Act rejected the Sherman Amendment. This distinction supported the Court's belief that congressional members perceived the constitutionality of imposing liability on municipalities without resorting to the amendment's remedies against local entities for other individuals' acts. Furthermore, supporters emphasized the remedial nature of the Act and indicated that the "largest latitude consistent with the words employed" applied to the Act.

Given this new light on the historical environment surrounding § 1983, the Court interpreted the word "person" in the statute to include municipal entities as well as officials. Hence, the stance in Monroe against municipal liability no longer applied, and the general principle of providing a federal remedy for abuses without state solutions extended beyond individual officials' actions. The Court, however, provided an additional "sketch" for instituting a § 1983 cause of action against a municipality.

2. The Limitation of the New Doctrine

While expanding § 1983 to include municipalities, the Court explained in dictum that municipal liability would not entail a respondeat superior theory. By again examining the legislative history, the Court found that "Congress did not intend municipalities to be held

48. Id. Specifically, the Court during the middle of the nineteenth century enforced the Contract Clause against municipalities and provided "positive relief" by requiring that they levy taxes to discharge court judgments. Id. at 681; see id. at 673 n.28 (listing cases during 1860s that enforced the Contract Clause).

49. Monell, 436 U.S. at 682.

50. Id.

51. Id. at 684 (quoting Cong. Globe, 42d Cong., 1st Sess., app. 68 (statement of Rep. Shellabarger)); see id. at 686-87 (explaining that Rep. Bingham drafted section 1 of the Fourteenth Amendment to redress government takings of property and intended section 1 of the Civil Rights Act to provide civil remedies based on the Fourteenth Amendment).

52. Id. at 683.

Since municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by § 1, and, further, since Congress intended § 1 to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of § 1.

Id. at 685-86. The Court reinforced this conclusion with case law from the early nineteenth century that defined "person" as including corporations. Id. at 687-88. In addition, an act of Congress passed months before the Civil Rights Act defined "person" as applying to all "politic and corporate" bodies. Id. at 688 (citing Act of Feb. 25, 1871, § 2, 16 Stat. 431 (1871)).

53. Id. at 695.

54. Id. at 691-95.
liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." 55 Specifically, the Court explained that proponents of respondeat superior liability advocate the ideals of reducing accidents and spreading the cost across the public. 56 Opponents of the Sherman Amendment failed to accept similar reasons for passing the amendment, however, because they argued federal affirmative obligations imposed upon municipalities would transgress constitutional boundaries. 57 As a result, municipal liability would need to avoid vicarious liability to conform to Congress's intentions. 58

The language of § 1983, the Court also found, denotes the need for a causal link between the municipality's regulation 59 and the victim's violated rights. 60 This language requires that the offender "subject" the victim to, or cause him or her "to be subjected" 61 to, a deprivation of his or her constitutional rights pursuant to the regulation. 62 Presented with this formulation, the drafters' intention appears to re-

55. Monell, 436 U.S. at 691.
56. Id. at 693-94.
57. Id. at 694 (quoting Cong. Globe, 42d Cong., 1st Sess. 777, 792 (1871) (statements of Sen. Frelinghuysen & Rep. Butler)).
58. Curiously, the Court did not address case law at the time that would support a respondeat superior theory of liability. Early nineteenth century cases commonly held municipalities liable for their employees' torts. See Charles A. Rothfeld, Comment, Section 1983 Municipal Liability and the Doctrine of Respondeat Superior, 46 U. CHI. L. Rev. 935, 956-57 & n.97 (1979) (providing an extensive list of cases in support of this principle). By 1871, however, courts accepted a distinction between public and private activities that established immunity for government entities when employees engaged in "public" activities. Id. at 957 n.99 ("The origin of the distinction may lie, in part, in the confusion between nonliable unincorporated governmental units and fully liable municipal corporations."). At the same time, respondeat superior liability applied to "proprietary" or "corporate" activities. Id. at 957. See also infra note 74 for more cases enforcing respondeat superior liability during the late 1860s and early 1870s. Many have also criticized the Court's interpretation of the legislative history that led to precluding respondeat superior liability. See Karen M. Blum, From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts, 51 TEMPE L.Q. 409, 413 n.15 (1978) (arguing that congressional members did not debate a federal remedy on local governmental units when they had an obligation under state law to perform peacekeeping tasks); Susanah M. Mead, 42 U.S.C. § 1983 Municipal Liability: The Monell Sketch Becomes a Distorted Picture, 65 N.C. L. Rev. 517, 532-38 (1987) (distinguishing rejection of the Sherman Amendment as municipal liability for actions by private citizens from vicarious liability for unconstitutional acts by municipal employees); Eric M. Hellige, Note, Monell v. Department of Social Services: One Step Forward and a Half Step Back for Municipal Liability Under Section 1983, 7 HOFSTRA L. Rev. 893, 913-14 (1979) (criticizing the Court for ignoring the possibilities that Congress believed a duty could be imposed on every citizen to police the contemporary violence and if the municipality had a duty to provide protection and failed to do so, respondeat superior liability would likely result).
59. The Court labeled the statute's listing of "regulation, custom, or usage" as the municipality's "official policy." Monell, 436 U.S. at 694.
60. Id. at 692.
61. The Court examined the statute as originally passed, which used "shall subject" rather than "subjects." Id. at 691.
62. Id. at 692.
quire that the entity’s regulation caused the offender to violate the victim’s rights. The Court interpreted this causation element as occurring when “execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.” Since the city in this case instituted an official policy of compelling pregnant employees to take unnecessary leaves of absence without pay, the city remained liable for the constitutional violation.

C. Qualified Immunity Defense Unavailable for Municipalities

In Owen v. City of Independence, the Court began to define the contours of municipal liability set out in Monell and rejected a qualified immunity defense for government entities. A police chief brought an action under § 1983 against the city for discharging his employment without notice of reasons or a hearing, in violation of procedural and substantive due process rights. The Eighth Circuit Court of Appeals found that the city possessed a right to qualified immunity based on the good faith of the officials involved.

The Court rejected the Eighth Circuit’s creation of a qualified immunity defense by interpreting the statute again in light of historical tradition as well as modern social policy. Several recent cases relied on traditional common law to establish immunity for various state and local officials. Supplied with this continual recognition of these immunities, the Court construed § 1983 to incorporate immunities that the common law clearly established when these immunities conformed to the purpose of the Civil Rights Act. In contrast to certain

63. Id.

64. Id. at 694. For a much broader interpretation of this language, see Mead, supra note 58, at 532-35 (arguing that the passive voice indicates a requirement of responsibility for the constitutional harm, allowing respondeat superior liability to control this responsibility).

65. Monell, 436 U.S. at 694-95.


67. Id. at 638.

68. Id. at 630.

69. Id. at 634.

70. Id. at 650.


72. Owen, 445 U.S. at 638.
local officials, municipal corporations do not possess a tradition of immunity from damages for statutory and constitutional violations. In fact, many cases during the middle of the nineteenth century "awarded damages against municipalities for violations expressly found to have been committed in good faith." 

While historical doctrines allowed immunity for municipalities, the Court discovered that modern needs could no longer support these doctrines. Even though traditional common law did not recognize absolute immunity for municipalities, courts frequently distinguished between governmental and proprietary functions, allowing immunity for the former based on a theory that the municipality existed as an "arm of the state." Since states no longer enjoy absolute immunity, the Court found that this theory did not apply to afford municipal immunity. Courts also allowed immunity for officials' discretionary acts, as opposed to ministerial acts, based on a theory of separation of powers between government entities and the judicial branch. When a violation of federal rights occurs, however, "a municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative."

Public policy concerns compelled the Court to depart from historical doctrines and reject the defense of good faith for municipal corporations. First, many victims would not possess a remedy if the city

73. Id.
74. Id. at 642; see, e.g., Hawks v. Charlemont, 107 Mass. 414 (1871) (holding a town liable for men selected to repair highways and bridges who took stones from the plaintiff's property, resulting in the washing away of parts of the plaintiff's land); Billings v. Worcester, 102 Mass. 329 (1869) (holding a municipality liable for allowing defective building eaves to accumulate water on a sidewalk, leading to the plaintiff's injuries when she slipped on the icy walkway); Horton v. Inhabitants of Ipswich, 66 Mass. 488 (1853) (holding a town liable for a snow-filled highway causing injury to the plaintiff when he did not have knowledge of the danger and used reasonable care); Elliot v. Concord, 27 N.H. 204 (1853) (holding a town liable for the plaintiff's injuries sustained from an obstruction to a highway when town employees were constructing a railroad); Lee v. Village of Sandy Hill, 40 N.Y. 442 (1869) (allowing the plaintiff to maintain a trespass action against the village for his torn-down fence when the village trustees mistakenly believed the fence encroached on the street); Town Council v. McComb, 18 Ohio 229 (1849) (holding a town council liable for excavating the ground in front of the plaintiff's house, resulting in the decrease in value of the house); Squiers v. Village of Neenah, 24 Wis. 588 (1869) (holding a village liable for opening a street on the plaintiff's land without his consent); Hurley v. Town of Texas, 20 Wis. 665 (1866) (holding a town liable for improperly taxing the plaintiff's logs when they were retained in town before being sent to another town).
75. Owen, 445 U.S. at 651.
76. Id. at 644-45.
77. Id. at 645-46.
78. Id. at 648.
79. Id. at 649.
80. The Court's policy approach departs from the strict adherence to historical interpretation in Monell. Mead, supra note 58, at 547.
possessed this defense. Furthermore, imposing liability on the city serves as a deterrent against future violations, as this creates an incentive to protect rights and develop internal rules and programs. The public also benefits from the government’s activities, and thus holding the public responsible for the entity’s management seems appropriate and better than making the victim bear the loss.

D. The Court’s Limitations on Municipal Liability

After the Court created expansive readings of the statute in Monroe, Monell, and Owen, the rising number of cases brought under § 1983 filled federal dockets. This high amount of litigation led to a series of particularized limitations on actions against municipalities. As will be explained in Part I.D.1, the Court’s initial step precluded obtaining punitive damages against a municipality under the statute.

In addition, the Court further analyzed the policy requirement left open to interpretation in Monell. The Court later established two versions of the municipality’s role in the victim’s deprivation of constitutional rights. As shall be discussed in Part I.D.2, when a municipal “policymaker” violates federal law, his or her action satisfies the policy requirement. If the municipality fails to take any affirmative action, as explored in Part I.D.3, and the policymaker remains “deliberately indifferent” to the need to act, the Court will find a sufficient nexus between the failure to act and the victim’s deprivation of rights. Part I.D.4 will show that the Court also reexamined federalism concerns and gave more deference to state law in defining when policymaking authority occurs.

1. A Victim Cannot Obtain Punitive Damages Against a Municipality Under § 1983

The Court, in City of Newport v. Fact Concerts, Inc., reversed the First Circuit’s decision to allow compensatory and punitive damages against the city after it attempted to block Blood, Sweat, and Tears from playing at the plaintiff’s jazz concert. While Fact Concerts eventually obtained a restraining order against the city and included

82. Id. at 651-52.
83. Id. at 655.
84. Chemerinsky, supra note 11, § 8.2, at 428.
85. Mead, supra note 58, at 521-22.
86. See infra Parts I.D.2 to I.D.4.
87. See infra Parts I.D.2 to I.D.3.
89. Id. at 271.
the group in the concert, it sold fewer than half of the tickets.\textsuperscript{90} As a result, the district court allowed punitive damages against city officials as deterrence against future misconduct and promotion of accountability for the next election.\textsuperscript{91}

From a historical perspective, the district court’s decision deviated from traditional doctrines. By 1871, a victim could sue a municipality for tortious conduct but not for punitive damages.\textsuperscript{92} Courts distinguished between compensating for injuries and punishing for bad-faith conduct to preclude the public from receiving punishment and imposing undue burdens on taxpayers when courts held the municipality liable to benefit the public.\textsuperscript{93} Moreover, the Sherman Amendment only considered compensatory damages for constitutional violations.\textsuperscript{94}

In addition to this deviance from historical practices, the Court also perceived a fundamental unfairness in imposing punitive damages on municipalities.\textsuperscript{95} Punitive damages punish one who intentionally or maliciously wrongs another.\textsuperscript{96} A municipality, however, “can have no malice independent of the malice of its officials.”\textsuperscript{97} The Court further found that the deterrence function of these damages, as another justification, did not appear effective when the punishment on the entity will probably not deter individual officers.\textsuperscript{98} Furthermore, compensatory damages serve enough of a function of public shame, making punitive damages unnecessary.\textsuperscript{99}

\textsuperscript{90} Id. at 252.
\textsuperscript{91} Id. at 254.
\textsuperscript{92} Id. at 259-60.
\textsuperscript{93} Id. at 263; see, e.g., City Council v. Gilmer & Taylor, 33 Ala. 116 (1858); City of Chicago v. Langlass, 52 Ill. 256 (1869); McGary v. City of Lafayette, 12 Rob. 668 (La. 1846); Woodman v. Nottingham, 49 N.H. 387 (1870); Order of Hermits v. County of Philadelphia, 4 Clark 120, Brightly N.P. 116 (Pa. 1847).
\textsuperscript{94} Fact Concerts, 453 U.S. at 264-65 (quoting Rep. Butler, CONG. GLOBE, 42d Cong., 1st Sess. 792 (1871) (“[W]e do not look upon [the Sherman amendment] as a punishment.... It is a mutual insurance.”)).
\textsuperscript{95} Id. at 267.
\textsuperscript{96} Id.; see Restatement (Second) of Torts § 908 (1979); 2 Stuart M. Speiser et al., The American Law of Torts § 8.45, at 802 (1985) (“Exemplary, or punitive, damages are generally defined or described as damages which are given as an enhancement of compensatory damages because of the wanton, reckless, malicious, or oppressive character of the acts complained of.”).
\textsuperscript{97} Fact Concerts, 453 U.S. at 267.
\textsuperscript{98} Id. at 268-69.
\textsuperscript{99} Id. at 269.
2. An Act by a Municipal Policymaker

In Pembaur v. City of Cincinnati, the Court allowed liability against a municipality when a policymaker's single decision caused the victim's injury. In response to Dr. Pembaur's refusal to let officers enter his clinic and serve capiases on two of his employees, deputy sheriffs contacted their supervisor for instructions. The supervisor directed them to call the county prosecutor, who told the officers to "go in and get [the witnesses]." After the doctor continued to refuse access to them, the officers obtained an axe and chopped down the door. Dr. Pembaur brought a § 1983 action against the city and county for violating a Fourth Amendment requirement that the officers obtain a search warrant to execute an arrest warrant for a third person. The Court reviewed only his claim against the county.

The Court found that an "official policy" did not remain limited to written rules determined by a municipal board. A policy could also include a particular course of action "properly made by [the] government's authorized decisionmakers." Furthermore, this action could constitute a single instance rather than repeated occurrences, as the purpose of § 1983 dictates compensation for all victims. The Court relied on Owen and Fact Concerts to support this possibility. The issue of whether an official possesses final policymaking authority, however, remains a question of state law. Because the Sixth Circuit

101. A capias is "a writ of attachment commanding a county official to bring a subpoenaed witness who has failed to appear before the court to testify and to answer for civil contempt." Id. at 472 n.1.
102. Id. at 472-73.
103. Id. at 473. The deputy sheriffs actually contacted the assistant prosecutor, who conferred with the county prosecutor and relayed the statement to the sheriffs. Id.
104. Id.
105. Id.
107. Pembaur, 475 U.S. at 477. While the district court dismissed his claim against both defendants, the Sixth Circuit Court of Appeals reversed the dismissal against the city by finding the city's policy unconstitutional. Pembaur v. City of Cincinnati, 746 F.2d 337, 341-42 (6th Cir. 1984).
108. Pembaur, 475 U.S. at 480.
109. Id. at 480-81.
110. Id. at 481.
111. Id. at 480 ("[E]ven a single decision by [a municipal] body unquestionably constitutes an act of official government policy.").
112. Id. at 483. The Court reaffirmed this view and determined that courts should decide if an official constitutes a final decisionmaker as a matter of law. See Jett v. Dallas Indep. Sch. Dist.,
concluded that the prosecutor could establish county policy under Ohio law, the prosecutor acted as the final decisionmaker, and thus the county could be held liable.\textsuperscript{113}

Despite this strong holding against the municipality, a plurality of the Court limited liability to situations where the decisionmaker makes a "deliberate choice to follow a course of action."\textsuperscript{114} Justice Stevens concurred in the judgment but did not join this part of the decision, as he argued that Congress enacted the Civil Rights Act with the intention of holding municipalities vicariously liable for resulting constitutional deprivations.\textsuperscript{115} By contrast, Justice O'Connor rejected the plurality's view, fearing that courts may misinterpret the standard "to expose municipalities to liability beyond that envisioned by the Court" in \textit{Monell}.\textsuperscript{116}

3. \textit{The Deliberate Indifference Standard}

The Court resisted extending the policy doctrine to a single incident of wrongdoing in two recent cases, \textit{City of Oklahoma City v. Tuttle}\textsuperscript{117} and \textit{City of Canton v. Harris}.\textsuperscript{118} Both of these cases involved § 1983 claims based on the municipalities' failure to train their employees adequately, which resulted in the deprivation of the plaintiffs' rights.\textsuperscript{119}

In \textit{Tuttle}, a plurality of four justices rejected a § 1983 claim alleging one incident of excessive force.\textsuperscript{120} A police officer fatally shot Tuttle when he reached down toward his boot after the officer ordered him to halt.\textsuperscript{121} Tuttle's widow brought an action against the city for failing to adequately train the officer, thereby violating Tuttle's right to due process.\textsuperscript{122} The Court overturned the jury's verdict, asserting that a factfinder could not infer from one instance of excessive force that inadequate training or "supervision amounting to 'deliberate indiffer-

\begin{itemize}
\item \textsuperscript{113} Pembaur, 475 U.S. at 484-85.
\item \textsuperscript{114} Id. at 483-84 (citing City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985)). The plurality consisted of Justices Brennan, White, Marshall, and Blackmun. Id. at 470.
\item \textsuperscript{115} Id. at 489 (Stevens, J., concurring); see supra note 58 for the basis for Stevens's argument.
\item \textsuperscript{116} Pembaur, 475 U.S. at 491 (O'Connor, J., concurring).
\item \textsuperscript{117} 471 U.S. 808.
\item \textsuperscript{118} 489 U.S. 378 (1989).
\item \textsuperscript{119} Harris, 489 U.S. at 382-83; Tuttle, 471 U.S. at 812-13.
\item \textsuperscript{120} Tuttle, 471 U.S. at 821. The plurality consisted of Justice Rehnquist, Chief Justice Burger, Justice White, and Justice O'Connor. Id. at 810.
\item \textsuperscript{121} Id. at 811.
\item \textsuperscript{122} Id. at 811-12.
\end{itemize}
ence'" caused the incident. As a foundation, the plaintiff had to establish that a municipal policymaker acted to implicate the municipality's role. Since the policy at issue did not in itself offend the Constitution, "there must [have been] an affirmative link between the policy and the particular constitutional violation alleged." The Court extended this reasoning to limit the definition of "deliberate indifference" in Harris. Officers brought Harris to the city police department, where she slumped to the floor two times. After they let her lie on the floor for an hour, the officers took her to a nearby hospital. As a result, she remained hospitalized for a week and received outpatient treatment for a year. Harris filed a § 1983 suit against the city for violating her due process right to receive necessary medical attention, and she presented evidence that shift commanders did not receive adequate training to determine when a detainee required medical care.

Relying on the requirement in Monell that the municipal policy must constitute the moving force behind the constitutional violation, the Court established a strict standard for failure to train cases. A plaintiff must show that the municipality made a deliberate or conscious choice in failing to implement an adequate training program. As a result, courts must focus on the "adequacy of the training program in relation to the tasks the particular officers perform" when determining if deliberate indifference exists. This standard, however, does not rely upon the degree of culpability that the plaintiff may need to establish when claiming a constitutional violation.

123. Id. at 821.
124. Id.
125. Id. at 823.
127. Id. at 381.
128. Id.
129. Id.
130. Id. at 381-82.
131. Id. at 389. One should note that the Court stated that the "first inquiry" in a municipal liability case remains "whether there is a direct causal link between a municipal policy or custom and the alleged constitutional violation." Id. at 385. This language derives from the plurality's decision in Tuttle. See supra notes 123-25 and accompanying text. Hence, the Court affirmed this standard. See 1 IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:05, at 58 (1996) ("[The Court] clarified that plaintiffs carry a heavy burden of proving the inadequacy [of a training program] is flagrant and can be directly linked to the conduct which caused the injury.").
132. Harris, 489 U.S. at 389.
133. Id. at 390.
134. Id. at 388 n.8 ("[T]he proper standard for determining when a municipality will be liable under § 1983 for constitutional wrongs does not turn on any underlying culpability test that determines when such wrongs have occurred.").
4. **Adherence to State Law as a Proper Remedy**

When initially interpreting § 1983, the Court found that the federal statute supplemented state law and allowed for a separate legal remedy independent of state remedies.135 Recently, however, a majority of the Court has focused on federalism issues and allowed state law to determine the threshold question of when policymaking authority occurs.136 This approach occurred in *City of St. Louis v. Praprotnik*137 and *Jett v. Dallas Independent School District*.138

*Praprotnik* dealt with an architect’s § 1983 claim against the city for a detrimental job transfer after he successfully appealed a finding that he wrongfully accepted outside employment without prior approval from the city.139 A plurality of the Court held that since local law gave the city’s Civil Service Commission the power to review personnel actions, the city’s transfer could not be regarded as a final government policy.140 Relying on *Pembaur*, the plurality remained “confident that state law . . . will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of local government’s business.”141 As a result, the plaintiff needed to establish how the local law empowered the personnel director who transferred him with the final policymaking authority.142

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136. See infra notes 139-46 and accompanying text. The Court also addressed this issue in *McMillian v. Monroe County*, 520 U.S. 781 (1997), which held that the county sheriff was the official policymaker for the state, rather than the county, on law enforcement issues. *Id.* at 785. Relying on the Alabama constitution and statutes on the sheriff’s functions, the Court found that the sheriff represented the state when executing law enforcement duties. *Id.* at 785-90. This decision has also had a profound effect on the lower courts. See, e.g., *Turquitt v. Jefferson County*, 137 F.3d 1285, 1291 (11th Cir. 1998) (overruling prior precedent for holding a county liable due to improper operation or negligent supervision of a jail when state law assigned such responsibilities to the sheriff).
140. *Id.* at 128-29 (O’Connor, J., Rehnquist, C.J., White, J., & Scalia, J.).
141. *Id.* at 125. Justice Brennan, joined by Justice Marshall and Justice Blackmun, concurred in the decision holding that the personnel director did not act as a final decisionmaker but criticized the plurality’s view that state or local law should be the determining factor in deciding this issue. *Id.* at 140-45 (Brennan, J., concurring) (“[T]he law is concerned not with the niceties of legislative draftsmanship but with the realities of municipal decisionmaking, and any assessment of a municipality’s actual power structure is necessarily a factual and practical one.”). In support of Brennan’s position, see Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1774-78 (1989) (arguing that the Court applies a “pyramidal model” of local policymaking structures that ignores the way low-level officials interact with the public and define policy).
142. *Praprotnik*, 485 U.S. at 131. The plurality’s view appears to derive from Justice Frankfurter’s dissent in *Monroe*, which interprets the history of § 1983 as limiting federal action to
A majority of the Court in *Jett* affirmed the plurality’s holding in *Praprotnik* that the trial judge must determine the officials with policymaking authority based on “relevant legal materials” and a municipality’s “custom or usage.” Jett presented an action under 42 U.S.C. §§ 1981 and 1983 for racial discrimination and loss of his position as a school athletic director. The Court rejected the district court’s assertion that municipal liability under § 1981 could proceed based on respondeat superior and found that the same analysis for liability must occur as in § 1983. The Court thus preserved ideals of federalism in construing the civil rights statutes.

E. Board of County Commissioners of Bryan County v. Brown

1. Deliberate Indifference Analysis for a Single Hiring Decision

The most recent examination of the deliberate indifference standard occurred in *Brown*. Victim Jill Brown initiated this case against a Bryan County police officer and the county itself based on a reserve areas where state law “authorized” infringements of constitutional rights. Monroe v. Pape, 365 U.S. 167, 224-37 (1961) (Frankfurter, J., dissenting) (“Congress by § [1983] created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some ‘statute, ordinance, regulation, custom, or usage’ sanctioned the grievance complained of.”).


144. Section 1981(a) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. 42 U.S.C. § 1981(a) (1994). A remedy under this statute is distinct from one under § 1983. Citron v. Jackson State Univ., 456 F. Supp. 3, 10 (S.D. Miss. 1977), aff’d, 577 F.2d 1132 (5th Cir. 1978). While § 1983 is only addressed to those acting under color of state authority, § 1981 extends to acts of private discrimination. Mahone v. Waddle, 564 F.2d 1018, 1031 (3d Cir. 1977).

145. *Jett*, 491 U.S. at 707-08. Jett, a white male, had many conflicts with the school’s new African-American principal and made several comments about the composition of African-American students on the football team. *Id.* at 705-06. The principal met with other officials in the district and dismissed Jett from his position as athletic director and head football coach. *Id.* at 706.

146. *Id.* at 736. Justice Scalia distinguished his justification for upholding this result from the plurality’s focus on legislative history. Based on a cannon of construction that “the specific governs the general,” Justice Scalia found that the more detailed § 1983 governed the more general § 1981. *Id.* at 738-39 (Scalia, J., concurring). The plurality examined the debates on the Civil Rights Act of 1866, the legislation leading to § 1981, and determined that the legislators did not intend to reverse prior Supreme Court precedent “holding that federal duties could not be imposed on state instrumentalties by rendering them vicariously liability [sic] for the violations of others.” *Id.* at 729.

147. 520 U.S. 397 (1997).

148. *Id.* at 397.
deputy's use of excessive force and unlawful arrest.\textsuperscript{149} Brown and her husband approached a police checkpoint on the border of Oklahoma when driving from Texas.\textsuperscript{150} Mr. Brown decided to return back to Texas after seeing the checkpoint,\textsuperscript{151} and two police officers (the deputy sheriff and a reserve deputy) followed him after witnessing him turn away.\textsuperscript{152} The officers stopped Mr. Brown four miles south of the checkpoint, and the deputy sheriff ordered the Browns out of their vehicle.\textsuperscript{153} When Mrs. Brown failed to exit the vehicle, Reserve Deputy Burns applied an "arm bar" technique by grabbing her wrist and elbow, pulling her from the vehicle, and spinning her to the ground.\textsuperscript{154} Mrs. Brown suffered knee injuries that later required corrective surgery.\textsuperscript{155}

Deputy Burns, Mrs. Brown eventually discovered, possessed a detailed criminal record of arrests and convictions before obtaining his position for the county.\textsuperscript{156} His record consisted of assault and battery, resisting arrest, public drunkenness, driving while intoxicated, false identification, driving with a suspended license, and nine moving traffic violations.\textsuperscript{157} In addition, an outstanding warrant for his arrest existed for violating probation and failing to perform required community service.\textsuperscript{158} Despite Sheriff Moore’s possession of this record, the sheriff decided to hire Burns, a member of the family.\textsuperscript{159}

Mrs. Brown brought this case under § 1983, alleging that Burns applied excessive force and that Bryan County should be held liable for this force for inadequately hiring and training Burns.\textsuperscript{160} Bryan

\textsuperscript{149} Brown v. Board of County Comm’rs, 67 F.3d 1174, 1177 (5th Cir. 1995).
\textsuperscript{150} Id. at 400.
\textsuperscript{151} Id. Mr. Brown testified that he turned away from the checkpoint because prior unnecessary detentions lasted up to 15 minutes and caused problems with other deputies. Brief for Respondent at 5 n.6, Brown, 520 U.S. 397 (No. 95-1100).
\textsuperscript{152} Brown, 67 F.3d at 1177.
\textsuperscript{153} Id. at 1177-78.
\textsuperscript{154} Id. at 1178. According to Mrs. Brown’s testimony, she began to exit the truck, but Deputy Burns grabbed her before she had an opportunity to do so. Id. at 1179. By contrast, Burns testified that she leaned forward in the truck, which led him to believe that she was reaching for a weapon. Id.
\textsuperscript{155} Id. at 1178. Medical testimony at trial demonstrated that Mrs. Brown would eventually need total knee replacements. Id. at 1178 n.5.
\textsuperscript{156} Id. at 1183.
\textsuperscript{157} Id.
\textsuperscript{158} Brief for Respondent at 1-2, Brown, 520 U.S. 397 (No. 95-1100).
\textsuperscript{159} Brown, 67 F.3d at 1183-84. Burns was the son of Sheriff Moore’s nephew, and Burns’s grandfather had worked in the police department for over 16 years. Id. at 1184. Sheriff Moore testified that he had actual knowledge about some of the charges, but “never noticed” most of them nor attempted to investigate the status of the charges at the time of his decision. Id.
\textsuperscript{160} Id. at 1177, 1182. She also asserted that Deputy Burns arrested her without probable cause. Id. at 1180. The jury found for the plaintiff on these issues, did not provide Deputy Burns
County stipulated that Sheriff Moore, the person who hired Burns, acted as the policymaker for the county in the sheriff's department. The jury found Burns liable for applying excessive force and the county's hiring and training policies "so inadequate as to amount to deliberate indifference" of Brown's constitutional rights. The Supreme Court addressed only the claim based on Sheriff Moore's hiring decision.

In a five to four decision, the Court vacated the Fifth Circuit's judgment for Brown and remanded the case based on Brown's failure to show that Moore's hiring decision "reflected a conscious disregard for a high risk that Burns would use excessive force in violation of [Brown's] federally protected right." Justice O'Connor, writing for the Court, argued that a single hiring decision could constitute a municipal policy only if a reasonable policymaker, after examining the applicant's background, could perceive the "plainly obvious consequence" that a deprivation of federal rights would occur if he or she hires the applicant.

After clearly establishing that Monell did not allow a respondeat superior theory of liability against a municipality, the Court stated that a plaintiff must show that the municipal action possesses the "requisite degree of culpability" and that a direct causal link exists between the municipal action and the deprivation of federal rights. Since Moore's hiring decision in itself did not constitute an illegal

with qualified immunity, and awarded the plaintiff punitive damages. Id. at 1180. The Fifth Circuit upheld the jury's findings but did not reverse the district court's dismissal of loss of income and future earning capacity damages. Id. at 1181.

161. Id. at 1182.

162. Id. at 1184-85. Prior to the verdict, the county moved for summary judgment by arguing that a municipality cannot be held liable for a single hiring decision, but the district court denied this motion. Board of County Comm'rs v. Brown, 520 U.S. 397, 401-02 (1997).

163. Brown, 520 U.S. at 402. In response to the county's appeal, the Fifth Circuit Court of Appeals affirmed the district court's decision. Brown, 67 F.3d at 1182-85. The Fifth Circuit did not examine the factual issue of the county's liability for inadequate training, but it did find the county liable based on the hiring decision. Brown, 520 U.S. at 402.

164. Brown, 520 U.S. at 415-16.

165. Id. at 412-13. Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, and Justice Thomas joined this opinion. Id. at 399.

166. Id. at 404. The Court appears to equate the culpability requirement to the "deliberate" test, while naming the "moving force" requirement as a direct causal link analysis. See Schwartz & Kirklin, supra note 37, §§ 7.7, 7.12 (suggesting that the deliberate indifference standard determines the level of fault needed to show municipal responsibility and that the Court's phrases of "moving force" and "direct causal link" require the policy to be the proximate cause of the constitutional violation). Both of these newer terms derive from Harris and Tuttle. See supra notes 120-34 and accompanying text. Note, however, that Harris did not require a culpability requirement and only centered on deliberate indifference as a single standard for failure to train cases. See supra note 134.
act, Brown had to satisfy “rigorous standards of culpability and causation” to avoid holding the county vicariously liable.168

The Court distinguished previous cases to indicate the problematic nature of Brown’s claim. While Owen and Fact Concerts recognized a cause of action based on a municipality’s single decision, these cases also involved situations where the municipal action itself established the fault and causation elements by violating federal law.169 In addition, the decision by the county prosecutor in Pembaur did not present questions of fault and causation, as the policy directly caused the plaintiff’s injuries.170 Thus, these decisions did not alleviate Brown’s burden.171

The Court relied on Harris to assert that a claim against a municipality’s lawful action must show that the policymaker acted with deliberate indifference to “known or obvious consequences.”172 Harris, however, involved the analysis of a training program in connection with the plaintiff’s lack of necessary medical attention.173 As a result, the plaintiff in that case had a stronger basis to prove fault and causation compared to Brown’s claim, as an inadequate program produces continual harms to the public and notifies policymakers of their need to act.174 Brown rested her argument about Bryan County’s inadequate hiring decision on a theory that the decision constituted a deviation from Moore’s ordinary practices, as he allegedly screened all other applicants adequately.175 In response to this theory, the Court raised concern that the county will be held liable without fault.176 Moreover, the Court held that federalism concerns arise from creating federal requirements for a municipality’s hiring decisions.177

Brown also argued that Burns’s use of excessive force could be plainly obvious to Moore when hiring Burns, thus establishing the required culpability and causation elements.178 The Court denied

167. Moore’s decision to hire Burns in spite of his background did not violate state law, as Oklahoma statutes only prohibited hiring officers with a conviction of a felony. Brief for Petitioner at 13, Brown, 520 U.S. 397 (No. 95-1100).
168. Brown, 520 U.S. at 405.
169. Id.; see supra notes 66-83, 88-99 and accompanying text.
170. Brown, 520 U.S. at 405-06; see supra notes 100-14 and accompanying text.
171. See Brown, 520 U.S. at 405-06.
172. Id. at 407.
173. See supra notes 126-34 and accompanying text.
175. Id. at 408.
176. Id.
177. Id. at 415.
178. Id. at 1391. Brown argued that since Moore had notice of Burns’s tendency to commit violent crimes, the jury could easily conclude that Moore remained deliberately indifferent to
Brown's analogy to the rationale in Harris, as predicting the consequence of a single hiring decision would be much more difficult than predicting the consequence of inadequate training.179 Furthermore, a full screening of an applicant may not exhibit any cause for concern, and thus one who fails to screen does not consciously disregard danger to the public merely by not acting.180 As a result, only where adequate screening 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.'"181

The district court instructed the jury to determine if Moore's inadequate screening of Burns's background was "so likely to result in violations of constitutional rights" that Moore remained deliberately indifferent to Brown's constitutional rights.182 Because this instruction failed to require that Burns's excessive force would be a "plainly obvious consequence" of Moore's screening, the proper causal connection did not exist.183 Furthermore, Brown failed to provide sufficient evidence that Moore disregarded a known or obvious risk of injury.184 The Court focused on the nature of Burns's past offenses, finding that the assault and battery arose from a fight on a college campus where he was a student.185 Despite the fact that these incidents may indicate Burns's status as an "extremely poor candidate for reserve deputy,"186 the record did not establish that excessive force would be a plainly obvious consequence of the hiring decision.187

2. The Dissents' Critique188

Justice Souter's dissent focused on the majority's application of the rule in Pembaur, where a policymaker's single act could constitute de-
liberate indifference to a "substantial risk" that a violation of federal law will result. In defining the deliberate indifference standard, Souter found that this standard equates to finding a level of intent behind the municipality's policy. Given that the Court had never rejected holding a municipality liable for a policy that in itself does not violate federal law, Sheriff Moore's decision could constitute a policy that satisfies this standard.

While the majority agreed with the above theoretical analysis, Souter found that the practical interpretation in the present case "expressed deep skepticism" that a municipality could ever be liable for a facially constitutional act resulting in a violation of another's rights. When interpreting the deliberate indifference standard, the majority applied dicta in *Harris* to set the high threshold of "plainly obvious" consequences. This language referred to a speculation that officers' frequent violations of constitutional rights would indicate to policymakers that further training clearly was necessary to prevent harm to the public. Furthermore, *Harris* did not require liability based on deliberate indifference toward the constitutional violation itself, but only to the need for further action. Hence, Souter found that the majority's skepticism influenced the legal analysis determining the outcome of the case.

Justice Souter also criticized the majority's fear that respondeat superior liability will transpire, which contributes to the requirement of the plainly obvious standard. In contrast to this fear, the deliberate indifference standard ensures that the municipality remains liable for only faulty actions. Moreover, the Court's requirement of a strict causal connection between the municipal action and the violation can receive full scrutiny under a theory of proximate cause. Once again, the majority's skepticism, driven by the fear of vicarious liability, created more difficult legal requirements.

Finally, Justice Souter examined the record and determined that the evidence supported the jury verdict, even under the plainly obvious

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189. *Id.* at 416. Justices Stevens and Breyer joined Souter's dissent. *Id.*
190. *Id.* at 419.
191. *Id.* at 420.
193. *Id.*
194. *Id.* at 422 (referring to City of Canton v. Harris, 489 U.S. 378, 390 n.10 (1989)).
195. *Id.* See *supra* notes 121-24 and accompanying text for support of this contention.
197. *Id.*
198. *Id.*
199. *Id.*
standard.\textsuperscript{200} Since Sheriff Moore knew that Burns possessed a long criminal record and failed to investigate further, the jury could find that Moore remained deliberately indifferent by acting to aid a relative rather than properly investigate.\textsuperscript{201} Brown’s expert witness also testified that Burns’ criminal record showed a “‘blatant disregard for the law and problems that may show themselves in abusing the public or using excessive force.’”\textsuperscript{202} As a result, the jury could find that excessive force was a plainly obvious consequence of the hiring decision.\textsuperscript{203}

Justice Breyer’s dissent critiqued the complexity of modern § 1983 analysis.\textsuperscript{204} The rejection of respondeat superior liability found in the majority’s view derived from the dictum in \textit{Monell} that examined the history of Congress’s refusal to accept the Sherman Amendment.\textsuperscript{205} This examination ignored the history of judicial action that held municipalities vicariously liable.\textsuperscript{206} The use of the word “person” in § 1983 also supported a theory of respondeat superior because federal courts applied this analysis with other statutes.\textsuperscript{207}

Notwithstanding the Court’s troubled historical analysis, Breyer denounced the majority’s use of complex distinctions.\textsuperscript{208} For example, a finding of deliberate indifference will hold the municipality liable, in contrast to the lesser standard of gross negligence.\textsuperscript{209} These distinctions act as another method of avoiding the use of respondeat superior and do not aid a sound legal analysis.\textsuperscript{210} Given that many states presently apply respondeat superior by allowing cases against the municipality for officials’ actions within the scope of their employment,\textsuperscript{211}

\begin{itemize}
  \item \textsuperscript{200} Id.
  \item \textsuperscript{201} Id. at 426-27.
  \item \textsuperscript{202} \textit{Brown}, 520 U.S. at 429 (quoting the record).
  \item \textsuperscript{203} Id.
  \item \textsuperscript{204} Id. at 430. Justices Stevens and Ginsburg joined Breyer’s dissent. \textit{Id}.
  \item \textsuperscript{205} Id.
  \item \textsuperscript{206} Id. at 431 (citing City of Oklahoma City v. Tuttle, 471 U.S. 808, 836 n.8 (1985) (Stevens, J., dissenting)). See \textit{supra} note 58 for further support of this assertion.
  \item \textsuperscript{207} \textit{Brown}, 520 U.S. at 432. See \textit{supra} note 52 for support of this contention from \textit{Monell}.
  \item \textsuperscript{208} \textit{Brown}, 520 U.S. at 434.
  \item \textsuperscript{209} Id. at 435; see City of Canton v. Harris, 489 U.S. 378, 388 n.7 (1989) (finding that courts more often require deliberate indifference rather than gross negligence).
  \item \textsuperscript{210} \textit{Brown}, 520 U.S at 435.
\end{itemize}
Breyer found the Court's use of these legal complexities unwarranted.212

II. ANALYSIS

Given the overview of the Court's interpretation of § 1983 claims against municipalities in Part I, one can see that Supreme Court precedent does not create a firm rule for situations where a failure to act causes the plaintiff's injury. While a standard of deliberate indifference dictates the analysis,213 the Court's application of this standard prior to Brown appeared to allow some claims when an inadequate program represents city policy.214 Brown, however, presented the issue of a municipality's hiring decision causing the plaintiff's injury, which required the Court to focus closely on the deliberate indifference standard.

As noted by the dissents in Brown,215 the Court limited municipal liability to an area much more confined than previous cases allowed. When extending the majority's use of the deliberate indifference standard to Brown's position, one discovers the near impossibility of presenting a valid § 1983 claim against the county.216 This impossibility, as shown in Part II.A, derives from the Court's divergence from constitutional law theory. As shown in Part II.B, this legal complexity presents specific problems for police abuse victims and truly avoids the purposes of the statute. Despite the Court's justifications for this trend, fairness and justice require a more effective remedy for police abuse, and a respondeat superior theory would provide this remedy.217

A. The Court's Strong Barrier: Deliberate Indifference

Justice Souter accused the majority in Brown of increasing requirements of deliberate indifference by raising the "plainly obvious" dictum in Harris to a new standard.218 The majority, in a footnote of the decision, argued that Brown failed to show Moore's deliberate indifference to her constitutional right, and therefore the "plainly obvious" language did not increase the standard.219 In addition to this failed

212. Id.
213. See supra Parts I.D.2 to I.D.3.
216. See infra Part II.A.
217. See infra Part II.C.
218. Brown, 520 U.S. at 422.
219. Id. at 413 n.1.
showing, the majority demonstrated the lower courts' gap of reasoning in finding deliberate indifference and the policy behind this standard:

The difficulty with the lower courts' approach is that it fails to connect the background of [Burns] to the particular constitutional violation [Brown] suffered. Ensuring that lower courts link the background of the officer to the constitutional violation alleged does not complicate our municipal liability jurisprudence with degrees of "obviousness," but seeks to ensure that a plaintiff in an inadequate screening case establishes a policymaker's deliberate indifference—that is, conscious disregard for the known and obvious consequences of his actions.220

The above argument ignores that the Court applied the deliberate indifference standard in Brown with a heightened requirement that Burns's background indicated with plain obviousness that a violation will occur.221 In examining Burns's record, the Court perceived the various charges as arising from a college fight and other minor incidents of misdemeanors.222 As a result, Sheriff Moore would not necessarily infer that Burns would harm the public. Brown, on the other hand, established a much different picture of Burns's background and argued that the offenses showed a "disregard for the law and a propensity for violence."223 She presented an expert witness who testified that Burns remained unfit to be a police officer based on a blatant disregard for the law.224 Given this display of unlawfulness, the jury could have perceived Moore’s conscious decision to hire a relative with propensities for violence, and thus found that the policymaker

220. Id. (citation omitted). In contrast to this strict objective test for deliberate indifference, the Court accepted a more subjective test in cases involving prison officials who violate a victim's Eighth Amendment rights: the official must know that a "substantial risk of serious harm" exists and disregard this risk by "failing to take reasonable measures to abate it." Farmer v. Brennan, 511 U.S. 825, 847 (1994). The Fifth Circuit recently noted Brown in a prison staffing case for holding that a plaintiff must produce evidence that the city knew or should have known of employees' likelihood of repeatedly raping the plaintiff when the city maintained the same staffing level at the jail for a long period of time. Scott v. Moore, 114 F.3d 51, 55 n.4 (5th Cir. 1997).

221. Brown, 520 U.S. at 414.

[Unless [Moore] would necessarily have reached [the decision that Burns would be a poor deputy] because Burns' use of excessive force would have been a plainly obvious consequence of the hiring decision, Sheriff Moore's inadequate scrutiny of Burns' record cannot constitute "deliberate indifference" to [Brown's] federally protected right to be free from a use of excessive force.

Id.

222. Id. at 413-14.

223. Brown v. Board of County Comm'rs, 67 F.3d 1174, 1183 (5th Cir. 1995).

224. Brief for Respondent at 3, Brown, 520 U.S. 397 (No. 95-1100). Dr. Otto Schweizer, a professor of criminal justice, worked for over twenty years in law enforcement. Id. at 2-3. Bryan County's expert witness also agreed that knowledge of Burns' criminal history should lead to a further review of his qualifications. Brown, 67 F.3d at 1184.
consciously disregarded the high likelihood that harm would occur to the public.\textsuperscript{225}

With such a strong background of criminal activity and unfitness for police activity, the jury seemed completely justified in finding Burns deliberately indifferent "to the rights of persons with whom the police come into contact."\textsuperscript{226} The majority's focus on the obvious consequences of this background, and in particular the constitutional violation occurring to Brown, obfuscates a clear legal analysis. While \textit{Pembaur} allowed liability based on a single decision by a municipal policymaker,\textsuperscript{227} the majority argued that \textit{Pembaur} did not present issues of fault and causation.\textsuperscript{228} These issues only arise in this case, though, from the Court's resistance\textsuperscript{229} against allowing claims against municipalities.\textsuperscript{230}

In the specific context of an inadequate hiring decision, the Court appears to tacitly require that a plaintiff show other instances of faulty hiring practices to hold the municipality liable. Brown attempted to analogize her situation to a hypothetical example in \textit{Harris} that allowed liability based on a single instance of failing to train an officer.\textsuperscript{231} Just as a court would hold a decisionmaker liable for failing to train an officer in the constitutional limitations of using deadly force,\textsuperscript{232} a court could hold the county liable for hiring an applicant when the decisionmaker possessed notice of a tendency to commit violent crimes.\textsuperscript{233} The Court rejected this analogy, however, for failing to provide a proper mechanism to predict the consequence of the hiring decision.\textsuperscript{234} By contrast, the Court held that a failure to train officers to handle recurring situations may, "in a narrow range of circumstances," present a high level of predictability that a violation

\begin{itemize}
\item \textsuperscript{225} See \textit{Brown}, 520 U.S. at 429 (Souter, J., dissenting).
\item \textsuperscript{226} City of Canton v. Harris, 489 U.S. 378, 388 (1989).
\item \textsuperscript{227} See supra Part I.D.2.
\item \textsuperscript{228} \textit{Brown}, 520 U.S. at 406.
\item \textsuperscript{229} Justice Souter labels this resistance "skepticism." \textit{Id.} at 416; see supra notes 192-99 and accompanying text.
\item \textsuperscript{230} The Court's resistance follows similar reasoning in \textit{Harris}, 489 U.S. at 391-92 ("To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983.").
\item \textsuperscript{231} \textit{Id.} at 390 n.10.
\item \textsuperscript{232} Id. (citing Tennessee v. Garner, 471 U.S. 1 (1985)).
\item \textsuperscript{233} See Brief for Respondent at 29 n.17, \textit{Brown}, 520 U.S. 397 (No. 95-1100). One may find a basis for the Court's application of deliberate indifference to this case in respondent's argument that causation problems do not arise in situations such as Brown's: "proximate cause will exist only in those rare cases . . . where the municipality has pre-employment notice of some specific tendency to commit a particular deprivation, and it is that particular deprivation that occurs." \textit{Id.}
\item \textsuperscript{234} \textit{Brown}, 520 U.S. at 409.
\end{itemize}
of federal rights will occur. While the Court left open the issue of whether a single inadequate screening could constitute deliberate indifference in any situation, the resistance to Brown's analogy does not provide much of a basis for ever holding a municipality liable in such a situation.

Prior to Brown, some could interpret the deliberate indifference standard as restating a form of recklessness. In fact, Harris indicated that this standard does not turn upon the degree of fault that a plaintiff would need to show. Brown, however, sets a high evidentiary standard that appears higher than criminal recklessness. Since the Court simply determined that Burns's record remained insufficient to establish Moore's deliberate indifference, a plaintiff would need to present further evidence that Moore fully disregarded the substantial risk that Burns would use excessive force. Given the Court's reasoning, a plaintiff would need to either show that the applicant committed felonies or present evidence that the applicant had a his-

235. Id. at 409-10. This level of predictability may also contribute to establishing an "inference of causation." Id. at 410.

236. Id. at 412.

237. 1 Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983 § 6:30, at 6-72 (4th ed. 1997) ("Brown applied the deliberate indifference standard to a single hiring decision, but did so with such rigor . . . that it will be difficult if not impossible for § 1983 plaintiffs to prevail in such cases in the future.").

238. See Brief for Respondent at 30 n.18, Brown, 520 U.S. 397 (No. 95-1100).


A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.


242. This method would show that Moore violated the Oklahoma statute prohibiting the hiring of such persons. See Brief for Petitioner at 13, Brown, 520 U.S. 397 (No. 95-1100).
tory of continually applying excessive force. Because a record of misdemeanors did not adequately establish the second method, a plaintiff faces a strong barrier to holding the entity liable.

In fact, Brown has already influenced many courts throughout the circuits to require a strict analysis into the municipality’s activity when confronting a § 1983 claim. Contrary to what some may suppose, the courts do not limit their reliance on this case to inadequate screening situations. In fact, they conform to the Court’s strict requirements for culpability and causation in a variety of situations.²⁴³ Courts require plaintiffs who present a failure to train theory to show other incidents of the inadequate policy.²⁴⁴ In addition, they extend Brown to claims

²⁴³. This approach conforms to the Court’s constant extensions of dicta in specific circumstances to apply in broader situations. See, e.g., supra notes 222-28 and accompanying text.

²⁴⁴. In Snyder v. Trepagnier, 142 F.3d 791 (5th Cir. 1998), the Fifth Circuit reversed a jury verdict holding the city liable for an inadequate stress management program. Id. at 799. Even though the plaintiff presented evidence that the offending officer acted under considerable stress, the court asserted that he needed to present evidence of overstressed officers throughout the city. Id. at 798.

In Swain v. Spinney, 117 F.3d 1 (1st Cir. 1997), the First Circuit rejected a female arrestee’s claim that the town failed to train officers who strip-searched her for drugs while not strip-searching her boyfriend. Id. at 11. By relying on Brown, the court found that the town did not have notice of inadequate training, since the plaintiff failed to allege any other incidents of improper strip searches, and therefore could not be held liable. Id. The lieutenant and officer could be held liable, however, if evidence shows that they did not act reasonably in conducting the search. Id. at 10.

Similarly, a California district court held that a plaintiff could not establish a failure to train claim under § 1983 for injuries resulting from an officer pushing him away from a police dog when the plaintiff was drunk. Palacios v. City of Oakland, 970 F. Supp. 732, 744 (N.D. Cal. 1997). Based on Harris and Brown, the court did not accept the plaintiff’s argument that an improved training program would have prevented the injury, as he would need to show that the program itself fails constitutional standards. Id.

The Seventh Circuit, in Robles v. City of Fort Wayne, 113 F.3d 732 (7th Cir. 1997), relied on Brown to assert that the plaintiff must establish a pattern of violations, or the entity’s awareness of such a pattern, to have a § 1983 action under a failure to train theory in this particular case. Id. at 735-36. The defendant officer worked off-duty as a security guard for a tavern and used excessive force on the plaintiff, and the plaintiff alleged that the city failed to train off-duty officers and thus remained deliberately indifferent. Id. at 736. The Court rejected the plaintiff’s claim, as no pattern of violations by off-duty officers existed to create deliberate indifference. Id.

See, however, Allen v. Muskogee, 119 F.3d 837 (10th Cir. 1997), which allowed a § 1983 action under an inadequate training theory. Id. at 845. Officers, after hearing that Allen threatened to kill himself and possessed a gun while sitting in his vehicle, reached into the vehicle and attempted to seize Allen’s gun. Id. at 839. As a result, Allen pointed his gun toward the officers, who reacted by firing twelve rounds of ammunition into his vehicle, resulting in Allen’s death. Id. The plaintiff, as a representative of Allen, alleged that the city failed to adequately train the officers on how to deal with mentally ill persons with ammunition. Id. at 842. The court applied a four-part test according to law within the circuit:

[A] plaintiff must show (1) the officers exceeded constitutional limitations on the use of force; (2) the use of force arose under circumstances that constitute a usual and recurring situation with which police officers must deal; (3) the inadequate training demonstrates a deliberate indifference on the part of the city toward persons with whom the
based on a failure to supervise theory. Brown has also directed courts to carefully scrutinize the causation between the municipal policy and the victim's injury.

The Court's apparent regression toward municipal immunity seems to derive from both a strong emphasis on federalism and a fusion of tort concepts into constitutional law. Ever since Praprotnik, a constituency of the Court altered the scope of § 1983 to uphold ideals of federalism and to have federal courts intervene only when local law demonstrates that the policymaker authorized a lower-level official to act in a way that infringes the victim's federal rights.

Police officers come into contact, and (4) there is a direct causal link between the constitutional deprivation and the inadequate training. Id. at 841-42. With regard to the third requirement, the plaintiff presented an expert witness who testified that the officers acted inappropriately in the situation according to standard police procedures when approaching a suicidal armed person. Id. at 842. The Court accepted the plaintiff's claim and distinguished the situation from Brown by arguing the facts present the "narrow range of circumstances" that allow an inadequate training theory based on a single incident. Id. at 845.

A New York district court found that the city could not be held liable for failing to train and supervise an officer who shot the plaintiff when evidence failed to demonstrate how the lack of supervision caused the officer to shoot the plaintiff. Morissey v. City of New York, 963 F. Supp. 270, 275 (S.D.N.Y. 1997). The court held that the city was not required to train "cooperators," officers attempting to catch other officers in illegal activity, that they will encounter stress and that this stress should not be released through shooting others. Id. Since the city had some monitoring of the officers in place, the plaintiff did not produce sufficient evidence of a failure to supervise. Id. A West Virginia district court, likewise, held that a plaintiff could not maintain a § 1983 action under failure to train, supervise, and discipline when officers searched her apartment mistakenly for drugs. Robertson v. City of Beckley, 963 F. Supp. 570, 576 (S.D. W. Va. 1997). The court asserted that Brown "emphasizes the difficult proof burden [the plaintiff] would have to meet in order to establish municipal liability." Id. at 576 n.5.

In Snyder, the Fifth Circuit relied on Brown to hold that the plaintiff's evidence on the offending officer's stress "did not establish even a remote link between the city's failure to enact a stress management program and Snyder's injury." Snyder, 142 F.3d at 799. The Seventh Circuit, in West v. Waymire, 114 F.3d 646 (7th Cir.), cert. denied, 118 S. Ct. 337 (1997), found that a town could not be held liable under § 1983 for an officer's sexual abuse of the plaintiff, a thirteen-year-old girl, as an obvious risk did not exist that the officer was a child molester. Id. at 652. Since the town only knew that he made comments to the girl's mother that "no 13 year old looks that good in a pair of jeans," the court believed the town did not possess knowledge that the officer would sexually abuse the girl. Id. at 648, 652. A Pennsylvania district court similarly dismissed a complaint that alleged that a school had a policy of allowing a teacher to insult students based on their heritage. Nicole K. v. Upper Perkiomen Sch. Dist., 964 F. Supp. 931, 937 (E.D. Pa. 1997). The teacher repeatedly called the plaintiff, a seventh grade girl, a "Neo-Nazi" and "the German girl." Id. Relying on Brown's "moving force" requirement, the court found that the school could not be held liable under § 1983. Id.

See, however, Haberthur v. City of Raymore, 119 F.3d 720 (8th Cir. 1997), which allowed action against an officer and the city for the officer's sexual abuse while on duty. Id. at 723-24.

See Lewis & Blumoff, supra note 27, at 791-93 (demonstrating that the current requirement of a "policy" reflects Justice Frankfurter's dissent in Monroe, allowing municipal liability only when the state authorizes the unconstitutional conduct, and moves beyond this view by limiting liability to cases in which the highest authority in the situation authorizes the conduct); Monroe v. Pape, 365 U.S. 167, 211-37 (1961) (Frankfurter, J., dissenting). Justice O'Connor's
sulated this concern for states’ rights: “A failure to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that States have themselves elected not to impose.”

While a legitimate concern, one commentator criticized similar justifications based on the cost of § 1983 suits in 1980 by asserting that the Constitution and the statute “embody a choice to bear certain costs to vindicate fundamental rights.”

Coinciding with federalism concerns, the Court applied more complex tort principles to limit § 1983 actions against municipalities. Rather than fully examine the issue of municipal responsibility for constitutional violations, the Court constructs legal fictions grounded in tort law that avoid pragmatic problems of compensating victims and deterring future abuses. The concept of deliberate indifference exemplifies this process, as the Court concentrates on the policymaker’s state of mind to determine the municipality’s responsibility. As a result, § 1983 plaintiffs suffer an arduous task of overcoming many legal hurdles, effectively creating municipal immunity.

B. Fostering Legal Difficulties for Police Abuse Victims

Consistent with Justice Brennan’s dicta in Monell, Brown and its precursors promote the theory of ensuring fault before imposing lia-

...
bility on a municipality.\textsuperscript{255} This reasoning leads to an extremely high threshold for a victim of police abuse.\textsuperscript{256} Over the past nineteen years, the Court has formed a legal theory that in effect immunizes municipalities without expressly advocating this doctrine.\textsuperscript{257} By creating this legal shield for municipalities, the Court has ignored historic and modern purposes of § 1983.\textsuperscript{258} As discussed below, the Court's modern jurisprudence frustrates the remedial nature of the statute and precludes possibilities of compensation.

When presenting a § 1983 action, a plaintiff faces numerous problems with obtaining compensation against individual officers: the plaintiff may not be able to obtain an attorney to take the case;\textsuperscript{259} the plaintiff may be unable to identify the offending officer;\textsuperscript{260} juries tend to credit the officer's testimony over the victim's;\textsuperscript{261} officers conform to a "code of silence," even when on the stand;\textsuperscript{262} the jury may not be willing to place a burden on the officer;\textsuperscript{263} the city's resources vastly outweigh the plaintiff's;\textsuperscript{264} the city will not conform to discovery requirements until ordered by a court to do so;\textsuperscript{265} and the officer may not be able to pay substantial damages if found liable.\textsuperscript{266} Given these difficulties, providing a victim with the outlet of charging the munici-
pality itself with fault would coincide with notions of fairness.\textsuperscript{267} If the victim did not possess this outlet, the purpose of providing a federal remedy would be lost.

In the modern days of oversized dockets in the federal courts, one may wonder why a victim of police abuse needs the availability of federal supervision. One response to this question derives from the nature of § 1983 itself. Because the statute provides a supplementary federal remedy for constitutional violations,\textsuperscript{268} a victim should be able to present a proper claim in the federal system.\textsuperscript{269} Furthermore, decisions from federal courts provide a symbolic assertion that certain rights will receive protection above existing state remedies, or lack thereof.\textsuperscript{270} When a victim chooses to present a case in federal court, he or she may desire a federal judge's expertise and freedom from state political ties,\textsuperscript{271} a more impartial jury,\textsuperscript{272} or the advantages of federal procedures.\textsuperscript{273} Besides providing compensation to victims, the

\textsuperscript{267} Id. at 919. The NOW Legal Defense and Education Fund, in its amicus brief, asserted another justification of fairness for holding the municipality responsible: "When a municipality hires a police officer it implicitly asks the public to trust that officer's decisionmaking abilities and authority. Citizens, in turn, trust the municipality to use sound selection practices in hiring the individuals who will obtain extraordinary power over citizens' lives." Amicus Brief of NOW Legal Defense and Education Fund at 12-13, Board of County Comm'r's v. Brown, 502 U.S. 397 (1997) (No. 95-1100). In other words, the empowerment by the public creates an obligation to ensure endangerment to their safety will not transpire from inappropriate municipal practices. This obligation would receive ultimate protection by holding the municipality responsible for its actions that lead to others' injuries. See infra Part II.C.


\textsuperscript{269} See Whitman, supra note 249, at 28 ("Where rights have been determined to be of constitutional merit, caseload considerations are necessarily secondary to the vindication of those rights."). For a discussion of how the legislative history of statute supports this analysis, see supra Part I.A.

\textsuperscript{270} Whitman, supra note 249, at 24. The issue of solving local problems through the federal system strikes at the heart of the debate between federalism and a uniform legal system. In the end, pragmatic solutions must prevail over traditional allocations of legal responsibility:

- Contraction of government liability reduces government accountability. It encourages the government to delegate without supervising, because its employees' acts may then be seen as "random and unauthorized" and thus not the government's concern. . . .
- The state is left to clean its own house. The result is that the Constitution imposes no barrier between the citizen and coercive state power.

Susan Bandes, Monell, Parratt, Daniels, and Davidson: Distinguishing a Custom or Policy from a Random, Unauthorized Act, 72 IOWA L. REV. 101, 127 (1986).

\textsuperscript{271} Bandes, supra note 270, at 124-25.

\textsuperscript{272} Despite this familiar justification, federal district court juries have become more representative of suburban, white, middle-class males. See Patton, supra note 5, at 766.

\textsuperscript{273} Some examples of advantages a plaintiff may possess in federal court include: notice pleading, 1 STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 8.2(a) (photo reprint 1997) (1988); Rule 11 sanctions, id.; more favorable discovery policies, id. § 8.2(d); entry of felony convictions into evidence, id. § 8.6; and a greater chance of creating a class action, id. § 8.8. Cf. id. § 8.2(c)-(d) (stating that many states allow plaintiffs to allege "Doe defendants" and that state court judges may be more reluctant to grant summary judgment motions).
suit brings political attention to the issue of police brutality, educates the public on police practices, and may deter police misconduct.\textsuperscript{274} As a result, a federal remedy should remain available to the victim.

The ability to bring these civil claims receives more support when one considers the specific situation in \textit{Brown}. The deputy and sheriff testified that they engaged in a high-speed chase for four miles after the Browns turned away from the checkpoint.\textsuperscript{275} This high speed scenario, resulting in serious injuries to the victim, commonly occurs and often results in shootings.\textsuperscript{276} Furthermore, Mr. Brown testified that he had problems with the checkpoints in the past and therefore avoided the scene.\textsuperscript{277} Mr. Brown is not alone in experiencing repeated abuses by the same officers, as the officers who get charged with brutality often committed the same acts in the past.\textsuperscript{278} With these systematic problems, the § 1983 action, if allowed to proceed

\textsuperscript{274} Patton, \textit{supra} note 5, at 800-01 (finding that if the suit receives large media attention or obtains a large financial award, deterrence will result); Alice McQuillan, \textit{City Cop Brutality Claims Up 24\textperthousand,} N.Y. \textit{Daily News}, Apr. 10, 1998, at 4 ("Brutality complaints against police soared 24\textperthousand during the first quarter of 1998, apparently because the high-profile Abner Louima cop torture case has prompted more accusers to come forward."); see Hoffman, \textit{supra} note 5, at 1518 (arguing that § 1983 claims, if allowed to proceed effectively, will inspire better training and supervision of officers). Of course, social remedies may provide for a more direct way of reforming police abuse and giving citizens more control over their officers. See \textit{Human Rights Watch}, \textit{supra} note 5, at 85 ("Civil remedies must always be available, but they cannot be a substitute for police department mechanisms of accountability or prosecutorial action."); Colbert, \textit{supra} note 24, at 500 n.2 (arguing that the public's trust in police could receive reinforcement from more powerful civilian review boards).

\textsuperscript{275} Brown \textit{v.} Board of County Comm'rs, 67 F.3d 1174, 1177-78 (5th Cir. 1995).

\textsuperscript{276} Freeman, \textit{supra} note 8, at 758 (describing this scenario as the "post-pursuit syndrome"); Hoffman, \textit{supra} note 5, at 1473 (finding shootings as the most common form of abuse in pursuit cases).

Just recently, the Court clarified the standard for a substantive due process claim against an individual officer during a high-speed automobile chase. In \textit{County of Sacramento v. Lewis}, 118 S. Ct. 1708 (1998), the Court found that an officer did not violate substantive due process in such a situation, as the "shocks-the-conscience" test could not be met. \textit{Id.} at 1711. Philip Lewis was a passenger on a motorcycle that Officer Smith chased and ran into at 40 miles an hour, resulting in Lewis's death. \textit{Id.} at 1712. The Court defended Officer Smith's actions:

While prudence would have repressed the reaction, the officer's instinct was to do his job as a law enforcement officer, not to induce [the driver's] lawlessness, or to terrorize, cause harm, or kill. Prudence, that is, was subject to countervailing enforcement considerations, and while Smith exaggerated their demands, there is no reason to believe that they were tainted by an improper or malicious motive on his part.

\textit{Id.} at 1721. The Court's attitude on the side of law enforcement shows how much difficulty a plaintiff faces in challenging an officer's actions, especially in high-speed chase situations.

\textsuperscript{277} See \textit{supra} note 151.

productively, 279 would address these problems by holding municipalities accountable for the injuries society suffers.

Brown and the deliberate indifference standard frustrates the ability of a victim of police abuse to present such an action. By focusing on federalism and complex tort hurdles, 280 the Court ignores the practical need for systematic changes in police departments. The structure of police departments follows a "bottom-up" scheme that provides lower-level officials with a large amount of autonomy and discretion to handle stressful situations. 281 In a sense, the officers themselves establish the "policies" for a department when choosing to act in certain ways with the public. 282 Just as individual members of the Ku Klux Klan invaded local institutions and created social injustice through surreptitious means, 283 abusive officers thrive in departments that may not authorize or prohibit their actions. 284 Because the Court limits municipal liability to situations where high-level individuals know or clearly should know about specific harms likely to occur, victims remain unable to effectively alter local departments' lack of accountability.

Given the continuing trend to heighten standards for § 1983 plaintiffs, one can only wonder how they can obtain compensation or how society will solve the crisis of police abuse. 285 This difficulty becomes even more complex when one realizes that obtaining an injunction to

279. A respondeat superior theory seems to be the most productive method for these suits. See Part II.C.

280. See supra notes 226-36 and accompanying text. The Court's focus may derive from an "individualist model" that ignores social structures. Rosa Eckstein, Comment, Towards a Communitarian Theory of Responsibility: Bearing the Burden for the Unintended, 45 U. MIAMI L. REV. 843, 855 (1991) (analyzing the Court's liberalism as protecting the private realm and restricting remedial statutes). Eckstein suggests that a communitarian perspective would recognize the effects of past discrimination and attempt to remedy these effects more directly. Id. at 863. She desires to balance community and autonomy, however, and thus suggests an alternative to respondeat superior liability: "the Court could propose a definition of internal institutional responsibility, basing its imputation of liability against a backdrop of fundamental individual rights." Id. at 908. Contrary to Eckstein's middle position, one could view respondeat superior as a more direct route to engaging a community in redressing problems of police misconduct.

281. Schuck, supra note 141, at 1778 ("[O]perating routines, situation-specific social and emotional needs, peer subculture norms and ideologies, and the dynamics and economy of their daily interactions with the public [determine officers' behavior."]").

282. Id. This observation does not ignore the fact that municipal rules and regulations structure the way officers deal with the public.

283. See supra note 26.

284. While the author does not necessarily equate abusive police officers to members of the KKK, one should acknowledge the continual problem of white supremacists employed as law enforcement officials. See Barnes, supra note 5.

285. See supra note 5.
stop certain police misconduct remains nearly impossible.\textsuperscript{286} Even though the historical purpose of the statute was to provide a federal remedy when local abuses of authority occur, the deliberate indifference standard frustrates the ability of victims to apply such a remedy. Consequently, the legal barriers to a § 1983 claim against a municipality require a simpler and more coherent analysis.

C. Respondeat Superior Liability as a Solution

Contrary to the Court's fear of vicarious liability, respondeat superior would provide a fair and adequate basis for recovery in police abuse cases.\textsuperscript{287} Vicarious liability holds an entity responsible only when the principal has control over the agent's actions.\textsuperscript{288} Nineteenth century common law routinely held municipal corporations vicariously liable.\textsuperscript{289} When one examines the limitations of this doctrine in light of § 1983 jurisprudence, an adequate solution to the Court's legal complexities that victims presently face is revealed.

Because the municipality has "clothed the employee with the governmental authority necessary for a constitutional abuse to take place,"\textsuperscript{290} fairness requires holding the municipality responsible. Without the legitimacy of the municipality, officers' powerful interactions with the public could not occur. This legitimacy also creates the structure of police departments and the way officers interact with the public that deliberate indifference fails to address.\textsuperscript{291} As a result, a victim has the right to obtain compensation from the entity contributing to a system of abuse by failing to adequately address their officers' actions.

Given the problems victims face when presenting a claim against individual officers,\textsuperscript{292} respondeat superior would provide a fair alter-
native to the victim, deter future violations by "formulating sound municipal policy," and create fair treatment of individual officers.\textsuperscript{293} Furthermore, higher level officials maintain a position that could "balance liability avoidance measures against the requirements of governing."\textsuperscript{294} In the case of Brown, requiring this balance for hiring decisions would also ensure that the applicant does not have a background replete with criminal conduct. Respondeat superior would further spread the cost of constitutional violations across the public. As a result, the public would receive fuller awareness of corrupt municipal officials and respond through democratic processes.\textsuperscript{295}

This theory of liability would discard both the deliberate indifference standard and the requirement of a "policy."\textsuperscript{296} Consequently, the new analysis would examine the scope of the officer's duties as a municipal employee and thus hold the municipality liable for the resulting constitutional violations.\textsuperscript{297} The Court's requirement of fault ignores the policy behind § 1983 of preventing governmental abuse.\textsuperscript{298} Rather than circumvent this policy, courts can limit frivolous suits by requiring specific allegations of an official's substantial abuse of authority.\textsuperscript{299} In addition, the plaintiff would still need to prove how the official caused his or her constitutional injury and the damages he or she suffered.\textsuperscript{300}

The Court continues to express the fear that holding municipalities liable at the federal level would transgress on states' rights to form

\textsuperscript{293} City of Oklahoma City v. Tuttle, 471 U.S. 808, 843-44 (1985) (Stevens, J., dissenting); see Hoffman, supra note 5, at 1519-20 (arguing that both parties would spend less on lawsuits, constituting a decrease in costs to society, as well an increased benefit to plaintiffs and a higher probability that reform to internal policies would occur).

\textsuperscript{294} Lewis & Blumoff, supra note 27, at 826.

\textsuperscript{295} See Owen v. City of Independence, 445 U.S. 622, 657 (1980). One may argue that equitable forms of relief would better accomplish some of the goals of § 1983 by requiring institutions to act in ways that change systems of corruption. See Whitman, supra note 249, at 49. Imposing respondeat superior liability on municipalities appears necessary at this point to fully compensate police abuse victims and create an awareness in law enforcement institutions that society will no longer accept unconstitutional conduct. See Hazel Glenn Beh, Municipal Liability for Failure to Investigate Citizen Complaints Against Police, 25 Fordham Urb. L.J. 209, 251-52 (1998) (suggesting that courts' review of citizen complaint procedures benefit the community). If federal courts reached this step, more improved equitable remedies may not seem so distant a possibility.

\textsuperscript{296} See Hoffman, supra note 5, at 1518 (advocating the limit of the issues to whether the Constitution was infringed and how the victim should be restored).

\textsuperscript{297} Lewis & Blumoff, supra note 27, at 829-30.

\textsuperscript{298} Id. at 836.

\textsuperscript{299} Steichen, supra note 27, at 1049. Cf. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) (ensuring that civil rights claimants need not meet a "heightened pleading" standard in alleging Monell claims).

\textsuperscript{300} Lewis & Blumoff, supra note 27, at 832.
their own requirements.\textsuperscript{301} This concern of federalism does not truly exist, however, because the Fourteenth Amendment requires limiting state power when constitutional violations occur.\textsuperscript{302} Unfortunately, as \textit{Brown} and the Louima event demonstrate, serious violations of this nature continue to occur.\textsuperscript{303}

A legitimate concern with the use of vicarious liability in the context of constitutional torts involves the introduction of more tort concepts into constitutional law.\textsuperscript{304} The use of respondeat superior only determines the extent of liability of a government entity, not the substantive issue of how it actually caused the plaintiff's injury.\textsuperscript{305} One may argue, therefore, that vicarious liability neglects to formulate a constitutional theory for imposing responsibility on the government that the Constitution demands.\textsuperscript{306} In the context of police abuse cases, though, respondeat superior would hold a municipality accountable after the plaintiff surpassed the hurdles of Fourth Amendment law\textsuperscript{307} and demonstrated that the injury resulted from an act or omission by an employee within the scope of his or her employment.\textsuperscript{308} Hence, the municipality would be held accountable for protecting Fourth Amendment values, and it would be found responsible only when it violated these norms. Respondeat superior would thus preserve constitutional standards of responsibility for government entities in police abuse cases.

\begin{itemize}
\item \textsuperscript{301} See Board of County Comm'rs v. Brown, 520 U.S. 397 (1997).
\item \textsuperscript{302} Rothfeld, supra note 58, at 964.
\item \textsuperscript{303} See supra note 5; see also Amicus Brief of NOW Legal Defense and Education Fund at 22 n.14, \textit{Brown}, 520 U.S. 397 (No. 95-1100) ("Since 1989, at least seventeen judges, police officers, correctional officers, and border patrol agents have been prosecuted and sentenced under 18 U.S.C. § 242 (1996), the criminal counterpart to § 1983, for improperly using their positions to rape and sexually assault women.").
\item \textsuperscript{304} See Whitman, supra note 251, at 250 ("When the government is the wrongdoer, ordinary injury is augmented by the abuse of government power, and the Constitution has appropriately been read to address these augmented injuries in their own terms, rather than by analogy to common-law torts."). Whitman argues that negligence, "to the extent that it embraces an obligation of empathy or mutual care," does not adequately address how an institution operates. \textit{Id.} at 259 n.149. Instead, she suggests examining the entity as an institution and finding liability in the failure to act situation when the entity had an opportunity to prevent the injury. \textit{Id.} at 254-57.
\item \textsuperscript{305} See John W. Wade \textit{et al.}, \textit{Prosser, Wade and Schwartz's Cases and Materials on Torts} 644 (9th ed. 1994) (stating that under vicarious liability one "is held liable ... without any fault of his own and becomes liable only by reason of his relation to the actual wrongdoer").
\item \textsuperscript{306} See Whitman, supra note 36, at 669 ("[T]he substantive heart of [a § 1983 case] is the special power of the government to do harm, rather than the quality of the plaintiff's injury.").
\item \textsuperscript{307} See Akhil Reed Amar, \textit{Fourth Amendment First Principles}, 107 \textit{Harv. L. Rev.} 757, 761-800 (1994) (describing the Court's complex and contradictory interpretation of Fourth Amendment law).
\item \textsuperscript{308} See supra note 288.
\end{itemize}
CONCLUSION

The deliberate indifference standard and *Board of County Commissioners of Bryan County v. Brown* promotes a stronghold on outdated precedent and the principle of allowing the government free reign over its citizenry. By maintaining the high threshold for § 1983 plaintiffs challenging municipalities for their officers’ blatant abuses, the Court ignores the social reality of litigation costs, trial court barriers, and the law’s distinct role in barring victims from deserved compensation. As a result, the police continue to possess their power to infringe others’ constitutional rights without penalty. The Court, as Justice Breyer recommended, must reassess these errors and adopt respondeat superior liability to sufficiently hold municipalities responsible for this abuse of power. For victims like Abner Louima, the federal judicial system remains the most beneficial avenue for redressing wrongs and changing police behavior.

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