

## Municipal Liability and Respondeat Superior: An Empirical Study and Analysis

*“The civil rights lawyer who pursues a claim under 42 U.S.C. § 1983 against a public entity must epitomize the Scholar Warrior, deftly balancing an ever splintering and multiplying framework of what constitutes public entity liability with the tact, fervor, and energy found in only the greatest of strategists and fighters.”*<sup>1</sup>

### I. INTRODUCTION

Chapter 42, section 1983 of the United States Code is the primary source of law for obtaining damages and equitable relief against state and local officials, and through them, municipalities who violate the constitution.<sup>2</sup> The statute provides remedies for violations of federal law by state and local officials, and also allows for certain types of relief against government entities themselves.<sup>3</sup> Section 1983 is the most frequently used basis for federal police misconduct actions against state or local officers.<sup>4</sup> Under current jurisprudence, however, holding municipalities accountable for the unconstitutional acts of one of its officials remains difficult in actions for damages.<sup>5</sup>

Two seminal cases helped shape the law of municipal liability under section 1983 in the United States.<sup>6</sup> In *Monroe v. Pape*,<sup>7</sup> the Supreme Court held that

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1. Clifford S. Zimmerman, *The Scholar Warrior: Visualizing the Kaleidoscope that Is Entity Liability, Negotiating the Terrain and Finding a New Paradigm*, 48 DE PAUL L. REV. 773, 774 (1999) (discussing criticisms of *Monell* liability and new ideas for reform). “Skill is the essence of the Scholar Warrior. Such a person strives to develop a wide variety of talents to a degree greater than even a specialist in a particular field.” *Id.* (quoting DENG MING-DAO, SCHOLAR WARRIOR: AN INTRODUCTION TO THE TAO IN EVERYDAY LIFE 10 (1990)).

2. 42 U.S.C. § 1983 (2005). Section 1983 provides, in pertinent part:  
Every person who . . . 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 . . . .

*Id.*

3. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (allowing direct suits against local governing bodies under section 1983 for different types of relief).

4. See MICHAEL AVERY, DAVID RUDOVSKY, & KAREN M. BLUM, POLICE MISCONDUCT LAW AND LITIGATION § 1:1, at 1 (3d ed. 2004) (explaining Civil Rights Act).

5. See 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION THE LAW OF SECTION 1983, § 1:1, at 1-4 (4th ed. 2002) (discussing process when plaintiff seeks damages).

6. *Id.* § 6:1 at 6-3, 6-4 (discussing rulings of main cases pursuant to governmental liability). See generally AVERY, RUDOVSKY, & BLUM, *supra* note 4, § 1:1-1:11 (discussing basic principles of section 1983).

government actors could be personally liable under section 1983, and stated that the plaintiff could sue for damages in federal court for the unconstitutional actions of several police officers.<sup>8</sup> The Supreme Court declared that the alleged actions of the officers were “under color of state law,” within the meaning of section 1983.<sup>9</sup> The local government, on the other hand, could *not* be sued as a “person” under section 1983.<sup>10</sup>

Seventeen years later, in *Monell v. Department of Social Services*,<sup>11</sup> the Court overruled *Monroe* and held that local governments may be sued as “persons” under section 1983, making local governments available as co-defendants in suits against municipal employees.<sup>12</sup> A caveat to this ruling is that vicarious liability cannot be imposed on a municipality on the basis of respondeat superior.<sup>13</sup> As a result, a plaintiff can sue both an employee of the local government and the government itself, but when suing the government, must have a theory of liability based on the local government’s own actions stemming from a policy or custom.<sup>14</sup>

Suits against the government have inspired contention in the legal heritage of our country for many years.<sup>15</sup> There are difficulties inherent in both the formation of a government controlled by fellow citizens, and the obligation of

litigation).

7. 365 U.S. 167 (1961).

8. *Id.* at 187-88, 192 (rejecting respondeat superior liability).

9. *Id.* at 187 (accepting prior Supreme Court rulings defining meaning of “under color of” state law). The *Monroe* Court argued that the meaning of “under color of” state law only includes actions taken by officials pursuant to state law. *Id.* at 184. The Court reasoned that if the definition constructs a rule causing unfavorable consequences, Congress has the power to change it. *Id.* at 185.

10. *Id.* at 187-92 (relying on interpretation of Sherman Amendment). The Court stated that it did not reach the policy considerations surrounding the issue of municipal liability opposed to private remedies, or the constitutional question of whether Congress even has the power to impose such liability on government employees who violate individuals’ civil rights. *Id.* at 191.

11. 436 U.S. 658 (1978).

12. *Id.* at 690 (analyzing legislative history of section 1983 and concluding Congress did intend municipal liability). The Supreme Court in *Monell* indicated that the “touchstone” of a section 1983 action against municipal government is responsibility for official policy resulting in an unconstitutional deprivation of rights, however, a municipality may also be sued for deprivations resulting from customs not officially approved by decision-makers. *Id.* at 690-91. The majority reasoned that the term “custom” was included in section 1983 because Congress realized that although customs were not explicitly authorized by state law, the practices of state officials could be so well settled as to have the force of law. *Id.* at 691.

13. *Id.* at 691 (limiting scope of municipal liability). The Supreme Court stated that the legislative history compelled the conclusion that municipal liability could not be imposed without a policy causing a constitutional tort. *Id.* Congress used the term “cause to be subjected” in the language of the statute, therefore the Court decided that Congress did not intend to impose liability where no causation was apparent. *Id.* at 692.

14. *Id.* at 694-95 (holding new test showing unconstitutional policy or custom now applies). The Court noted the disagreement surrounding the question of whether municipal liability should attach where the employer/employee relationship is the “sole nexus” between the employer and the tort. *Id.* at 693. Although the Court found two justifications for respondeat superior liability, revolving around reduction of total accidents and spreading liability to the community, it concluded that the imposition of a more general liability would not be any “less constitutionally objectionable.” *Id.* at 694.

15. PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* xi-xiii (1983) (discussing government entities as defendants).

that government to control the people as well as itself.<sup>16</sup> The government, therefore, is a reflection of human nature.<sup>17</sup> Commentators state that “[l]awbreaking is endemic to government,” therefore it is important to have a legal doctrine to address the issue.<sup>18</sup>

This Note will initially discuss the history and current procedure for bringing a claim based on municipal liability, and will additionally address the recourse for damages arising out of constitutional violations by local governments and their employees.<sup>19</sup> Next, it will analyze issues that plague the current regime and the arguments for and against respondeat superior liability under section 1983.<sup>20</sup> Finally, this Note will relay the results of my empirical study of current practices of section 1983 actions for police misconduct in large, medium and small cities in the United States.<sup>21</sup> This Note will analyze these results to determine whether rejecting respondeat superior liability under section 1983 is a useful doctrine in light of current policies and procedures of police misconduct claims against municipalities.<sup>22</sup>

## II. HISTORY

### A. Section 1983 and Municipal Liability

Respondeat superior is unavailable under section 1983, which provides liability for a municipality’s own conduct and not the conduct of its employees.<sup>23</sup> The jurisprudence of the Supreme Court leading to this

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16. See generally THE FEDERALIST NO. 51 (James Madison) (describing inherent problems with government liability for wrongs against individuals); see also SCHUCK, *supra* note 15, at xi (discussing Madison’s Federalist Paper views about governmental abuse of power).

17. THE FEDERALIST, *supra* note 16 (explaining issues with citizens governing citizens and likelihood of causing injury in governmental capacity).

18. See SCHUCK, *supra* note 15, at xi (articulating Madison’s views). Madison recognized when a government is comprised of citizens, remedies must be implemented to address situations wherein government actors deprive citizens of their rights. *Id.*

19. See *infra* Part II (describing section 1983 jurisprudence, and former and current tests for municipal liability).

20. See *infra* Part III.A (analyzing section 1983 case law and critics’ commentaries regarding respondeat superior and municipal liability).

21. See *infra* Part III.B (relaying results of empirical study).

22. See *infra* Part III.B (analyzing results of empirical study).

23. See Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627 (1999) (discussing development of municipal liability under section 1983). The Supreme Court has not developed municipal liability jurisprudence consistent with its views regarding other areas of section 1983 because of policy concerns surrounding the broadening of vicarious liability for municipalities. *Id.* Beermann points out the four rules stemming from Supreme Court decisions that broaden the scope of municipal liability. *Id.* at 628. First, the policy itself need not be unconstitutional. *Id.* Second, the policy does not have to be adopted by the highest legislative body, instead, liability may result from any decision of an official with final municipal authority. *Id.* Next, such decision of one with final authority does not have to be framed as a general rule. *Id.* Finally, a municipal policy may result in liability even where the actual policy is difficult to identify, such as “failure to train.” *Id.*

conclusion is rooted in an analysis of the legislative history surrounding the statute.<sup>24</sup> This historical evidence has led to conflicting conclusions by the Supreme Court, and has dramatically changed municipal liability under section 1983 over the years.<sup>25</sup>

*1. The Legislative History of Section 1983 and the Jurisprudence Leading up to the Current Regime*

Section 1983 is commonly referred to as either the Civil Rights Act of 1871 or the Ku Klux Klan Act of 1871.<sup>26</sup> Congress enacted the statute six years after the Civil War ended, at a time when newly freed slaves and their supporters fell victim to increasing violence that went unpunished by state governments.<sup>27</sup> Legislators were looking for a new way to break down barriers that victims of this violence faced when trying to bring complaints in federal courts based on actions by the states perpetrated by their officials.<sup>28</sup> Section 1983 represents both an effort by Congress to remove these barriers and to quell executive fears that their powers to address the violence were unclear under existing laws.<sup>29</sup>

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24. Beermann, *supra* note 23, at 629-30 (pointing to Supreme Court's analysis of section 1983's legislative history). The Supreme Court's interpretation of section 1983 also incorporates common law doctrines. *Id.*

25. *See* Beermann, *supra* note 23, at 627 (discussing conflicting conclusions by the Court).

26. *See* Steven Stein Cushman, *Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker*, 34 B.C. L. REV. 693, 698 (1993) (describing nomenclature and history of section 1983). The Supreme Court highlighted three principle aims of the Civil Rights Act that aid in the application of the statute. *Id.* Congress intended the statute to override and prevent "invidious legislation" by the States against rights of citizens, as well as to provide a remedy for deprivations of these rights when state law was inadequate. *Id.* The Court noted Congress' intention to provide a federal remedy where the state remedy was available in theory but not available in practice. *Id.* The Court recognized the concern of Congress that local governments either could not or would not enforce the laws equally. *Id.*

27. *See* Michael J. Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 547 (1989) [hereinafter Gerhardt, *Monell Legacy*] (discussing history behind enactment of Civil Rights Act). Certain amendments to the Constitution, including the Fourteenth Amendment in 1868 and the Fifteenth Amendment in 1870, "created a political revolution" by providing Congress with additional power to enforce the new amendments through legislation. *Id.* at 546-47. To the dismay of Congress, these amendments did not end the violence perpetrated upon many citizens in the South, as many officials in the state governments were involved in the crimes either individually or as members of groups such as the Ku Klux Klan. *Id.* at 547. Many state officials including judges, ignored the violence, participated in it, or did not punish the offenders adequately. *Id.*

28. *See* Gerhardt, *Monell Legacy*, *supra* note 27, at 547 (discussing problems with bringing actions against states under Fourteenth Amendment). These barriers included Eleventh Amendment prohibitions on lawsuits against states by non-residents, problems with recognizing official state action with certainty, and problems identifying the appropriate remedies available whether in the form of damages or injunctions. *Id.*

29. *Monroe v. Pape*, 365 U.S. 167, 172-73 (1961) (discussing legislative history of section 1983). Justice Douglas, writing for the majority, describes how a letter sent to Congress in 1871 from President Grant motivated lawmakers to enact section 1983. *Id.* at 172. It depicted the President's fear that the existing laws were not adequate to stop the violence in the South. *Id.* This message read:

A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive

In the case of *Monroe v. Pape*, the Supreme Court considered the principle aims of Congress in enacting section 1983.<sup>30</sup> The Court rejected municipal liability and instead hinged the verdict on an analysis of the Act's legislative history.<sup>31</sup> The Supreme Court considered an important piece of legislation called the Sherman Amendment to the Civil Rights Act of 1871, which proposed that municipalities be held strictly liable when states violate the federal rights of individuals within their boundaries.<sup>32</sup> The rationale Congress employed in rejecting the Sherman Amendment proved to be key to the Supreme Court's rejection of municipal liability in *Monroe*.<sup>33</sup>

Even though the Court did not accept municipal liability, Justice Douglas succeeded in breaking down some of the barriers that plaintiffs faced by determining who could be sued under section 1983 and the relief to which the plaintiffs were entitled.<sup>34</sup> More significantly, based on the rejection of the

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of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

*Id.* at 172-73; see Gerhardt, Monell *Legacy*, *supra* note 27, at 548 (discussing evidence of Congress' intentions behind enacting section 1983). Congress' motives behind enacting section 1983 included deterring the Ku Klux Klan from violating rights of citizens, providing federal remedies and compensation for victims, and reaffirming the principles of the Fourteenth Amendment. Gerhardt, Monell *Legacy*, *supra* note 27, at 548. Gerhardt states that there is evidence that Congress intended the statute to be "broadly worded" and therefore not limited in its application or interpretation. *Id.*

30. *Monroe*, 365 U.S. at 173 (discussing legislative history and purpose behind section 1983); see also Cushman, *supra* note 26, at 698 (discussing Supreme Court's holding in *Monroe*). In its discussion of the legislative history of section 1983, the Court stated the three purposes behind the statute. *Monroe*, 365 U.S. at 173. First, section 1983 "prohibits any invidious legislation by States against the rights or privileges of citizens." *Id.* Second, it "provided a remedy where state law was inadequate [for states' violations of rights under federal law]." *Id.* Finally, section 1983 provided "a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.*

31. See Cushman, *supra* note 26, at 698 (describing Supreme Court's decision in *Monroe*). The Court found that the Plaintiff satisfied the prima facie requirements of section 1983 and that he was deprived of constitutional rights under color of law. See Lessie Gilstrap Fitzpatrick, *Limiting Municipal Liability in Section 1983 Litigation: McMillan v. Monroe Country, Alabama*, 35 HOUS. L. REV. 1357, 1365 (1998) (discussing Justice Douglas' examination of section 1983 legislative history). In order to answer the question of whether the city could be a defendant in a section 1983 action, however, the Court turned to the history of the Act. *Id.*

32. See Fitzpatrick, *supra* note 31, at 1365 (describing content of Sherman Amendment). The Sherman Amendment provided a cause of action to persons injured by those with intent to deprive individuals of constitutional rights, to persons deterred by those from exercising such rights, and to persons punished for their race or previous condition of servitude. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 666 (1978). Also, the Amendment provided that this cause of action would be against "the county, city or parish in which the riot had occurred." *Id.* at 667.

33. See Fitzpatrick, *supra* note 31, at 1365 (discussing Supreme Court's reasoning in *Monroe*). In *Monroe*, the Court indicated that Congress had refused to accept the Sherman Amendment on the grounds that one of the sections would impose a type of municipal liability. *Id.* This led to the decision that under section 1983, the term "person" included municipal officers, but not the municipalities themselves, therefore rejecting municipal liability in that case. *Id.*

34. See Gerhardt, Monell *Legacy*, *supra* note 27, at 552 (discussing Douglas' opinion in *Monroe*). Justice Douglas wrote for the majority in *Monroe*, and relying on the legislative history surrounding section 1983, determined the correct plaintiffs and remedies under the statute. *Id.* He interpreted "person" to include

Sherman Amendment, he concluded that municipalities are not “persons” for the purposes of section 1983, and therefore are not available as defendants in section 1983 actions.<sup>35</sup> The consequence of the Court’s interpretation of the legislative history of the Act, particularly the rejection of the Sherman Amendment, was the preclusion of municipal liability.<sup>36</sup> The Court inferred that in one instance of rejecting municipal liability, Congress barred it in all other contexts.<sup>37</sup>

After the landmark decision in *Monroe*, the Supreme Court delivered decisions that both affirmed and undermined their previous conclusions.<sup>38</sup> In a case affirming its rejection of municipal liability under section 1983, the Court extended states’ Eleventh Amendment immunity.<sup>39</sup> The Court also held that municipalities could not be sued for equitable relief under the Act.<sup>40</sup>

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municipal officials, but cited Congress’ rejection of the Sherman Amendment as the basis for his conclusion that municipalities could not be “persons” within the meaning of section 1983 liability. *Id.* Justice Douglas also described the remedy for section 1983 actions as an award of damages or injunctive relief that may be against a “municipal official in his personal capacity.” *Id.* These conclusions resulted in the Supreme Court allowing a damages remedy against municipal officials under the statute, making limited progress for plaintiffs. *Id.*

35. See Gerhardt, Monell *Legacy*, *supra* note 27, at 552 (discussing Justice Douglas’ reasoning in his decision). Justice Douglas stated that the Sherman Amendment would have made municipalities strictly liable for the violence of private parties, effectively imposing a duty on the cities to keep the peace. *Id.* He then reasoned that Congress rejected the Sherman Amendment, indicating their intention not make the municipalities available as defendants. *Id.* The importance of the rejection of the Sherman Amendment by Congress has been questioned. *But see* Beermann, *supra* note 23, at 631 (discussing rejection of Sherman Amendment). Beermann states that the rejection of the Amendment “is not strong authority for rejecting municipal liability” for several reasons. *Id.* He states that the arguments made against the Amendment were not against municipal liability, but directed at other problems with the Amendment. *Id.* Furthermore, Beermann points out that because two other versions of the Amendment passed in the Senate, conclusions regarding municipal liability should not be drawn from its rejection. *Id.*

36. See Gerhardt, Monell *Legacy*, *supra* note 27, at 552 (discussing Justice Douglas’ reasoning in his decision).

37. See NAHMOD, *supra* note 5, § 6:6 at 6-21, 6-22 (discussing ramifications of Congress’ rejection of municipal liability).

38. See Gerhardt, Monell *Legacy*, *supra* note 27, at 553 (discussing jurisprudence of Supreme Court post-*Monroe*). After *Monroe*, there were two lines of decisions by the Supreme Court. *Id.* Several decisions reaffirmed and extended the holding of *Monroe* that municipalities may not be held liable under section 1983. *Id.*; see, e.g., *Aldinger v. Howard*, 427 U.S. 1, 17 (1976) (holding plaintiff can’t join state law action against county to section 1983 action against officials); *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973) (prohibiting plaintiffs from suing municipalities for equitable relief under section 1983); *Moor v. County of Alameda*, 411 U.S. 693, 710 (1973) (concluding county not liable for damages under section 1983). Several Eleventh and Fourteenth Amendment decisions by the Supreme Court, however, undermined the *Monroe* Court holding. Gerhardt, Monell *Legacy*, *supra* note 27, at 553. The Court stated municipal liability may be allowable under section 1983 through the Fourteenth Amendment. *Id.* By 1978, suits against local school boards were allowed, Congress had the power to abrogate states’ Eleventh Amendment immunity, and municipal officers were limited to qualified immunity from section 1983 damages. *Id.* at 554.

39. See Gerhardt, Monell *Legacy*, *supra* note 27, at 553-55 (discussing cases subsequent to *Monroe*.) For example, the Court held that “a county is not liable for damages under section 1983 notwithstanding the fact that a county had no Eleventh Amendment immunity.” *Id.* See generally *Moor v. County of Alameda*, 411 U.S. 693 (1973) (extending Court’s decision in *Monroe*).

40. See Gerhardt, Monell *Legacy*, *supra* note 27, at 553 (discussing post-*Monroe* cases affirming holding

The Supreme Court rendered several contrary decisions during the seventeen years prior to overruling *Monroe*.<sup>41</sup> The Court, for example, utilized the Eleventh and Fourteenth Amendments to weaken the holding in *Monroe* by deciding that municipal liability for damages and injunctive relief may be allowed.<sup>42</sup> It was not, however, until the Court took a fresh look at the legislative history behind the Act, including the rejection of the Sherman Amendment, that the Court changed its view towards municipal liability and considered respondeat superior in the context of section 1983.<sup>43</sup>

## 2. *The Rules Now: Government Entity Accountability*

Following *Monroe*, the Supreme Court implemented a new policy creating liability for municipalities for the actions of their employees.<sup>44</sup> The Court adhered to a narrow scheme by which liability attaches only when a person's federal rights are violated by a policy or custom acted out by a municipal official or employee.<sup>45</sup> While the Court broadly interpreted the definition of an

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of no municipal liability). *See generally* *City of Kenosha v. Bruno*, 412 U.S. 507 (1973) (holding no equitable relief under the Act when suing municipality).

41. *See* Gerhardt, *Monell Legacy*, *supra* note 27, at 553 (discussing cases leading towards development of current municipal liability theory). Between 1961 and 1978, the Supreme Court rendered several decisions stemming from the Eleventh and Fourteenth Amendments undermining the holding of the Court in *Monroe*. *Id.*; *see also supra* note 38 and accompanying text (noting cases undermining *Monroe* and leaning towards a broader interpretation of municipal liability).

42. *See* Gerhardt, *Monell Legacy*, *supra* note 27, at 553 (discussing cases allowing some theories of municipal liability). *See generally* *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (holding Fourteenth Amendment may allow municipal liability for damages). The Supreme Court relied on the authority derived from the *Bivens* Court to support its holding in a number of decisions stating that damages and injunctive relief in suits against municipalities may be allowable under the Fourteenth Amendment. Gerhardt, *Monell Legacy*, *supra* note 27, at 553.

43. *See* Beermann, *supra* note 22, at 640 (discussing Supreme Court's overruling of *Monroe*). The *Monell* Court interpreted the debates surrounding the rejection of the Sherman Amendment and recognized that the opposition was rooted in the obligation of "peacekeeping" it laid on the municipalities. *Id.* at 640-41. The Court made a significant observation by recognizing the distinction between imposing an obligation on municipalities to "keep the peace," and imposing civil liability for damages on a municipality "that was obligated by state law to keep the peace, but which had not in violation of the Fourteenth Amendment." *Id.* at 641. The Court also remarked that even "staunch" opponents of the Sherman Amendment stated that Congress had the power to designate municipal liability where said municipality used its powers in violation of the Constitution. *Id.* The keystone to the decision in *Monell* is that the Court concluded the objections to the Sherman Amendment, so heavily relied upon in the past, were "not probative on whether Congress intended to impose liability on municipalities under § 1983 for their own violations." *Id.*

44. *See* NAHMOD, *supra* note 5, § 6:6 at 6-21, 6-22 (discussing substantial change brought by Supreme Court's decision in *Monell*). The landmark decision in *Monell* led the Court away from the prior rule, under which a party could only sue a municipality for injunctive relief by naming the relevant official in their official capacity. *Id.* After the ruling came down in *Monell*, the Court shifted and allowed municipalities to be named for such relief, as long as it met the custom or policy requirement laid out in the opinion. *Id.* These developments in section 1983 jurisprudence were significant to injured plaintiffs because they allowed for a more meaningful chance at recovery. *Id.*

45. Cushman, *supra* note 26, at 712 (discussing acts of municipal policymakers which trigger liability); *see also* AVERY, RUDOVSKY & BLUM, *supra* note 4, § 4:18-4:19, at 325-34 (discussing policy and custom theories of municipal liability).

official policy which may open the door to municipal liability, the new rules remain restrictive because of hurdles in determining which municipal officials are capable of creating policies under section 1983.<sup>46</sup>

*a. Monell: The Supreme Court Shifts Its View of the Legislative History of Section 1983*

In *Monell v. Department of Social Services*, the Supreme Court reversed its earlier decision in *Monroe*, holding municipalities liable as “persons” who could be sued under section 1983.<sup>47</sup> According to the view supported by the holding in *Monroe*, the policy or custom requirement declared in *Monell* is not substantiated by the language or legislative history of the Act.<sup>48</sup> The *Monell* Court, however, distinguished the Sherman Amendment’s placement of peacekeeping obligations on municipalities from section 1983 which allows plaintiffs to enforce municipalities’ already existing statutory and constitutional obligations.<sup>49</sup> Thus, the Court held that Congress’ rejection of the Sherman Amendment should not result in a complete rejection of municipal liability under the Act.<sup>50</sup> This “fresh analysis” of the legislative history led to the conclusion that Congress *did* intend to bring municipalities within the reach of section 1983.<sup>51</sup>

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46. See Cushman, *supra* note 26, at 712 (noting Supreme Court’s restriction of official policy making capacity). The Supreme Court has broadly interpreted the definition of “policy.” *Id.* The definition adopted states that the term means a “deliberate choice of some course of action.” *Id.* The Court has limited the policies that may be attributed to officials under a municipal liability theory by restricting which officials may adopt liability-creating policies. *Id.*

47. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 660 (1978). In *Monell*, a class of female employees at the Department of Social Services brought section 1983 actions against their municipal employer. *Id.* at 661. The Department, as a matter of official policy, required pregnant employees to take unpaid leaves of absence before they were required to for medical reasons. *Id.* The petitioners sued the board and the city for damages in the form of injunctive relief and back pay for periods of the forced maternity leave. *Id.* at 661. The Supreme Court granted certiorari to determine whether “local governments and/or local independent school boards are ‘persons’ within the meaning of 42 U.S.C. § 1983.” *Id.* at 662.

48. See Gerhardt, *Monell Legacy*, *supra* note 27, at 544 (discussing federal common law as filling in gaps of section 1983). The policy or custom test derived by the Court in *Monell* results from the delegation of authority to the Supreme Court to develop federal common law in order to fill in the ambiguities of section 1983. *Id.* at 544-45. The history surrounding the “federalism-based” restrictions of this gap-filling power of the Court has defined the scope of the relationship between the federal and state governments that the Constitution creates. *Id.*

49. See Cushman, *supra* note 26, at 701 (discussing Supreme Court’s conclusion to bring municipalities within ambit of section 1983). In reevaluating its prior analysis in *Monroe*, the *Monell* Court reasoned that the mere rejection of the Sherman Amendment should not result in a complete rejection of municipal liability under section 1983. *Id.* The Court went on to determine “persons” as stated in the statute to incorporate municipalities, relying its broad construction by Congress. *Id.* The Court noted that municipalities, as well as individual persons, had the capability to impose the same harms that the statute was intended to prevent and remedy. *Id.*

50. See Cushman, *supra* note 26, at 701 (incorporating re-analysis of Sherman Act into test for municipal liability under section 1983).

51. See Cushman, *supra* note 26, at 700-01 (noting shift in Supreme Court’s analysis of section 1983 legislative history).

Although the holding in *Monell* paved the way for municipal liability, it did so with specific limitations.<sup>52</sup> The Supreme Court decided that Congress did not intend for municipalities to be held liable under respondeat superior.<sup>53</sup> The Court explicitly rejected respondeat superior, stating “a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory.”<sup>54</sup> The rationale for this decision was that Congress could not have intended the Act to include respondeat superior liability because it would have raised many of the same issues and concerns as the rejected Sherman Amendment.<sup>55</sup> The Court also reasoned that because respondeat superior amounts to vicarious liability on the part of the municipality, it would not meet the causation requirement of the Act.<sup>56</sup> Under this requirement, the municipality must cause the injury.<sup>57</sup>

The Supreme Court instated a new requirement that municipalities be held liable when an employee violates an individual’s constitutional rights.<sup>58</sup> Under the new requirements, courts will hold a municipality liable for actions of an employee only when the deprivation of the individual’s rights “occurs pursuant to an official policy or a longstanding custom.”<sup>59</sup> The Court did not provide

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52. See Cushman, *supra* note 26, at 701-02 (describing rejection of respondeat superior liability). While the *Monell* Court opened the door for plaintiffs to municipal liability that was never previously available, it did so on a limited basis. *Id.* at 701. Under the same legislative history analysis, the Court concluded that Congress did not intend the traditional tort doctrine of respondeat superior to fall within section 1983 and municipal liability. *Id.* The Court dissected the language of the statute, highlighting the causation clause, and concluded that municipal liability may only attach when said municipality “causes an employee to violate someone’s rights.” *Id.* In sum, the Supreme Court could not reconcile the causation clause of the statute with a theory of vicarious liability under respondeat superior. *Id.*

53. See Cushman, *supra* note 26, at 700-02 (discussing rejection of respondeat superior as resulting limitation to *Monell* holding).

54. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978) (stating no respondeat superior liability under section 1983).

55. See Cushman, *supra* note 26, at 702 (discussing reasoning in *Monell*).

56. See Cushman, *supra* note 26, at 702 (discussing reasoning leading to rejection of respondeat superior in *Monell*).

57. See Beermann, *supra* note 23, at 642 (discussing Court’s reasoning and limits imposed by holding in *Monell*). Beermann suggests that the Supreme Court’s reliance on the causation language in the statute is a much stronger argument for the rejection of municipal liability than the rejection of the Sherman Amendment, yet he insists that it “may ultimately prove an unsatisfactory basis for rejecting” municipal liability. *Id.* at 642-43.

58. See Cushman, *supra* note 26, at 702-03 (discussing new policy and custom requirements). Instead of respondeat superior, which the Court viewed as allowing liability predicated on unauthorized acts of employees, the Court articulated new requirements for a municipality to be held liable. *Id.* at 702-703.

59. See Cushman, *supra* note 26, at 703 (describing Court’s new doctrine). While the Court clearly articulated that in order for a municipality to be held liable, a local official or employee must violate an individual’s federal rights pursuant to an official policy or custom, they did not provide any guidance as to the interpretation of these requirements. *Id.* at 703. In fact, the Court noted only that they were expressly leaving the interpretation of the test and designation of the parameters of municipal liability under section 1983 open for discussion in subsequent cases. *Id.* Therefore, post-*Monell*, the Supreme Court has struggled with balancing the interests of injured plaintiffs and “maintaining fiscal integrity” of municipalities. *Id.*

specific parameters for interpreting the meaning of the policy or custom requirements.<sup>60</sup> In fact, the Court made only a general comment describing the scope of the term “policy.”<sup>61</sup> This vagueness sparked criticism of the *Monell* holding, spanning from declarations that the Court misinterpreted the legislative history of the statute, to assertions that Congress intended to impose liability on municipalities under a respondeat superior theory.<sup>62</sup> Nevertheless, the *Monell* decision led the Supreme Court on a journey to create a cohesive doctrine that balances the interests of municipalities and individuals seeking whole relief.<sup>63</sup>

*b. Methods to Establish Governmental Liability*

Even though the *Monell* Court rejected respondeat superior as a basis for municipal liability, Justice Brennan articulated that courts may hold municipalities liable when an officially adopted policy or a “custom not formally approved but ‘permanent and well settled’ causes the deprivation of constitutional rights.”<sup>64</sup> Since deciding that municipalities may be held liable, the Court has made efforts to “identify the nexus that must exist between a municipal official’s action and the municipality.”<sup>65</sup> A progression of cases following *Monell* allowed the Supreme Court to begin setting parameters and developing guidelines for interpreting the policy and custom requirements.<sup>66</sup>

*i. Policy*

In cases following *Monell*, the Court attempted to clarify the parameters of the policy requirement, focusing on issues of identifying the policies that give rise to municipal liability, and identifying the responsible policymaker.<sup>67</sup> These considerations have resulted in a flood of litigation, as individuals seek to prove that a municipal policy caused their deprivations of rights in order to reach the deeper pockets of the municipality.<sup>68</sup> Cases involving municipal policies can range from unconstitutional ordinances passed by cities, to the isolated acts of

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60. See Cushman, *supra* note 26, at 703 (describing lack of guidelines for determining policy and custom requirements).

61. See Cushman, *supra* note 26, at 703 (noting vagueness of Court’s holding in *Monell*).

62. See Gerhardt, *Monell Legacy*, *supra* note 27, at 540 (discussing criticisms of Court’s decision in *Monell*).

63. See Cushman, *supra* note 26, at 703 (noting direction of Court since *Monell*).

64. Terrence S. Welch & Kent S. Hofmeister, *Praprotnik, Municipal Policy and Policymakers: The Supreme Court’s Constriction of Municipal Liability*, 13 S. ILL. U. L.J. 857, 862 (1989) (discussing underpinnings of municipal liability).

65. See Fitzpatrick, *supra* note 31, at 1358 (discussing ramifications of *Monell* holding).

66. See Cushman, *supra* note 26, at 703 (noting consequences of holding in *Monell*).

67. See Fitzpatrick, *supra* note 31, at 1358-59 (discussing issues surrounding policy requirement in *Monell*).

68. See Beermann, *supra* note 23, at 652 (discussing implications of policy requirement).

individual municipal employees such as police officers using excessive force.<sup>69</sup> In several cases, the Supreme Court attempted to clarify its willingness to hold municipalities liable, as well as the limits on liability.<sup>70</sup>

In *Monell*, the Court set forth the general rule that in order to hold a municipality liable under the policy requirement, the policy in question does not have to come from the highest level within the municipal government.<sup>71</sup> Therefore, individual decision-making actions representing municipal policy and authority can lead to liability.<sup>72</sup> The Court further defined “policy” as a “course of action consciously chosen from among various alternatives” in *City of Oklahoma City v. Tuttle*.<sup>73</sup> The *Tuttle* Court also noted that the municipal policy at issue itself does not have to be unconstitutional, but if it is found to be so deficient that an official should have known about its shortcomings, liability will result.<sup>74</sup> The Supreme Court also found municipal liability where a single decision is made by a municipal official with final authority, even if that decision was unique to a particular set of circumstances.<sup>75</sup> Furthermore, the Supreme Court found municipal liability when there was no formally stated policy, but decisions made by officials displayed disregard for victims’ federal rights.<sup>76</sup> Finally, the Court decided that in order to deduce who has policymaking authority in a municipality, courts must look to state law.<sup>77</sup>

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69. See Beermann, *supra* note 23, at 652 (discussing policies of municipalities possible resulting in liability).

70. See Beermann, *supra* note 23, at 652 (discussing policy as means to find municipal liability). The Court has made four key rulings opening the door to policy claims, even where such policy is not clearly stated. *Id.* In one decision, the Court ruled that municipal policy does not have to come at the highest level within the government. *Id.* In another ruling, the Court “found municipal policy from a single decision by the municipal official with final authority, even though that decision was not formulated as a rule to govern all cases.” *Id.* The Court has also allowed for the possibility of municipal liability without any formally stated policy at all, “when municipal decisionmaking evidences a gross disregard for the rights of potential victims.” *Id.* at 653. Finally, the Court ruled that municipal liability does not require that the municipal policy alleged to have caused the violation itself be unconstitutional. *Id.* These types of “doctrinal developments encourage plaintiffs to bring cases against municipalities claiming that the official who violated their federally protected rights had final authority, represented municipal policy, or that the municipality failed to adequately train or supervise the employee who committed the violation.” *Id.* The Supreme Court reviewed some of these cases, but others are seen as attempts to impose vicarious liability on the municipality. *Id.* Some commentators view these cases as fair examples of when it is appropriate to hold a municipality liable for the actions of an official when they violate an individual’s constitutional right. *Id.* Beermann also notes that the “possibility of liability based on a constitutional municipal policy coupled with the relatively clear causation and fault requirements the Court has imposed regarding such liability creates the potential for a large number of claims against municipalities.” *Id.* at 655.

71. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 660-61 (1978) (discussing holding in *Monell* addressing policy requirement).

72. *Id.* at 661 (discussing general rule of policy requirement).

73. 471 U.S. 808, 823 (1985) (defining policy in context of municipal liability).

74. *Id.* (discussing policy definition regarding municipal liability).

75. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) (holding individual decisions can lead to municipal liability).

76. See Beermann, *supra* note 23, at 653 (discussing policy as means to find municipal liability).

77. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (holding courts must use state law to

*ii. Custom*

Municipal liability may also arise from a custom “so permanent” that it is regarded as policy.<sup>78</sup> As the Supreme Court stated in *Monell*, if conduct reflects permanent and well-settled practices of state officials creating a “custom or usage” with the force of law, liability may result.<sup>79</sup> Customs alleged to be actions are frequently more difficult to establish as official policy because they are typically informal and unwritten.<sup>80</sup> Therefore, allegations of unconstitutional customs tend to revolve around the question of how long a practice must be in place to be considered a “custom.”<sup>81</sup> The Supreme Court suggests that practices must be settled and widely-followed, showing high ranking or policy-making officials actually or constructively ratified the activity.<sup>82</sup>

*B. Uncertainty Arising from the Rejection of Respondeat Superior in the Realm of Municipal Liability*

The Supreme Court’s rejection of respondeat superior liability under section 1983 has not gone without opposition.<sup>83</sup> Justice Stevens, in a dissenting opinion, interpreted the legislative history of the Act to find that municipalities can be held liable on a respondeat superior basis.<sup>84</sup> Specifically, Justice Stevens stated that the *Monell* Court should have allowed municipal liability on a respondeat superior basis when unconstitutional acts of employees are “performed in the course of their official duties.”<sup>85</sup>

Justice Breyer has also expressed uncertainty with the majority’s holding in *Monell*.<sup>86</sup> Joined by Justices Stevens and Ginsburg in *Board of County Commissioners v. Brown*,<sup>87</sup> Breyer questioned *Monell*’s “ever-developing” distinctions between “respondeat superior liability and liability that is based on a municipality’s policy or custom.”<sup>88</sup> According to Breyer, there is little need for such a distinction because “the Court has generated a body of law so

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determine policymaking authority).

78. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970) (discussing custom and usage requirement).

79. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978) (discussing custom liability).

80. See *Adickes*, 398 U.S. at 167-68 (discussing custom requirement under *Monell*).

81. See *id.* (describing issues in custom cases for municipal liability).

82. See *id.* (discussing “custom” test).

83. See Gerhardt, *Monell Legacy*, *supra* note 27, at 567 (discussing dissenting opinion of Justice Stevens).

84. See Gerhardt, *Monell Legacy*, *supra* note 27, at 567 (describing dissent of Stevens).

85. See Gerhardt, *Monell Legacy*, *supra* note 27, at 567 (noting Stevens’ support of respondeat superior liability for municipalities).

86. J. Matthew Mauldin, Note, *Constitutional Law—Single Hiring Decisions and Municipal Entities: The United States Supreme Court’s Latest Safeguard Against Municipal Liability Under 42 U.S.C. § 1983*, *Board of County Comm’rs v. Brown*, 117 S. Ct. 1382 (1997), 20 U. ARK. LITTLE ROCK L. REV. 327, 344-45 (1998) (discussing dissenting opinion of Justice Breyer).

87. 520 U.S. 397 (1997).

88. Mauldin, *supra* note 86, at 344-45 (detailing Breyer’s dissenting statement).

complex that it has become difficult to apply.”<sup>89</sup> Furthermore, “[f]actual and legal changes have divorced the law from the distinction’s apparent original purposes.”<sup>90</sup> Justice Breyer opines that the Court must take a second look at the decision in *Monell*, and find that the language of “every person” does not ban respondeat superior liability.<sup>91</sup>

### III. ANALYSIS

#### A. Criticisms of *Monell*

After *Monroe*, the Supreme Court insisted that in order for municipal liability to be possible under section 1983, there must be “evidence or demonstration of intent on the part of the city to violate the Constitution,” consistently rejecting respondeat superior.<sup>92</sup> *Monell* departed from this “intent” requirement, adopting a formalistic view in an attempt to balance concerns about federalism and respect the financial integrity of municipalities, while at the same time holding them responsible for their constitutional violations in federal court.<sup>93</sup> Uncovering municipal intent was problematic because intent is more easily ascertained in individuals than in institutions.<sup>94</sup> To find municipal intent, courts had to attempt to discern whether officers of municipalities were acting as “government” officials and inquire as to who played the role of decision-maker.<sup>95</sup> This analysis resulted in repeated rejection of respondeat superior liability.<sup>96</sup>

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89. *Brown*, 520 U.S. at 431 (Breyer, J., dissenting) (discussing Breyer’s opinion of respondeat superior liability).

90. *Id.* at 431 (Breyer, J., dissenting) (discussing confusing nature of current municipal liability regime).

91. *Id.* at 432 (Breyer, J., dissenting) (discussing Breyer’s support of respondeat superior liability).

92. See Michael J. Gerhardt, *Institutional Analysis of Municipal Liability Under Section 1983*, 48 DEPAUL L. REV. 669, 672-73 (1999) [hereinafter Gerhardt, *Institutional Analysis*] (discussing Supreme Court’s repeated rejection of respondeat superior liability under section 1983). Gerhardt states that after *Monroe*, the Court looked to intent as a way to allow vindication of claims under section 1983, yet avoiding respondeat superior liability for municipalities. *Id.* at 673.

93. See *id.* at 673 (describing formal analysis utilized by Court, paralleling individual’s decision to act). Gerhardt states that the Court’s analysis was designed to parallel the link between defendant’s act and plaintiff’s injury in tort. *Id.* The Court endeavored to find a link between the act of a municipal officer to the alleged constitutional injury, yet still reject respondeat superior liability. *Id.* Presumably, this analysis is what led to the policy or custom requirements of *Monell*, yet these two requirements serve as substitutes for otherwise unexpressed intent. *Id.*

94. See *id.* at 673-74 (applying requirement of intent on part of municipality). This is a “misguided inquiry” because institutional defendants lack the characteristics of individuals, making it inappropriate to ask an institution about negligence or deliberate indifference. *Id.* at 674.

95. See *id.* at 674 (describing inquiry’s form of searching for particular persons or legislative bodies that make government decisions). The rule in *Monell* states that an officer of a municipality only acts as “government” when they play the role as a decision-maker are in the legislature. *Id.* Therefore, litigation stems from the question of whether the defendant was acting in a decision-making capacity when the constitutional right was violated and not from inquiries related to intent. *Id.*

96. See Gerhardt, *Institutional Analysis*, *supra* note 92, at 673 (stating Court’s application of rigid

There are several reasons why the current test for imposing municipal liability is criticized for its efficacy.<sup>97</sup> Large portions of section 1983 litigation concerning municipal liability arise out of cases involving law enforcement, such as police misconduct.<sup>98</sup> These cases are widespread across the country, in cities of all sizes, thus there exists a need for a more efficient and effective system of municipal liability.<sup>99</sup> Fairness concerns, the complicated nature of the rule, and litigation expenses are several central issues with the current state of municipal liability.<sup>100</sup>

Critics cite fairness concerns as one reason for a shift towards respondeat superior.<sup>101</sup> Just as private employers are responsible for the torts of their employees who violate federal rights in the course of employment, municipalities are responsible in the same manner.<sup>102</sup> Critics of the rule in *Monell* argue it is unfair that the focus of section 1983 litigation is on the individual who may have committed the violation in good faith, as opposed to the municipal entity.<sup>103</sup> In addition, the reasons influencing the victim's choice to pursue the litigation indicate that claims should be brought directly against

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standards lead to rejection of respondeat superior). The Court has ruled that the plaintiff must prove a causal link between the deliberate municipal action and the deprivation of rights. *Id.* at 674-75. Specifically, courts must carefully examine this link in order to prevent municipal liability from collapsing into respondeat superior. *Id.* at 675.

97. See Beermann, *supra* note 23, at 665 (describing case against rule in *Monell*). Beermann notes that there are a variety of perspectives from which the *Monell* rule can be criticized. *Id.*

98. See Zimmerman, *supra* note 1, at 777 (stating reform is necessary and instances of constitutional violations by municipalities not isolated in nature). Zimmerman notes the "splintering" in entity liability law, resulting in the current need for reform of the system. *Id.*

99. See Zimmerman, *supra* note 1, at 777 (describing systemic problems in law enforcement as pervasive and growing). Zimmerman states that the problems arising in the arena of law enforcement have risen "beyond the level of one bad apple," bolstering his argument that a more effective means of liability is needed to cure government offenders of civil rights. *Id.* at 778.

100. See Beermann, *supra* note 23, at 665-66 (stating case against *Monell* is strong from various perspectives).

101. See Beermann, *supra* note 23, at 665-66 (stating fairness concerns point to a ruling of vicarious liability).

102. See Beermann, *supra* note 23, at 666 (comparing violations of federal rights by private employers to those of municipalities). In his analysis, Beermann observes the common law's "widespread acceptance" of vicarious liability. *Id.* He draws the conclusion that this consensus exhibits the notion that employers are responsible for the tortious actions of their employees, to the extent they acted within the scope of their employment. *Id.* It is a fact that the municipal employee would not be in the position to commit violations of federal rights, had the local government not pursued the program the employee was hired to work in. *Id.* Beermann argues that the scrutiny inherent to the *Monell* rule does not allow all the ways municipalities are involved in these violations to come to light. *Id.* For example, it may be common knowledge that a certain municipality systematically ignores improper conduct of officers, yet these claims are too difficult for plaintiffs to make out under the current rule. *Id.*

103. See Beermann, *supra* note 23, at 666 (describing unfair focus of section 1983 litigation). Beermann also notes that although some municipalities recognize this unfairness and have policies allowing the indemnification of government employees, not all do so. *Id.* at 666 n.206. Criticizing indemnification policies, Beermann states that it is a poor substitution for respondeat superior because of the immunities employees retain, compounded by misperceptions of juries that damages may be paid out of the violating employee's own pocket. *Id.* at 667.

the offending municipality.<sup>104</sup>

Critics also argue that the complicated rule currently governing the standard for municipal liability is a “doctrinal mess,” for which the Supreme Court is responsible.<sup>105</sup> The Court’s aversion to the idea of respondeat superior liability has led to alternative holdings, hardly resolving the many questions regarding municipal liability for violations of federal rights.<sup>106</sup> Their objections to respondeat superior resulted in a substantial body of law making it difficult to hold municipalities responsible for constitutional wrongs committed by their employees.<sup>107</sup> One critic notes that even where there is no malicious intent on the part of employees who violate the federal rights of individuals, they can still cause harm as a result of the organizational structure that comprises municipalities.<sup>108</sup>

One example of confusion advocates and courts face, arising out of the current standard for municipal liability, is the complicated distinction between direct and vicarious liability post-*Monell*.<sup>109</sup> In *City of Canton v. Harris*<sup>110</sup> and *Collins v. City of Harker*,<sup>111</sup> the Court established two different theories of municipal liability—statutory and direct.<sup>112</sup> The confusion surrounding the distinction is evidenced in advocates’ arguments and judicial opinions.<sup>113</sup> The

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104. See Beermann, *supra* note 23, at 666 (applying reasoning behind call for reform to standpoint of victims).

105. See Beermann, *supra* note 23, at 667 (arguing Supreme Court, and not Congress, is responsible for complications associated with *Monell* rule).

106. See Gerhardt, *Institutional Analysis*, *supra* note 92, at 685 (describing “significant consequences” on resolution of questions associated with constitutional torts and municipal liability).

107. See Gerhardt, *Institutional Analysis*, *supra* note 92, at 685 (noting current regime’s difficulties in holding municipalities accountable for wrongdoing by employees).

108. See Gerhardt, *Institutional Analysis*, *supra* note 92, at 685-86 (describing shortcomings in standard for holding municipalities accountable). Gerhardt states that the “formal lines of decisionmaking” and “informal arrangements and understandings” are two of the channels in which municipal institutions can cause harm to individuals. *Id.* at 686. The gaps in many formal rules and communications in the structure of municipalities can allow for the “development of informal practices that take on lives, significance, and perceived legitimacy of their own.” *Id.* These channels for causing harm and gaps leading to liability illustrate the need for an institutional analysis to claims of municipal liability. *Id.*

109. See Karen M. Blum, *Municipal Liability: Derivative or Direct? Statutory or Unconstitutional? Distinguishing the Canton Case from the Collins Case*, 48 DEPAUL L. REV. 687, 687-88 (1999) (discussing complex *Monell* distinction).

110. 489 U.S. 387 (1989).

111. 503 U.S. 115 (1992).

112. See Blum, *supra* note 109, at 687-88 (discussing different theories of municipal liability). *Canton* stands for the rule that “failure to train” police misconduct cases may result in municipal liability where a “deliberate indifference” standard is met. *Canton*, 489 U.S. at 388. The Court noted, however, that this standard is a matter of *statutory* construction and is relevant to what is required to establish a municipal policy behind the violation. *Id.* at 388-89. In *Collins*, the issue did not revolve around municipal liability for the unconstitutional conduct of an official, but whether a constitutional violation had occurred at all. *Collins*, 503 U.S. at 122-23. The Court stated that there must be a direct violation to result in municipal liability, specifically, a finding of a constitutional violation and the municipality’s responsibility for that violation. *Id.* at 117-18. Plaintiffs, therefore, can make a case for municipal liability stemming from the decisions in *Canton* or *Collins*. See Blum, *supra* note 109, at 687.

113. See Blum, *supra* note 109, at 718 (commenting on recent Seventh Circuit opinions).

Seventh Circuit Court of Appeals, for example, has both recognized and demonstrated the difficulty for practitioners and judges alike to differentiate between these two approaches to municipal liability laid out in *Canton* and *Collins*.<sup>114</sup>

Another argument made by critics for a more definite rule is that litigation expenses could be decreased if the standard for municipal liability was more clearly defined.<sup>115</sup> A more definite rule would eliminate claims brought by plaintiffs that, while plausible, ultimately fail because they do not meet the complicated standard.<sup>116</sup> Judicial resources spent and attorneys fees for both plaintiffs and municipalities, including outside counsel hired to defend employees, could be decreased under a clearer rule.<sup>117</sup> Justice Breyer stated that the *Monell* rule needlessly complicates the procedure for holding municipalities liable for federal rights violations, and does not help to identify offending municipal policies in any meaningful sense.<sup>118</sup>

There are several reasons to reexamine the *Monell* rule and move towards respondeat superior liability.<sup>119</sup> *Monell* critics argue that the law controlling the standard for municipal liability should not impose limitations on claims because of financial concerns when those limitations undermine the statute's ability to correct problems in the system.<sup>120</sup> Section 1983 must provide a "meaningful, attainable and effective remedy" for federal civil rights violations arising from municipal actions.<sup>121</sup> Courts would especially benefit from a

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114. See Blum, *supra* note 109, at 718-19 (discussing Seventh Circuit cases). In both *Contreras v. City of Chicago* and *Armstrong v. Squadrito*, the Seventh Circuit grappled with direct and statutory theories of municipal liability. *Id.* See generally *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998); *Contreras v. City of Chicago*, 119 F.3d 1286 (7th Cir. 1997). In *Contreras*, the court "commented upon . . . and displayed the *Canton/Collins* confusion." See Blum, *supra* note 109, at 718. Later, in *Squadrito*, the court recognized the facts as aligning with *Canton*, yet performed a *Collins* analysis of the claim. *Id.* at 721.

115. See Beermann, *supra* note 23, at 665 (stating change to more definite rule, whether expanding or shrinking it, could save expenses).

116. See Beermann, *supra* note 23, at 665-66 (noting great deal of time attorneys spend on claims that fail in end).

117. See Beermann, *supra* note 23, at 665-66 (describing costs associated with figuring out correct application of *Monell* standard for liability).

118. See Beermann, *supra* note 23, at 667 (noting Justice Breyer's dissenting view calling for reexamination of *Monell* rule); see *Board of Comm'rs v. Brown*, 520 U.S. 397, 432-33 (1997) (Breyer, J., dissenting) (detailing Breyer's dissent and arguing vicarious liability satisfies section 1983's causation requirement). Breyer also stated that because the municipality is responsible for the actions of municipal employees, the causation requirement set forth in section 1983 is satisfied by respondeat superior. *Id.* at 432-33.

119. See Zimmerman, *supra* note 1, at 774 (stating correction of institutional problems requires greater consideration and attention).

120. See Zimmerman, *supra* note 1, at 774 (noting fiscal concerns take away ability of statute to correct problems perpetuating wrongdoing). Zimmerman argues that when a municipality either created the offending policy, employed the policymaker, knew of the unconstitutional practice, or failed to correct the practice, a change in the system will better society as a whole. *Id.* He also argues that this change may lead to a reduced number of events, from which these suits arise where individuals make claims for compensation. *Id.*

121. See Zimmerman, *supra* note 1, at 780-81 (describing need for section 1983 as "viable tool" to correct systemic problems).

simple test, such as respondeat superior, because it could be applied much more easily than *Monell's* multifaceted test.<sup>122</sup>

The courts, as well as critics, question the ability of respondeat superior to accomplish the goals of section 1983 and address the interests of plaintiffs, municipal employees, and municipalities.<sup>123</sup> There is a strong argument that respondeat superior is consistent with the aims of section 1983 and a workable judicial tool.<sup>124</sup> The “body of law encompassing the enforcement of civil rights must have teeth so that the ability of the courts to effect change is not eviscerated.”<sup>125</sup> The state limits on damages recoverable against municipalities, such as caps on awards, may not apply in federal civil rights actions.<sup>126</sup> Although these limitations may align with state policies, they conflict with section 1983 and should not be relied upon as a substitute for municipal liability.<sup>127</sup>

*B. An Empirical Study: Policies and Procedures for Police Misconduct Claims Under Section 1983*

I conducted an empirical study of small, medium, and large cities in the United States in an effort to discover how city attorneys around the nation view many of the issues addressed above concerning municipal liability and section 1983.<sup>128</sup> The results of this study provide insight into the policies followed by different sized cities and the means by which they handle *Monell*-type claims arising out of police misconduct.<sup>129</sup>

The results of the empirical study show that a plaintiff almost always names

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122. See Zimmerman, *supra* note 1, at 781 (noting better ability of courts to manage without having to interpret intricacies of *Monell*).

123. See Zimmerman, *supra* note 1, at 781 (questioning ability of respondeat superior to address relevant interests to all stakeholders in claims).

124. See Zimmerman, *supra* note 1, at 781 (stating argument in favor of including respondeat superior in section 1983 liability). Beermann argues that respondeat superior is justifiable in the arena of section 1983 litigation because there is “ample authority for federal courts to develop a set of vicarious liability rules,” holding local governments liable under similar circumstances as those in the private sector. See Beermann, *supra* note 23, at 651 (stating Congress’ authority to define respondeat superior in section 1983). He also argues that the rejection by Congress of respondeat superior is based on the flawed interpretation of the rejected Sherman Amendment, having nothing to say about the issue of respondeat superior. *Id.* Beermann asserts that the respondeat superior ban is based on the same “faulty basis” as the original ban on general municipal liability, indicating a need for reexamination of the rule. *Id.*

125. See Zimmerman, *supra* note 1, at 781 (arguing in order to effect systemic change, there must not be limits to aspects of relief).

126. See Beermann, *supra* note 22, at 668 (noting discrepancy in state and federal policies regarding municipal liability).

127. See Beermann, *supra* note 22, at 668 (noting fundamental conflict between state limitations to awards and aims of federal statute).

128. See *infra* Appendix I (detailing questions asked in Empirical Study).

129. The responses I received from city attorneys serve as the basis of my analysis. Although I had a thirty-percent return rate (thirty out of one hundred), there is not enough information for it to be statistically significant.

the municipality as a defendant when bringing a police misconduct case.<sup>130</sup> Many of the surveyed cities permit indemnification of an individual officer sued under a state law, such as a State Tort Claims Act. In fact, about half of the cities accept respondeat superior liability under state law for misconduct by individual police officers. These responses raise questions as to the amount of money cities spend on the defense, settlements, and judgments of these cases relative to the amount of their potential liability under respondeat superior. Is there a disparity? If so, what are possible motives behind defending these claims at a high cost?

I found that several of the cities cap awards allowed in these types of cases. The majority of these caps in cities of all sizes ranged from \$100,000 to \$500,000.<sup>131</sup> Cities in each of the categories, small, medium, and large, regularly incur defense costs significantly higher than the cap, with large amounts of the defense costs being spent on outside counsel. For example, a city that caps awards at \$150,000 paid approximately \$1.5 million dollars in one year in costs associated with litigating police misconduct claims.<sup>132</sup> It is possible that cities could minimize or eliminate a significant portion of the litigation and legal expenses by accepting respondeat superior liability.

Thoughtful attorneys from a few cities noted that this analysis does not fully address the issue. For example, in Baltimore, under federal and state law the city is not the principal of police officers. In other words, the city does not control the Baltimore Police Department. Therefore, their Principal Counsel notes that although the city ultimately pays for judgments against police officers, they could be much higher if the city were included as a defendant. He also states that hiring more city lawyers to litigate the cases may cost more than hiring outside counsel. Attorneys from Oklahoma City, Oklahoma and Portland, Oregon argued that looking only to the costs of defending this type of lawsuit does not consider the fact that for every suit that is successfully defended, an unknown number are not filed. They noted that their cities frequently are able to defeat plaintiffs' policy or custom claims on summary judgment or directed verdict.

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130. In seventy-five percent of the responses I received, the city was named as a defendant in greater than ninety percent of the actions.

131. On average, caps on damages imposed by state law ranged between \$100,000 and \$500,000, although some were as high as \$1.5 million.

132. The City of Denver, Colorado caps damages imposed by state laws at \$150,000. In the year 2001, Denver spent between \$1 million and \$5 million on judgments for police misconduct claims. Denver estimated that they spent \$1.5 million in defense costs in 2001, and indicated that they spent \$500,000 to \$1 million of that on outside counsel.

CAPS AND COSTS OF DEFENSE:<sup>133</sup>

<i>Size of cities</i>	<i>Cap</i>	<i>Cases/Year</i>	<i>Defense Costs/Year</i>
Small (<100K)	100K-500K	<10	10K-250K
Medium (100K-400K)	175K-500K	10-50	25K-1M
Large (400K-9M)	500K-1.5M	10-200	50K-1.5M

SETTLEMENTS:<sup>134</sup>

<i>Size of Cities</i>	<i>Settlements/Awards</i>	<i>Defense Costs/Year</i>
Small (<100K)	<10/<100K	10K-250K
Medium (100K-400K)	10-25/<100K	25K-1M
Large (400K-9M)	10-25/100K-1.5M	50K-1.5M

Although several of the responding attorneys pointed to respondeat superior liability as a potential source of savings, they are clearly reluctant to depart from the status quo. In questions thirteen and fourteen, I solicited the city attorneys' opinion on the current doctrine of municipal liability and whether they would prefer respondeat superior. Not surprisingly, the respondents overwhelmingly answered "no" to both questions. Many of the city attorneys reasoned that the current doctrine makes it difficult for a plaintiff to prove a case against the city, resulting in fewer victorious claims for plaintiffs. Some also suggested that the *Monell* doctrine is the most equitable because it effectively limits cities' liability. Also, respondents from some cities expressed concern about saddling taxpayers with the costs relating to settlements and judgments against the cities. Moreover, they do not want individuals to view the cities as "targets" for this type of litigation. One city attorney even commented that these cases are "always dismissed under *Monell*," indicating satisfaction with the barriers plaintiffs face in bringing claims against municipalities.

The survey results indicated that some cities with high defense costs and relatively low caps on damages would save money associated with litigation costs if they recognized respondeat superior liability. For example, in medium-sized Cincinnati, Ohio, the cap on damages is \$250,000.<sup>135</sup> In the years 2001 and 2002, the city spent between \$500,000 and \$1 million respectively on defense costs related to policy or custom claims. Therefore, it is possible that

133. This chart is based on averages from all responses in each category. These numbers simply represent anecdotal data from responses I received.

134. This chart is based on averages from all responses in each category. These numbers simply represent anecdotal data from responses I received.

135. This number excludes compensatory damages.

the motive and drive to maintain the difficult scheme of law surrounding plaintiffs' ability to bring section 1983 claims against municipalities is not cost. Perhaps cities are more interested in spending a disparate amount on defending policy and custom claims, rather than accepting respondeat superior liability, in order to discourage injured plaintiffs from seeking relief at all.

The results indicated that city attorneys were concerned that acknowledging respondent superior liability may open the door to many weaker claims against the city. Several city attorneys explained that one of the benefits of current section 1983 case law is that the high standard and confusing requirements allow the cities to prevail on summary judgment or directed verdict in many cases. The survey results displayed satisfaction with the difficulty that plaintiffs encounter due to the nature of the law which many times prevents their success. In addition, many responses asserted that the current law discourages many others from filing claims at all. Therefore, responses to the survey argue that the current law "weeds out" weaker claims against the cities.

In this maze of dollar figures and pros and cons, however, one must not forget the purpose behind section 1983. Section 1983 was enacted by Congress to serve those seeking redress for violations of their constitutional rights committed by municipalities. Currently, the approach to municipal liability favors those committing the wrong, instead of those seeking redress for violations of their rights. This seems a contradictory result in a judicial system that aims to promote fairness and equitable solutions.

#### IV. CONCLUSION

The Supreme Court's search for an adequate method of holding municipalities liable for constitutional wrongs has not yielded a satisfactory resolution to questions concerning governmental responsibility. The persistent rejection of respondeat superior liability has resulted in a doctrine of municipal liability that decreases accountability for constitutional offenders. Even without intent to cause injury on the part of municipal officials, municipalities still have the power to violate rights of individuals through their infrastructure or development of practices by employees. Imposing vicarious liability on municipalities, however, also raises concerns. Without the policy or custom requirements, many more aggrieved parties would bring claims against municipalities, resulting in higher costs of settlement or defense.

The current disposition of the Court's members creates uncertainty regarding the future of municipal liability. While a majority of Supreme Court justices still favor the *Monell* ruling, at least three justices have indicated a willingness to overrule it. Respondeat superior liability represents only one of many alternative approaches to municipal liability available to the Court. While adopting respondeat superior liability might reduce litigation costs and increase the remedies available to plaintiffs, many city attorneys view the current

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doctrine as fair and effective.

Respondeat superior would significantly widen the scope of claims available under section 1983 and still protect municipalities from incurring liability for actions it clearly did not condone. It would pave the way for increased municipal accountability for unconstitutional activity, while simultaneously guarding against claims arising from actions beyond the scope of the officers' duty. A shift by the Supreme Court towards the adoption of respondeat superior liability under section 1983 would lead to a more equitable standard of municipal liability.

*Lisa D. Hawke*

## APPENDIX I

*QUESTIONNAIRE: POLICIES, PROCEDURES AND RESULTS FOR § 1983 CLAIMS  
AGAINST MUNICIPALITIES*

1. How many lawsuits per year are filed in your city alleging § 1983 claims arising out of police misconduct?

<10    10-25    25-50    50-100    100-200    >200

In how many of these is the city a named defendant?

<10%    10%-50%    50%-90%    >90%

2. Does your city have exposure under state tort law or state civil rights law for police misconduct claims?

Yes    No

If so, under what circumstances?

State Tort Claims Act

State Common Law

State Civil Rights Act

3. Is there respondeat superior liability against the city under state law for misconduct by individual police officers?

Yes    No

4. Is there a cap on the damages imposed by any of these state laws?

Yes    No

If so, what is it? \$ \_\_\_\_\_

5. Is the city insured for civil rights violations by their police officers?

Yes    No

6. When a plaintiff files a suit against both the city and police officers does the city hire counsel for the officers other than the attorney who represents the city?

Always    >75%    25%-75%    <25%    Never

If so, what are the most common reasons?

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7. In each of the last three years, how much money has the city spent on outside counsel?

In 2001:

25-50K    50-100K    100-250K    250-500K    500K-1 million    >1 million

In 2002:

25-50K    50-100K    100-250K    250-500K    500K-1 million    >1 million

In 2003:

25-50K    50-100K    100-250K    250-500K    500K-1 million    >1 million

8. What is the state law with respect to indemnification of police officers for civil rights judgments?

Please check all that apply:

State law permits indemnification.

State law requires indemnification.

State law permits indemnification only when officer acted in good faith.

State law prohibits indemnification when conduct is egregious or wanton.

State law forbids punitive damages.

State law prohibits indemnification of punitive damages.

9. How often does the city settle claims for officers whom they are not required to indemnify?

<10%    10%-50%    50%-90%    >90%

10. How many police misconduct claims against officers in your city have been settled or reduced to judgment in the last three years?

In 2001:

<10    10-25    25-50    50-100    100-200    >200

In 2002:

<10    10-25    25-50    50-100    100-200    >200

In 2003:

<10    10-25    25-50    50-100    100-200    >200

11. How much has the city paid in judgments or settlements for police misconduct claims in each of the last three years?

In 2001:

<100K    100-250K    250-500K    500K-1 mil.    1-5 mil.    Other \$ \_\_\_\_

In 2002:

<100K    100-250K    250-500K    500K-1 mil.    1-5 mil.    Other \$ \_\_\_\_

In 2003:

<100K    100-250K    250-500K    500K-1 mil.    1-5 mil.    Other \$ \_\_\_\_

12. Please estimate the costs in each of the last three years of defending against policy or custom claims against the city, including costs associated with outside counsel, costs of responding to discovery requests regarding policy or custom issues, and costs associated with the litigation of other issues specific to the municipal liability claim.

2001: \$ \_\_\_\_\_

2002: \$ \_\_\_\_\_

2003: \$ \_\_\_\_\_

13. In your opinion, what are the advantages of requiring plaintiffs to prove policy or custom, economic or otherwise, to the city as a requirement of municipal liability?

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14. Would you rather that the city could be held liable under a doctrine of respondeat superior? Briefly state the most important reasons for your view.

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