

Municipal Liability Under 42 U.S.C. § 1983: *Monell v. Department of Social Services of the City of New York*—In 1961, access to the federal courts for litigants seeking redress under section 1983¹ for violations of federal constitutional rights was greatly expanded by the United States Supreme Court decision of *Monroe v. Pape*.² In *Monroe*, the Court held that official misconduct, although violating state law, nevertheless may be action taken “under color of” state law for purposes of a section 1983 claim.³ However, while increasing the availability of section 1983 remedies in actions against municipal employees, the *Monroe* Court placed a substantial limitation on its holding by excluding municipalities and other local government units from the scope of section 1983.⁴ Stating that municipalities are not “persons” within the meaning of that section, the Court in *Monroe* granted municipalities absolute immunity from section 1983 liability.⁵

In the sixteen years following *Monroe*, the Supreme Court reaffirmed, on several occasions, the absolute municipal immunity rule established by that decision.⁶ In its 1977 term, however, the Court in *Monell v. Department of Social Services of the City of New York*⁷ overruled that portion of *Monroe* which had excluded municipalities from the scope of section 1983,⁸ and held that henceforth municipalities do not enjoy absolute immunity from section 1983 liability.⁹ Although expanding further the availability of section 1983 remedies by including municipalities within the scope of that section, the *Monell* Court also limited its holding by prohibiting the use of the doctrine of *respondeat superior* in section 1983 actions against municipalities¹⁰ and by adopting a narrow interpretation of the concept of municipal action.¹¹

The plaintiffs in *Monell*, female employees of the New York City Board of Education (the Board) and the New York City Department of Social Services (the Department), instituted a class action suit in federal district court on

¹ 42 U.S.C. § 1983 (1976) provides:

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

² 365 U.S. 167 (1961).

³ *Id.* at 183-87.

⁴ *Id.* at 187-92.

⁵ *Id.* at 191. In reaching its decision to exclude municipalities from the scope of § 1983, the *Monroe* Court specifically reserved judgment on the constitutional question whether Congress possesses the power to impose liability on municipalities for the acts of municipal employees who violate the civil rights of individuals. *Id.*

⁶ See *Aldinger v. Howard*, 427 U.S. 1, 5 (1976); *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973); *Moor v. County of Alameda*, 411 U.S. 693, 710 (1973). See text at notes 55-77 *infra*.

⁷ 436 U.S. 658 (1978).

⁸ *Id.* at 663.

⁹ *Id.* at 690.

¹⁰ *Id.* at 691-95.

¹¹ *Id.* at 690-91. See text at notes 128-29 *infra*.

behalf of themselves and other female city employees similarly situated.¹² The defendants in the suit were the Board and its Commissioner, the Department and its Chancellor, and the City of New York and its Mayor.¹³ The plaintiffs alleged that, due to the official rules and regulations of the defendant-agencies, they had been forced to take unpaid maternity leaves of absence before medical reasons required them to do so, and thus had been deprived of their constitutional right of due process.¹⁴ Federal jurisdiction was based on 28 U.S.C. § 1343(3)¹⁵ with 42 U.S.C. § 1983 providing an express right of action. Plaintiffs sought declaratory and injunctive relief, as well as back pay for the time they were not permitted to work.¹⁶

Although the district court determined that the official policy in question had violated the constitutional rights of the plaintiffs,¹⁷ it concluded that the claims for declaratory and injunctive relief were moot.¹⁸ Considering the remaining claim for back pay, the court held that, pursuant to *Monroe* and its progeny, the defendant-agencies were immune from suit under section 1983.¹⁹ Although the individual defendants did not enjoy such immunity, the court recognized that any monetary judgment against these defendants ultimately would be paid from the city treasury.²⁰ The court, therefore, concluded that the *Monroe* rule mandated dismissal of the claims against the individual defendants as well.²¹

¹² *Id.* at 660.

¹³ *Id.* at 661. Each of the three individual defendants was sued only in his official capacity. *Id.*

¹⁴ *Id.*

¹⁵ 28 U.S.C. § 1343(3) (1976) provides in pertinent part:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

¹⁶ 436 U.S. at 661.

¹⁷ *Monell v. Department of Social Services of the City of New York*, 394 F. Supp. 853, 855 (S.D.N.Y. 1975). In determining that the policy in question was unconstitutional, the district court relied on the Supreme Court decision of *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). The Court in *LaFleur* held that a policy enforcing mandatory maternity leaves of absence violates the due process clause. *Id.* at 651.

¹⁸ 394 F. Supp. at 855. Subsequent to filing the complaint but prior to trial, the Department and the Board had changed their maternity leave policy so as to provide that no female employee was required to report her pregnancy or take a leave of absence while she was physically able and willing to perform her duties. *Id.*

¹⁹ *Id.*

²⁰ *Id.* The district court reasoned that, because the individual defendants had been sued solely in their official capacities, any money judgment rendered against them would be paid with city funds. *Id.*

²¹ *Id.* In determining that a judgment against the individual defendants would violate the absolute municipal immunity rule of *Monroe*, the court relied on the reasoning found in *Edelman v. Jordan*, 415 U.S. 651 (1974). The Supreme Court in *Edelman* held that, although injunctive relief can be awarded against a state official sued in his official capacity, money damages cannot be awarded if they are to be paid from the state treasury. The Court held that such an award would violate the eleventh amendment. *Id.* at 663-71.

The United States Court of Appeals for the Second Circuit affirmed the decision of the district court.²² Plaintiffs on appeal had argued strongly that the Board of Education was an entity which was independent of the city and, as such, was a "person" under section 1983.²³ The court of appeals, emphasizing the Board's fiscal dependency on the city, rejected this argument,²⁴ and held that the Board, like the City and the Department, was immune from section 1983 liability.²⁵ Addressing the claims against the Commissioner, the Chancellor, and the Mayor, the court of appeals employed reasoning similar to that of the lower court, and determined that a monetary judgment could not be awarded against these defendants when such a judgment would be paid with city funds.²⁶ The circuit court concluded, therefore, that it was without jurisdiction to hear the suit.²⁷

The Supreme Court granted certiorari²⁸ and reversed the decision of the Second Circuit.²⁹ After re-examining the reasoning of *Monroe* and the legislative history of the Civil Rights Act of 1871,³⁰ the Court held: municipalities and other local government units are "persons" within the meaning of section 1983.³¹ In reaching its decision, the Court overruled *Monroe* to the extent that it had granted municipalities absolute immunity from suit under section 1983.³² Justice Brennan, writing for the majority, announced that municipalities may be sued under section 1983 for monetary, declaratory, and injunctive relief when a constitutional violation is caused by the application of an official policy, regulation, ordinance or custom.³³ The Court further stated, however, that the doctrine of vicarious liability is inapplicable to section 1983 actions.³⁴ Thus, the Court held that municipalities cannot be liable

²² *Monell v. Department of Social Services of the City of New York*, 532 F.2d 259, 268 (2d Cir. 1976).

²³ *Id.* at 263. Although the plaintiffs had conceded that the Department was not a "person" under § 1983, they argued that the Board was directly suable under § 1983. In support of this argument, the plaintiffs relied on three prior decisions in which § 1983 actions were allowed to proceed against school boards. *Id.* at 264. The three decisions relied on were *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Lombard v. Board of Educ.*, 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975); and *Green v. Waterford Bd. of Educ.*, 473 F.2d 629 (2d Cir. 1973).

²⁴ 532 F.2d at 263-64. The court of appeals did not consider itself bound by the precedents cited by the plaintiffs because the issue of subject matter jurisdiction had not been specifically considered in those cases. *Id.* at 264.

²⁵ *Id.*

²⁶ *Id.* at 264-67.

²⁷ *Id.* at 266.

²⁸ 429 U.S. 1071 (1977).

²⁹ *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 702 (1978). Justice Brennan delivered the opinion of the Court, in which Justices Blackmun, Marshall, Powell, Stewart, and White joined, and in which Justice Stevens joined in Parts I, III, and V. Justice Powell wrote a concurring opinion and Justice Stevens wrote a statement concurring in part. Justice Rehnquist dissented and wrote an opinion in which Chief Justice Burger joined.

³⁰ 42 U.S.C. § 1983 is a codification of § 1 of the Civil Rights Act of 1871.

³¹ 436 U.S. at 690.

³² *Id.* at 663.

³³ *Id.* at 690-91.

³⁴ *Id.* at 691.

under that section for the constitutional violations of municipal employees solely on the basis of *respondeat superior*.³⁵ The Court observed that in the present controversy, the unconstitutional action clearly had resulted from the application of an official policy and, hence, the complaint stated a valid cause of action.³⁶

Justice Powell wrote a concurring opinion³⁷ in which he expressed his approval of the majority's reasoning. Noting the line of cases in which the Court had assumed section 1983 jurisdiction *sub silentio* over school boards, Justice Powell emphasized the necessity of the Court's holding in *Monell* to preserve the integrity of those decisions.³⁸ Justice Stevens concurred in part. He did not join in those portions of the majority opinion which considered the issues of vicarious liability and municipal immunity under Section 1983 because he viewed them as merely advisory.³⁹ Justice Rehnquist, writing a dissenting opinion in which Chief Justice Burger joined,⁴⁰ concluded that in the absence of signs of congressional displeasure with the *Monroe* interpretation of section 1983,⁴¹ the Court should not abandon what he viewed as well-reasoned precedents,⁴² but rather should adhere to the doctrine of *stare decisis*.⁴³

The significance of the *Monell* decision lies in the Supreme Court's rejection of the *Monroe* rule of absolute municipal immunity from section 1983 liability. By including municipalities within the definition of a section 1983 "person", the Court has expanded further the availability of federal statutory remedies for constitutional violations committed "under color of" state law. The impact of the decision is substantially diminished, however, by the Court's prohibition of the use of the doctrine of *respondeat superior* in section 1983 actions against municipalities, and by its circumscription of a limited category of municipal action which will result in section 1983 liability.

In analyzing the probable impact of *Monell*, this Note initially will outline the background of the decision, focusing on the emergence of direct four-

³⁵ *Id.* Although the term *respondeat superior* is merely the Latin expression for the concept of vicarious liability, it is often used to denote a specific type of vicarious liability: that which makes a master liable for the torts of his servants. See generally, W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 69 (4th ed. 1971) (hereinafter PROSSER). In this Note, the phrase *respondeat superior* refers to the master's liability for the torts of his servants.

³⁶ 436 U.S. at 694-95.

³⁷ *Id.* at 704-14 (Powell, J., concurring).

³⁸ *Id.* at 710-11, citing 436 U.S. at 663 n.5.

³⁹ *Id.* at 714 (Stevens, J., concurring in part).

⁴⁰ *Id.* at 714-24 (Rehnquist, J., dissenting).

⁴¹ Justice Rehnquist was correct in noting that there has been no visible sign of congressional displeasure with the *Monroe* interpretation of § 1983. Several bills which would have amended § 1983 and supplanted the rule of absolute municipal immunity have been introduced in the legislature, but none has gained passage. For a partial listing of these bills, see *Mahone v. Waddle*, 564 F.2d 1018, 1060 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978).

⁴² See cases cited at note 6 *supra*.

⁴³ 436 U.S. at 714.

teenth amendment actions against municipalities.⁴⁴ It then will discuss the reasoning employed by the *Monell* Court in reaching its decision both to include municipalities within the scope of section 1983, and to prohibit the use of the doctrine of *respondeat superior* in section 1983 actions against municipalities. The Note then will analyze the perceived weakness of the *Monell* rule of municipal liability. This discussion will focus primarily on the problematic aspects of the Court's narrow interpretation of the concept of municipal action. Finally, it will be submitted that the Court should adopt a broader definition of municipal action, thereby expanding its rule of municipal liability under section 1983.

I. FROM *MONROE* TO *MONELL*: THE HISTORICAL BACKGROUND

The Supreme Court's decision of *Monroe v. Pape*⁴⁵ is widely viewed as the birthplace of modern civil rights litigation.⁴⁶ The *Monroe* Court held that the unauthorized conduct of thirteen Chicago police officers who had broken into and ransacked Monroe's home, was action taken "under color of" state law within the meaning of section 1983, despite the fact that such action violated Illinois state law.⁴⁷ The Court further held that Monroe was not required to exhaust the remedies available to him under Illinois law before invoking the federal remedy contained in section 1983 in a federal forum.⁴⁸

The Court, however, dismissed that portion of Monroe's complaint which named the City of Chicago as a defendant. Concluding that "Congress did not undertake to bring municipal corporations within the ambit of Section 1983,"⁴⁹ the Court held that municipalities could not be subject to liability under that section.⁵⁰ The *Monroe* Court's decision to immunize municipalities from section 1983 liability was based on the House of Representatives' rejection of the Sherman amendment, a proposed addition to the Civil Rights Act

⁴⁴ A direct fourteenth amendment action is one in which the substantive cause of action of the plaintiff rests solely on a violation of the fourteenth amendment and not on a federal statute which explicitly creates a cause of action for violations of the fourteenth amendment.

⁴⁵ 365 U.S. 167 (1961).

⁴⁶ See C. WRIGHT, *LAW OF FEDERAL COURTS* 211 (3d ed. 1976); P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 950 (2d ed. 1973).

⁴⁷ 365 U.S. at 183-87. The Court in *Monroe* adhered to the meaning which had been given the phrase "under color of" state law in *United States v. Classic*, 313 U.S. 299, 326 (1941) and reaffirmed in *Screws v. United States*, 325 U.S. 91, 109 (1945). In *Classic* the Court held that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." 313 U.S. at 326.

⁴⁸ 365 U.S. at 183. The Court indicated that although the Constitution of Illinois made unreasonable searches and seizures unlawful, and that therefore there existed a state law which, if enforced, would give Monroe relief, this fact was no barrier to the instant suit. *Id.*

⁴⁹ *Id.* at 187.

⁵⁰ *Id.* at 191-92.

of 1871.⁵¹ The Sherman amendment would have subjected local government units to liability for damage which resulted from violence occurring within their borders.⁵² The Court reasoned that the rejection of this amendment was indicative of congressional intent to exempt municipalities from civil liability under section 1 of the Civil Rights Act of 1871 (now section 1983).⁵³ Thus, based upon the foregoing reasoning, the *Monroe* Court established a rule of absolute municipal immunity from section 1983 liability.

The *Monroe* Court's decision to shield municipalities from section 1983 liability had harsh repercussions. Under the rule of absolute municipal immunity, victims of the unconstitutional conduct of municipalities and municipal officials were restricted to seeking redress from low-level—often judgment-proof—municipal employees.⁵⁴ This result of the inflexible *Monroe* rule prompted many plaintiffs in civil rights actions arising out of municipal misconduct to fashion various legal theories designed to circumvent the rule. An examination of the fate of several of these theories, however, reveals that the Supreme Court consistently thwarted all attempts to avoid the *Monroe* rule of absolute municipal immunity.⁵⁵

⁵¹ There were in fact three different versions of the Sherman amendment. For a concise overview of these three drafts, see *Monell*, 436 U.S. at 665-69.

⁵² It was actually the second version of the amendment, the first conference draft, which would have subjected municipalities to liability for private violence. The first conference draft read in pertinent part as follows:

That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damaged by such offense, if living, or to his widow or legal representative if dead;

....
CONG. GLOBE, 42d Cong., 1st Sess. 749, 755 (1871).

For the full text of the other two drafts of the amendment see *Monell*, 436 U.S. at 702-04 app.

⁵³ 365 U.S. at 191. The *Monroe* Court noted that "[T]he response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." *Id.*

⁵⁴ Cf. *Jennings v. Davis*, 476 F.2d 1271, 1273 (8th Cir. 1973) (complaint against defendant deemed to be judgment-proof dismissed); *Lankford v. Gelston*, 364 F.2d 197, 202 (4th Cir. 1966) ("[N]either the personal assets of policemen nor the nominal bonds they furnish afford genuine hope of redress.").

⁵⁵ There is, however, one legal theory aimed at avoiding the *Monroe* rule of municipal immunity which has not yet been directly considered by the Supreme Court. This is the possibility of bringing an action against a municipality in which the substantive cause of action is based solely on the fourteenth amendment and not on the enabling statute, § 1983. See, e.g., *Reeves v. City of Jackson*, 532 F.2d 491, 495 (5th Cir. 1976); *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975); *Dahl v. City of Palo Alto*, 372 F. Supp. 647, 649-51 (N.D. Cal. 1974).

One such theory, employed in an effort to attach liability for constitutional violations to a local government unit despite the absolute immunity rule of *Monroe*, was advanced in *Moor v. County of Alameda*.⁵⁶ The plaintiffs in *Moor* instituted an action against the sheriff, four deputy sheriffs, and the County of Alameda in an attempt to recover damages for injuries sustained when one deputy sheriff allegedly wrongfully discharged a shotgun into a crowd.⁵⁷ The plaintiffs asserted both state and federal causes of action against the individual defendants and the county. The federal causes of action against the county were brought under section 1983 and 42 U.S.C. § 1988.⁵⁸ Section 1988 provides that when federal law is found to be ineffective to carry out fully the objectives of the Civil Rights Acts, the federal courts shall be guided by the common law and statutes of the states, insofar as they are not inconsistent with the laws of the United States.⁵⁹ The plaintiffs in *Moor* argued that section 1988 permitted a federal court to adopt California state law to the extent that it makes a county vicariously liable for the unconstitutional conduct of its sheriff and deputy sheriffs.⁶⁰ The Supreme Court, rejecting the plaintiffs' argument, concluded that section 1988 was not intended to facilitate the wholesale incorporation of entire state causes of action,⁶¹ and therefore dismissed this claim against the county.⁶²

⁵⁶ 411 U.S. 693 (1973). The plaintiffs, Moor and Rundle, had filed two separate actions in the district court but these actions were consolidated on appeal. *Id.* at 698.

⁵⁷ *Id.* at 695.

⁵⁸ 42 U.S.C. § 1988 (1976) reads in pertinent part: the jurisdiction in civil . . . matters conferred on the district courts by [the Civil Rights Acts] . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adopted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . .

⁵⁹ See note 57 *supra*.

⁶⁰ 411 U.S. at 698. The county vigorously disputed the plaintiffs' interpretation of the California Tort Claims Act of 1963, Cal. Gov't Code § 815.2(a), which the plaintiff contended made a county vicariously liable for the acts of its sheriff and deputies committed in violation of the Federal Civil Rights Act. Because the issue of the proper interpretation of the section had not been decided by either of the lower courts, the Supreme Court did not consider it. 411 U.S. at 696 & n.3.

⁶¹ 411 U.S. at 703-04.

⁶² *Id.* at 710. The plaintiffs had also argued that the district court had power to exercise pendent jurisdiction over the state law claims against the county. The Supreme Court concluded that the district court was correct in refusing to exercise pendent jurisdiction, where no independent basis of jurisdiction existed. It therefore upheld the dismissal of the state law claims which had been brought on this theory. *Id.* at 717.

The plaintiff Moor, however, claiming that he was a citizen of Illinois, asserted that the district court had the power to hear his state law claims on the basis of diver-

Another attempt to circumvent the *Monroe* rule of absolute municipal immunity was made in *City of Kenosha v. Bruno*.⁶³ The plaintiffs in *City of Kenosha*, two tavern owners, alleged a denial of their right to procedural due process. The denial resulted, plaintiffs asserted, from the failure of the City of Kenosha to afford them an opportunity for an adversary hearing before the city refused to renew their liquor licenses.⁶⁴ Suit was brought against the city under section 1983, and declaratory and injunctive relief was sought. The district court concluded that due to the equitable nature of the claims it possessed jurisdiction over the parties pursuant to 28 U.S.C. § 1343(3).⁶⁵ Although neither party had raised the jurisdictional issue on appeal, the Supreme Court determined that the district court had erred in accepting jurisdiction over the city.⁶⁶ The Court concluded that the *Monroe* rule of absolute immunity of municipalities from section 1983 liability was not limited to actions for monetary relief and rejected "the proposition that a city is a 'person' under section 1983 where equitable relief is sought, but is not a 'person' under the same section where damages are sought".⁶⁷

sity of citizenship, 28 U.S.C. § 1332(a) (1976). Although both the district court and the court of appeals had held that the County of Alameda was not a "citizen" of California for the purpose of diversity jurisdiction, the Supreme Court reversed this finding and held that Moor's state law claim against the county was within diversity jurisdiction. 411 U.S. at 721.

⁶³ 412 U.S. 507 (1973).

⁶⁴ *Id.* at 508. Although the plaintiffs had been given a public hearing on the issue of renewal of their licenses, none of the testimony at the hearing was recorded, no speakers were sworn, and no cross-examination of the speakers took place. The plaintiffs' claim of denial of procedural due process rested on the fact that the public hearing had lacked these characteristics of an adversary proceeding. *Id.* at 510-11.

⁶⁵ *Misurelli v. City of Racine*, 346 F. Supp. 43, 45 & n.1 (E.D. Wis. 1972). 28 U.S.C. § 1343(3) is the jurisdictional counterpart of § 1983. For text of § 1343(3) see note 15 *supra*.

⁶⁶ 412 U.S. at 513.

⁶⁷ *Id.* Although the Supreme Court determined that § 1983 and its jurisdictional counterpart were not a proper basis for federal jurisdiction, it remanded the case for a determination of the amount in controversy and the availability of 28 U.S.C. § 1331 as a jurisdictional basis. *Id.* at 514-15. Section 1331 provides in pertinent part that "the district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000 . . . and arises under the Constitution, laws or treaties of the United States . . ." 28 U.S.C. § 1331 (1976). The remand of *City of Kenosha* is significant because the Court seems to imply that if the amount in controversy in that case was determined to be at least \$10,000, section 1331 would provide a basis for federal jurisdiction. Section 1331, however, is a purely jurisdictional statute and does not itself grant any substantive cause of action. Because the Court in *City of Kenosha* had already determined that the cause of action contained in section 1983 was not available to the plaintiffs, it would appear that the violation of the fourteenth amendment would be the sole source of the substantive claim. As a result, many courts have viewed the remanding of *City of Kenosha* as an indication of the Supreme Court's willingness to recognize the validity of direct fourteenth amendment actions against municipalities. See, e.g., *Calvin v. Conlisk*, 520 F.2d 1, 8-9 (7th Cir. 1975), *vacated and remanded for reconsideration in light of Rizzo v. Goode*, 424 U.S. 902 (1976); *United Farmworkers of Fla. Hous. Project v. City of Delray Beach*, 493 F.2d 799, 801-02 (5th Cir. 1974) (dictum); *Dahl v. City of Palo Alto*, 372 F. Supp. 647, 649-51 (N.D. Cal. 1974).

Employing yet a third theory in an attempt to by-pass the *Monroe* rule of absolute municipal immunity, the plaintiff in *Aldinger v. Howard*⁶⁸ urged the Court to exercise pendent jurisdiction⁶⁹ over state law claims against the County of Spokane.⁷⁰ The plaintiff in *Aldinger* had been discharged from her position in the County Treasurer's office without a hearing. Alleging that the discharge violated her constitutional rights under the first, ninth and fourteenth amendments, the plaintiff brought suit against various individual county officials and the County of Spokane.⁷¹ The claims against the officials were based on section 1983. A state law claim against the County was grounded on state statutes which the plaintiff claimed waived the County's sovereign immunity, making it vicariously liable for the tortious conduct of its employees.⁷² The plaintiff asserted that the federal court could exercise pendent jurisdiction over the state law claim against the County, even though no independent basis for federal jurisdiction over that party existed.⁷³

After re-affirming its holdings in *City of Kenosha* and *Monroe* that municipalities are absolutely immune from suit under section 1983,⁷⁴ the Court considered the plaintiff's pendent jurisdiction argument and its applicability to the County of Spokane. The Court initially indicated that the doctrine of pendent jurisdiction is primarily designed to give the federal courts jurisdiction over additional *claims* and not over additional *parties* who otherwise would be beyond the reach of the federal court.⁷⁵ The Court then concluded that, in light of the fact that the federal courts are "courts of limited jurisdiction marked out by Congress"⁷⁶ and that Congress had refused to extend section 1983 jurisdiction to municipalities, it would be an improper use of judicial discretion for the Court to exercise pendent jurisdiction over the County of Spokane in the instant case.⁷⁷ The Court, therefore, dismissed the claims against the County.⁷⁸

Unlike the theories discussed thus far, one final technique used by plaintiffs seeking to avoid the *Monroe* rule of absolute municipal immunity has met with limited success, but only at the lower court level. This technique emerged after the Supreme Court decision in *Bivens v. Six Unknown Federal Narcotics*

⁶⁸ 427 U.S. 1 (1976).

⁶⁹ "Pendent jurisdiction" is a doctrine which permits a federal court that has jurisdiction over a claim arising under the federal constitution or the laws or treaties of the United States, to adjudicate a state claim which is so closely connected to the federal claim as to warrant the "conclusion that the entire action before the court comprises but one constitutional 'case.'" *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

⁷⁰ 427 U.S. at 2-3. The state law claims were based on state statutes which had waived the sovereign status of the county and made it vicariously liable for the torts of its officials. *Id.* at 5.

⁷¹ *Id.* at 3-4.

⁷² *Id.* at 4-5.

⁷³ *Id.*

⁷⁴ *Id.* at 5.

⁷⁵ *Id.* at 14.

⁷⁶ *Id.* at 15.

⁷⁷ *Id.* at 19.

⁷⁸ *Id.*

Agents.⁷⁹ The plaintiff in *Bivens* alleged that federal narcotics agents, acting under color of federal authority, illegally entered and searched his apartment, and then arrested him without either an arrest or a search warrant.⁸⁰ If the allegations were true, Bivens had been deprived of his fourth amendment right to be free from unreasonable searches and seizures. The defendants argued, however, that Bivens should be relegated to his state tort law remedy for invasion of privacy because there existed no federal statute which granted monetary relief for the fourth amendment violations by federal agents.⁸¹ The Supreme Court rejected the defendants' argument⁸² and concluded that a valid cause of action against the federal agents arose directly from the fourth amendment.⁸³ The Court further concluded that money damages were a proper form of redress for Bivens' injuries.⁸⁴

Victims of constitutional violations committed by municipalities and their employees immediately recognized the *Bivens* rationale as a potential vehicle for circumventing the absolute municipal immunity rule of *Monroe*. Plaintiffs in civil rights actions urged the courts to extend the *Bivens* rationale to allow for a remedy against municipalities directly under the fourteenth amendment, despite the absence of a federal statute authorizing such a remedy.⁸⁵ Although this argument, calling for an extension of the *Bivens* rationale, has met with some success in the lower courts,⁸⁶ its validity has not been addressed

⁷⁹ 403 U.S. 388 (1971).

⁸⁰ *Id.* at 389.

⁸¹ *Id.* at 390. By its own terms, § 1983 applies only to action taken under color of state law and was therefore of no assistance to Bivens. Also, until it was amended in 1974, the Federal Tort Claims Act did not apply to the intentional misconduct of federal agents. See 28 U.S.C. § 2680 (1976).

⁸² 403 U.S. at 390-92. The defendants argued that the fourth amendment should be viewed only as a limit on the extent to which they, in a state tort action, could claim to have been acting under federal authority. *Id.* at 390-91.

⁸³ *Id.* at 390-95.

⁸⁴ *Id.* at 395-96.

⁸⁵ In a direct fourteenth amendment suit, federal jurisdiction is based on the general federal question jurisdictional statute, 28 U.S.C. § 1331 (1976). Direct fourteenth amendment actions, therefore, must meet the minimum amount in controversy requirement of \$10,000. No such requirement exists for suits brought under § 1343 in conjunction with § 1983.

⁸⁶ See, e. g., *Gentile v. Wallen*, 562 F.2d 193, 195-96 (2d Cir. 1977); *Owen v. City of Independence*, 560 F.2d 925, 932 (8th Cir. 1977), *vacated and remanded for reconsideration in light of Monell v. Department of Social Services of the City of New York*, 98 S. Ct. 3118 (1978); *Amen v. City of Dearborn*, 532 F.2d 554, 559 (6th Cir. 1976) (remanded for amount in controversy determination); *Reeves v. City of Jackson*, 532 F.2d 491, 495 (5th Cir. 1976); *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975); *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569, 577 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976); *Gray v. Union County Intermediate Educ. Dist.*, 520 F.2d 803, 805 (9th Cir. 1975); *Roane v. Callisburg Independent School Dist.*, 511 F.2d 633, 635 & n.1 (5th Cir. 1975); *Maybanks v. Ingraham*, 378 F. Supp. 913, 914-16 (E.D. Pa. 1974); *Dahl v. City of Palo Alto*, 372 F. Supp. 647, 649-51 (N.D. Cal. 1974). *But see Jones v. McElroy*, 429 F. Supp. 848, 857 (E.D. Pa. 1977); *Perry v. Linke*, 394 F. Supp. 323, 326 (N.D. Ohio 1974); *Smetanka v. Borough of Ambridge*, 378 F. Supp. 1366, 1377-78 (W.D. Pa. 1974) (*dictum*).

yet by the Supreme Court.⁸⁷ Some of the lower courts, focusing on the desirability of providing the victims of unconstitutional conduct with adequate and meaningful remedies, extended the rationale employed in *Bivens* and allowed municipalities to be subject to liability directly under the fourteenth amendment.⁸⁸ Moreover, of the courts which have so extended *Bivens*, a number also have allowed liability for the constitutional infractions of municipal employees to attach to the municipality vicariously under the doctrine of *respondeat superior*.⁸⁹

In sum, during the sixteen years following *Monroe*, four different legal theories emerged, each aimed at avoiding the rule of municipal immunity established by that decision. The theories propounded in *Moor*, *City of Kenosha*, and *Aldinger* have been considered untenable by the Supreme Court. The viability of the fourth theory, the direct fourteenth amendment suit, has not been tested at the Supreme Court level. Thus, although efforts at avoiding the *Monroe* rule have been largely unsuccessful, these efforts demonstrate that the dissatisfaction generated by the rule has been plentiful.

II. MONELL—THE REASONING BEHIND THE DECISION

Against this background, the Supreme Court in *Monell* again reconsidered its *Monroe* decision. Determining that *Monroe* had "misapprehended the meaning of [section 1983],"⁹⁰ the *Monell* Court rejected the rule of absolute municipal immunity from section 1983 liability. In *Monroe*, the Supreme Court had based its conclusion that municipalities were not "persons" within the meaning of section 1983 on its analysis of the congressional debates concerning the first conference committee draft of the Sherman amendment.⁹¹ The Sherman amendment would have subjected a "county, city or parish" to liability for property damage or personal injury caused by persons "riotously and tumultuously assembled" within its borders.⁹² Individual representatives

⁸⁷ It is uncertain what the role of the direct fourteenth amendment action will be after *Monell*. Plaintiffs who now suffer a deprivation of constitutional rights as the result of the implementation of official policy or adherence to governmental custom will have a cause of action against the municipality under section 1983. Resort to a direct fourteenth amendment action, therefore, would appear to be largely unnecessary.

⁸⁸ See, e.g., *Murray v. Murray*, 441 F. Supp. 120, 122-23 (E.D. Pa. 1977); *Williams v. Brown*, 398 F. Supp. 155, 159 (N.D. Ill. 1975).

⁸⁹ See, e.g., *Culp v. Devlin*, 437 F. Supp. 20, 24 (E.D. Pa. 1977); *Santiago v. City of Philadelphia*, 435 F. Supp. 136, 148 (E.D. Pa. 1977); *Collum v. Yurdovitch*, 409 F. Supp. 557, 559 (N.D. Ill. 1975). It would appear that the only possible use the direct fourteenth amendment action could serve after *Monell* would be as a vehicle for circumventing the *Monell* rule against the use of the doctrine of *respondeat superior* in section 1983 actions against municipalities. This tactic already has been attempted unsuccessfully in two cases. See *Jones v. City of Memphis*, 586 F.2d 622 (6th Cir. 1978), cert. denied, 440 U.S. 914 (1978); *Molina v. Richardson*, 578 F.2d 846 (9th Cir. 1978), cert. denied, 439 U.S. 1048 (1978).

⁹⁰ 436 U.S. at 700 (quoting *Monroe*, 365 U.S. at 192 (Harlan, J., concurring)).

⁹¹ See note 50 *supra*.

⁹² For the pertinent text of this version of the amendment, see note 51 *supra*.

who had voiced constitutional objections to the amendment were doubtful that the federal government possessed the authority to impose "any obligation upon county and town organizations, the mere instrumentality for the administration of state law."⁹³ These opponents viewed the Sherman amendment as an attempt to impose on municipalities indirectly an obligation to keep the peace by establishing municipal liability for breaches of the peace.⁹⁴ The *Monell* Court observed that it was this congressional unwillingness to impose a specific obligation on local government units which the *Monroe* Court had equated with a prohibition against the imposition of civil liability on municipalities.⁹⁵

The *Monell* Court's re-examination of the legislative history of the Civil Rights Act of 1871 revealed the error of the *Monroe* Court's conclusion. Justice Brennan first observed that many of the opponents of the Sherman amendment perceived no constitutional barrier to the imposition of civil liability on those municipalities which had been given the obligation to keep the peace by the state, but which had failed to fulfill this obligation in a manner violative of the fourteenth amendment.⁹⁶ Second, the *Monell* Court pointed out that by 1871 the power of the federal judiciary to enforce the contract clause of the Constitution against municipalities was well established.⁹⁷ This fact, the Court reasoned, also demonstrates that the Congress at that time thought it permissible to impose liability on municipalities for their direct violations of the Constitution.⁹⁸ The *Monell* Court thus determined that:

Since § 1 of the Civil Rights Act [now § 1343 and § 1983] simply conferred jurisdiction on the federal courts to enforce § 1 of the Fourteenth Amendment—a situation precisely analogous to the grant of diversity jurisdiction under which the Contract Clause was enforced against municipalities—there is no reason to suppose that opponents of the Sherman amendment would have found any constitutional barrier to § 1 suits against municipalities.⁹⁹

The *Monell* Court concluded, therefore, that the *Monroe* Court was in error in interpreting the rejection of the Sherman amendment as a congressional decision against municipal liability.

⁹³ 436 U.S. at 664 (quoting CONG. GLOBE at 804 (1871) (Rep. Poland) (emphasis omitted)).

⁹⁴ 436 U.S. at 673.

⁹⁵ *Id.* at 664-65.

⁹⁶ The *Monell* Court observed that Representative Poland, an opponent to the passage of the Sherman amendment, expressed this position when he stated that:

[W]here a State had imposed a duty [to keep the peace] upon [a] municipality . . . an action would be allowed to be maintained against them in the courts of the United States under the ordinary restrictions as to jurisdiction. But enforcing a liability, existing by their own contract, or by a State law, in the courts, is a very widely different thing from devolving a new duty or liability upon them by the national Government. . . . "

Id. at 680 (quoting CONG. GLOBE at 794).

⁹⁷ 436 U.S. at 673 & n.28.

⁹⁸ *Id.* at 681-82.

⁹⁹ *Id.*

The *Monell* Court further emphasized the error of the *Monroe* decision by noting that those representatives who had voted in favor of section 1 of the Civil Rights Act, many of whom subsequently voted against passage of the Sherman amendment, well understood that section 1 would subject municipal officials to liability for constitutional violations committed by them in their official capacities.¹⁰⁰ Because state independence is impaired to an equal degree whether federal power is exercised on individual state officials or corporate state agencies,¹⁰¹ the *Monell* Court reasoned that those congressmen who had voted in favor of section 1 would not have objected to the inclusion of municipalities within the scope of that section.¹⁰²

Having found the Sherman amendment debates devoid of any indication that Congress intended to exempt municipalities from liability for their own fourteenth amendment violations, the *Monell* Court proceeded to analyze section 1 of the Civil Rights Act itself.¹⁰³ Justice Brennan discussed the relevant factors which suggest the proper statutory interpretation of section 1. First, section 1 is a remedial act, and as such should be broadly construed.¹⁰⁴ The Court reasoned that, since municipalities are capable of causing the very harm that section 1 was intended to remedy, the section should be interpreted as applying to municipalities in the absence of a clear congressional directive that they are to be exempt.¹⁰⁵ The *Monell* Court found no such directive in the legislative history. On the contrary, the Court observed that by the year 1871 Congress well understood the usual meaning of the word "person" to include municipal corporations.¹⁰⁶

Based upon the foregoing reasoning, the *Monell* Court concluded that Congress had intended to include municipalities within the ambit of section 1983.¹⁰⁷ The Court therefore held that municipalities and other local government henceforth will be subject to suit pursuant to section 1983 for constitutional violations occasioned either by 1) the implementation of "a policy statement, ordinance, regulation, or decision officially adopted and promul-

¹⁰⁰ *Id.* at 682 & n.41. Because section 1 of the Civil Rights Act of 1871 was directed specifically at "persons" it was undoubtedly understood to apply to individual officials. *Id.*

¹⁰¹ *Id.* at 682. "Both are state instrumentalities and the state could be impeded no matter over which sort of instrumentality the Federal Government [seeks] to assert its power." *Id.*

¹⁰² *Id.* at 682-83.

¹⁰³ See note 29 *supra*.

¹⁰⁴ 436 U.S. at 684-86.

¹⁰⁵ *Id.* at 685-86.

¹⁰⁶ *Id.* at 687-89. The Court traced the historical developments which had led to the common practice of including municipal corporations within the meaning of the word "person." The Court indicated that the longstanding belief that corporations were *not* persons, which had been adopted in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809), had been overruled in *Louisville, C. & C. R.R. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844). In 1869 the principle established in *Letson*, that corporations were persons, was extended to municipal corporations. *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118, 121 (1869). *Id.*

¹⁰⁷ 436 U.S. at 690.

gated by that body's officers,"¹⁰⁸ or by 2) the adherence to a governmental "custom" even though such custom has not received official approval.¹⁰⁹

Although the *Monell* Court was willing to impose liability on municipalities for constitutional violations caused by the implementation of official policies or adherence to governmental customs, it would not go so far as to subject a non-culpable municipality to liability for the unconstitutional conduct of its employees acting without official directive. The question of the availability of the doctrine of *respondeat superior* was not present in the *Monell* dispute, however the Court addressed this issue in strongly worded language. The Court stated, "in particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."¹¹⁰ In reaching this conclusion the Court again examined both the statutory language and the legislative history of section 1983. The Court initially decided that the specific wording of section 1983 could not easily be read to include the concept of vicarious liability.¹¹¹ The Court reasoned that by employing the words "subject" and "causes to be subjected" in section 1983,¹¹² Congress had injected into the statute an element of causation and actual culpability without which liability may not be imposed.¹¹³

After determining that the specific statutory language of section 1983 did not indicate that Congress intended liability to attach vicariously under that section, the Court discussed whether the legislative history of the Civil Rights Act of 1871 supported its interpretation of the section. In summary fashion, the Court concluded that those representatives who had perceived a constitutional barrier to the imposition on municipalities of a federal obligation to keep the peace by means of the Sherman amendment likewise would have seen a constitutional barrier to the imposition of a federal law of municipal vicarious liability under section 1.¹¹⁴ The Court further observed that two common justifications for the doctrine of vicarious liability had been offered by proponents of the Sherman amendment in support of the amendment's passage.¹¹⁵ These justifications were, first, that vicarious liability has a deterrent effect on the repetition of wrongful conduct, and second, that vicarious liability is a vehicle for spreading the risk of wrongful conduct to society as a whole.¹¹⁶ Despite the appealing aspects of these justifications, Congress

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 690-91.

¹¹⁰ *Id.* at 691.

¹¹¹ *Id.* at 692.

¹¹² Section 1983 states that, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, *subjects, or causes to be subjected*, any citizen of the United States . . . to the deprivation of any rights . . ." (emphasis added). See note 1 *supra* for full text of § 1983.

¹¹³ 436 U.S. at 692. The Court stated that "the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." *Id.*

¹¹⁴ *Id.* at 693.

¹¹⁵ *Id.* at 694.

¹¹⁶ *Id.*

nevertheless had determined that they were insufficient to overcome the constitutional infirmities which were perceived to exist in the Sherman amendment.¹¹⁷ Accordingly, the *Monell* Court concluded that it would be unrealistic "to suppose that a more general liability [vicarious liability] imposed for . . . similar reasons would have been thought less constitutionally objectionable."¹¹⁸ Therefore, the Court concluded that municipalities cannot be held vicariously liable under section 1983 for the unconstitutional conduct of municipal employees.

III. THE STRENGTH AND THE WEAKNESS OF THE *MONELL* DECISION— AN ANALYSIS AND AN ALTERNATIVE RULE

In reaching its decision in *Monell*, the Supreme Court was faced with the always difficult and unpleasant task of overruling one of its prior decisions. Heeding Justice Frankfurter's oft cited maxim "not to reject [wisdom] merely because it comes late,"¹¹⁹ however, the Court correctly overruled that portion of *Monroe* which had absolutely immunized municipalities from section 1983 liability. The Court's holding in *Monell*, bringing municipalities within the ambit of section 1983, clearly was well founded. As Justice Powell noted in his concurring opinion in *Monell*, *Monroe's* odd result of exempting municipalities from liability while allowing section 1983 suits to proceed against the individual municipal employees who merely performed the ministerial function of implementing official policy, begged for reconsideration of the *Monroe* holding.¹²⁰ Section 1983 was intended to provide a federal, civil remedy for violations of constitutional rights "under color of" state law. As Justice Powell recognized, few categories of action so readily fulfill the "under color of" state law requirement as action taken pursuant to official government mandate.¹²¹ The *Monroe* rule of absolute municipal immunity had forced victims of unconstitutional conduct occasioned by official municipal policy to seek their sole redress from municipal employees who often were shielded from liability by a good-faith immunity defense.¹²² The victims,

¹¹⁷ *Id.* The reasoning employed by the Court at this juncture is somewhat obscure. If the Representatives had determined that a federally imposed obligation to keep the peace was unconstitutional, it is difficult to perceive that any justification could serve to remove the constitutional infirmities.

¹¹⁸ *Id.* at 694. Again the Court's reasoning is unclear. Under the first conference draft of the Sherman amendment, municipalities would have been subjected to liability for damage resulting from the violence of private citizens. See note 51 *supra*. Municipal liability based on the doctrine of *respondeat superior* would make a municipality liable only for the torts of its employees. It therefore appears that, contrary to the Court's position, municipal vicarious liability based on *respondeat superior* is a more restrictive species of liability than that contained in the Sherman amendment.

¹¹⁹ *Henslee v. Union Planters Bank*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

¹²⁰ 436 U.S. at 705 (Powell, J., concurring).

¹²¹ *Id.* at 707 (Powell, J., concurring).

¹²² *Cf. Wood v. Strickland*, 420 U.S. 308, 315, 322 (1975) (good faith immunity defense available in § 1983 actions); *Scheuer v. Rhodes*, 416 U.S. 232, 247-491 (1974)

therefore, remained uncompensated for their injuries, while the municipality which had directed or sanctioned the enforcement of the unconstitutional policy escaped liability. The *Monell* Court determined that the *Monroe* interpretation of section 1983 which led to this distressing result was an inaccurate interpretation of the law.

The *Monroe* Court's reliance on the rejection of the Sherman amendment was also misplaced. The motivation behind the rejection of the Sherman amendment was Congress' belief that the imposition on municipalities of a federal obligation to keep the peace would have been an interference with a purely local matter reserved to the states under the tenth amendment.¹²³ Because state governments traditionally had been free to allocate local police power among their political subdivisions as they saw fit, a federal law which would effectuate a forced re-allocation of that power apparently was viewed by the Congress as an unconstitutional usurpation of state authority.¹²⁴ The inclusion of municipalities within the scope of section 1983, however, does not give rise to such tenth amendment problems. Section 1983 was enacted by Congress pursuant to its power under section 5 of the fourteenth amendment as a means of enforcing section 1 of the same amendment.¹²⁵ Although sec-

(officers of executive branch of state government enjoy a qualified good faith immunity); *Hana v. Drobnick*, 514 F.2d 393, 397 (6th Cir. 1975) (good faith defense available to seven city building inspectors). See generally Theis, "Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights, 59 MINN. L. REV. 991 (1975).

¹²³ The tenth amendment provides: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

The following statement by Representative Blair illustrates the tenth amendment concerns present throughout the Sherman amendment debates.

[T]here are certain rights and duties that belong to the States . . . there are powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality?

CONG. GLOBE, 42d Cong., 1st Sess. 795 (1871).

¹²⁴ *Id.* at 795. In determining that a federal obligation to keep the peace imposed on municipalities would be unconstitutional, Representatives relied on the decisions in *Collector v. Day*, 78 U.S. (11 Wall) 113 (1871) (federal government had no power to tax the salary of a state officer), *overruled in* *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939), and *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (Congress has no power to lay duties on state officers). *Id.*

¹²⁵ The fourteenth amendment provides in pertinent part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

tion 1, by its terms, is addressed only to states, it is well established that municipalities, as instrumentalities of state government, are equally bound by the provisions of the section.¹²⁶ The *Monell* Court recognized that "the doctrine of dual sovereignty . . . put[s] no limit on the power of federal courts to enforce the Constitution against municipalities that [violate] it."¹²⁷ Thus, in a long overdue decision, the Supreme Court wisely abandoned the ill-advised doctrine of absolute municipal immunity from section 1983 liability.

Although the Court's decision to reject the *Monroe* doctrine appears unassailably correct, a similar conclusion is not easily reached regarding the specific rule of municipal liability adopted by the *Monell* Court. It is clear that not every post-*Monell* constitutional violation committed by a municipal employee will result in municipal liability. On the contrary, the Court stated "it is 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 that the government as an entity is responsible under § 1983."¹²⁸ The perceived weakness of the *Monell* decision lies in the narrowness of this newly-adopted rule of municipal liability.

Although the specific conduct involved in the *Monell* case fell within the confines of the Court's rule of municipal liability, much of the conduct of municipal employees which results in constitutional violations apparently lies beyond its scope. Incidents of police brutality which rise to the level of constitutional deprivations would seem to be all too common examples of excluded conduct. To say that few, if any, municipalities have officially adopted policies, or customs so well established that they can be characterized as official policy, which authorize such conduct merely states the obvious. Thus, under the *Monell* rule, the vast majority of these constitutional violations will not result in municipal liability under section 1983.

Some authors have suggested that the adoption of a standard of municipal liability in section 1983 actions which incorporates the doctrine of *respondeat superior* is the sole means of adequately protecting the constitutional rights of individuals from the excesses of municipal employees.¹²⁹ Under such a standard of liability, which was specifically rejected by the *Monell* Court,¹³⁰ municipalities would incur section 1983 liability for all constitutional violations committed by municipal employees acting within the scope of their employment.¹³¹

There are several attractive aspects of a standard of municipal liability based on the doctrine of *respondeat superior*.¹³² The most compelling argu-

¹²⁶ See, e.g., *Hunter v. Erickson*, 393 U.S. 385, 389 (1969); *Avery v. Midland County, Texas*, 390 U.S. 474, 479 (1968); *Cooper v. Aaron*, 358 U.S. 1, 15-16 (1958).

¹²⁷ 436 U.S. at 680.

¹²⁸ *Id.* at 694.

¹²⁹ Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 136-37 (1972); Comment, *Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection*, 57 CAL. L. REV. 1142, 1158-59 (1969); Note, *Vicarious Liability Under Section 1983*, 6 IND. L. REV. 509 (1973).

¹³⁰ See text at note 109 *supra*.

¹³¹ See generally, PROSSER, *supra* note 34, § 69.

¹³² Among the various justifications which have been offered for the doctrine of *respondeat superior* are: 1) the master is able to control the servant and if he fails to

ment in support of such a standard of liability is that it would act as a deterrent to the commission of future constitutional violations by municipal employees. A municipality which will incur automatic liability under section 1983 for every constitutional violation committed by its employees acting within the scope of their employment is apt to adopt policies of careful selection, proper training, and adequate discipline of its employees in an effort to reduce the number of constitutional violations, and thereby to reduce the number of adverse section 1983 judgments.

It is clear that the *Monell* rule will not have this deterrent effect. Limiting municipal liability under section 1983 solely to situations where constitutional violations result from the implementation of official policies or customs, the rule provides municipalities with no incentives to police more actively the actions of their employees. The *Monell* rule permits municipalities which are willing to purge their by-laws, regulations, and record books of any official policies susceptible to attack on constitutional grounds, to immunize themselves again from section 1983 liability. Thus, although the *Monell* rule of municipal liability may be a welcome step away from the unsupportable *Monroe* doctrine, it would appear to fall far short of providing adequate protection for the constitutional rights of individuals.

Although the perceived defect in the *Monell* rule—its lack of any deterrent effect—provides strong support for the position that a satisfactory rule of municipal liability must include the doctrine of *respondeat superior*, an alternative rule of municipal liability exists which would provide the deterrent effect offered by a standard based on *respondeat superior*, without straying from the exact language of the statute. It will be recalled that the *Monell* Court's strongest objection to a standard of municipal liability which would incorporate the doctrine of *respondeat superior* was the wording of section 1983 that indicated liability under that section must be based on actual culpability.¹³³ The hallmark of the doctrine of *respondeat superior*, a species of vicarious liability, is that liability attaches in the complete absence of culpability.¹³⁴

It is suggested that by focusing on the concept of municipal action, rather than on the standard of liability, one can fashion a rule of municipal liability under section 1983 which would deter future wrongdoing, unlike the *Monell* rule, and which would conform to the language of section 1983, unlike a rule based on *respondeat superior*. Because municipalities can act only through their employees and agents, any attempt to distinguish *municipal action* from the *action of municipal employees* is plagued with conceptual difficulties. However, the *Monell* Court's line of demarcation between these two sources of conduct seems particularly inappropriate. The language employed by the Court suggests that it is the *prior* authorization of unconstitutional conduct which will

do so, he should suffer the consequences; 2) the master has chosen the servant and has first placed him in a position to act; 3) imposing liability on the master will deter future wrongdoing. See generally PROSSER, *supra* note 34, at 459; James, *Vicarious Liability*, 28 TULANE L. REV. 161, 165-73 (1954); Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 455 (1923).

¹³³ See text at notes 110-12 *supra*.

¹³⁴ See generally PROSSER, *supra* note 34, § 69.

trigger municipal liability.¹³⁵ The appropriate definition of municipal action not only should include conduct of municipal employees which has been authorized, either expressly or implicitly, by municipal "policymakers" in advance, but also should include that conduct which is subsequently ratified by the municipality.¹³⁶ If a municipality itself treats certain conduct of its employees as municipal action by ratifying that conduct, it is both appropriate and equitable for the courts likewise to view the conduct as municipal action.

It remains to be determined, however, what factors properly shall be considered evidence of municipal ratification for purposes of this expanded concept of municipal action. At this juncture, substantial guidance can be derived from the settled principles of the law of Agency. It is well established that ratification of an act by a principal "can be manifested in a variety of ways, as by a verbal statement, a writing, the acceptance of the benefits or by *doing nothing after learning of the unauthorized act.*"¹³⁷ Although instances in which municipalities affirm wrongful conduct by way of express verbal or written approval of the conduct may be rare, it is submitted that affirmation through passive inaction is not uncommon. A municipality which becomes aware of wrongful conduct that has been taken on its behalf and fails to repudiate that conduct, demonstrates its acquiescence in the conduct. Under this analysis, the failure of municipal officers having knowledge of wrongful conduct to take disciplinary action against the blameworthy employee should be viewed as significant evidence of municipal ratification of the wrongdoing. If such ratification has occurred, the municipality should be held accountable for the conduct in the same manner as the actual wrongdoer. Such accounting properly should include the possibility of section 1983 liability. Thus, although the rule of municipal liability proposed here retains the standard of liability based on culpability found in the *Monell* rule, it increases the potential exposure of municipalities to section 1983 liability. Under the proposed rule, a municipality would be considered "culpable" if it either had *authorized* or *ratified* conduct which is determined to be violative of section 1983.

The potential deterrent effect of the proposed rule of municipal liability is apparent. Such a rule would motivate municipalities to discipline actively and adequately wrongdoing employees in order to demonstrate their repudiation of the wrongful conduct and thereby to insulate themselves from possible liability under section 1983. Concurrently, the institution by municipalities of

¹³⁵ See text at note 127 *supra*.

¹³⁶ The United States Court of Appeals for the Second Circuit, in a direct fourteenth amendment action against a municipality, adopted a rule of municipal liability which included the concept of municipal ratification. The Second Circuit, however, subsequently dismissed the action, upon remand from the Supreme Court. *Turpin v. Mailet*, 579 F.2d 152 (2d Cir. 1978) (en banc), *vacated and remanded for reconsideration in light of Monell sub nom. City of West Haven v. Turpin*, 439 U.S. 974 (1978), *modified*, *Turpin v. Mailet*, 591 F.2d 426 (1979) (per curiam) (en banc). The *Turpin* Court had held that "a damage action can be maintained against a municipality to redress injuries resulting from those actions of its employees that have been authorized, sanctioned or ratified by municipal officials or bodies functioning at a policy-making level". 579 F.2d at 164.

¹³⁷ W. SEAVEY, *LAW OF AGENCY* § 67 (1964) (emphasis added).

aggressive disciplinary policies would operate to deter future wrongdoing by municipal employees. It is recognized that this suggested rule is not problem free. The most difficult issue raised by the rule is determining what type and amount of discipline will be sufficient to demonstrate municipal repudiation of unconstitutional conduct. Clearly, action which is "disciplinary" in form only, and which lacks any actual punitive substance should not be deemed sufficient to insulate the municipality from section 1983 liability. The question whether specific disciplinary measures are adequate to demonstrate municipal repudiation, however, should be an issue for the trier of fact, to be decided on a case by case basis. In sum, this issue would appear to be no more formidable an obstacle to the just resolution of section 1983 actions than is any other factual issue.

IV. CONCLUSION

In holding that a municipality may be liable under section 1983 for constitutional violations caused by the implementation of official policy or governmental custom, the *Monell* Court has cast a final blow to the tottering *Monroe* rule of absolute municipal immunity from section 1983 actions. The Court's failure to recognize that passive inaction, as well as affirmative action, is a sound basis for municipal liability, however, greatly reduces the practical significance of the *Monell* decision. As a step toward reducing the number of constitutional violations committed "under color of" state law, the Court should adopt a rule of municipal liability which subjects municipalities to section 1983 liability for unconstitutional conduct which they either expressly or implicitly authorize, or which they subsequently ratify. Such a rule falls clearly within the language of section 1983 and would afford greater protection for the constitutionally guaranteed rights of the people than that presently afforded by the *Monell* rule.¹³⁸

MARY E. CORBETT

¹³⁸ Editor's Note

In 1980 the Supreme Court addressed a question left unanswered by the *Monell* decision. In *Owen v. City of Independence*, 48 U.S.L.W. 4389 (April 15, 1980), the Court held "that a municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983." 48 U.S.L.W. at 4394.