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RESPONDEAT SUPERIOR LIABILITY OF MUNICIPALITIES FOR CONSTITUTIONAL TORTS AFTER MONELL: NEW REMEDIES TO PURSUE?

The United States Supreme Court recently construed the Civil Rights Act\(^1\) to permit persons deprived of their constitutional rights under color of state law to recover damages or to seek an injunction against municipalities that cause the deprivation. This decision, *Monell v. Department of Social Services of the City of New York*,\(^2\) overruled the Supreme Court's longstanding and much-cited construction of section 1983 in *Monroe v. Pape*.\(^3\) Under *Monroe* municipalities were excluded from the class of "persons" whose unconstitutional actions were made actionable by the statute. While broadening the construction of section 1983 "persons" to include municipalities, the Court adopted a rule which may seriously limit the utility of section 1983 as a tool for vindicating federal constitutional rights violated by municipalities. *Monell* adopts the rule that a municipality may not be held liable under section 1983 for civil rights violations on any theory of vicarious liability, including *respondeat superior*.\(^4\) This Comment will consider the reasons offered for and the impact of abandoning municipality immunity under section 1983. It will then critically examine the exclusion of vicarious liability from section 1983, and suggest ways to avoid the barriers presented by *Monell* to an effective remedy in federal court for municipalities' constitutional violations.

The position of this comment is that the Supreme Court's dicta against the imposition of *respondeat superior* liability on municipal corporations for the constitutional torts of their employees under section 1983 are not justified by the language or legislative history of the statute. Despite the rejection of *respondeat superior* liability of municipalities for constitutional torts in directly implied actions in the few court of appeals decisions confronting the question, implied vicarious liability may be supported by the

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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.


4. 436 U.S. at 690-95. See text accompanying notes 57 & 71-79 infra.
many cases which hold that remedies implied directly from the Constitution are not subject to limitations in the language or history peculiar to section 1983.

In *Monell*, each of three female employees of the New York City Board of Education and one female employee of the New York City Department of Social Services were directed to take unpaid leaves of absence during pregnancy about a month before the dates their respective doctors would have ordered. The city employees filed a class action, naming as defendants the New York City School District and its Chancellor Scribner, the Department of Social Services and its Commissioner Sugarman, and former Mayor John Lindsay. The plaintiffs challenged the constitutionality of rules and regulations which required women employees to take leaves of absence before such leaves were required for medical reasons, and sought injunctive relief and back pay for periods of unlawful forced leave. District Judge Metzner dismissed the claim for injunctive relief as mooted by subsequent changes in official policy, dismissed the claim for back pay against the Board and the Department on the ground that neither were "persons" against whom section 1983 authorized relief, and dismissed the claim for back pay against the individual defendants named in their official capacities on the theory that an equitable order for back pay against the officials would require payment of city funds and that such circumvention of municipal immunity was impermissible. The court of appeals affirmed. The Supreme Court granted certiorari to consider the extension of the municipality immunity doctrine to bar suits for equitable

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9. 436 U.S. at 661.
10. 394 F. Supp. at 855. The district court and court of appeals opinions in *Monell* are representative of a recent line of cases holding that equitable orders against an individual officer of a municipality named in her official capacity are impermissible under § 1983 if the order would in effect require the payment of public funds to the plaintiff. Such cases find support in the Supreme Court's holding that municipalities are immune from § 1983 liability, in *Monroe* and subsequent cases such as *Aldinger* v. Howard, 427 U.S. 1 (1976) (barring pendancy of state law claims joined with § 1983 claims against a municipality as contrary to legislative policy), *City of Kenosha* v. Bruno, 412 U.S. 507 (1979) (extending the nonperson doctrine to claims for equitable relief as well as for damages), and *Moor* v. County of Alameda, 411 U.S. 693 (1973) (extending the nonperson doctrine to immunize counties). This line of cases included *Muzquiz* v. City of San Antonio, 520 F.2d 995 (5th Cir. 1975), rev'd on rehearing en banc, 528 F.2d 499 (5th Cir. 1976). See also *Wade* v. Mississippi Coop. Extension Serv., 528 F.2d 508, 520 (5th Cir. 1976). *Muzquiz* is analyzed in *Levin*, *The Section 1983 Immunity Doctrine*, 65 GEO. L.J. 1483, 1504-14 (1977). See also Note, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1198 n.56 (1977).
relief in the nature of back pay sought against individual officials named as defendants in their official capacities, and reversed, overruling Monroe v. Pape insofar as it holds that local governments are immune from suit under section 1983.

After carefully reexamining the legislative history that Monroe had relied on to justify municipal immunity, the Court concluded that Congress did intend section 1983 to impose civil liability on municipalities for violations of constitutional rights. The predecessor to section 1983 was section 1 of H.R. 320, which became law as the Civil Rights Act of 1871. Central to Monroe's construction of section 1983 is the rejection of Senator Sherman's amendment to H.R. 320 by the House in the spring of 1871. The amendment provided that any inhabitant of a city, county or parish could be held civilly liable for specified kinds of riot damage. It was initially approved by the Senate as section 7 of H.R. 320 but was rejected by the House. The amendment was submitted to Congress in the first conference committee report without substantial change. That report was approved by the Senate but was again rejected by the House. A second conference report limiting liability to persons having knowledge that the described forms of injury to persons or property were taking place was approved by both the Senate and the House, and is currently codified at 42 U.S.C. § 1986. The Supreme Court in Monroe was convinced that the rejection of the Sherman amendment by the House revealed Congress to be so hostile to the imposition of liability for riot damage on municipalities that the word "person" in section 1 of the 1871 Act could not have been intended to include municipalities.

12. 436 U.S. at 662.
13. Id. at 663. See text accompanying notes 57 & 71-79 infra, and criticism in text accompanying notes 80-104 infra.
15. CONG. GLOBE, 42d Cong., 1st Sess. 709 (1871). The text of the Sherman amendment may be found at CONG. GLOBE, 42d Cong., 1st Sess. 669 (1871). It is quoted in Monroe, 365 U.S. at 188 n.38, and in the Appendix to Monell, 436 U.S. at 702.
16. CONG. GLOBE, 42d Cong., 1st Sess. 725 (1871).
17. The first conference report substituted the liability of "the county, city, or parish" for the original Sherman amendment provision for liability of "the inhabitants of the county, city or parish." Id. at 749. It is quoted in Monroe, 365 U.S. at 188-89 n.41, and in the Appendix to Monell, 436 U.S. at 703-04.
18. CONG. GLOBE, 42d Cong., 1st Sess. 779 (1871).
19. Id. at 800-01.
20. Id. at 831.
21. Id. at 832.
23. 365 U.S. at 194. Apart from this narrowing construction, Monroe broadly construed § 1983 liability for unconstitutional acts "under color of" state law to include acts committed by those cloaked with state authority. See note 144 infra.
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Monell surveys the Congressional debates which took place in the spring of 1871, and concludes that Monroe drew an unjustifiably broad inference from the rejection of the Sherman amendment by the House. In short, the Court in Monell concludes that the Forty-second Congress rejected the Sherman amendment not because it would have made municipalities as well as individuals liable for constitutional violations, but because it would have authorized holding individuals and municipalities liable in damages for types of injuries not limited to deprivations of constitutional rights and without regard to whether the municipality was authorized by the State to prevent such injuries.

Opponents of the Sherman amendment saw that it would indirectly require municipalities to create local police forces, when there were none in existence, to keep the peace. Several of its opponents argued that Congress had no constitutional power to impose such duties on state officers or corporate agents of a state, citing Supreme Court decisions that embraced a theory of dual sovereignty. The Supreme Court in Monell assembles three arguments to show that section 1 of H.R. 320 was not subject to the same constitutional objection.

First, even opponents of the Sherman amendment admitted that Congress had the power to impose civil liability on municipalities in federal court “for using their authorized powers in violation of the Constitution.” Where the States had delegated an obligation to a local governmental entity, granting jurisdiction to federal courts to enforce the fourteenth amendment was unobjectionable. Such a grant of jurisdiction was consistent with rejecting municipality liability for riot damage where the authority to prevent riot damage had not been delegated to the municipality. Second, federal courts were not seen as interfering with the states’ parallel sovereignty when vindicating federal constitutional rights by enforcing the contract clause against municipalities in diversity cases. Monell treats the contract clause cases as showing that “federal judicial enforcement of the Constitution’s express limits on state power” against municipalities was not subject to the constitutional infirmity seen in the Sherman amendment by its opponents. Finally, several members of the House opposed the Sherman amendment but acknowledged the constitutionality of, or supported, section 1 of H.R. 320. These considerations persuaded the Monell Court

26. 436 U.S. at 673-75.
27. Id. at 680.
28. See cases cited 436 U.S. at 673 n.28.
29. 436 U.S. at 681.
30. Id. at 682.
that rejection of the Sherman amendment is consistent with holding municipalities liable for their constitutional torts.

In addition to finding no reason in the legislative history for inferring a congressional intention to immunize municipalities from civil liability for constitutional violations, the Monell Court finds positive support therein for the view that section 1 was intended to impose liability on municipalities as well as on natural persons. Again, the Court constructs three arguments. The first argument premises that Congress intended section 1 to be broadly construed, in accordance with the canon of statutory construction that a remedial statute should be broadly construed.31 Representative Shellabarger, the chairman of the special committee that drafted H.R. 320,32 expressly cited this canon of construction in the speech in which he reported the bill out of committee. Shellabarger explained that "the largest latitude consistent with the words employed is uniformly given in construing such statutes," and insisted that it would be "strange and, in civilized law, monstrous were this not the rule of interpretation."33 Since municipal corporations are as capable of violating a person's constitutional rights as are natural persons, the Supreme Court in Monell holds

31. J. Sutherland, 3 Statutes and Statutory Construction § 60.01 at 29 (C. Sands 4th ed., 1974). See also id. § 72.02 at 374, 375, § 72.05 at 391-94.
32. Cong. Globe, 42d Cong., 1st Sess. 249 (1871). It is worthwhile to consider the circumstances surrounding the drafting and passage of the bill that became § 1983. In the spring of 1871, while there was much concern in Congress about the spread of racially and politically motivated violence in the southern states visited on Negroes and Republicans by the Ku Klux Klan, Congress was reluctant to enact legislation tailored to meet the problem of these so-called "outrages in the South," at least until after a full-scale investigation had been conducted to determine the extent of Ku Klux violence. Representative Lewis, Cong. Globe, supra, at 335. The Senate and House passed a concurrent resolution to appoint a joint select committee to inquire into the "condition of the late insurrectionary states." Id. at 135, 182, 560. Repeated motions to adjourn the session were introduced, and it appeared that the 42d Congress would adjourn the 1st session without passing legislation to deal with the problem of the Ku Klux Klan. On March 23, 1871, however, President Grant delivered a message to both houses of Congress that renewed the sense of urgency to act. Id. at 236, 244; Monroe, 365 U.S. at 174. Grant's message referred to the "condition of affairs . . . in some States of the Union rendering life and property insecure" and "urgently recommend[ed] such legislation as in the judgment of Congress shall effectively secure life, liberty, and property, and the enforcement of law in all parts of the United States." Representative Shellabarger was named to head a select House Committee to which Grant's message was referred. Cong. Globe, supra, at 249. The message was sent on a Thursday; by the following Tuesday, H.R. 320 was reported out of committee, and a long and bitter debate on its provisions began. The House substantially considered no other business until the bill was passed, and debates were carried on through a special Saturday session, a special morning session, and late into four evening sessions. The bill gained the approval of the House on April 6, 1871, only two weeks after Grant's message was received.
that "there is no reason to suppose that municipal corporations would have been excluded from the sweep of § 1."

Secondly, H.R. 320 was titled and was indexed in the Globe as a bill to enforce the provisions of the fourteenth amendment, which forbids uncompensated takings by a state. Representative Bingham, the author of section 1 of the fourteenth amendment, took the view in the debates on H.R. 320 that section 1 of that bill would provide a remedy against a city that takes property without providing just compensation. In light of these considerations, the Court concluded it was not reasonable to infer that Congress intended municipalities to be immune from suit under section 1983.

Finally, decisional and statutory law had come to treat municipal corporations as natural persons by the time the Civil Rights Act became law. In Cowles v. Mercer County, decided only two years before passage of the statute, the Supreme Court had decided that municipal corporations should be treated just as the Court had treated business corporations in an earlier case, i.e., to all intents and purposes they were to be deemed natural persons. Further, Congress itself had defined "person" to include bodies politic and corporate "in all acts hereafter passed," in the so-called "Dictionary Act," passed less than a month before Shellabarger's committee finished drafting H.R. 320.

The Supreme Court also suggests that the municipal immunity doctrine is irreconcilable with the Court's consistent assumption of section

34. 436 U.S. at 686.
36. CONG. GLOBE, 42d Cong., 1st Sess. App. 84 (1871); 436 U.S. at 686-87. Such a remedy had been denied under the fifth amendment in Barron v. Baltimore, 32 U.S. (7 Pet.) 464 (1833), on the ground that the fifth amendment taking clause was a restriction only on the power of the federal government, and Representative Bingham explained that he had Barron especially in mind when he drafted § 1 of the fourteenth amendment.
37. 74 U.S. (7 Wall.) 118, 121 (1868), cited in Monell, 436 U.S. at 688.
39. Act of Feb. 25, 1871, ch. 71, 16 Stat. 431; Monroe, 365 U.S. at 190; 436 U.S. at 688. In acknowledging that the Dictionary Act provision controls interpretation of § 1983, the Court adopts a view commonly espoused by critics of Monroe's nonperson doctrine. Kates & Koub, Liability of Public Entities under Section 1983 of the Civil Rights Act, 45 S. CAL. L. REV. 131, 133 n.12 (1972); Note, Suits Against Municipalities for Equitable Relief under Section 1983, 87 HARV. L. REV. 252, 257 n.29 (1973); Note, Developing Governmental Liability under 42 U.S.C. § 1983, 55 MINN. L. REV. 1201, 1206 n.26 (1971). The Supreme Court in Monell disagreed with Monroe that this definition of person was merely advisory, and held that the Dictionary Act provided a mandatory rule of construction, at least absent a showing that Congress intended the word "person" to be used to exclude "bodies politic and corporate" in the Civil Rights Act. 436 U.S. at 689 n.53. Monell did not view the rejection of the Sherman amendment as providing such a showing of congressional intent.

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1983 jurisdiction over school boards, since there is no persuasive ground on which to distinguish municipalities from school boards for section 1983 purposes. In particular, the Court suggests that the legislative history does not support treating school boards differently from other corporate agents of the State. As Monell reads that history, the rejection of the Sherman amendment warrants treating constitutional torts differently from riot damage but not treating the constitutional torts of school boards differently from those of municipalities. The fact that treating school boards differently from other entities of state government is inconsistent does not of itself justify the Court's choice of a rule of liability for all municipal entities over a rule of immunity for all municipal entities. The Court finds justification for a rule of municipality liability in recent congressional refusals to enact proposals to strip federal courts of jurisdiction over school boards in desegregation cases and in recent congressional

40. See cases cited 436 U.S. at 663 n.5. The Court further states that "the principle of blanket immunity established in Monroe cannot be cabined short of school boards," hence cases "holding school boards liable in § 1983 actions are inconsistent with Monroe ..." 436 U.S. at 696.

41. "Moreover, the constitutional defect that led to rejection of the Sherman Amendment would not have distinguished between municipalities and school boards, each of which is an instrumentality of State administration." 436 U.S. at 695-96.

42. A number of federal courts of appeals had extended the municipal immunity doctrine to insulate school boards from § 1983 liability. Mims v. Board of Educ., 523 F.2d 711 (7th Cir. 1975); Burt v. Board of Trustees, 521 F.2d 1201 (4th Cir. 1975); Adkins v. Duval County School Bd., 511 F.2d 690 (5th Cir. 1975); Singleton v. Vance County Bd. of Educ., 501 F.2d 429 (4th Cir. 1974); Wright v. Arkansas Activities Ass'n, 501 F.2d 25, 27 (8th Cir. 1974); Harvey v. Sadler, 331 F.2d 387 (9th Cir. 1964). Other decisions expressly left the question open. Stapp v. Avoyelles Parish School Bd., 545 F.2d 527, 531 n.7 (5th Cir. 1977) (unnecessary to decide whether members of the school board are persons if school board is not because jurisdiction found under 28 U.S.C. § 1331); Campbell v. Gadsden County Dist. School Bd., 534 F.2d 650, 653 (5th Cir. 1976); Berg v. Richmond Unified School Dist., 528 F.2d 1208, 1211 (9th Cir. 1975) vacated and remanded on other grounds, 434 U.S. 158 (1977) (§ 1983 jurisdiction over school district and board "may be questionable" but jurisdiction found under Title VII of the Civil Rights Act of 1964); Bertot v. School Dist. No. 1, 522 F.2d 1171 (10th Cir. 1975); Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803, 805 (9th Cir. 1975); Kelly v. West Baton Rouge Parish School Bd., 517 F.2d 194 (5th Cir. 1975); Roane v. Callisburg Indep. School Dist., 511 F.2d 633 (5th Cir. 1975); Mitchell v. West Feliciana Parish School Bd., 507 F.2d 662 (5th Cir. 1975); Bramlet v. Wilson, 495 F.2d 714, 717 (8th Cir. 1974); Akron Bd. of Educ. v. State Bd. of Educ., 490 F.2d 1285, 1291 (6th Cir. 1974). Most of the circuits facing the question had also extended Monroe's nonperson doctrine to immunize universities and colleges from § 1985 liability. Hill v. Trustees of Indiana Univ., 537 F.2d 248 (7th Cir. 1975); Hostrop v. Board of Jr. College Dist., 523 F.2d 569 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976); Hander v. San Jacinto Jr. College, 522 F.2d 204 (5th Cir. 1975); Prostrollo v. University of South Dakota, 507 F.2d 775 (8th Cir. 1974), cert. denied, 421 U.S. 952 (1975); Gresham v. Chambers, 501 F.2d 687 (2d Cir. 1974); Blanton v. State Univ., 489 F.2d 377 (2d Cir. 1973).
authorization of funds to help school boards comply with court orders in desegregation suits. Although Congress has failed to enact proposals to extend immunity to school boards, the inference is not compelled that Congress would choose the universal liability alternative since Congress has been equally inactive on proposals to legislatively overrule Monroe.

A final reason for broadening the definition of section 1983 "persons," not made explicit in Monell's majority opinion, is suggested in the last paragraph of Justice Powell's concurring opinion. Justice Powell expresses concern that if the Court failed to extend section 1983 liability to municipalities it could not long postpone deciding whether a cause of action against municipalities may be "implied" directly from the fourteenth amendment for its violation. The availability of a damages remedy in a directly implied cause of action was recognized by the Supreme Court in Bivens v. Six Unknown Named Federal Narcotics Agents. The Court's extension of municipality immunity under section 1983 to preclude actions for injunctive relief as well as for damages in City of Kenosha v. Bruno has encouraged lower federal courts to approve directly implied action. Bruno itself strongly suggests that where the due process clause of the fourteenth amendment is infringed by a municipality, a cause of action would lie against the municipality and federal jurisdiction may be founded on 42 U.S.C. § 1331. Despite its apparent approval of the

43. 486 U.S. at 696-97 & n.62.
45. 486 U.S. at 712.
46. 403 U.S. 388 (1971) (fourth amendment remedy against federal narcotics agents for an invasion of constitutional rights similar to that alleged in Monroe).
48. In Bruno, applications for renewal of liquor licenses were denied to plaintiffs without adversary hearings, apparently because the taverns featured nude dancing. The licensees brought a § 1983 action against the municipalities involved. An injunction against the enforcement of the licensing statutes issued by the court of appeals was vacated by the Supreme Court, which held that the "nonperson" doctrine of Monroe precluded § 1983 suits against municipalities not only for money damages but also for injunctive relief: "We find nothing ... to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them." 412 U.S. at 513. Significantly, the Court remanded the cause for a determination whether plaintiffs had met the $10,000 amount in controversy requirement for general federal question jurisdiction under 28 U.S.C. § 1331, suggesting that a cause of action directly implied from the fourteenth amendment might lie against municipalities for constitutional deprivations. See 412 U.S. at 516 (Brennan, J., concurring). See also Bodensteiner, Federal Court Jurisdiction of Suits against "Non-Persons" for Deprivation of Constitutional
directly implied action by remanding the case in Bruno, the Supreme Court has never expressly held that a cause of action stated directly under the Constitution will lie against municipalities. In Mt. Healthy School District Board of Education v. Doyle the Court said that whether such an action would lie was still an open question. Nonetheless, the Bivens-Bruno precedents have led nearly every federal circuit court of appeals to address the question whether direct actions are free of section 1983 immunity impediments, and most have permitted suits against municipalities to redress constitutional violations. The question whether Justice Powell is justified in the view that Monell will reduce the pressures to resort to a Bivens theory of recovery against municipalities will be discussed later.

The impact of Monell may be far-reaching. Monroe's establishment of municipal immunity has been said to limit the utility of section 1983 damages actions against state-inflicted constitutional deprivations more than any other single ruling. The municipality immunity doctrine was often an insurmountable obstacle for a victim of a deprivation of constitutional rights in search of a financially responsible defendant against whom to seek a judgment. Monell may permit effective recovery where before there was none, and to that extent render the Bivens alternative less attractive. As will emerge more clearly later, however, the exclusion from section 1983 liability of municipal employers for the unconstitutional acts of

50. See note 120 infra.
51. Note, Damage Remedies against Municipalities for Constitutional Violations, 89 HARV. L. REV. 922, 957 (1976). Monell may tend to increase the rapidly expanding volume of federal civil rights litigation. In 1974, 8,207 civil rights actions were filed, or 5.73% of the total 143,284 federal district court cases filed; by 1977, the number of civil rights actions filed had risen to 13,114 or 8.2% of the total 168,492 federal district court cases filed. The 1977 figures represent a 59.8% increase in the civil rights actions filed over the 1974 figures, while the total number of federal district court cases filed increased 14.1% in the same three years. It is not known how much of the increase is attributable to the availability of directly implied Bivens-type actions. ADMINISTRATIVE OFFICE OF THE U.S. COURTS MANAGEMENT STATISTICS FOR U.S. COURTS, REPORT FROM THE DIRECTOR (1974 and 1977).
52. At least where policy or custom is alleged so that § 1983 jurisdiction may be invoked, directly implied actions may be more difficult to maintain, because 28 U.S.C. § 1331 requires that the amount in controversy be at least $10,000, Brault v. Town of Milton, 527 F.2d 750 (2d Cir. 1975); Hanna v. Drobnick, 514 F.2d 393 (6th Cir. 1975) (actual damages of $500 alleged; no allegation of malice to support claim for $9500 in punitive damages), and because courts may adopt more stringent constitutional requirements for the directly implied cause of action than for § 1983 suits. Molina v. Richardson, 578 F.2d 846 (9th Cir. 1978), Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977). See also Davis v. Passman, 571 F.2d 793 (5th Cir. 1978), rev'd, 47 U.S.L.W. 4645 (U.S. June 5, 1979) (No. 78-5072).
their employees may prevent Monell from dramatically expanding civil remedies for constitutional injuries.53 Cases involving an unconstitutional express policy as in Monell may be less common than cases in which constitutional violations are a matter of custom, flowing from unarticulated habits and biases of municipal employees. The latter are much more difficult to document, and there may be some judicial reluctance to recognize the existence of customary violations of constitutional rights in section 1983 actions, even where the plaintiffs seek only injunctive relief.54 Although a section 1983 action alleging unconstitutional municipal custom does not require a showing of intentional misconduct, the problems involved in proving the existence of an unconstitutional municipal custom are analogous to the problems commonly observed in showing intentional discrimination in the enforcement of state penal laws.55 If the courts remain reluctant to see the failure to correct statistically significant patterns of constitutional violations by municipal employees as involving a custom of the entity so that the entity is viewed as the cause of the violations, the right to legal or equitable relief against the entity for customary constitutional violations may be of little practical value.

Like Monroe, which broadly construed "color of state law"56 but narrowly construed "persons," Monell has a narrowing aspect which may more than offset the expansive impact of abandoning the municipal immunity doctrine. Monell lays down the rule that there may be no recovery

53. See text accompanying notes 105-08 infra.
54. An example of judicial reluctance to acknowledge the existence of unconstitutional municipal custom or to find that toleration of a pattern of violations itself causes further violations may be seen in the Supreme Court's opinion in Rizzo v. Goode, 423 U.S. 362 (1975). The district court heard evidence on approximately 40 incidents of alleged police misconduct occurring within a year. 357 F. Supp. at 1294-1316. The district court did not find an unconstitutional departmental policy but held there existed a "pattern of frequent police violations" of constitutional rights. 357 F. Supp. at 1318. In dissolving the district court's mandatory injunction to revise grievance and disciplinary procedures, the Supreme Court held that the named defendant officials' "failure to act in the face of a statistical pattern" did not give rise to liability under § 1983. 423 U.S. at 376. See Note, Availability of Federal Equitable Relief Against Police Supervisory Personnel, 90 HARV. L. REV. 238, 240-41 (1976). See text accompanying notes 61-64 infra.
55. Such discrimination was found actionable in Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1885). For an analysis of these problems of proof, see Comment, The Right to Nondiscriminatory Enforcement of State Penal Laws, 61 COLUM. L. REV. 1103, 1122-31 (1961). The author contends that actions to enforce the right to evenhanded application of state laws face proof problems that are exacerbated by a lack of judicial flexibility in judging attempts to prove discriminatory practices, and that these problems "may be insurmountable in the face of the present judicial reluctance to be persuaded that state enforcement agencies have in fact violated the constitutional right to nondiscrimination." 61 COLUM. L. REV. at 1141.
56. 523 U.S. at 184. See notes 23 supra & 144 infra.
against a municipality for civil rights violations on any theory of vicarious liability, including respondeat superior.\(^{57}\)

The Court states several arguments against using respondeat superior as a theory of recovery under section 1983 which warrant careful attention. It quotes the language of the statute as passed, providing a civil cause of action against a person who “shall subject, or cause to be subjected” another to a deprivation of her rights, and focuses attention on the word “cause.”\(^{58}\) The Court reads the word “cause” narrowly, and holds that unless the employee of the governmental entity caused the injury pursuant to a policy or custom of the entity, it is not proper to say that it was the entity that caused the injury. The Court does not construe the use of “cause” in section 1983 to encompass the common law rule holding a principal liable for the torts of its agents.\(^{59}\) The mere use of the word “cause” is taken to rule out imputed causation.

Monell’s analysis of what constitutes “cause” for section 1983 purposes is not entirely new. The same account of section 1983 causation surfaced two years earlier in the Supreme Court’s decision in Rizzo v. Goode.\(^{60}\) In Rizzo, the Third Circuit Court of Appeals ordered revisions in the Philadelphia, Pennsylvania, police department manuals and procedures for hearing citizen grievances. The Supreme Court reversed, holding that section 1983 does not support the granting of relief against defendants whose conduct “played no affirmative part”\(^{61}\) in the deprivation of rights

\(^{57}\) “[W]e 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.” 436 U.S. at 691 (emphasis in original). See also 436 U.S. at 663 n.7. Monell’s rule relates to the entity-employer, the employee’s true master, and consequently is not to be confused with a rule that superior officers cannot be held liable for actions of their inferiors because the superiors are “not the masters of the tortfeasors but fellow-servants of the same master.” Kirtland, Vicarious Liability Under Section 1983, 6 IND. L. REV. 509, 520 (1978). But see Smith & Singer, Limitations on Federal Judicial Power in Civil Rights Cases: “Persons,” Eleventh Amendment, Immunities, Vicarious Liability, 14 WAKE FOREST L. REV. 711, 735 and n.148 (1978).

\(^{58}\) 436 U.S. at 692. For an examination whether such restriction of the Court’s attention does justice to the language and history of § 1983, see text accompanying notes 88-104 infra.

\(^{59}\) See notes 85-87 infra.

\(^{60}\) 423 U.S. 362, 370-71 (1976). “The plain words of the statute impose liability . . . only for conduct which ‘subjects, or causes to be subjected’ the complainant to a deprivation of a right secured by the Constitution and laws.” Id. Rizzo finds that this requirement was not met where “there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy—express or otherwise—showing their authorization or approval of such misconduct.” Id. This “affirmative link” test in Rizzo has, in Monell, matured into a “policy or custom” test of municipal liability, but the primary argument supporting such restrictive interpretation remains the analysis of “cause.” See generally Note, Rizzo v. Goode: The Burger Court’s Continuing Assault on Federal Jurisdiction, 30 RUTGERS L. R. 103, 122-24 (1976).
of which plaintiff complains. *Rizzo* anticipated *Monell*'s exclusion of vicarious liability when it distinguished cases finding liability against school boards under section 1983 in school desegregation cases by explaining that in those cases the administrators and school board members "were found by their own conduct" to have denied plaintiffs' constitutional rights. 62 *Rizzo* suggested that section 1983 would not be available to vindicate a deprivation of constitutional rights against defendants who merely "had in their employ a small number of individuals, which latter on their own deprived" persons of their constitutional rights. 63 Hence, *Rizzo*, like *Monell*, rejects the broader notion of vicarious liability, then attempts to apply that rejection to the narrower notion of *respondeat superior*. 64

The Supreme Court also finds support for its conclusion that section 1983 does not authorize municipal vicarious liability in Congress' rejection of Sherman's proposal to hold individuals or municipalities liable for riot damage occurring in their locality. 65 The Court argues that with the rejection of the Sherman amendment, Congress rejected the "only form of vicarious liability presented to it," 66 and that vicarious liability, unlike municipality liability in general, "would have raised all the constitutional problems associated with the obligation to keep the peace." 67 The Court also asserts that because common arguments for vicarious liability did not move the House to approve the Sherman amendment, Congress did not intend vicarious liability to be imposed under section 1983. 68 The arguments

62. *Id.* (emphasis in original); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Brown v. Board of Educ., 347 U.S. 483 (1954). *Rizzo* also distinguished police cases Allee v. Medrano, 416 U.S. 802 (1976), and Hague v. CIO, 367 U.S. 496 (1969), where a causal link was found between the conduct of named defendants and the plaintiff's injury. 423 U.S. at 373-75. Amazingly, the Court then emphasizes a further feature that distinguishes *Hague* and *Medrano* from *Rizzo*: "[T]here was no showing that the behavior of the Philadelphia police was different in kind or degree from that which exists elsewhere ...." 423 U.S. at 375. In fact, the district court found the problems highlighted by plaintiffs "fairly typical" in urban settings. Council of Organizations v. *Rizzo*, 357 F. Supp. 1289, 1318 (E.D. Pa. 1973). See Note, *Rethinking Federal Injunctive Relief Against Police Abuse: Picking up the Pieces After Rizzo v. Goode*, 7 RUT.-CAM. L.J. 530, 540 (1976). Clearly, the fact that constitutional abuses of a certain type are widespread should not be a defense to a § 1983 action, since the Congress that passed H.R. 320 in 1871 was motivated by the alarming spread of Ku Klux Klan violence, perceived to be encouraged by official toleration. See *note* 32 *supra*.

63. 423 U.S. at 377.

64. "By our decision in *Rizzo* v. Goode . . . we would appear to have decided that the mere right to control . . . is not enough to support § 1983 liability." 436 U.S. at 694 n.58.

65. *See* text accompanying notes 14-17 *supra*.

66. 436 U.S. at 693 n.57.

67. *Id.* at 693.

68. *Id.* at 699.
inferring a congressional intent to exclude vicarious liability from the rejection of the Sherman amendment will be examined more closely later. 69

The reasons advanced by the Supreme Court for rejecting respondeat superior under section 1983 are not entirely persuasive, for several reasons. These reasons include the following, to be discussed seriatim: (1) The analysis of what constitutes "cause" is inconsistent because it vicariously attributes the acts of some agents to the municipal entity but not those of other agents; (2) the analysis of "cause" overlooks the alternative wording of the statute; (3) the rejection of the Sherman amendment was not a rejection of respondeat superior, because that proposal would not have limited liability to actors or their agents; (4) the fact that arguments commonly advanced in support of vicarious liability failed to persuade Congress to adopt the Sherman amendment does not show that vicarious liability is not imposed under section 1983, because similar arguments were used by proponents of section 1983 itself in the Congressional debates in 1871; (5) the policy of deterring constitutional abuses is thwarted without respondeat superior because institutional organization carries inherent potential for abuse that will be unreachable under the requirement of direct causation; and (6) if Bivens actions are construed to be free of constraints to which section 1983 is subject, Monell's narrow aspect will encourage increasing use of directly implied actions.

As set out above, 70 the majority opinion's dicta 71 that section 1983 does not permit holding a local governmental entity liable on a theory of respondeat superior rests heavily on analysis of the word "cause." Despite the fact that a municipal corporation is an "artificial" person 72 that can act only through its agents, the Court reads section 1983 to exclude liability for injuries "inflicted solely by its employees or agents." 73 The Court asserts that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." 74 The Court makes clear, however, that constitutional deprivations pursuant to "policy of some nature" include customary deprivations "even though such a custom has not received formal approval through the body's official decisionmaking channels." 75 The principal argument against imposing respondeat superior liability under section 1983 is set out in a crucial passage:

69. See text accompanying notes 88-104 infra.
70. See text accompanying notes 57-68 supra.
71. Because Mr. Justice Stevens considered the portion of the Monell majority opinion that interprets § 1983's requirement of cause to exclude respondeat superior of corporate entities "merely advisory and not necessary to explain the Court's decision," he refused to concur in that portion of the opinion. 436 U.S. at 714.
73. 436 U.S. at 694, 663-64 n.7.
74. Id. at 691.
75. Id.
[The statutory language "any person who . . . shall subject, or cause to be subjected"] plainly imposes liability on a government that, under color of some official policy, "causes" an employee to violate another's constitutional rights. At the same time, that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor. Indeed, 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. 76

The statute does not "plainly" address the question of B's liability where B causes A to cause a deprivation of C's constitutional rights. Nevertheless, the Court restricts a municipality's statutory liability to this single situation. Moreover, the Court adopts a remarkable rule for determining when an entity will be said to cause its agent to cause a constitutional injury. The entity is causally responsible only when a constitutional deprivation is inflicted through the execution of policy or custom created by officials "whose edicts or acts may fairly be said to represent official policy or custom." 77 In adopting this test for deciding when the entity will be treated as the cause of a constitutional injury, the Court acknowledges that a governmental entity can act only through its agents; the policy-making acts of higher-level agents will be vicariously attributed to the governmental employer. The policy of forcing pregnant employees to take unpaid leaves of absence before required to do so for medical reasons was itself both created 78 and dismantled 79 by agents and officers of the city. However, the Court will not permit the Constitution-violating acts of lower-level agents, if at variance with local policy or custom, to be vicariously attributed to the governmental employer. The Court's announcement of a rule excluding vicarious liability is misleading at best, since the Court contemplates permitting suits against the municipal employer when certain employees act to adopt unconstitutional policies. This inconsistency is even more obvious in the case of custom than in that of policy, since the acts of employees that simultaneously establish and express a customary and unconstitutional practice are attributed to the entity: those acts con-

76. Id. at 691-92 (citing Rizzo v. Goode, 423 U.S. 362 (1976)).
77. Id. at 694. Monell "unquestionably involves official policy as the moving force of the constitutional violation found by the District Court." Id.
78. Monell's allegation that her leave of absence was ordered pursuant to citywide policy was supported by a letter received from an administrator in the Division of Personnel Relations of the Department of Social Services. Amended Complaint at 13, item 28, Brief for plaintiff, 436 U.S. 658 (1978).
79. 'The issues presented by plaintiffs' claim for injunctive and declaratory relief were held mooted by the change in policy made with respect to the Department of Social Services by Deputy Mayor Edward K. Hamilton, and with respect to the School Board by the voting members of the Board of Education of the City of New York, 394 F. Supp. 853, 855.
stitute the entity's customary practice, and the entity may thereby be subject to civil liability for those acts.

Given that the Court does contemplate a limited application of respondeat superior under section 1983, the distinction between agents whose unconstitutional acts can bind the entity and those whose unconstitutional acts cannot bind the entity, if drawn according to the level of the agent within the hierarchy of the governmental body, seems arbitrary. The criteria for selecting the class of agents whose policy-making acts will be attributed to the entity is left uncertain. The rule that it is only "those whose edicts and acts may fairly be said to represent official policy" who may subject their employer to section 1983 liability suggests that the criterion will be one of fairness to the entity; if it is unfair to say that an agent's acts represent official policy, the plaintiff will be unable to hold the entity liable in an action for damages or injunctive relief. This transforms the inquiry from the question of whether a governmental employee deprived the plaintiff of constitutional rights while acting within the scope of employment and under color of state law into the question of whether it is fair to hold the entity liable for the acts under consideration. It is submitted that this question of fairness is not one for the courts to decide in each case, because it is the very policy question which was settled by Congress through legislation in 1871. There is no principled way to distinguish the acts of "policymakers" from those of employees who "implement" policy. It is a strained construction of section 1983 that denies a plaintiff relief against an entity for the unconstitutional acts of some employees on the theory that those acts did not rise to the level of setting unconstitutional policy or expressing unconstitutional custom.

In a part of Monroe v. Pape which Monell does not overrule, the Court held that section 1983 does not require a showing of specific intent to deprive plaintiff of constitutional rights as does 18 U.S.C. § 242, which imposes criminal liability on a person for wilfully violating another's constitutional rights. The difference between the criminal statute and the statute

80. This is especially true in instances where the greatest discretion and interaction with the public, and thus the greatest opportunity to deprive persons of their constitutional rights, are at the lowest levels of the governmental organization. See Kirtland, Vicarious Liability under Section 1983, 6 IND. L. REV. 509, 510 (1973).

81. 436 U.S. at 694 (emphasis added).

82. 18 U.S.C. § 242 was originally passed in 1866, and § 1983 was modeled after it. Representative Shellabarger, CONG. GLOBE, 42d Cong., 1st Sess. at App. 68 (1871); Monroe v. Pape, 365 U.S. 167, 185 (1961). Screws v. United States, 325 U.S. 91 (1945), reaffirmed the holding in United States v. Classic, 313 U.S. 299 (1944), that "color of state law" in 18 U.S.C. § 242 included acts committed while the wrongdoer is "clothed with the authority of state law," but held that the use of the word "wilfully" imported a requirement that the constitutional violation be done with specific intent to deprive a person of a federal right. Monroe based its broad interpretation of § 1983 on the construction given "under color" in 18 U.S.C. § 242 in Screws. Monroe, however, rejected the argument that the analogy
creating a civil remedy was underscored in an oft-quoted passage that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Monell adopts this analogy when it refers to section 1983 violations as "constitutional torts" and to individual section 1983 defendants as "tortfeasors." In 1871, it was a settled principle of law that corporate employers were civilly responsible for the tortious acts of their employees. If, as the Court held shortly before the passage of section 1983, it is improper to distinguish municipal corporations from business corporations and both are to be treated as natural persons, it is incongruous to hold a business corporation for the torts of its agents but refuse to hold a municipal corporation for the constitutional torts of its agents. Again and again, the Supreme Court has incorporated restrictive elements of the common law of torts in interpretations of section 1983. It is anomalous that while the Court purports to construe section 1983 literally, it incorporates elements of the common law that restrict liability but refuses to incorporate elements of the common law that would extend liability.

between the two statutes should be extended to require a showing of specific intent under § 1983, both because § 1983 does not contain the word "wilfully," and because the state of mind requirements of a statute imposing a civil remedy are different from those of a statute imposing criminal sanctions. 365 U.S. at 183-84, 187.

83. Monroe v. Pape, 365 U.S. 167, 187 (1961). A major aspect of the distinction between tort liability and criminal liability is that while respondeat superior developed as a part of the common law of torts in the eighteenth and nineteenth centuries as a response to the growth of industry and commerce, "no such development took place in criminal law." Sayre, Criminal Responsibility for Acts of Another, 43 HARV. L. REV. 689, 694 (1930).

84. 436 U.S. at 691, 692.

85. Kirtland, Vicarious Liability under Section 1983, 6 IND. L. REV. 509, 514-15 (1973); Sayre, supra note 83, at 699; Wigmore, Responsibility for Torts: Its History II, 7 HARV. L. REV. 383 (1894). See W. BLACKSTONE, COMMENTARIES *429-30: "[T]he master is answerable for the act of his servant, if done by his command, either expressly given, or implied: nam qui facit per alium, facit per se. . . . [W]hatever a servant is permitted to do in the usual course of his business, is equivalent to a general command." The dicta in Monell in effect measures the liability of the employer of a constitutional tortfeasor, though the state has clothed him with its authority, much as the common law would measure the liability of the employer of an independent contractor who commits a tort.


It would be worthwhile to reexamine the reasons offered for a standard of municipal liability which appears to be both internally inconsistent and inconsistent with the established analogy between constitutional torts and common law torts. The Court's narrow focus on the use of the word "cause" in section 1983, in the Rizzo-Monell analysis, neglects the fact that the statute is worded in the alternative: "subjects, or causes to be subjected." The statute uses two different formulae, and apparently imposes liability on a constitutional tortfeasor in two distinct situations: where the tortfeasor causes a deprivation of the plaintiff's constitutional rights, and where the tortfeasor subjects the plaintiff to a deprivation of constitutional rights. The verb "cause" takes as its object the deprivation; the verb "subjects" takes as its object the person injured. This difference in the grammar of the terms used suggests a substantive difference in theories of liability authorized by those terms. In a case where the defendant subjects the plaintiff to a deprivation of her rights, the statute directs attention to the person injured. From the injured party's point of view, when a deprivation is caused by a governmental agent while acting within the scope of employment and is made possible only because the agent is cloaked with the authority of the state, it is the power of the entity employer that intrudes on her privacy, threatens her security, and affronts her dignity. The canon of statutory construction counseling avoidance of an interpretation rendering statutory language meaningless or superfluous is violated by the Court's construction of the statute. The Supreme Court does not justify the attempt to read the language "subjects, or" out of section 1983 by its interpretation in Rizzo and Monell. Because that language appears to expand the types of causal responsibility to which section 1983 attaches, it is perplexing that the Court adopts a single, and unprecedentedly narrow, concept of causation under the statute.

The speeches of several congressmen in debates on H.R. 320 in 1871—section 1 of which is now codified as section 1983—suggest that "subjects, or causes to be subjected" was intended to capture more than a single theory of causal responsibility for a deprivation of constitutional rights to which liability would attach. It is important to bear in mind that while the impetus for passage of the bill was the widespread increase in Ku Klux Klan violence, "the remedy created was not a remedy against it or its members but against those who representing a State . . . were unable or unwilling to enforce a state law." The use of such indirect means in an at-

88. For the view that the meaning of "subjects" as it is used in § 1983 is not coextensive with that of "causes to be subjected," see Note, The Federal Injunction as a Remedy for Unconstitutional Police Conduct, 78 YALE L.J. 143, 147 n.19 (1968).


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tempt to provide redress for the Klan's constitutional violations was repeatedly explained in the debate. Representative Stevenson of Ohio urged the passage of H.R. 320 in the following language:

Denial [of equal protection] may, therefore, be either active or passive. It is more frequently passive than active. . . . Unexecuted laws are no "protection." And this brings us to the very case: The States have laws providing for equal protection, but they do not, because either they will not or cannot, enforce them equally; and hence a class of citizens have not "the protection of the laws." Union men, white and black, are "denied" the protection of the laws as completely as if the laws excepted from their operation "all cases of outrage by Ku Klux upon Republicans, white or colored."91

Representative Mercur of Pennsylvania also focused attention on the fourteenth amendment's proscription against the denial of equal protection and due process of law by the states. He thought it "very obvious" that the word "deny" as it was used in the fourteenth amendment "means to refuse, or to persistently neglect or omit to give that 'equal protection' imposed upon the State by the Constitution."92 Again, Representative Perry of Ohio argued that when the fourteenth amendment forbids a state to deny equal protection, it forbids the state to "fail to afford or withhold the equal protection of the laws."93 A Congress that was willing to impose liability on a municipal corporation that "passively" denies equal protection to its


91. CONG. GLOBE, 42d Cong., 1st Sess. App. 300 (1871). Note that Rizzo refused to find § 1983 liability because:
There was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization of such misconduct. . . . Instead . . . the sole causal connection found by the District Court . . . was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur. . . . 423 U.S. at 371. It is difficult to reconcile Rizzo's refusal to base § 1983 liability on the inefficiency of local enforcement of sanctions against offenders with numerous speeches in the 1871 debates that justify the passage of H.R. 320 by reference to the failure of local law enforcement processes. See, e.g., the speeches of Representative Pratt of Indiana, CONG. GLOBE, supra, at 505; Representative Voorhees of Indiana, id. at 179; Representative Hoar of Massachusetts, id. at 334; Representative Osborn of Florida, id. at 653; Representative Garfield of Ohio, id. at App. 153; Representative Stoughton of Michigan, id. at 321; Representative Coburn of Indiana, id. at 457; Representative Burchard of Illinois, id. at 312; Representative Rainey of South Carolina, id. at 394: "The judge of this circuit is sitting on his bench, the machinery of justice is in working order; but there can be found no hand bold enough to set it in motion." Representative Beatty of Ohio referred to the testimony of "learned judges within whose circuits . . . the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent." Id. at 428.

92. CONG. GLOBE, 42d Cong., 1st Sess., at App. 181 (1871).

93. Id. at App. 79.
citizens by failing to bring Klan members to justice was equally prepared to hold the same municipality liable for the active denial of fourteenth amendment rights through the acts of its own employees. As the Supreme Court interprets section 1983, civil liability is imposed on a municipality that withholds, fails to afford, refuses, neglects, does not give, or does not grant the equal protection of the laws to some of its citizens through ineffective enforcement of those laws against non-employees who attack those citizens, yet it does not impose liability on the municipality that far more directly denies the equal protection of the laws when its own agents attack those citizens.44 The congressmen’s concern that the enforcement statute should reach not only active but also passive denials of constitutional rights is roughly expressed in the statute’s distinction between “subjects X to a deprivation of rights” and “causes a deprivation of X’s rights.” This much is clear: Congress did not intend a narrow reading of “cause” to circumscribe section 1983 liability, and could not have so intended if the cause of action provided against persons under color of state law was to effectively deter and remedy Ku Klux Klan abuses.

The Supreme Court bolsters its analysis of “cause” with a supplemental argument against imposing respondeat superior liability on a governmental employer by referring to the legislative history of H.R. 320. No direct reference to respondeat superior is found in the debates, but the Court returns to Congressional rejection of Senator Sherman’s proposed amendment to H.R. 320 for “a clue to whether it would have desired to impose respondeat superior liability.”95 The Court asserts without elaboration that “all of the Constitutional problems” raised by opponents of the Sherman amendment are presented by imposing liability on a governmental

44. The inadequacy of Monell’s view that the Congress that passed § 1983 did not contemplate that imposition of vicarious liability under the statute is evidenced by the way in which supporters of H.R. 320 conceptualized the relation between the fourteenth amendment’s limitations on states and § 1’s prohibition of action by persons. The primary source of congressional power to pass H.R. 320 was found in § 5 of the fourteenth amendment. Representative Blair of Missouri argued that H.R. 320 unconstitutionally overstepped § 5’s grant of congressional power. He emphasized the fact that the fourteenth amendment prohibits certain actions by states and does not mention individuals, but the proposed enforcement statute imposes liability on persons and exempts the state. CONG. GLOBE, 42d Cong., 1st Sess. at App. 208. Representative Blair’s criticism was answered by Representative Mercur of Pennsylvania, who simply defined “state” as used in the fourteenth amendment to mean the people of the state: “[T]he clear import and meaning of the term ‘State,’ in the sense in which it is used in this section is free citizens or people dwelling within the limits of an organized state.” Id. at App. 181. See also the speech of Representative Perry of Ohio, defining “state”: “The primary meaning is the people.” Id. at App. 80. The attribution of acts of people of a state to the state itself is necessary to get around Representative Blair’s constitutional objections to § 1 of H.R. 320. Nevertheless, Monell rejects the analogous vicarious attribution of responsibility from municipal employees to their employers as inconsistent with the legislative history of § 1983.
95. Id. at 198. 

employer for the unconstitutional acts of its employees. The problems to which the Court alludes are those associated with imposing the obligation to keep the peace on a local entity to which that obligation had not been delegated by the state. Monell holds that section 1983 does not impose liability on a municipality for failure to perform a duty which has not been delegated to it, but only for exercising delegated state authority so as to violate constitutional rights. For this reason, and because contract clause cases supply ample precedent for enforcing federal constitutional guarantees against municipalities, section 1983 is immune to the constitutional infirmity of the Sherman amendment. These two reasons also distinguish vicarious liability under section 1983 from the liability sought to be imposed by the Sherman amendment. The Court's assertion that respondeat superior raises the same constitutional problems raised by the Sherman amendment is not borne out by an examination of what the Court identifies as those constitutional problems.

Discernible in Monell is a distinct thread of argument for rejecting respondeat superior liability based on the rejection of the Sherman amendment by the House. The Congress is said to have spurned the only form of vicarious liability presented to it when it rejected the Sherman amendment. However, the Sherman amendment did not involve respondeat superior at all, because it did not limit liability of municipalities to constitutional abuses by their employees, but sought to impose liability for non-constitutional injuries (property damage and personal injuries) caused by any persons "riotously and tumultuously assembled." The Court acknowledges that "the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees." In a crucial passage, Monell premises rejection of respondeat superior on the specious argument that Congress did not intend to impose vicarious liability for riot damage on municipalities and therefore did not intend to impose "a more general liability" in the form of respondeat superior. The reference to more general liability is patently misleading: respondeat superior is not broader than the liability sought to be imposed by the Sherman amendment; it is considerably narrower, since limited to employees, over whom the employer has the right of control. It is apparent that the Supreme Court in

96. See notes 25-26 and accompanying text supra for an exposition of those problems.
97. A governmental employee acting within the scope of her employment and under color of state law does act upon authority delegated to her; and the contract clause cases provide precedent for imposing liability on the entity for failing to conform its employees' conduct to constitutional norms.
98. CONG. GLOBE, 42d Cong., 1st Sess. 709 (1871).
99. 436 U.S. at 693 n.57. "[T]he nature of the obligation created by that amendment was vastly different from that created by § 1 ..." 436 U.S. at 664.
Monell makes the same type of logical error that it did in Monroe; congressional rejection of one narrowly defined type of liability is taken to manifest an intention to reject other quite distinct types of liability.\(^1\) In disapproving the Sherman amendment in its initial form and as revised in the first conference report, the House rejected a proposal combining at least five distinct features:

(a) vicarious liability
(b) for the acts of non-employees (anyone riotously and tumultuously assembled)
(c) that result in certain types of property damage and personal injury (without reference to violation of constitutional rights)
(d) imposed on municipalities
(e) that had not been delegated authority to keep the peace.

Monroe mistakenly interpreted Congress' action as rejecting feature (d) (the imposition of liability on municipalities) in all circumstances, when it was only in conjunction with the other features, particularly (e) (the lack of delegated authority to keep the peace), that the Sherman amendment was seen to be defective.\(^2\) Monell overrules Monroe precisely because the Court's reexamination of the legislative history of Section 1983 sensitized it to the importance of feature (e) in the debates over the Sherman amendment. Monell then attempts to shift ground from finding a congressional intent to reject (e) to finding a congressional intent to reject (a) (vicarious liability) in all circumstances. Again, this inference is unjustifiably broad. It was only in conjunction with the other unique features of Sherman's proposal that vicarious liability was rejected. Indeed, that Congress rejected the imposition of vicarious liability on municipalities where not restricted to constitutional violations by employees clothed with municipal authority may give rise to the inference that vicarious liability would have been acceptable were such restriction present.

The Court's observation that common arguments advanced in support of vicarious liability failed to move Congress to adopt the Sherman amendment\(^3\) is immaterial to the liability sought to be imposed under section 1 of H.R. 320—now Section 1983—because those arguments are of the type used by supporters of section 1 to urge its passage. The three arguments discussed by the Court for adopting vicarious liability are that such liability will deter abuses, that it will spread the cost of compensating the individual victim of constitutional deprivation, and that vicarious liability will be fair when limited to the imposition of liability on an employer by virtue

\(^{101}\) Similar considerations have led one commentator to assert that "the distinction drawn in Monell between direct and vicarious liability perpetuates an unsound and unsupported interpretation of the Sherman amendment debate . . . ." Blum, From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts, 51 TEMPLE L.Q. 409, 412-13 (1978).

\(^{102}\) 436 U.S. at 673-76.
of its right to control the conduct of an employee who deprives another of her rights. The argument that liability would deter constitutional abuses, particularly by the Ku Klux Klan, and the argument that victims of deprivations of their constitutional rights ought not be left to bear the burden of the deprivation, are precisely what moved Congress to pass H.R. 320.104 The speeches in support of H.R. 320 catalogue Ku Klux Klan abuses in a manner calculated alternately to evoke a visceral response against perpetrators who escape punishment and to evoke sympathy for their uncompensated victims. The fact that the arguments for passage of H.R. 320 bear a strong resemblance to arguments often used to justify the imposition of liability on an employer for the errant conduct of its employees supports rather than undermines the view that the Civil Rights Act incorporates respondeat superior liability. The rejection of the Sherman amendment is as much a red herring in the inquiry into the intent of Congress in using the word "cause" in section 1 of H.R. 320 as it was in the inquiry into Congress' intent in using the word "person"; it obscures rather than highlights the type of liability imposed by section 1983.

The Court's rejection of municipal liability for the constitutional torts of employees disserves important public policy of deterring infringement of constitutional rights and compensating victims of such infringements. There are elements of institutional organization which, while their presence is not readily discernible by conventional standards of causation, tend to encourage the occurrence of constitutional injuries. In the wake of Rizzo's direct-causation interpretation of section 1983, a recent comment focused attention on the way in which a "judicial approach...grounded in individual-based fault concepts" is inadequate to explain or to remedy abuses inherent in "institutional behavior patterns."105 In the context of police abuses, the authors draw on a variety of sociological and psychological studies to isolate sources of unconstitutional "organizationally elicited behavior." These sources include the lack of effective disciplinary procedures, the paramilitary organization, the training experience (primarily through street apprenticeship), and the measures used to evaluate an individual's performance.106 While the causal efficacy of such institu-

104. Monroe v. Pape, 365 U.S. 167, 172-83 (1961). Justice Douglas' opinion for the majority in Monroe canvasses the debates on H.R. 320 and distills three primary purposes in its passage: to override discriminatory state legislation, to provide a remedy for injuries where state law is inadequate to provide one, and to supply a remedy where a state's remedy is unavailable in practice. By far the greatest attention in the debates was devoted to the third purpose, as it is that purpose which is expressed in the paramount concern with remedying and deterring Ku Klux Klan violence.


tional factors in molding behavior is a commonplace in nonlegal literature, it is not clear that the Supreme Court's requirement of proof of unconstitutional municipal "custom" as a precondition of liability under section 1983 could be satisfied by proof that techniques of training and evaluation, for example, lead individuals to be insensitive to constitutional safeguards. Consequently, the policy behind section 1983 of providing a primarily federal forum for the vindication of federal constitutional rights will be thwarted under Monell's construction of section 1983 where violations are committed by the employees of municipal corporations. There are abuses inherent in institutional organization with its network of occupational incentives that will be unreachable under a requirement of direct causation.

As suggested above, where a plaintiff suffers a constitutional deprivation at the hands of a municipal employee which cannot easily be characterized as resulting from the implementation of a policy or custom of the entity, Monell denies that plaintiff a section 1983 remedy against the municipality. Yet because an injunction running only against individually named officers or agents of the entity may be unenforceable against successors without notice of the order, and because a damages judgment against individually named officers may prove uncollectable against salaried governmental employees, the plaintiff will have strong motive to seek to bind the entity with her judgment. Consequently, Monell will continue to generate pressure to expand causes of action against municipalities directly implied from the Constitution by analogy to Bivens where respondent superior can supply the theory of liability. To the extent that such development of the federal common law is unpredictable and vari-

108. Despite the authors' suggestion that police structure is "substantially different from other bureaucracies," Note, supra note 105, 7 RUT.-CAM. L.J. at 541 n.60, an analysis stressing the relation of procedures for selection, training, evaluation, discipline, and organization of officers and agents to the disposition to comport with constitutional requirements can productively be applied to a broad spectrum of municipal corporations, departments, and agencies.
109. FED. R. CIV. P. 65(d).
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able across circuits, rendering a citizen who must rely on an implied cause of action less secure in her constitutional rights, Monell's rejection of respondeat superior liability under section 1983 is unfortunate.

Dicta in Monell indicate that section 1983 does not authorize holding a municipality liable for the constitutional torts of its employees. What has been said so far suggests that those dicta are based on a faulty analysis of the statute's language and an inaccurate view of the history of its passage. Further, this narrow construction of section 1983 lacks conceptual consistency, and is unfortunate as thwarting the policy behind the statute of providing a federal forum for victims of constitutional abuse by municipal corporations. Turning from the analysis of the scope of municipal liability for constitutional violations under section 1983, the balance of this comment will focus on whether a person deprived of constitutional rights by a municipal employee may assert a cause of action directly implied from the Constitution against the municipality-employer. The Supreme Court in Monell attempts to justify the exclusion of respondeat superior liability under section 1983 by reference to the statute's unique language and legislative history. Such considerations are not relevant to a cause of action which is derived not from the statute but is stated directly under the Constitution.

Monell provides an answer to only one of the two questions expressly left open in Mt. Healthy School District Board of Education v. Doyle. Mt. Healthy reserved not only the question whether school boards are persons for section 1983 purposes but also observed that the question whether a cause of action analogous to that implied in Bivens v. Six Unknown Named Federal Narcotics Agents should be implied "directly from the Fourteenth Amendment which would not be subject to the limitations contained in section 1983, is one which has never been decided by this court." The Court in Monell does decide that school boards, as well as municipalities, are persons for section 1983 purposes, but maintains that the governmental entity could not be held vicariously liable under section 1983. Monell does not address the question whether a Bivens action will lie against municipalities on a vicarious liability theory. The first obstacle to extending a cause of action by analogy to Bivens may be found in the reasoning of Bivens itself. The majority opinion in Bivens was careful to qualify its finding of a cause of action arising directly from the fourth amendment for violations of its provisions by federal agents by cautioning that direct causes of action arising under the Constitution ought not to be

111. 429 U.S. 274 (1977) (action alleging wrongful termination of employment of nontenured teacher for exercise of first amendment rights).
112. 429 U.S. at 279, cited in Monell, 436 U.S. at 663.
114. 429 U.S. at 278.
115. In overruling the Monroe nonperson doctrine, Monell undercuts the extension of that doctrine to school boards in lower federal court decisions. See note 42 supra.
lightly implied. The Court suggests that it might have been persuaded not to imply a cause of action in a case in which Congress had expressed a policy opposed to extending a damages remedy: "The present case involves no special factors counseling hesitation in the absence of affirmative action by Congress."116 This passage suggests that the Constitution does not compel the judicial implication of a remedy directly from the right embodied in the Constitution.117 The Court in Bivens suggests that the affirmative action by Congress that might pre-empt an implied damages remedy must be the provision of "another remedy, equally effective in the view of Congress."118 However, two circuit courts of appeal have been persuaded that the failure to offer an equally effective remedy against governmental employers for the constitutional torts of their employees—an omission by Congress rather than affirmative action—supports refusal to imply a cause of action against municipalities directly from the Constitution.119 Under the Monroe interpretation, Congress did not provide a civil remedy against municipalities for deprivations of constitutional rights and by its rejection of the Sherman amendment was understood to oppose extending such a remedy to injured parties. Nevertheless, most circuit courts of appeal have not taken the congressional failure to provide a remedy against municipalities as precluding the direct implication of a cause of action against municipalities under the Constitution.120 City of Kenosha v. Bruno helped

116. 403 U.S. at 396.
117. Molina v. Richardson, 578 F.2d 846 (9th Cir. 1978); Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977).
118. 403 U.S. at 397. See Judge Goldberg's brilliant dissent in Davis v. Passman, 571 F.2d 793, 809-12, 815 (5th Cir. 1978), rev'd, 47 U.S.L.W. 4643 (U.S. June 5, 1979) (No. 78-5072) (en banc majority declined to imply a cause of action against former United States Representative Passman for sex discrimination in the termination of his female administrative assistant). Judge Goldberg observes that Bivens only speaks of deferring to congressional action after deciding that some remedy is constitutionally required: "[T]he voice of Congress is relevant, if at all, only in guiding the court in its determination as to whether damages provide an appropriate remedy. There is no suggestion in Bivens that Congress can negate the existence of every remedy which might vindicate a constitutional right . . . ." 571 F.2d at 815 (emphasis in original). See also Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 HARV. L. REV. 1532, 1548 n.89 (1972).
119. Molina v. Richardson, 578 F.2d 846 (9th Cir. 1978); Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977). Molina and Kostka considered the question of whether courts should defer to congressional action not merely to assess the appropriateness of a damages remedy but to determine whether the constitutional right required an implied remedy.
120. Gordon v. City of Warren, 579 F.2d 386, 391 (6th Cir. 1978) (fourteenth amendment action seeking damages for the taking of private property for public use without compensation); Nix v. Sweeney, 573 F.2d 998, 1003 (8th Cir. 1978) (fourteenth amendment action alleging illegal search and seizure; jurisdiction founded on 28 U.S.C. § 1331); Pitrone v. Mercandante, 572 F.2d 98 (3d Cir. 1978), cert. denied, 99 S. Ct. 99 (1978) (fourteenth amendment; beating by police; jurisdiction found under § 1331); Lister v. Commissioners Court, 566 F.2d 490 (5th Cir. 1978) (class action challenging reapportionment remedied to permit proof of amount in controversy for § 1331 jurisdiction); Dellums v. Powell,
to encourage the recognition of a directly implied cause of action against municipalities for constitutional deprivations despite the reigning view

566 F.2d 216, 225 (D.C. Cir. 1977), cert. denied, 98 S. Ct. 3147 (1978) (arrested demonstrators alleged violation of first amendment rights; held, directly implied cause of action under § 1331 is not restricted by § 1983 municipal immunity); Gentile v. Wallen, 562 F.2d 193, 196-97 (2d Cir. 1977) (fourteenth amendment liberty interest violation alleged in school board's termination of teacher); Owen v. City of Independence, 560 F.2d 925, 933 (8th Cir. 1977), vacated and remanded for further consideration in light of Monell, 98 S. Ct. 3118, modified, 589 F.2d 335 (8th Cir. 1978) (fourteenth amendment liberty interest violation alleged in termination of police chief; jurisdiction for equitable relief including backpay found under § 1331); Buch v. Board of Educ., 555 F.2d 315 (2d Cir. 1977), cert. denied, 98 S. Ct. 3122 (1978) (fourteenth amendment due process held not violated in termination of former high school guidance counselor; decision on merits); Stapp v. Aveyelles Parish School Bd., 545 F.2d 527, 551 n.7 (5th Cir. 1977) (first and fourteenth amendment action arising out of termination of school principal, jurisdiction under § 1331); Skehan v. Board of Trustees, 538 F.2d 55 (3d Cir. 1976) (first and fourteenth amendment action for termination of college teacher remanded for determination on the first amendment claim, assuming jurisdiction under § 1331); Campbell v. Gadsden County Dist. School Bd., 554 F.2d 650 (5th Cir. 1976) (first amendment action brought for termination of building inspector; case remanded with leave to amend pleading to allege § 1331 jurisdiction); Amen v. City of Dearborn, 552 F.2d 554 (6th Cir. 1976) (action alleging violation of fourteenth amendment property rights in urban renewal project remanded for proof of amount in controversy for § 1331 jurisdiction); Reeves v. City of Jackson, 532 F.2d 491, 495 (5th Cir. 1976) (fourth, eighth, and fourteenth amendment action arising out of jailing of unconscious plaintiff for 22 hours without medical care states a claim for damages with jurisdiction founded on § 1331); Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975) (alleged violation of right to privacy, eighth amendment, and fourteenth amendment due process and equal protection rights arising out of unauthorized permanent sterilization of black girl; jurisdiction founded on § 1331); Reich v. City of Freeport, 527 F.2d 666, 669 (7th Cir. 1975) (first and fourteenth amendment action arising out of termination of police officer; jurisdiction founded on § 1331); Fitzgerald v. Porter Memorial Hosp., 525 F.2d 716, 718-19 n. 7 (7th Cir.), cert. denied, 425 U.S. 916 (1976) (alleged violation of right to marital privacy and fourteenth amendment liberty right in public hospital's policy against permitting fathers in the delivery room during birth; found jurisdiction under § 1331, but no violation of rights); Hostrop v. Board of Jr. College Dist., 523 F.2d 569, 577 (7th Cir. 1975), cert denied, 425 U.S. 963 (1976) (fourteenth amendment property rights allegedly violated in discharge of college president without a hearing in breach of extant employment contract states a cause of action under § 1331); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 903 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976) (jurisdiction for challenge of zoning plan found under § 1331); Hander v. San Jacinto Jr. College, 522 F.2d 204 (5th Cir. 1975) (alleged violation of first and fourteenth amendment rights in termination of teacher for noncompliance with grooming regulation; jurisdiction found under § 1331); Calvin v. Conlisk, 520 F.2d 1, 8 (7th Cir. 1975) (action seeking injunctive relief for failure to enforce constitutional standards for arrest and search in police conduct remanded for proof of amount in controversy for § 1331 jurisdiction); City of Highland Park v. Train, 519 F.2d 681, 696 (7th Cir. 1975) (alleged denial of equal protection in adoption of zoning ordinance permitting construction of shopping center; jurisdiction found under § 1331, but ordinance upheld on merits); Kelly v. West Baton Rouge Parish School Bd., 517 F.2d 194,
that municipalities were nonpersons for section 1983 purposes.\footnote{121} Monell replaces the nonperson doctrine with a rule denying respondeat superior liability under section 1983, and justifies that rule on a view of the congressional intent in using the word "cause" which parallels Monroe's construction of "person." Neither Monroe nor Monell gives an account of the legislative history of section 1983 that discloses affirmative action by Congress in providing another, equally effective remedy. Consequently, the cases which imply a cause of action against municipalities for deprivations of constitutional rights despite the nonperson doctrine may support by analogy the implication of a directly implied cause of action against municipalities for such violations on a theory of respondeat superior, despite Monell's dicta against respondeat superior under section 1983.

Several recent federal circuit court of appeal decisions have addressed the question whether a directly implied cause of action will lie against a municipality for deprivations of constitutional rights caused by its employees on a theory of respondeat superior. In McDonald v. State of Illinois,\footnote{122} the plaintiff had been tried and convicted of murder and spent 197 (5th Cir. 1975) (alleged racial discrimination in failure of school board to rehire nontenured black elementary school teachers in court-ordered desegregation; dicta that jurisdiction might be invoked under § 1331); Hanna v. Drobnick, 514 F.2d 393, 398 (6th Cir. 1975) (fourth amendment damages claim against city growing out of building inspection ordinance; held, complaint states a cause of action and jurisdiction would obtain under § 1331 but for failure to prove jurisdictional amount); Roane v. Callisburg Indep. School Dist., 511 F.2d 633, 635 (5th Cir. 1975) (fourteenth amendment violation alleged in termination of school superintendent without a hearing before the end of contract term of employment; jurisdiction found under § 1331); Cardinale v. Washington Tech. Inst., 500 F.2d 791, 796 n.5 (D.C. Cir. 1974) (fourteenth amendment property interest allegedly violated in termination of teacher with a hearing, jurisdiction found under § 1331); United Farmworkers v. City of Delray Beach, 493 F.2d 799, 802 (5th Cir. 1974) (fourteenth amendment equal protection allegedly violated in refusal to permit housing project to tie into city's water and sewer systems; jurisdiction founded on § 1331); Traylor v. City of Amarillo, 492 F.2d 1156, 1157 n.2 (5th Cir. 1974) (fourteenth amendment property interest allegedly violated in demolition of property under nuisance ordinance; dicta that § 1331 would support a claim against a city but ordinance upheld). District court cases are collected in Blum, From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts, 51 TEMPLE L.Q. 409, 417 n.31 (1978).

121. 412 U.S. 507 (1973), cited in, Gentile v. Wallen, 562 F.2d 193, 196 (2d Cir. 1977); Owen v. City of Independence, 560 F.2d 925, 931 (6th Cir. 1977), vacated and remanded on other grounds, 98 S. Ct. 3118, modified, 589 F.2d 335 (8th Cir. 1977); Stapp v. Avoyelles Parish School Bd., 545 F.2d 527, 531 (5th Cir. 1977); Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976); Amen v. City of Dearborn, 532 F.2d 554, 558 (6th Cir. 1976); Roane v. Callisburg Indep. School Dist., 511 F.2d 633, 635 (5th Cir. 1975); United Farmworkers v. City of Delray Beach, 493 F.2d 799, 801-02 (5th Cir. 1974).

122. 557 F.2d 596 (7th Cir.), cert. denied, 434 U.S. 966 (1977). Cf. Mahone v. Waddle, 564 F.2d 1018 (5d Cir. 1977), cert. denied, 98 S. Ct. 3122 (1978), which declined to decide the question of whether vicarious liability could be imposed in a directly implied cause of action against a municipality for a constitu-
over a year serving a 100-150 year sentence. He was released and ultimately pardoned "based on innocence" after another person confessed to the crime. The plaintiff brought an action for damages against the City of Chicago, Cook County, the Department of Corrections, several named police officers, sheriffs, police supervisors, and the Superintendent of the Department of Corrections for violations of his fourth, sixth, and fourteenth amendment rights. The Seventh Circuit recognized that a cause of action to redress constitutional violations may be implied against a governmental entity, citing Bivens, but refused to permit such an action against Cook County on a theory of respondeat superior. The court distinguished Hostrop v. Board of Junior College District in which it had held the Junior College Board liable in damages for discharge of its president without a fair hearing in breach of a valid employment contract. Hostrop differed, it was said, as involving a situation in which "[t]he governing board of the entity had itself taken the action which deprived the plaintiff of a property right, without due process." McDonald contains dicta that the rule in Hostrop might reasonably be extended to hold an entity liable for unconstitutional acts of "an inferior employee when his act was required by a policy adopted by the governing board." However, because McDonald's complaint did not allege that the defendants police officer's conduct was required by any policy of Cook County, the court would not imply a direct cause of action.

It is remarkable that McDonald adopts an even narrower test for finding that a governmental entity itself violates a plaintiff's constitutional

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[123. 557 F.2d at 599.
[124. The complaint included a count alleging that county police officers refused to permit McDonald's attorney to photograph him in custody shortly after his initial apprehension, when photographs would presumably have shown evidence of a beating and corroborated his account of events leading up to his being found unconscious near the scene of the murder. The court of appeals apparently found this allegation constituted a denial of sixth amendment right to counsel, and reversed the district court's dismissal of the action against the individual responsible and remanded for further proceedings against Officer Weil.
[125. 523 F.2d 569 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976).
[126. 557 F.2d at 604.

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rights in a directly implied cause of action than does Monell under section 1983. The McDonald test appears to narrow entity liability in two ways: it excludes from the class of entity-caused violations those acts of employees which are not pursuant to official policy, even though the acts may be part of a customary pattern of constitutional deprivations; and it excludes from the class of entity-caused violations those acts of employees which are not required by official policy.\textsuperscript{128} Monell would permit section 1983 suits to

128. \textit{Id.} at 604: “[T]here is no allegation that any policy of Cook County . . . required Weil to refuse an opportunity to photograph plaintiff.” Similarly, the court of appeals in Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977), \textit{vacated and remanded on other grounds}, 98 S. Ct. 3118, \textit{modified}, 589 F.2d 335 (8th Cir. 1978) recognized a cause of action directly implied from the fourteenth amendment for depriving a former police chief of a liberty interest without due process by terminating him without a hearing under stigmatizing charges. However, the court expressly reserved the question whether an implied action should be entertained on a theory of vicarious liability, adopting for implied actions a limitation that parallels that adopted in Monell for § 1983 actions. The court implied that monetary liability would not be imposed on municipalities “absent proof that the city’s policy-making agencies or officials knowingly encouraged or tolerated such conduct. . . .” 560 F.2d at 933-34 n.9. The United States Supreme Court vacated and remanded the cause for reconsideration in the light of Monell. 98 S. Ct. 3118 (1978). The Eighth Circuit on remand modified its earlier opinion, holding that because the city was not absolutely immune from suit for constitutional violations, it was unnecessary to reach the question of a directly implied cause of action. However, the court went on to find that the city was immune on the ground that it had acted in good faith and without malice. Monell left open the possibility of a “qualified immunity” for municipalities under § 1983. The court of appeals opinion on remand in Owen asserts that there is such an immunity, and further sculpts the contours of the immunity after the model provided in Wood v. Strickland, 420 U.S. 308, 321-22 (1975). \textit{Wood} provides immunity for individual defendants upon a showing that both objective and subjective tests of good faith have been met. Owen applies this same dual test of liability to municipalities, as it found both that the City of Independence had no malice and that it did not know and could not reasonably have known, two months before the Supreme Court’s decisions in Board of Regents v. Roth, 408 U.S. 564 (1973) and Perry v. Sindermann, 408 U.S. 593 (1972), that firing Owen without a stigmatizing hearing constituted a violation of the plaintiff’s due process rights.

Neither Monell nor Owen pause to analyze whether the underlying rationale for extending such a “good faith” immunity to officials applies in the case of municipalities. \textit{Wood} found immunity because imposing liability on individual school board members would unfairly impose the burden of good faith mistakes on the decision-maker, would deter independent and uninhibited decision-making, and would deter capable candidates from seeking official positions. 420 U.S. at 319-22. Similar reasons are recited in Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). \textit{Accord}, Butz v. Economou, 98 S. Ct. 2894, 2911 (1978) (extending to federal agent defendants in directly implied actions a qualified immunity analogous to that available to state official defendants in § 1983 cases). These reasons for immunity have no application when it is the municipal entity itself from which an injured plaintiff seeks compensation: there is no specter of imposing financial burden directly on a decision-maker for honest mistakes. Consequently, no decision-maker will be deterred “from exercising his judgment independently, forcefully, and in a manner best serving the long-term public interest.” 420 U.S.
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proceed against entities on an allegation that the deprivation complained of "implements or executes" or is "visited pursuant to" official policy or when such "execution . . . inflicts" the injury. The class of acts done pursuant to a policy may be broader than the class of acts required by a policy, especially where the policy encourages but does not mandate unconstitutional conduct. Thus, McDonald appears to make the availability of directly implied actions against municipalities for deprivations of constitutional rights narrower than Monell does the remedy against municipalities under section 1983.

The Seventh Circuit in McDonald assumed that the test for implying a cause of action imposing vicarious liability on a municipality for a constitutional violation "would have to be" whether imposition of liability is "an appropriate and necessary prophylactic against constitutionally improper acts of its agents." Despite its observation that superior officers of a governmental entity would be provided an incentive to supervise employees to minimize constitutional violations by the threat against their budgets posed by a directly implied civil remedy, the court was not persuaded that the "drastic" extension of directly implied causes to include respondeat superior liability was needed.

Stephen Kostka was shot and killed by Westford, Massachusetts, police officer David Hogg in the course of an arrest. In Kostka v. Hogg, Kostka's estate sought damages for a violation of the victim's fourteenth amendment due process rights. The First Circuit noted that it had jurisdiction over Westford under 28 U.S.C. § 1331, but separated the jurisdictional question from the question of whether the complaint stated a cause

320. Similarly, there is no likelihood that persons will be deterred from seeking office by the prospect of "heavy burdens upon their private resources from monetary liability. . . ." 420 U.S. at 320. Both the Supreme Court's dicta in Monell that good faith immunity might apply to municipalities and the actual application of qualified immunity to the City of Independence in Owen are ill-considered. Where the defendant is the entity-employer, there is no need to reconcile a plaintiff's right to compensation with the policy of protecting decision-making officials as there is where the defendant is an individual official. It is speculative at best to suggest that a decision-maker would be intimidated by the specter of the imposition of liability on the entity by whom he is employed. The policy behind insulating decision-making officials from liability for constitutional torts does not justify vicariously imputing the qualified immunity of the employee to the municipal employer.

129. 436 U.S. at 690-91.
130. Id. at 694.
132. 557 F.2d at 605.
133. 560 F.2d 37 (1st Cir. 1977).
of action. It held that because Congress had affirmatively acted to fore-
close municipality liability, as elaborated in Monroe and subsequent deci-
sions, there was no federal common law cause of action. The court ignored
allegations that the town was directly responsible for the plaintiff's
shooting death in that it failed to adequately instruct, train, educate, and
control Officer Hogg. 135 "We focus on the precise remedy plaintiffs wish us
to create: one making a political subdivision vicariously liable in damages
for the constitutional wrongs of its employees." 136 Like McDonald, the
language in Kostka is more restrictive of directly implied causes of action
than is Monell's of section 1983 causes: "Were we faced with a case in
which the municipality had ordered the constitutional violation, the appli-
cation of the constitutional test would be different." 137 Kostka does not
elaborate on what might constitute an entity's "ordering" a constitutional
violation. If the reference is understood to describe a case in which a
superior officer ordered unconstitutional conduct, the imposition of
liability on the entity for the issuance of such an order would clearly be
grounded on a theory of respondeat superior. 138 Kostka expressly disclaims
deciding whether its reasoning concerning respondeat superior liability for
claims arising under constitutional guarantees other than fourteenth
amendment due process, or for claims seeking equitable relief instead of
damages, would be the same as that for direct actions against municipali-
ties for constitutional deprivations. 139

Although purporting to follow the Bivens dicta concerning affirmative
action by Congress, Kostka adopted only half of the rule: Bivens counseled
restraint in implying direct causes of action for constitutional violations
where the affirmative action of Congress was manifested in providing
another remedy, equally effective in the view of Congress. 140 There is no
suggestion that a judgment for damages against a salaried policeman
would be equally effective, either to compensate the victim or to deter
repeated violations, as would be a judgment for damages against the
department or city for which that policeman acted when committing the
constitutional violation.

This pair of court of appeals decisions addressing the thorny question
of whether vicarious liability may be imposed against municipalities
through a remedy directly implied from the Constitution 141 predated the

136. 560 F.2d at 44.
137. Id. at 45 (emphasis added).
138. See discussion of an analogous inconsistency in Monell in text accompa-
nying notes 77-79 supra.
139. 560 F.2d at 45. The court does not suggest what considerations would
make such situations distinguishable, and it appears that its expansive view of the
evil Congress feared in rejecting the Sherman amendment (as explained in
Monroe) does not support distinguishing these situations.
140. 403 U.S. at 597. See text accompanying notes 117-19 supra.
141. The First Street Court of Appeals recently considered the

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decision in *Monell*. One federal circuit court of appeals has confronted the question since *Monell* was decided. In *Molina v. Richardson*, the plaintiff, while driving his automobile in Los Angeles, was stopped by two policemen who had noticed that the rear license plate did not bear a current registration tab. He produced the registration tab and displayed his license on request, but refused to remove the driver license from his wallet and hand it over to the officers. The officers removed Molina from his car

whether to hold a municipality liable on a *respondeat superior* theory under a directly implied action for constitutional violations. In *Turpin v. Mallett*, 579 F.2d 152 (2d Cir.), cert. denied, 99 S. Ct. 586 (1978), a 15-year-old boy had in an earlier § 1983 action won a $3500 damage judgment against a police officer for using excessive force in apprehending him. The judgment was paid by the governmental entity’s insurance company, and the West Haven Board of Police Commissioners decided against disciplining the officer. Somewhat later *Turpin* was arrested by other policemen on charges that were subsequently dropped. Turpin brought an action for damages against the city on the theory that its refusal to discipline the officer involved in the first incident encouraged its officers in the belief that they could disregard *Turpin*’s constitutional rights with impunity, and had resulted in the false arrest.

The court of appeals ruled that the city could be held liable on a directly implied cause of action if it were found to have directly caused the deprivation of the plaintiff’s rights, and that the plaintiff’s complaint did not seek to impose liability against the city on merely *respondeat superior* grounds:

> [T]he actions and policy determinations of those in ‘high office’ may be treated as the conduct of the governmental entity. Accordingly, we hold that a damages action can be maintained against a municipality to redress injuries resulting from those actions that have been authorized, sanctioned, or ratified by municipal officials, or bodies functioning at a policy-making level. Under such circumstances, it is clear that the municipality, no less than the employee, has violated the constitution.

*Id.* at 164-65. The “authorized, sanctioned or ratified” test is repeated in the *Turpin* court’s summary of its holdings. This test clearly permits much broader liability against municipalities under directly implied causes of action than would the “required” test of *McDonald* or the “ordered by a superior” test suggested in *Kostka*. It would seem to be at least as broad as *Monell*’s “policy or custom” test for § 1983 liability. The court in *Turpin* argues that where a municipal employee’s unconstitutional action is authorized, sanctioned, or ratified at a policy-making level by the municipal employer, the employer is itself in violation of the Constitution and there are two wrongs to be remedied, but reasons that *respondeat superior* liability would create an “additional remedy . . . for a single constitutional infraction. It is not a case of redress for two distinct constitutional violations.” *Id.* at 166. The *Turpin* court’s method of counting constitutional violations is questionable. It is inaccurate to say that a situation in which the employee acts in the absence of unconstitutional policy involves one constitutional wrong, while a situation in which he acts to implement unconstitutional policy involves two such wrongs. On the contrary, the latter situation involves only one constitutional violation of which the law will recognize two causes, either of which may be subjected to liability. Cast in these terms, it appears circular to justify the refusal to impose *respondeat superior* liability by appeal to how many causal agents the law will recognize as responsible for the single constitutional deprivation.

142 578 F.2d 846 (9th Cir. 1978).
by force, took him to the police station and booked him for resisting arrest. The prosecutor refused to file charges. Molina recovered $65.75 compensatory damages from each officer in a section 1983 action, and appealed the dismissal of the city under both sections 1983 and a directly implied cause of action with jurisdiction founded on 28 U.S.C. § 1331. The dismissal of the section 1983 claim was affirmed on the authority of Monell’s dicta that respondeat superior liability may not be imposed on a municipality under section 1983. The court reasoned that Monell barred the section 1983 action against Los Angeles because “Molina did not argue before the district court that the allegedly illegal conduct of the officers ‘may fairly be said to represent [the city’s] official policy.’” Molina here subtly distorts Monell’s test for municipality liability under section 1983. Monell permits holding a municipality liable where its employee deprives plaintiff of constitutional rights pursuant to a policy or custom attributable to the entity because made by persons “whose edicts or acts may fairly be said to represent official policy...” That is, Monell did not limit the policymaking class to those immediately involved in the deprivation of plaintiff’s constitutional rights. If unconstitutional policy or custom is created by anyone who may fairly be said to represent official policy, and a governmental employee injures someone by implementing that policy, the entity is liable. Molina, in contrast, affirmed the dismissal of a section 1983 action against Los Angeles because the “conduct of the officers” immediately involved was not alleged to be fairly representative of official policy. The

143. Id. at 847.
144. Id. at 848 (emphasis in original). The court’s emphasis on the fact that the conduct complained of was illegal appears to resurrect a defense for municipalities that was rejected in Monroe for individually named defendants. In Monroe, the named police officers who had invaded and searched the Monroe home without a warrant, and arrested and detained Monroe without warrant or arraignment, had argued that they could not be held liable under § 1983 because their actions violated the Constitution and laws of Illinois, and hence could not be said to have been done “under color of” state law as required by the terms of § 1983. Monroe v. Pape, 365 U.S. 167, 169, 172 (1961). Monroe expressly adopted a broad interpretation of “under color of” state law to include abuses of power “made possible only because the wrongdoer is clothed with the authority of state law,” id. at 184, and held that “the fact that Illinois by its Constitution and laws outlaws unreasonable search and seizures is no barrier” to the liability under § 1983 of the individual defendants who had caused the deprivation of plaintiff’s federal constitutional rights. Id. at 183. The plaintiff in Monroe ultimately won a judgment for $13,000 against the individual officers. 221 F. Supp. 635 (N.D. Ill. 1963). Monell in no way narrowed Monroe’s construction of “under color of” state law. If it may be said in another case that a city such as Los Angeles has caused a deprivation of constitutional rights, Molina does not support a defense that the city cannot be held liable because the acts causing the injury were also-illegal. A municipal corporation can cause an injury, remediable even under the Supreme Court’s narrow construction of § 1983 “cause,” through acts which are in violation of its own state laws and municipal ordinances.
145. 436 U.S. at 694.
146. 578 F.2d at 848.
Conduct of those officers should be considered in conjunction with the conduct of other patrolmen in Los Angeles, and if the aggregate evidences customary disregard of constitutional rights in Los Angeles, liability should attach. While it was too late for the plaintiff in Molina to seek to prove customary disregard of constitutional rights at trial, since Monell was decided while Molina's appeal was pending, plaintiffs in subsequent incidents should not have that avenue foreclosed by a subtle misreading of Monell.

Molina points out that a finding of general federal question jurisdiction does not determine that a federal cause of action must also be recognized.\textsuperscript{147} The court finds persuasive the argument that Congress has precluded the implication of a Bivens action by supplying, in section 1983, the exclusive remedy for constitutional violations committed under color of state law. Nevertheless, the court declines to adopt that reason for rejecting Bivens liability against Los Angeles, because it perceives a narrower ground for upholding the dismissal of the city.

Molina discusses three grounds for refusing to directly imply a cause of action against the city for the imposition of respondeat superior liability: respect for the proper role of Congress, federalism, and the adequacy of the remedy in section 1983. Molina relies on Monell for the proposition that "Congress has deliberately chosen to exclude vicarious liability against municipalities from the scope of § 1983."\textsuperscript{148} The court finds "special factors counseling hesitation"\textsuperscript{149} in implying respondeat superior liability directly from the fourteenth amendment, especially since section 5 of the fourteenth amendment expressly gives Congress a role in enforcing the guarantees of that amendment, whereas the fourth amendment, on which the cause of action was founded in Bivens, does not similarly provide in express terms for legislative enforcement.\textsuperscript{150} Secondly, the court expresses the view that if the federal judiciary were to "produce its own solutions to every perceived need to protect individual rights against local government action," the effect would be to inhibit the states themselves from developing "creative, efficacious resolutions to such disputes."\textsuperscript{151} Finally, the court announces that it remains unpersuaded that the section 1983 remedy is inadequate because of jury sympathy with individual defendants perceived to have acted in good faith, or because respondeat superior liability would more effectively deter future violations, deriding those arguments as "speculative at best."\textsuperscript{152}

These factors counseling hesitation do not justify rejecting implied respondeat superior. As discussed above, the Supreme Court's own anal-

\textsuperscript{147} Id. at 849.

\textsuperscript{148} Id. at 851.

\textsuperscript{149} Id. (quoting Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388, 396-97 (1971)).

\textsuperscript{150} 578 F.2d at 851-52.

\textsuperscript{151} Id. at 852. See note 110 supra.

\textsuperscript{152} 578 F.2d at 853.
sis does not support the conclusion that it was the vicarious liability feature that led the House to reject the Sherman amendment, and even assuming that it was vicarious liability for riot damage that was rejected, respondeat superior is far narrower.\footnote{155}{Vicarious liability is not the feature of the Sherman amendment that the representatives singled out as objectionable. See text accompanying notes 98-101 supra.}

The creative resolution of disputes growing out of deprivations of constitutional rights cited in Molina is not an unqualifiedly desirable development. While indemnification of public employees for section 1983 damages judgments may assure that a plaintiff has access to the “deep pocket” of the governmental employer, far from increasing protection for individuals’ constitutional rights from deprivation by state action, it neutralizes any deterrent effect the section 1983 damages judgment against an individual defendant might have exercised on the individual constitutional tortfeasor. Access to a solvent defendant against whom to execute a judgment for constitutional tort damages remains less desirable than initial avoidance of constitutional violations. On the other hand, it is not clear how extending implied respondeat superior liability would in any way undermine the impetus to indemnify public employees for compensatory judgments growing from their constitutional torts.

Since the Civil Rights Attorney Fees Award Act of 1976\footnote{154}{42 U.S.C. § 1988 (Supp. 1978).} makes awards of attorney’s fees discretionary with the trial court, the access to the municipal “deep pocket” for compensatory damages is an incomplete solution even to the problem of compensating an injured plaintiff for the deprivation. This inadequacy is especially apparent where the damages are, as in Molina, small in comparison to the costs involved in winning the judgment.

One additional avenue left open in the wake of Monell for holding a municipality liable in federal courts on a theory of respondeat superior is through state tort claims against the municipality where not barred by local sovereign immunity,\footnote{155}{The recent Missouri statute limiting governmental tort liability is V.A.M.S. § 537.600 (Supp. 1979). The statute was passed in reaction to the Missouri Supreme Court’s prospective abrogation of sovereign immunity in Jones v. State Highway Comm’n, 557 S.W.2d 225 (Mo. En Banc 1977). See generally, Note, Torts—Abrogation of Sovereign Immunity—Scope of Retained Immunity, 43 MO. L. REV. 387 (1978).} provided a federal cause of action for a deprivation of plaintiff’s constitutional rights arises out of a core of operative fact common to the state claim.\footnote{156}{FED. R. CIV. P. 14. See UMW v. Gibbs, 383 U.S. 715, 725 (1966).} Pendent jurisdiction over such state claims was temporarily set back by the Supreme Court’s decision in Aldinger v. Howard.\footnote{157}{432 U.S. 182 (1977).} In Aldinger, the plaintiff was evaluated as an “excellent” employee of the defendant city, but was nevertheless allegedly

...
wrongfully discharged for living with her boyfriend. The Court affirmed the dismissal of both section 1983 and pendent state claims against the municipality, relying on those aspects of Monroe's legislative history which Monell has since declared to have been misinterpreted.\textsuperscript{158} In Aldinger, the Court made its holding very explicit and very narrow:

All that we hold is that where the asserted basis of federal jurisdiction over a municipal corporation is not diversity of citizenship, but is a claim of jurisdiction pendent to a suit brought against a municipal officer within § 1343, the refusal of Congress to authorize suits against municipal corporations under the cognate provisions of § 1983 is sufficient to defeat the asserted claim of pendent-party jurisdiction.\textsuperscript{159}

Insofar as Congress is no longer seen as refusing to authorize suits against municipal corporations, Monell may be taken as having removed the reason for a blanket rejection of pendent-party jurisdiction in suits against municipalities involving state causes of action. One commentator suggests that Monell might be read by lower federal courts to perpetuate a bar to pendent state claims against municipalities in either of two ways: courts may assume that Monell lifts the Aldinger bar to asserting pendent state claims against a municipality only to the extent that the municipality is alleged to be directly responsible for a constitutional violation; or, even where the plaintiff can comply with Monell's requirements by alleging direct municipal responsibility, courts may hold that a state claim against a municipality for vicarious constitutional violations does not derive from a nucleus of facts common to the section 1983 claim against the employer for directly causing the violation.\textsuperscript{160} The Monell dicta concerning vicarious

\textsuperscript{158} The dissenter in Molina apparently assumed Aldinger is still good law, that "pendent party jurisdiction is not available in a Section 1983 action to join a municipality on a state claim." 578 F.2d at 856 (Grant, J., dissenting). But Monell clearly undercuts the reason offered in Aldinger for the rule. Cf. Gagliardi v. Flint, 564 F.2d 112 (3d Cir. 1977), cert. denied, 98 S. Ct. 3122 (1978) (held no error for district court to decline to decide whether to imply a cause of action for holding the municipality vicariously liable but instead to hear the merits of the pendent state wrongful death claim for damages growing out of an incident in which a policeman allegedly failed to follow regulations on the use of weapons).

\textsuperscript{159} 427 U.S. at 17-18 n.12 (1976). Just as courts refused to expand into directly implied actions the municipality immunity which Monroe inferred from the legislative history of § 1983, Aldinger's rule on pendent party jurisdiction has been rejected in state claims brought pendent to directly implied actions. Pitrone v. Mercadante, 572 F.2d 98 (3d Cir. 1978), cert. denied, 99 S. Ct. 99 (1978) (reversing dismissal of claims pendent to direct fourteenth amendment action against township for alleged beating by police); Gagliardi v. Flint, 564 F.2d 112 (3d Cir. 1977), cert. denied, 98 S. Ct. 3122 (1978).

liability may provide as much support for the first approach described as Monroe's doctrine of municipal immunity supported Aldinger. However, the second approach mistakes the peripheral question of agency under state law for that of the factual nucleus surrounding the injury to plaintiff's rights common to both the state and federal claims.

In summary, Monell dramatically overrules Monroe's municipality immunity doctrine, which had shielded municipalities from liability under section 1983 for seventeen years. In correcting its earlier construction of the statute, however, the Supreme Court repeats the mistake of treating the rejection of the Sherman amendment by the House in passing section 1983 as relevant to the liability sought to be imposed by that statute, and fortifies its construction of section 1983 as excluding respondeat superior liability with an unprecedentedly narrow analysis of the meaning of the word "cause" as used in the statute. The rule against imposing liability on municipalities for the constitutional torts of their employees might be defended on the ground that such a rule provides some residual protection for the budgets of municipal corporations against burdensome damage judgments. If the Monell dicta against respondeat superior liability under section 1983 is taken to be covertly grounded on fears of vexatious suits and large damage judgments against municipalities, the rule is vulnerable to attack on several grounds: this rationale would not justify barring actions against municipalities for vicarious constitutional deprivations that seek equitable relief instead of damages (although the statute itself speaks equally of actions at law and suits at equity, and City of Kenosha v. Bruno explicitly rejected bifurcating the statute depending on the nature of the relief sought); protection of the resources of municipal corporations was not even mentioned by the Court in Monell as entering into its reasoning respecting the availability of respondeat superior liability under section 1983; and the Court should not have relied on such policy considerations, inasmuch as the Congress had already determined that the policy in favor of protecting municipal finances must give way to the policies in favor of compensating persons who have suffered a deprivation of constitutional rights and of deterring constitutional abuses by municipalities. In the absence of an effective remedy under section 1983, plaintiffs who rely on a respondeat superior theory to hold a municipal corporation liable for constitutional infringements will be likely to resort to a theory of recovery directly implied from the Constitution. Ample precedent exists for treating the direct action as independent of constraints on the scope of section 1983 that are peculiar to that statute, but courts seem to be reluctant to impose vicarious liability in directly implied actions. Holding the municipality vicariously liable in federal court through the assertion of pendent state claims may be an alternative approach open to the injured plaintiff, to the extent that state law permits holding the

municipal employer liable for its employees' torts, but the principles of Aldinger v. Howard may be found to foreclose that alternative. Monell is certain to have an impact on the entire field of constitutional litigation involving municipalities, but it will be perceived as a mixed blessing by those who seek redress for deprivations of constitutional rights by municipal employees.

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