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MUNICIPAL LIABILITY FOR POLICE MISCONDUCT: EXPERIENCES IN THE EIGHTH CIRCUIT

Surell Brady

I. INTRODUCTION

Thirty-five years ago, Felix Frankfurter warned that efforts to parse the legislative history of a particular civil rights law "started as an unexamined assumption on the basis of inapplicable citations and has the claim of a dogma solely through reiteration." Judicial interpretation of the civil rights statute has fared no better since then. Originally section 1 of the Ku Klux Klan Act of 1871, the statute today is codified as title 42, section 1983 of the...
United States Code. Section 1983 provides a civil remedy for violations of constitutional rights committed "under color of [law]."
The law is commonly invoked to redress constitutional violations that occur during police stops or arrests. However, 125 years after the law was enacted, the courts still struggle in applying it to municipalities.

This Article suggests that the Supreme Court’s treatment of section 1983 continues to resemble the reiteration of dogma and that the absence of careful analysis and a clear standard frustrates plaintiff and defendant alike in an area of significant public policy. The Article first reviews the legislative history pertaining to the enactment of section 1983. It then considers the impact of the seminal *Monroe* and *Monell* decisions by examining the Eighth Circuit’s experience with section 1983. The Article concludes by discussing several legal and practical concerns related to the way in which the courts treat municipal liability.

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II. CONGRESSIONAL INTENT TO PROVIDE A FEDERAL REMEDY FOR LOCAL GOVERNMENTS' FAILURE TO SAFEGUARD INDIVIDUAL CIVIL RIGHTS

The original legislation targeted individuals who used their official authority, as well as state and local governmental units that acted collectively, to deprive citizens of their civil rights. Both the 1871 statute and earlier post-Civil War legislation, which created criminal remedies for violations of civil rights committed "under color of law," were aimed at local government officials who were members of the Ku Klux Klan and vigilante groups. These individuals either refused to enforce laws for the benefit of the recently emancipated blacks or enacted laws designed to perpetuate the vestiges of slavery. On March 28, 1871, when the provision was introduced pursuant to the Fourteenth Amendment, Congress was aware of growing vigilante violence in the South and the failure of local and state governments to suppress it. Thus, the legislation was enacted to prevent local governments and individuals in local government positions, who operate under express or implied authority, from depriving citizens of their constitutional rights. Nevertheless, the Supreme Court did not recognize the liability of local governments for more than 100 years after the 1871 statute was enacted. Even today the Court refuses to hold municipalities directly liable for the actions of their officials and employees by insisting upon additional layers of proof.


8. The Fourteenth Amendment states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

9. See Colbert, supra note 7, at 513; Developments in the Law, supra note 7, at 1154; Gerhardt, supra note 6, at 539. In rejecting the Supreme Court's efforts to limit the direct liability of municipalities, Professor Gerhardt argues, "[I]t is beyond dispute that Congress intended section 1983 to deter and to punish state-]approved action that violates constitutional rights." Gerhardt, supra note 6, at 582.
A. Monroe v. Pape

Section 1 of the 1871 legislation was enacted with little debate and no question about the statute’s use of the term “person” to define who is subject to liability. In Monroe, however, the Supreme Court held that the term “person” did not include municipalities, even though by that time the term was commonly applied in a legal context to non-natural “persons.” The plaintiffs in Monroe sued the city of Chicago, as well as the individual police officers who had entered the plaintiffs’ home in the early morning, ransacked it, and detained Mr. Monroe for ten hours without charging him.

In deciding that the city of Chicago could not be held liable, the Court failed to analyze the term “person” or any other language in the statute to determine if the context illuminated its scope. Instead, the Court examined a separate provision, which was introduced at the same time as the 1871 precursor to section 1983, but which Congress ultimately rejected. This provision, known as the Sherman Amendment, would have made municipalities liable for the actions of any persons—not just municipal officers—who committed violence against residents of a municipality. The Monroe Court concluded that in rejecting the Sherman Amendment, Congress showed its intent not to hold municipalities liable at all.

10. See Monell, 436 U.S. at 665.
11. See Developments in the Law, supra note 7, at 1192.
13. Id. at 169.
14. See id.
15. Id. at 189.
16. The amendment would have required “the inhabitants of the county, city, or parish . . . to pay full compensation” to a person damaged by anyone “riotously and tumultuously assembled together . . . if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States.” Id. at 188 n.38 (quoting CONG. GLOBE, 42d Cong., at 663 (1871)).
17. See id. at 191-92. The Court failed to consider whether the statute’s language might allow for municipal liability and ducked the issue of whether extending the statute to municipalities was constitutional by characterizing the issue as a “policy consideration.” Id. Justice Frankfurter agreed with the majority’s holding on municipal liability. Id. at 224 (Frankfurter, J., dissenting). His dissent focused on whether the phrase “under color of law” intended to cover conduct that, al-
pality could not be held liable under the statute.

B. Monell v. Department of Social Services

In 1978, the Supreme Court set out to correct Monroe’s erroneous legislative analysis. Far from resolving the issue, however, Monell v. Department of Social Services\(^\text{18}\) compounded the earlier analytical errors. Consequently, almost as soon as Monell was announced, it became apparent that the decision would only confound the problem of police/citizen relations.\(^\text{19}\)

Monell overruled Monroe insofar as Monroe did not include municipalities within section 1983’s use of the term “person.” Monell rejected the Court’s earlier illogical reliance on the history of the Sherman Amendment and held that the concept of “dual sovereignty” does not mean that federal civil rights laws are unenforceable against municipalities.\(^\text{20}\) Of the original provision, the Court stated, “[A]bsent a clear statement in the legislative history supporting the conclusion that [section] 1 was not to apply to the official acts of a municipal corporation – which simply is not present – there is no justification for excluding municipalities from the ‘persons’ covered by § 1.”\(^\text{21}\)

Ironically, the Monell decision rested on the “well understood” proposition, going back even earlier than 1871, that “corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.”\(^\text{22}\) If the decision had ended on that note, almost twenty years of judicial con-


\(^{19}\) See generally Kramer & Sykes, supra note 6, at 250 (discussing the confusion Monell created in the area of municipal liability).

\(^{20}\) Monell, 436 U.S. at 680-81.

\(^{21}\) Id. at 701. Monell's extension of section 1983 to municipalities was consistent with earlier decisions. For example, in 1973, the Supreme Court held that a municipality could not be held liable under section 1983 for even declaratory or injunctive relief. See City of Kenosha v. Bruno, 412 U.S. 507, 513 (1973). However, by 1976, members of the Court recognized that prior section 1983 decisional law had allowed non-monetary relief against municipalities. See Rizzo v. Goode, 423 U.S. 362, 385 n.2 (1976) (Blackmun, J., dissenting).

\(^{22}\) Monell, 436 U.S. at 687.
fusion over municipal liability under section 1983 might have been avoided.\(^{23}\)

The issue before the Court in *Monell* was whether the city of New York could be held liable for damages under section 1983 for requiring female employees of the city's Department of Social Services to take maternity leave, typically after the seventh month of pregnancy. The Court's answer was "yes." However, the Court went on to hold:

> Our analysis of the legislative history [of section 1983] compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom [section] 1983 applies. Local governing bodies, therefore, can be sued directly under [section] 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional *implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.*\(^{24}\)

The Court went on to refine its holding on municipal liability: "[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 [section] 1983 on a *respondeat superior* theory."\(^{25}\)

The statute itself does not require a plaintiff to prove that a municipality has officially adopted and promulgated the offending action. By its own terms, section 1983 provides that a person can be held liable when acting under color of "any statute, ordinance, regulation, custom, or usage.\(^{26}\) The *Monell* Court never stated its basis for requiring official adoption of a "policy statement." It did, however, find the requisite policy statement in the

\(^{23}\) Even in *Monell*, however, the entire Court was not satisfied that the plain meaning of "person" extended to political bodies. In his dissent, Justice Rehnquist held out hope that, even though the Dictionary Act provided that "person" may include "bodies politic and corporate," the Act left open the possibility that specific legislation could restrict use of the term. *Id.* at 719 (Rehnquist, J., dissenting). The dissenting Justice did not point to any such limiting language in section 1983, but he urged that the possibility of such limitation meant that a limitation should be implied in the statute at bar. *Id.* at 719-22. In *City of Oklahoma City v. Tuttle*, Justice Rehnquist continued to express disenchantment with the numerous possibilities for finding a "policy" under *Monell*'s treatment of municipal liability. 471 U.S. 808, 810, 820-24 (1985).

\(^{24}\) *Monell*, 436 U.S. at 690 (emphases added; footnotes omitted).

\(^{25}\) *Id.* at 691.

Monell case itself: New York City admitted that it had a citywide policy requiring female employees to take maternity leave, usually after the seventh month of pregnancy.27

The decision recognized that municipalities are subject to suit. The Court held that "local governments, like every other [section] 1983 person, . . . may be sued for constitutional violations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels."28 This allowance, however, is at best superfluous. The common meaning of "custom" includes actions that are not officially adopted.29 The words "custom or usage" in the statute can be reasonably read as distinguishing between unofficial practice and those policies that are officially adopted through "statute, ordinance, [or] regulation." The Monell Court's interpretation of the statute was definitely more limiting than the statutory language itself. Thus, the Court's rewriting of section 1983 continued.

In 1985, the Court added the further enhancement that a section 1983 action against a municipality must include proof that the policy can be traced to a particular municipal policymaker.30 In 1986, the Court opined that the legislative history demonstrates that, while a municipality can be held liable for its own acts, section 1983 does not hold it responsible for the "conduct of others" (i.e., its own employees).31 By 1989, the Court limited section 1983 municipal liability even further by confining it to those situations involving "deliberate indifference to the rights of persons with whom the police come into contact."32

27. In his dissent, Justice Rehnquist deemed the majority's respondeat superior analysis to be only "advisory," presumably because the holding of municipal liability rested on the determination that the city itself, and not simply municipal employees, had adopted the unconstitutional policy. See Monell, 436 U.S. at 714 (Rehnquist, J., dissenting). If Justice Rehnquist's characterization of the holding is correct, case after case construing municipal liability since Monell has adopted dictum as a rule of law.
28. Id. at 690-91.
29. See, e.g., WEBSTER'S DICTIONARY 449 (2d ed. 1983) (defining "custom" in the legal context as "[a] usage [that] by long-established, uniform practice and common consent has taken on the force of law").
32. City of Canton v. Harris, 489 U.S. 378, 388 (1989). The context of the "deliberate indifference" standard in Canton was a perceived failure to train police officers. However, the standard has been used by the Eighth Circuit Court of Appeals in post-Canton section 1983 cases not involving adequacy of training. See, e.g.,
C. The Fallacy of Monroe and Monell's Reasoning

As Justice Frankfurter cautioned, the reiteration of the belief that municipal liability is somehow limited under section 1983 has created its own dogma. The case law simply does not illuminate the historical, legal, or practical justifications for the shield granted municipalities against section 1983 liability. This lack of illumination has moved one scholar to note that the official policy requirement that the Supreme Court grafted onto section 1983 “lacks the transparency, accessibility, and congruence with its underlying purposes that any legal standard ought to possess.” The Court has rejected its original determination that section 1983’s legislative history evinces an intention to exempt municipalities from the statute. The Court also has rejected the idea that Congress lacks the power to enforce civil rights laws against municipalities. Yet, application of section 1983 to municipalities has been limited, and the Court has not supplied a rationale for this narrow view.

Tilson v. Forrest City Police Dep't, 28 F.3d 802, 806-07 (8th Cir. 1994) (incarceration without probable cause); White v. Holmes, 21 F.3d 277, 280 (8th Cir. 1994) (injuries caused by prison librarian); Doe v. Special Sch. Dist., 901 F.2d 642, 645-46 (8th Cir. 1990) (sexual assault by school bus driver). The Eighth Circuit also used the standard in non-training cases before Canton. See, e.g., Patzner v. Burkett, 779 F.2d 1363, 1367 (8th Cir. 1985) (warrantless arrest); Herrara v. Valentine, 653 F.2d 1220, 1224 (8th Cir. 1981) (kicking of pregnant woman). For a discussion of how other courts have treated the “deliberate indifference” standard, see Gerhardt, supra note 6, at 600 n.248.

33. See supra note 1 and accompanying text. Even in Monell, the Court reminded itself that the generic word “person” in section 1983 should not be given a “bifurcated application” when a municipality is the defendant. 436 U.S. at 701 n.66 (citing City of Kenosha v. Bruno, 412 U.S. 507 (1973)). The reference was to the type of relief — i.e., injunctive versus monetary — but the warning should be heeded for all purposes under section 1983. Thus, a municipal defendant should not enjoy a level of immunity not granted other defendants and certainly not found in the statute itself. In Owen v. City of Independence, the Court formulated this construction of section 1983:

[The] language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the Act imposes liability upon “every person” who, under color of state law or custom, “subjects or causes to be subjected any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” And Monell held that these words were intended to encompass municipal corporations as well as natural “persons.”


Without an explicit justification from the Court, preferably based on the statute itself, lower courts presumably are at sea in determining municipal liability or in instructing juries as to what they must find to hold a city liable for its employees' actions. As judicial variations on the requisite level of negligence demonstrate, this cognitive gap "makes the case outcomes seem manipulable, unprincipled[,] and arbitrary." 36

In both *Monroe* and *Monell*, the Court continued to reject Justice Douglas' suggestion that Congress intended to limit the statute's application to municipalities so as to prevent the financial ruin of local governments. 37 Moreover, it is far from clear that the truncated standards used by courts since *Monell* protect municipal financial resources. 38 Even assuming that the Court saw fit to graft that purpose onto the language of section 1983, it would amount to "judicial law-making." 39

Another possible explanation for the Court's stubborn reluctance to impose municipal liability under section 1983 may be an unstated policy assumption about appropriate federal court oversight of local government activities. Yet another explanation may be an ill-defined legal concept that a municipality only acts as a collective body, and not through the actions of its agents. As with the financial liability theory, none of these explanations can be justified from reading the statute itself or from observing how municipalities actually function.

35. See Gerhardt, supra note 6, at 600-01.
36. Schuck, supra note 34, at 1755.
37. *Monell*, 436 U.S. at 644 n.9; *Monroe*, 365 U.S. at 190. Professor Gerhardt posits that by 1985, at least seven justices were concerned that *Monell* liability should be limited to prevent the financial ruin of municipalities. Gerhardt, supra note 6, at 567 (discussing *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 819-20 (1985)). Gerhardt presumably grounds this assertion on the fact that a plurality of four and an additional three concurring justices overturned the jury's verdict of $1,500,000 for the plaintiff. *Tuttle*, 471 U.S. at 819, 824. However, it is not otherwise clear that the justices in *Tuttle* intended to use economic theory to reformulate the application of section 1983.

In *Tuttle*, the Court held that a municipality could not be held liable on the basis of a single act of excessive force, unless the plaintiff proved the incident resulted from an unconstitutional policy. Id. at 819-20. Like its other section 1983 decisions, the Court did not elucidate the basis for its legal standard. See id. The decision does not make clear whether the policy requirement is actually based on a desire to limit financial exposure, or on the Court's belief that, as a matter of law, a municipality can be liable only for its "own" acts rather than those of its employees. See id. at 819-24.

38. See infra notes 104-13 and accompanying text.
In *Monell*, the Supreme Court rejected the theory that federal courts are constitutionally prevented from enforcing civil rights laws against municipalities. Absent that constitutional justification, some scholars posit that the Court’s continuing reluctance to hold municipalities liable under section 1983 reflects the Court’s lingering federalism concerns, despite *Monell*’s assertion to the contrary. In *Monell*, the Court distinguished between its holding and the line of cases that protected the states from affirmative duties imposed by the federal government. It concluded that a distinction exists between imposing an affirmative obligation and “merely imposing civil liability for damages on a municipality.” However, in *Monell* and its progeny the Court has balked at requiring a municipality to bear the brunt of the constitutional violations to which the municipality “subjects or causes to be subjected” those who come within its borders.

Thus, without articulating a legal basis for the limitation, the Court essentially undermines both the letter and spirit of section 1983. In so doing, it evokes Professor Schuck’s warning about “manipulable, unprincipled, and arbitrary” decisions. *Monell* paid lip service to the legislative history of the precursor statute, which evinced congressional intent to “give a broad remedy for violations of federally protected civil rights.” The Court has reiterated the need for liberal construction to accomplish the purposes of numerous civil rights laws. Nonetheless, it has recognized municipal liability under section 1983 only grudgingly.

This contradiction surely is not lost on plaintiffs or defendants, including individual officers whose conduct is at issue. For plaintiffs, it requires marshalling proof that may only be within a municipality’s possession — namely, to what extent the municipality had knowledge of constitutionally suspect practices. As case law demonstrates, it also essentially creates a “one-bite” rule for a certain class of constitutional violations. Thus, given *Monell*’s search for a “well-settled” policy, municipalities are not necessarily

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41. See, e.g., Gerhardt, *supra* note 6, at 541 n.10.
42. *Monell*, 436 U.S. at 677-83.
43. Id. at 679.
45. Schuck, *supra* note 34, at 1755.
47. See *infra* note 54.
held liable for the first, or even first few, constitutional violations their agents commit in direct contact with the public. For defendants, the message of section 1983 municipal liability is far from clear. This message is either that municipalities, unlike other defendants, may act with impunity in an area of otherwise well-settled constitutional law, or that municipalities are not responsible for the actions of the individuals whom they cloak with actual and implied authority. This latter situation puts the notion of deterrence in municipal section 1983 cases at great risk. As long as the burden remains on plaintiffs to show a link between a municipality and its actors, the municipality can maintain an illusion of distance from its own actors.

The "policy statement" and "promulgation" requirements imposed by Monell rest on the unfounded presumption that a municipal defendant can be said to "act" only when it makes formal rules or issues ordinances and regulations. This effectively immunizes municipalities from liability for most of their daily activities, particularly those involving police interaction with a city's residents. One commentator has pointed out that Monell's standards are especially problematic for law enforcement agencies, which perform their functions through direct interaction with the public, with broad autonomy and discretion, and under considerable physical and emotional stress. That kind of "street-level bureaucracy" consists largely of situation-specific, informal actions. Thus, the Supreme Court's insistence on proof of an official policy effectively forecloses section 1983 as a remedy for one of the common ways in which citizens address constitutional deprivations.

The Court's recognition that a "custom" might be a less formalized government action does little to relax Monell's strictures. Monell would require even these less formal actions to be "permanent and well-settled." Day-to-day, hour-to-hour police activities simply do not fit that mold. However, local law enforcement activities are among the very problems that section 1983 was en-

48. See infra notes 55-67 and accompanying text (discussing Eighth Circuit "pattern" cases).
49. See Monell, 436 U.S. at 694-95.
50. See Schuck, supra note 34, at 1778.
51. See id. For a more detailed discussion about the concept of "street-level bureaucracy," see generally M. Lipsky, STREET-LEVEL BUREAUCRACY: THE DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980).
52. Monell, 436 U.S. at 691.
acted to remedy\textsuperscript{53} and for which the Supreme Court has expended considerable resources of its own.

\section*{IV. LOWER COURTS' STRUGGLE TO FILL THE VOID OF A SECTION 1983 RATIONALE}

Courts often have no idea under what set of facts a municipality can be held liable under section 1983 for the actions of its police officers. This lack of direction not only creates muddled precedent, but it places municipalities in a perilous position. It gives municipalities and their police officers no guidance as to how to prevent constitutional violations. It also gives no guidance to citizens, who expect that section 1983 will be enforced in the same broad way as other civil rights statutes.\textsuperscript{54} The section 1983 cases arising out of the Eighth Circuit after the Monell-through-Canton line of cases reflect the lack of clarity handed down by the Supreme Court. The burden of proof in municipal section 1983 cases after Monroe has evolved from proof of an official policy, to proof that the policy received formal promulgation or sanction, to proof that the municipality was deliberately indifferent to the unconstitutional actions of its agents. As could probably be expected from so much hair-splitting, some lower courts have "merged" the various levels of proof to an articulation resembling, "If it happens often enough, it is policy (or is it custom?), and the failure of the municipality to act in the face of so much policy constitutes deliberate indifference."

\footnote{53. See Schuck, supra note 34, at 1753.}
\footnote{54. The Supreme Court itself recognized in Owen v. City of Independence the "breadth of construction" that section 1983 is to receive. 445 U.S. 622, 636 (1980). Representative Shellabarger, the author and manager of the bill in the House of Representatives, articulated the reach of the act when he introduced the bill to the House, stating:

I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

Id. (quoting CONG. GLOBE, 42d Cong., App. 68 (1871)).}
Eighth Circuit cases reflect this "frequency + inaction" standard. For example, in Herrara v. Valentine, the court of appeals concluded that the city acted with deliberate indifference because it did not respond to an investigative report about more than forty complaints of police sexual misconduct and excessive force toward American Indians.\(^{55}\) In Harris v. Pagedale, the court determined that the municipality had engaged in a "long-standing evasion" of complaints about a cited officer's sexual misconduct.\(^{57}\) The number of complaints in these cases convinced the court of appeals that Monell was satisfied: the city had notice of constitutional violations, yet took no action to prevent them.\(^{57}\) However, the proof of constitutional violations in Herrara and Harris consisted largely of complaints to the defendant city about its police force; in both cases the Eighth Circuit ducked the issue about the reliability of such evidence.\(^{58}\)

Section 1983 cases in the Eighth Circuit have continued to require proof of notice to the municipality for Monell liability to exist.\(^{59}\) However, in post-Herrara cases, the court of appeals has offered numerous definitions of what constitutes "notice" of constitutional violations. In at least one case, the Eighth Circuit required the plaintiff to show there were prior complaints against

\(^{55}\) 653 F.2d 1220, 1225 (8th Cir. 1981). The plaintiff alleged that a police officer kicked a pregnant woman in the stomach and then ignored her pleas for medical help, resulting in her demise and the death of her unborn child. Id. at 1222.

\(^{56}\) 821 F.2d 499, 508 (8th Cir. 1987).

\(^{57}\) See id. at 505-06; Herrara, 653 F.2d at 1224-25. "[A] municipality's continuing failure to remedy known unconstitutional conduct of its police officers is the type of informal policy or custom that is amenable to suit under section 1983." Herrara, 653 F.2d at 1224.

\(^{58}\) See Harris, 821 F.2d at 503; Herrara, 653 F.2d at 1225. One complainant did not report her complaint to any city official; however, the court notes that "the district court instructed the jury to consider evidence of unreported incidents of police misconduct only as evidence that such prior incidents had occurred and not as evidence that the city had notice of such prior misconduct." Harris, 821 F.2d at 503 n.6. In Herrara, the court of appeals also was satisfied that the jury's apparent confusion as to whether it had found violations of federal or state law did not make the verdict "inconsistent." 653 F.2d at 1226-27 n.5.

\(^{59}\) See, e.g., Parrish v. Luckie, 963 F.2d 201, 204 (8th Cir. 1992) (rape by police officer); Doe v. Special Sch. Dist., 901 F.2d 642, 646 (8th Cir. 1990) (physical and sexual abuse of handicapped student passengers by bus driver); Williams-El v. Johnson, 872 F.2d 224, 230 (8th Cir. 1989) (prison beating); Harris v. Pagedale, 821 F.2d 499, 506-08 (8th Cir. 1987) (assault by police officer); Patzner v. Burkett, 779 F.2d 1363, 1367 (8th Cir. 1985) (excessive force by police officer); Baker v. McCoy, 799 F.2d 381, 384-85 (8th Cir. 1984) (police beating).
the specific defendant officer, rather than just notice that other officers had acted similarly. In another case, the court seemed to require a particular number of complaints against an individual employee. In yet another case, the court seemed unsure whether a pattern of prior misconduct must be proven at all. These different, if not inconsistent, approaches demonstrate how unworkable the Monell standard still is.

Despite the court of appeals’ reliance on a notice concept, federal district court and state court decisions in the Eighth Circuit are retreating from the notion that a number of prior complaints equals proof, a fortiori, of a pattern or policy. For example, in Thelma D. v. Board of Education, the court held that the board’s failure to respond to six prior complaints of sexual abuse against the defendant teacher constituted mere negligence, not deliberate indifference. In Handle v. City of Little Rock, the court held that a large number of complaints of police misconduct does not in and of itself prove a city policy. Rather, the plaintiff must prove that the prior complaints have validity. Moreover, in Lynch v. City of Minneapolis, evidence of excessive force complaints filed by other citizens was deemed insufficient to establish municipal liability.

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60. See, e.g., Patzner, 779 F.2d at 1367 (relying on fact that no similar complaints had been made against defendant officers).
61. See Doe, 901 F.2d at 646 (holding that the defendant municipality was not liable under section 1983 even though the plaintiff presented evidence showing that several complaints of similar sexual misconduct had been made to numerous district officials).
62. In Baker, the court affirmed the directed verdict granted the municipality and set out a specific standard of proof of similar conduct sufficient to meet the Herrara standard: “a pattern of similar incidents in which suspects in police homicides were physically beaten by police officers while in custody at a police station.” Baker, 739 F.2d at 385. However, the court recognized that other circuits did not require proof of a pattern and declared that was “the better position.” Id. at 385 n.8.
63. See infra notes 64-67 and accompanying text. According to Professor Gerhardt, numerous lower courts interpreted the official policy standard differently between 1978 and 1985, because Monell had not defined it and since there was no such requirement in section 1983 itself. Gerhardt, supra note 6, at 564. Herrara v. Valentine is one of the cases Gerhardt cites. See id. Cases since Gerhardt’s article demonstrate that the lack of a consistent and workable definition persists. See supra note 59-62 and accompanying text; infra notes 64-67 and accompanying text.
64. 669 E Supp. 947, 949 (E.D. Mo. 1987).
66. Id.
If the lower federal and state court decisions give municipalities a glimmer of hope from *Monell* liability, the plaintiffs surely must react with befuddlement. What constitutes an official policy is unclear, as is whether that policy can be proven by a certain number of complaints without official action, or whether the plaintiff must marshal proof of actual prior misconduct. The practical and procedural problems associated with this lack of clarity were voiced almost as soon as *Monell* was decided. At least one commentator anticipated as early as 1979 that it would be unfair and impractical to require plaintiffs in section 1983 cases to show a causal link between the actions of an individual officer and a municipal policy or custom.\(^6^8\)

Case law since then has proven how insurmountable that burden of proof can be. For example, *Herrara v. Valentine* relied on evidence that prior complaints were reported to the municipality;\(^6^9\) presumably it would have been impracticable, if not impossible, for the plaintiff to prove each of the prior complaints. In *Patzner v. Burkett*, however, the court required the plaintiff to produce proof of the defendant officers' prior misconduct.\(^7^0\) This left open the question whether prior excessive force or mere complaints of misconduct by any other members of the force would have been probative.\(^7^1\) As discussed earlier, to find a pattern of excessive force the *Baker* court apparently would have required proof that the defendant used excessive force against a detainee charged with exactly the same crime.\(^7^2\)

Numerous Eighth Circuit cases demonstrate that proof of a pattern of conduct does not necessarily figure in incidents in which section 1983 liability is asserted. These cases have often presented claims that a single act by a police officer resulted in a constitutional violation.\(^7^3\) For example, in *Fleming v. Greater St.

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68. See Project, *Suing the Police In Federal Court*, 88 YALE L.J. 781, 816-17 (1979). The writers compare a police misconduct suit under section 1983 to a product liability action, where plaintiffs are not required to prove the existence of a warranty before the manufacturer is held liable. Id. at 816 n.195.

69. See *Herrara*, 653 F.2d at 1225.

70. 779 F.2d 1363, 1367 (8th Cir. 1985).

71. See id.

72. See *Baker*, 739 F.2d at 384-85.

73. In *Pembaur v. City of Cincinnati*, the Court held that a single instance of unconstitutional conduct may be sufficient for *Monell* liability, as long as the action is "properly made by [the local] government's authorized decision makers." 475 U.S. 469, 480-81 (1986). However, as discussed supra and as demonstrated by the Eighth Circuit cases cited herein, police activity rarely fits that mold.
Louis Area Major Case Squad, the plaintiff alleged that his arrest and detention for murder constituted racial discrimination. Attempting to satisfy the Monell standard, he claimed that his treatment was part of a pattern of discrimination against blacks. The Eighth Circuit, however, found his allegations vague and conclusory. The court reasoned that the Monell standard prevents an individual plaintiff from receiving relief from an unconstitutional act unless he is part of a class similarly harmed.

In Munz v. Parr, the court dismissed an arrestee’s section 1983 action against the city and county because his allegation involved only a single set of circumstances. In Wilson v. City of North Little Rock, the owner of a roller rink alleged that a roadblock set up by police one evening near his business establishment violated section 1983 and his contractual rights. Testimony established that local police wanted to discourage black patronage at the rink, that the commanding officer knew that “some action was going to be taken” toward the roller rink on the nights of large black attendance, and that only black motorists were stopped at the roadblock. Nevertheless, the court of appeals affirmed the directed verdict in favor of the city, because it was not satisfied that the case amounted to “an instance of unconstitutional city policy.”

Wilson may be one of the Eighth Circuit’s “best” bad examples of the Monell legacy. The decision does not make clear exactly what standard the court wanted to impose. First, the court held that the plaintiff did not prove the existence of an unconstitutional city policy that caused the roadblock. If that really is the message of the case, it revisits the issue that the congressional debates on the original “under color of law” civil statute presumably resolved. The issue is whether the statute applies only to in-

75. Id. at *5.
76. Id. at *4.
77. 758 F.2d 1254, 1259 (8th Cir. 1985).
78. 801 F.2d 316, 318 (8th Cir. 1986).
79. Id.
80. Id. at 319.
81. Id.
82. Id. at 324.
83. Id.
84. See Monell, 436 U.S. at 669-83 (discussing congressional debate over the meaning of the phrase, “under color of law”).
stances of unconstitutional laws or policies or to any official act that works a constitutional deprivation. Yet, in the same discussion, the court searched for evidence of unconstitutional "behavior" or "illegal conduct."

Second, despite testimony that all levels of the police department shared the same racial animus toward the rink's black patrons, the court confined the liability exposure to lower level patrol officers, thereby sheltering the police supervisory personnel and the city itself. The Eighth Circuit concluded that the district court had erroneously used a procedural due process standard on the plaintiff's claim of racial animus. The court therefore remanded the case for determination of the individual police officers' liability. The court stated that "[w]hile the evidence corroborates common knowledge that every police officer has discretion to act in accord with the given circumstances, it is insufficient to establish a municipal policy of illegal conduct amounting to an abuse of power." This means that virtually no actions by individual police officers can be attributed to the city that employs them. The court recognized the practical circumstance of "street-level bureaucracies" that give almost unfettered discretion to municipal employees, but refused to hold the municipality liable for the manner in which that discretion is exercised.

Yet another case, Edwards v. Baer, seems like a straightforward application of Monell's official policy requirement, but it is hard to square with the Supreme Court's decision in City of Canton v. Harris. In Edwards, the plaintiff alleged an invalid arrest and

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85. See Monroe, 365 U.S. at 173 (explaining that the original statute was not merely intended to "override" unconstitutional laws, but also to provide a remedy where state law does not protect, or is not being used to protect, constitutional guarantees). If the Wilson court really intended to require the plaintiff to prove that an unconstitutional policy existed, the effect would be an even more limited application of section 1983 than the Supreme Court has required.

86. Wilson, 801 F.2d at 324.
87. Id. at 323.
88. Id. at 321-22.
89. Id. at 324.
90. Id.
91. 863 F.2d 606 (8th Cir. 1988). In Edwards, the court ruled that the defendant municipal body, the St. Louis Board of Police Commissioners, was not a suable entity and therefore did not address Monell liability of the municipality. Id. at 609. However, it examined the board's policies to determine whether the individual members of the board were liable. Id. at 609.
false imprisonment. The court held individual members of the police board were not liable because the board had a policy regarding running checks of outstanding warrants that, had it been followed, probably would have prevented the arrest. In contrast, in City of Canton, the Supreme Court held that although the municipality had an explicit written policy that would have required the police to seek medical treatment for the plaintiff, the city was nonetheless liable because its officers were not trained in how to apply the seemingly non-discretionary policy. Between City of Canton and the Eighth Circuit's Edwards, it is not clear whether even written policies can insulate a municipality from Monell liability.

V. PRACTICAL CONSEQUENCES

Even apart from the issues concerning statutory interpretation, the courts' treatment of municipal liability under section 1983 raises serious questions about whether Congress' intent can ever be satisfied in this area. At the time the original "under color" of law civil remedy was enacted, citizens were looking to the federal government to restore and preserve rights that the states or their political subdivisions had either denied or were ambivalent about granting. Still, the continued reluctance of courts to use the remedy liberally has resulted in major practical roadblocks for plaintiffs trying to apply the statute against munici
cipalities.

Under current section 1983 law, there is no "burden-shifting" - i.e., a municipality need not react to evidence put forth by a plaintiff. Case law in other civil rights contexts has recognized

93. Edwards, 863 F.2d at 607.
94. Id. at 608.
95. City of Canton, 489 U.S. at 381. The city regulation provided that a jailer at the city police station

shall, when a prisoner is found to be unconscious or semi-conscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to City Jail. Id. at n.2. After slumping to the floor, the plaintiff could not respond coherently when asked by police whether she needed medical care; despite the policy, no such care was sought. Id. at 381.
96. See Developments in the Law, supra note 7, at 1142.
97. See, e.g., City of Los Angeles v. Heller, 475 U.S. 796, 799-800 (1986) (per curiam) (holding that section 1983 requires the plaintiff to prove a constitutional

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the fairness of shifting the burden to the defendant at the point at which evidence uniquely available to the defendant could rebut the plaintiff's case. 98 That evidentiary device could save both parties some "fishing expedition" expenses in section 1983 cases, while putting plaintiffs on a more equal footing in cases that justify presenting evidence to the fact-finder. In many cases, evidence of prior misconduct can be gathered only through such means as an active community "ombudsman" who compiles evidence of police misconduct or a civilian complaint body that has the investigative resources and authority to establish independently the validity of citizen complaints against the police.

The civil discovery process does not solve these difficulties. Section 1983 plaintiffs presumably may seek access in discovery to internal disciplinary or complaint files on individual officers.100

99. See, e.g., Herrera, 653 F.2d at 1225.
100. A plaintiff's ability to delve into a defendant officer's personnel file is dependent upon the forum state's data privacy laws. A survey of the states that comprise the Eighth Circuit illustrates the diversity in data privacy law found throughout the country. For example, North Dakota is the only state in the Eighth Circuit to allow a plaintiff unlimited access to a defendant officer's personnel file. See N.D. CENT. CODE § 44-04-18 (1994) (granting public access to all records of public or governmental bodies). Other states authorize state agencies to determine what information will be released to the public. See, e.g., MO. ANN. STAT. § 610.021 subd. 3 (West Supp. 1996) (giving public governmental bodies the authorization to close records otherwise available to the public when they relate to the "[h]iring, firing, disciplining or promoting of particular employees by a public governmental body when personal information about the employee is discussed or recorded."); A majority of states, however, allow plaintiffs only limited access to law enforcement personnel files. See, e.g., ARK. CODE ANN. § 25-19-105, subd. (b) (10) (Michie 1996) (providing that certain records will not be available to the public, including "[p]ersonnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy"); MINN. STAT. § 13.43, subd. 2 (1994) (authorizing public disclosure of personnel data on current and former state employees, including, but not limited to, salary, pension, fringe benefits, job title, job description, education and training background, previous work experience, existence and status of any complaints or charges against the employee (regardless of whether the complaint or charge resulted in disciplinary action), the final disposition of any disciplinary action, the terms of any agreement settling any dispute arising out of an employment relationship, and honors and awards received); NEB. REV. STAT. ANN. § 84-712.05(7) (Michie 1995) (providing that "[p]ersonal information in records regarding personnel of public bodies other than salaries and routine directory information" may be withheld from the public); S.D. CODIFIED LAWS § 1-27-1 (Michie Supp. 1996) (providing for the public inspection of state records, but specifically excepting "[a]ny employment examination or performance appraisal record maintained by the bureau of personnel"); allowing access to salary
For the plaintiff, access alone probably is not adequate; as demonstrated earlier, courts are requiring each plaintiff to prove not just that a city received a number of misconduct complaints, but that these complaints had merit. Unless a "smoking gun" sits in an officer's internal file, most plaintiffs are unlikely to be able to investigate the complaints sufficiently to prove prior misconduct occurred.

Wholesale access by plaintiffs to individual police personnel records poses significant problems of fairness for the police officers and other municipal employees. On the one hand, if the court accepts the Herrara approach of the Eighth Circuit, plaintiffs will argue that the mere existence of complaints shows a propensity for constitutional mischief by the officer, and therefore establishes the city's Monell liability. If an internal investigation is unable to resolve the citizen v. officer complaint when it is made, the officer will almost certainly be unable to defend his earlier acts – often years later – in a section 1983 suit.

This rudderless endeavor costs plaintiffs and defendants alike. With no guidance as to the probative value of prior complaints, section 1983 plaintiffs need to expend litigation resources to learn if prior complaints exist and then to ascertain if any such complaints have merit. Thus, before they even determine whether a confrontation constitutes a constitutional violation that would trigger section 1983 liability, plaintiffs face considerable costs.

The municipality-employee dichotomy that Monell created also has expensive procedural consequences for defendants. Although it is not clear whether the Supreme Court considers financial liability of municipalities to be a reason for limiting sec-

schedules, staff schedules, and job descriptions of personnel). Iowa is the only state in the Eighth Circuit that completely forecloses a plaintiff from reviewing a defendant officer's personnel file. See IOWA CODE ANN. § 22.7, subd. 11 (1995) (stating that "[p]ersonal information in confidential personnel records of public bodies" is not available to the public).

101. See, e.g., Handle, 772 F. Supp. at 434; Thelma D., 669 F. Supp at 947.

102. The Supreme Court has justified its Monell restrictions at least in part out of its concern that not every police/citizen altercation justifies Fourth Amendment scrutiny. See Pembaur, 475 U.S. at 484. However, the lack of guidance on what constitutes municipal liability invites plaintiffs either to assume, absent contrary evidence, that most encounters are constitutionally suspect or to expend party and court resources simply to determine, rarely to plaintiffs' satisfaction, that the Court's hypothesis is valid.
tion 1983’s application, it would make sense to avoid procedural skirmishes that increase the cost of litigation. The current state of the law, however, clearly contradicts common sense. Instead, the law serves only to prolong what already are expensive suits. Litigation expenses can spiral out of control because the possibility of Monell liability could cause defendants to want to separate the individual liability phase of the trial from the municipal liability phase. The result could be a protracted two-phase trial.

If a police department’s “dirty laundry” is aired at the trial to prove numerous instances of prior misconduct for Monell purposes, both municipal and individual defendants could be unfairly prejudiced. If, for example, the allegations against the defendant officer are particularly egregious, a municipal defendant’s defense of its response to misconduct could be prejudiced. Nevertheless, by either straight tort theory or a balancing of prejudice, the municipality probably should bear the burden of guilt by association with its own employees. By the same token, an individual defendant may be prejudiced if the jury hears the earlier allegations against the department at the same time as it is deciding whether the particular officer acted improperly. To prevent this circumstance and protect an officer from evidence of misconduct by other officers, the trial court should take some preventive steps.

The primary preventive action available to the courts – bifurcation – comes with its own additional costs and time concerns. Bifurcation permits an individual officer’s liability to be tried before a municipality’s liability. Thus, if the jury determines that no constitutional violation occurred, no Monell phase is neces-

103. See supra note 37 and accompanying text (discussing the Supreme Court's consideration of financial exposure of municipalities).

104. Bifurcation is not a certainty in every Monell liability case. The trial judge retains wide discretion on whether to permit bifurcation or not. The Federal Rules of Civil Procedure provide:

FED. R. CIV. P. 42(b).

105. See Colbert, supra note 7, at 536 (explaining how bifurcation becomes a barrier to plaintiffs in section 1983 cases because of the lack of "resources and fortitude" to proceed through a second trial).
sary. However, since individual defendants may require separate counsel, they will still presumably incur additional litigation costs when *Monell* liability must be litigated.

Another litigation cost caused by the identity split between a municipality and its employees under *Monell* arises from the potential conflict of interest between the parties. Section 1983 claims against municipal employees subject them to liability in their personal and individual capacities. Thus, the employees are entitled to counsel in their individual capacities and, where conflicts arise, counsel separate from that of the municipality that employs them. Most section 1983 cases should not require divergent defenses. *Monell*, however, could create such a divergence. Apart from the issue of defense and indemnification, a municipality could conceivably assert that *Monell* liability is inappropriate in a given case, but that the individual officer or employee did commit a constitutional violation. Accordingly, the city's attorneys would be ethically bound to cease representing the individual officer and a second defendant's counsel would be necessary.

A particular feature of public law, defense and indemnification, also adds to the cost of litigation in such cases. Under Minnesota statute, for example, a municipality is required to defend and indemnify its officers and employees. Commentators have noted that such provisions are common for public employees.

106. Professor Colbert contends that courts that do not allow a *Monell* issue to reach the jury after finding a defendant officer did not commit a constitutional violation are misapplying *City of Los Angeles v. Heller*, 475 U.S. 796, 820 (1986). See Colbert, *supra* note 7, at 538-45.


108. For example, the Minnesota Court of Appeals found no conflict in a city's representation of a police officer in a section 1983 action, because the city conceded that the officer was acting within the scope of his employment. Minneapolis Police Officers Fed'n v. City of Minneapolis, 488 N.W.2d 817, 820 (Minn. Ct. App. 1992). Presumably, the court construed the city's within-scope determination to be coterminous with defending the officer's conduct. See *id.* at 820-21.

109. *Minn. Stat.* § 466.07 (1996). The state law provides, in pertinent part, that a municipality ... shall defend and indemnify any of its officers and employees ... for damages, including punitive damages, claimed or levied against the officer or employee, provided that the officer or employee:

1. was acting in the performance of duties of the position; and
2. was not guilty of malfeasance in office, willful neglect of duty, or bad faith.

*Id.*

110. See, e.g., Colbert, *supra* note 7, at 547 n.258; Project, *supra* note 68, at 811.
Thus, if a city decides not to defend an officer's conduct in a section 1983 action, or in any other case presenting conflicting defenses, the city nonetheless must provide the employee with counsel. In such a case, even a municipality that condemns an officer's conduct is obliged to pay the freight. The municipality would pay for that defense as well as its own defense of the Monell claim. This is a common outcome in cases of respondeat superior liability but an inapposite result in post-Monell section 1983 cases that have declined to follow respondeat superior principles.

VI. CONCLUSION

Establishing municipal liability under section 1983 has become more elusive than the statute itself or its underlying purpose requires. Indeed, there is ample evidence that this circumlocution of municipal liability is made of whole cloth. While simply repeating that section 1983 does not make municipalities vicariously liable, the courts have conjured up theories that might prove that municipalities themselves have violated policies such as the written policy in Monell. Decisional law demonstrates that cases meeting the Monell standard are few and far between. Consequently, courts have chosen not to hold municipalities responsible for the conduct of their employees and officers—people who have been put in positions where they can commit constitutional violations.

Inconsistent court decisions and years of judicial and scholarly debate dramatize the need for realigning judicial treatment of section 1983. That reconfiguration need not be drastic. Courts, plaintiffs, and defendants have coped responsibly with more direct municipal liability and its costs in other civil rights contexts. It can only be assumed that a stricter application of

& n. 163.
111. See Colbert, supra note 7, at 547 n.258.
112. See Monell, 436 U.S. at 691.
114. For example, municipalities have been directly liable for employment discrimination since 1964, even when their employees made the hiring, promotion, or other adverse personnel decisions that resulted in the claims of discrimination. See 42 U.S.C. § 2000(e)-(5) (1994). Back-pay awards, particularly in class action

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section 1983 to municipalities could result in legislative action to cap or otherwise limit each municipality’s financial exposure.

As long as the statute is not applied directly to municipalities, it is unclear whether a greater deterrent effect could be achieved with broader use. Under the current law, municipalities may have less incentive to prevent unconstitutional actions by their employees because most damages awards are made against a few recalcitrant officers, rather than against the cities themselves.115

Finally, if municipal defendants are treated like other “persons” subject to liability under the law, the courts could fashion a spectrum of liability that could distinguish between cases that reflect the bad faith of an employee and those that involve a municipality’s conscious decision as a collective decision-making body to violate the law. Instead, the current practice of sidestepping a municipality’s responsibility violates both section 1983 and public policy.

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115. Professor Colbert suggests that the fee-splitting occasioned by Monell can actually make jury awards palatable, since the municipality itself does not appear to be squandering the taxpayers’ money. Colbert, supra note 7, at 502. It is as likely that the jury awards against officers do not reflect jurors’ sense of the real value of the constitutional violation, because jurors presumably are unaware that the employer (the city) is paying the awards in most cases. The actual verdicts may reflect what is considered likely to deter an individual officer financially, rather than a sense of public outrage that a government agency has created a set of circumstances that violated a citizen’s rights. See, e.g., Larez v. Holcomb, 16 F.3d 1513, 1519-20 (9th Cir. 1994) (approving Eighth Circuit rule whereby juries are not informed of indemnification and insurance coverage).