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Introduction: The Emperor's New Clothes: Section 1983 Municipal Liability in Civil Rights Litigation - Eighth Annual DePaul Law Review Symposium

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INTRODUCTION: THE EMPEROR'S NEW CLOTHES

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Section 1983[1] jurisprudence is, both methodologically and substantively, a highly peculiar body of law. The methodology proceeds on two tracks—the claimed and the actual. The claimed methodology for construing the reach of § 1983 is to determine what the 1871 enacting Congress must have intended when it passed the sparsely worded statute. Discussions of legislative intent rely on the legislative debates and on the law at the time of passage. These sources have proved predictably unsatisfying. The debates are notoriously indeterminate on many of the crucial issues—either because of affirmatively contradictory testimony or because they were simply not addressed. Moreover, rather astonishingly, by far the most influential bit of legislative history is the fact that a particular amendment to the statute—the Sherman Amendment—failed to pass. Many of the most important decisions about the reach of the statute are based on inferences (some later revised) from the amendment's failure. The law at the time of passage has also proved an unreliable guidepost. There have been questions about *which* law ought to govern (for example the failure of the Sherman Amendment or the Dictionary Act) and garden variety disputes about which law prevailed at the time in particular substantive areas. There have been objections to using the state of 1871 tort law to determine legislative intent about 1871 civil rights law, as well as methodological disputes about what inference ought to be drawn from the failure of the statute to specify a deviation from contemporaneous law, not to mention the more basic question of how much sway the intent of the 1871 Congress ought to have over current construction of the statute.

The actual methodology employed in § 1983 cases is even harder to pin down. In the municipal liability cases that are the focus of this Symposium, the Court insisted, both in *Monroe v. Pape*,[2] which declined to permit suits against governmental entities, and in *Monell v.*

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1. 42 U.S.C. § 1983 (1994).

2. 365 U.S. 167 (1961).

Department of Social Services,[3] which directly overruled this portion of *Monroe* seventeen years later, that it was relying solely upon the text and legislative history of the statute. Since the *Monell* decision, the courts have struggled to determine the contours of the suit against the entity. They still claim that they are doing so with reference to text and legislative history, but the claim is becoming ever more difficult to countenance.

The substantive peculiarity of the statute's development is closely tied to the methodological problems I have just mentioned. The law of municipal liability has been growing increasingly complicated as the Supreme Court has become more and more active in trying to elucidate it. The substantive peculiarity is the function of several factors: the difficulties inherent in the claimed methodology—given the indeterminacy of the statute and history; the disjunction between the claimed and actual methodologies and the courts' failure to acknowledge it; the tremendous elasticity of the policy analysis in which the courts so often engage; and the inadequate articulation of those policies which flows from the courts' pretense that they are not actually talking about policy—only about what the 1871 Congress would have wanted.

As in the folktale of *The Emperor's New Clothes*, the participants in this Symposium attempt to expose to the light of day the Court's claims that its analysis is properly clothed in text and history. They do so in three important ways. First, they describe and evaluate the actual methodology the Supreme Court employs in municipal liability cases, which is often frankly policy-oriented and strikingly uninterested in the legislative history or even the text of the statute. Second, they take the Court at its word and take a careful look at the history and text themselves, asking what the scope of municipal liability would be if those two sources were in fact taken seriously. Finally, they look at the policies which do and should animate § 1983, and discuss what the current scope of the statute ought to be.

This is an especially opportune time for such a discussion to occur. For several years after the *Monell* decision, municipal liability law evolved slowly, but recently the proliferation of precedent has been explosive. Indeed, in just the last couple of years, the Court has decided two important municipal liability cases: *Board of County Commissioners of Bryan County v. Brown*[4] (as to whether a single decision by a policymaker can establish municipal liability for failure to screen)

3. 436 U.S. 658 (1978).

4. 520 U.S. 397 (1997).

and *McMillian v. Monroe County*[5] (on determining whether a policymaker is a county or state official). The Articles in this Symposium will be among the first to consider the effects of these decisions. Slightly older cases such as *City of Canton v. Harris*[6] (regarding liability for failure to train) and *City of Los Angeles v. Heller*[7] (as to whether lack of individual liability precludes municipal liability), have not received significant scholarly attention. More important than the individual cases is the sheer difficulty of understanding them in any coherent way. This task is made even more complicated because of the need to understand municipal liability law in conjunction with the substantive law governing the underlying causes of action. Thus, as Karen Blum points out, cases like *Collins v. City of Harker Heights*,[8] which defines deliberate indifference in the context of an underlying constitutional violation, and *County of Sacramento v. Lewis*,[9] which determines the standard for establishing that a high speed chase violates substantive due process, are far too easy to confuse with the state of mind and causation requirements of the § 1983 cause of action for failure to train and supervise.[10]

Thus, the Symposium comes at a good time simply to assist in sorting out this confusing body of law—a task not to be undervalued. In addition, with the proliferation of doctrine has come an incremental but ultimately significant theoretical shift. For example, there has been a shift away from the simple causation model of the early municipal liability cases to the far more complex causal links now required, particularly in failure to train, screen, and supervise cases. How should it be determined whether a municipality has caused a deprivation—through the sparse text of the statute, the unhelpful legislative history, the conflicting precedent, or the elastic weighing of competing policies? The most significant limitation on municipal liability law, the rejection of respondeat superior liability, is based on the claimed methodology. It is an inference from the rejection of the Sherman Amendment. Justice Stevens has long called for the Court to impose respondeat superior liability on municipalities,[11] and recently Justice Breyer, joined by Justices Ginsberg and Souter, have echoed Stevens'

5. 520 U.S. 789 (1997).

6. 489 U.S. 378 (1988).

7. 475 U.S. 796 (1986).

8. 503 U.S. 115 (1992).

9. 523 U.S. 833 (1998).

10. Karen M. Blum, *Municipal Liability: Derivative or Direct? Statutory or Constitutional? Distinguishing the* Canton *Case from the* Collins *Case*, 48 DEPAUL L. REV. 687 (1999).

11. City of Oklahoma City v. Tuttle, 471 U.S. 808, 835-40 (Stevens, J., dissenting).

view.[12] Are they justified, and if so, on what methodological or substantive grounds? This Symposium will address these important questions.

Perhaps the most valuable aspect of this Symposium is that it assesses the development of municipal liability law from virtually every important vantage point. This is appropriate, since § 1983 jurisprudence has consequences that are both intensely theoretical and intensely practical. For purely practical purposes, § 1983 litigation comprises a major portion of federal litigation, and a not-insignificant amount of state litigation as well. For litigators and judges, as well as for those of us who write about the doctrines, there is the basic but crucial issue of how the doctrines work and how they interrelate—both with each other and with substantive constitutional law. There are questions of level of proof, of state of mind requirements, of proof of individual versus municipal liability, of bifurcation of claims, of conflicts of interest among lawyers litigating these claims, of the viability of proving a single act, and of identifying the policymaker, just to name a few. These Articles address those issues in a way that practitioners and jurists, as well as scholars, ought to find illuminating.

Karen Blum, who has both written and litigated widely in this area, does a great service by taking several highly confusing, seemingly contradictory and important areas of municipal liability law and explaining them in an understandable manner.[13] She re-emphasizes the procedural nature of § 1983, and the importance of distinguishing it from the underlying substantive claims.[14] This distinction is increasingly difficult to make, given the similar-sounding but different state of mind requirements required for the substantive and procedural claims. As she points out, the distinction has plagued too many lower federal courts.[15] In addition, she raises the important question of the difference between the wrongful acts of the individual officer and those of the municipality.[16] This is in part a question of distinguishing the municipality's derivative liability for the acts of its employees from its liability for its own wrongful acts. This practical distinction also has obvious theoretical implications for the discussion about whether respondeat superior liability is needed, as well as practical implications regarding the current scope of cognizable wrongdoing.

12. *See* Board of County Comm'rs v. Brown, 520 U.S. 397, 397-98 (Breyer, J., dissenting).

13. Blum, *supra* note 10, at 687.

14. *Id.* at 688-702.

15. *Id.*

16. *Id.*

Judge Hamilton provides a similarly practical vantage point, yet one that is rarely represented in the law journals.[17] As a federal district judge who presides over numerous § 1983 cases, he gives concrete content to discussions about docket overcrowding, about the merit or lack of merit of the individual cases, about how the cases are (and should be) litigated, and about who actually benefits from municipal liability claims. His critique of the *McMillian* case, which attempts to distinguish state from county policymakers, for example, carries a special bite since it is based on his observations about how poorly the doctrine works in practice.[18] His approval of the *Heller* bifurcation procedure between municipal and individual liability claims is likewise enhanced by his observation about its courtroom efficacy.[19]

Part of the strength of the Symposium is that it allows us to evaluate various conflicting positions on these issues in light of the many roles represented. For example, Judge Hamilton's approval of bifurcation is partly based on his interest in keeping abreast of his docket and keeping his courtroom running efficiently.[20] Flint Taylor, a prominent, highly experienced, civil rights litigator, takes a very different, yet also quite practical, view of bifurcation, and indeed of municipal liability litigation in general.[21] His Article counterbalances Judge Hamilton's discussion from the viewpoint of one committed to garnering the court's full attention for his clients.[22]

Taylor's discussion focuses on how police brutality claims can be litigated in cases in which the brutality is systemic.[23] It is a detailed, savvy, and highly useful road map for approaching these difficult cases, in which the hurdles include the police code of silence, tremendous institutional loyalty, ingrained indifference and acquiescence, and perjury.[24] The discussion is fascinating on another level as well. In its highly knowledgeable focus on how to litigate against police departments, it explains much about how these departments work.[25] As we will see shortly, in discussing Michael Gerhardt's paper, much current municipal liability analysis has little to do with the ways in which

17. Hon. David F. Hamilton, *The Importance and Overuse of Policy and Custom Claims: A View from One Trench*, 48 DEPAUL L. REV. 723 (1999).

18. *Id.* at 737-43.

19. *Id.* at 731-32.

20. *Id.*

21. G. Flint Taylor, *A Litigator's View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DEPAUL L. REV. 747 (1999).

22. *Id.*

23. *Id.* at 750-63.

24. *Id.*

25. *Id.*

municipal decisionmaking actually occurs.[26] Taylor's analysis illustrates that, at least in this context, policy is rarely explicitly articulated, much less written.[27] Much decisionmaking occurs through failures—failures to act, failures to screen, failures to discipline, failures to train, and even failures to keep records.[28] Decisions are made, not by individuals, but through far more convoluted causal means—such as interlocking series of failures to act.[29] Taylor offers, what is in my opinion, a useful corrective to Judge Hamilton's assumption that money damages against indemnified individuals are an adequate substitute for municipal liability.[30] Taylor demonstrates that much police brutality is truly systemic, and that trying to pay damages for each individual instance has left the systemic causes and problems completely unaddressed.[31]

Hamilton's and Taylor's practical discussions lead seamlessly to the theoretical issues raised by Jack Beermann and Michael Gerhardt, both of whom have a longstanding scholarly interest in this field. Gerhardt suggests that if indeed municipal liability law is based on policy analysis, which it appears to be, we ought to examine the policies that are implicated.[32] He advocates a return to Christina Whitman's influential suggestion several years ago that we examine the ways in which institutions actually work in order to determine how judicial decisions can influence them.[33] He exhorts scholars to learn more about both the theoretical constructs and the empirical evidence that can help answer questions about how decisionmaking works in complex governmental bureaucracies.[34] How *do* institutions cause injury? How *does* intent manifest itself in a governmental agency, if at all? As he points out, the institutional analysis needs to focus not just

26. Michael J. Gerhardt, *Institutional Analysis of Municipal Liability Under Section 1983*, 48 DEPAUL L. REV. 669 (1999).

27. Taylor, *supra* note 21, at 750.

28. *Id.* at 750-53.

29. *Id.*

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

31. The Symposium is also fortunate to have an additional article on the topic of municipal liability. Kevin Vodak, a third-year DePaul Law student, has written an excellent analysis of the failure of current municipal liability law to address problems of systemic police brutality. He pays critical attention to the recent decision in *Board of County Commissioners v. Brown*. *See* Kevin Vodak, Comment, *A Plainly Obvious Need for New-Fashioned Municipal Liability: The Deliberate Indifference Standard and* Board of County Commissioners of Bryan County v. Brown, 48 DePaul L. Rev. 785 (1999).

32. Gerhardt, *supra* note 26, at 671-76.

33. Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986).

34. Gerhardt, *supra* note 26, at 677-83.

on local governmental decisionmaking, but on how Congress and the courts make decisions about § 1983 itself.[35]

Jack Beermann suggests that if we take the court at its word that it bases its decisions in this area on the legislative intent of the 1871 Congress, then we ought to take a fresh and careful look at the legislative debates and also at the common understandings of legal obligation in 1871.[36] He looks particularly at the rejection of the Sherman Amendment, which he convincingly argues cannot be construed to bar respondeat superior liability, and at the common understandings in 1871, which he also argues support respondeat superior.[37] He follows his detailed analysis of the 1871 Congress' possible intent with an examination of the recent Supreme Court cases, which he concludes poorly comport with the original intent of the statute.[38]

The distinction between theory and practice is not all that helpful in this context, if it ever is. If indeed the Court is to consider whether respondeat superior liability ought to be adopted, it needs to resolve the methodological question of what sources to consult. If it decides to look toward legislative history, it needs to do a more careful job of it. If it decides it has the power to be more pragmatic in constructing the statute (that is, to admit that it has been making judicial common law for a very long time) then it would do well to ask how government agencies do cause harm, and how courts can best attempt to effect systemic change. In doing so, it might look not only at how wrongdoing occurs, but at how lower courts decide, at what happens in litigation, and, of course, at how it can create a useful and coherent road map. This Symposium, I respectfully suggest, has much to offer on all of those issues.

35. *Id.* at 683-85.

36. Jack M. Beermann, *Municipal Liability for Constitutional Torts*, 48 DEPAUL L. REV. 627 (1999).

37. *Id.* at 629-35.

38. *Id.* at 635-44.