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Constitutional Law—Single Hiring Decisions and Municipal Entities: The United States Supreme Court's Latest Safeguard against Municipal Liability Under 42 U.S.C. §1983. *Board of the County Comm'rs v. Brown*, 117 S. Ct. 1382 (1997).

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CONSTITUTIONAL LAW—SINGLE HIRING DECISIONS AND MUNICIPAL ENTITIES: THE UNITED STATES SUPREME COURT'S LATEST SAFEGUARD AGAINST MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983. *BOARD OF THE COUNTY COMM'RS V. BROWN*, 117 S. Ct. 1382 (1997).

I. INTRODUCTION

Since its first major interpretation in *Monroe v. Pape*,¹ 42 U.S.C. § 1983² has developed into an extremely vast and complex body of law.³ The rapid increase in the number of § 1983 suits filed has aided this evolution.⁴ Since the landmark case of *Monell v. Department of Social Services*,⁵ some of the most difficult cases in this area have dealt with questions regarding municipal⁶ liability under § 1983.⁷

The United States Supreme Court restricted municipal liability under § 1983 through its recent decision in *Board of the County Commissioners v.*

1. 365 U.S. 167 (1961), *overruled by* *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978). For further discussion of *Monroe*, see *infra* Part III.C.

2. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1988).

3. See CHARLES R. RICHEY, *MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS* § 4:0, at 4-2 (2d ed. 1996). Due to § 1983's expansive coverage and the competing judicial awareness of federalism concerns, § 1983 litigation has grown increasingly intricate. See *id.*

4. See 1A MARTIN A. SCHWARTZ, *SECTION 1983 LITIGATION* § 1.1, at 3 (3d ed. 1997). In 1961, only 270 federal civil rights lawsuits were filed as compared to the present day in which 40,000 to 50,000 similar lawsuits are filed every year in federal courts. See *id.*

5. 436 U.S. 658, 690 (1978). For further discussion of *Monell*, see *infra* Part III.C.

6. A municipality is defined as:

A legally incorporated or duly authorized association of inhabitants of limited area for local governmental or other public purposes. A body politic created by the incorporation of the people of a prescribed locality invested with subordinate powers of legislation to assist in the civil government of the state and to regulate and administer local and internal affairs of the community. A city, borough, town, township, or village. Also, the body of officers taken collectively, belonging to a city, who are appointed to manage its affairs and defend its interests. Political subdivision or public agency or instrumentality of a [s]tate.

BLACK'S LAW DICTIONARY 1018 (6th ed. 1990) (citations omitted).

7. See Michael J. Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539 (1989).

Brown.⁸ In a five to four decision,⁹ the Supreme Court held that for a municipality to be liable for a single hiring decision under the deliberate indifference standard, a plaintiff must show that a municipal employee violated the plaintiff's constitutional rights and that the specific constitutional violation was a plainly obvious consequence of the hiring decision.¹⁰

This note will begin with an analysis of the material facts and case history of the *Brown* decision in Part II. Part III provides a general background of 42 U.S.C. § 1983 that specifically focuses on the complex and intricate legal doctrines of municipal liability under the statute. Finally, after Part IV examines the reasoning of the Court's decision in *Brown*, including the majority's opinion and two dissenting opinions, the note will address the significance of the case in Part V.

II. SUMMARY OF FACTS

After a visit to Grayson County, Texas, respondent Jill Brown and her husband Todd began the return trip home to Bryan County, Oklahoma, during the early hours of May 12, 1991.¹¹ After crossing the Texas-Oklahoma border, Brown and her husband, who was driving, approached a police checkpoint operated by Bryan County Deputy Sheriff Robert Morrison and Reserve Deputy Stacy Burns.¹² Todd and Jill Brown turned their vehicle around in the middle of the road and retreated from the checkpoint.¹³ In response to the

8. 117 S. Ct. 1382 (1997). For discussion regarding how *Brown* has affected municipal liability under § 1983, see *infra* Part V.

9. The majority opinion of the Court was written by Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. See *id.* at 1386 (Souter J. dissenting). Justice Souter filed a dissenting opinion, joined by Justices Stevens and Breyer. See *id.* at 1394 (Breyer J. dissenting). Justice Breyer also filed a dissenting opinion, joined by Justices Stevens and Ginsburg. See *id.* at 1401.

10. See *id.* at 1392. For further discussion of the Court's reasoning in *Brown*, see *infra* Part IV.

11. See Board of the County Comm'rs v. Brown, 117 S. Ct. 1382, 1386 (1997); Petitioner's Brief at 5, Board of the County Comm'rs v. Brown, 117 S. Ct. 1382 (1997) (No. 95-1100) (citations omitted).

12. See *Brown*, 117 S. Ct. at 1386. At the time of this incident, Reserve Deputy Stacy Burns had been a Bryan County law enforcement officer for only six days. See David G. Savage, *High Court Restricts Damages for Brutality; Police: Justices Rule, 5-4, Local Governments Can't Be Held Liable in Most Cases Under U.S. Law for Injuries Inflicted by an Officer. Impact in California Is Considered Uncertain.*, L.A. TIMES, April 29, 1997, at A1.

13. See *Brown*, 117 S. Ct. at 1386. The reasons for the Browns' reversal in direction were disputed. The petitioners claimed that Todd Brown wished to avoid harassment which he had experienced in the past as well as prevent the officers from discovering a loaded rifle and a concealed revolver. See Petitioner's Brief at 5-6, *Brown* (No. 95-1100) (citations omitted). However, the respondent contended that they were familiar with the checkpoint due to previous encounters, and they decided to return to her mother-in-law's home in Texas for the night. See

Browns' retreat, Morrison and Burns pursued at speeds exceeding one hundred miles per hour.¹⁴ Once the chase had ended, Morrison drew his revolver and ordered the Browns to exit their vehicle.¹⁵ Burns subsequently ordered Mrs. Brown to exit the vehicle on two occasions, and both times she failed to obey.¹⁶ Burns then used an arm bar technique to remove Brown from the pickup and force her to the ground.¹⁷ As a result, she suffered extensive damage to both knees.¹⁸

Brown then sought relief under 42 U.S.C. § 1983 and state law against Bryan County, Sheriff B.J. Moore, Deputy Robert Morrison, and Reserve Deputy Stacy Burns.¹⁹ Although the district court granted summary judgment to Moore and Morrison, it denied like motions by Burns and Bryan County.²⁰ The crux of her claim against Bryan County was two-fold: first, the County

Respondent's Brief at 5-6 n.6, Board of the County Comm'rs v. Brown, 117 S. Ct. 1382 (1997) (No. 95-1100) (citations omitted).

14. See *Brown*, 117 S. Ct. at 1386. Again, there was a dispute as to the manner in which the Browns reversed their direction away from the checkpoint. Bryan County asserted that "the Browns' truck fishtailed, its tires squealing, and left the checkpoint at a high rate of speed toward the Denison dam." Petitioner's Brief at 6, *Brown* (No. 95-1100) (citations omitted). The respondent claimed the truck's tires never squealed and that they did not flee at a high rate of speed. See Respondent's Brief at 6 n.6, *Brown* (No. 95-1100) (citations omitted).

15. See *Brown*, 117 S. Ct. at 1386.

16. See *id.* As to Morrison's order to exit, respondent claimed that she did not hear the order. See Petitioner's Brief at 7, *Brown* (No. 95-1100) (citations omitted). Burns claimed that Brown was reaching for a gun. See Bernard Mower & Barbara Yuill, *Opening of Supreme Court Term Shows Renewed Interest in Workplace Issues*, EMPL. POL'Y & L. DAILY (BNA), Oct. 4, 1996, at D-2. Regarding Burns's two orders, Brown leaned forward with outstretched hands; yet, she claimed that she was not reaching for anything and that she was attempting to obey Burns's orders. See Petitioner's Brief at 7, *Brown* (No. 95-1100) (citations omitted). Although the Browns never faced criminal charges, officers on the scene removed a loaded rifle and a concealed handgun from the vehicle after ordering the Browns to vacate their truck. See Savage, *supra* note 12, at A1; Petitioner's Brief at 7, *Brown* (No. 95-1100) (citations omitted).

17. See *Brown*, 117 S. Ct. at 1386-87. The arm bar technique was executed by "grabbing respondent's arm at the wrist and elbow, pulling her from the vehicle, and spinning her to the ground." *Id.* at 1386-87. Petitioner claimed that the level of force was the "lowest level of force" an officer can employ short of purely oral persuasion." Petitioner's Brief at 7, *Brown* (No. 95-1100) (citations omitted).

18. See *Brown*, 117 S. Ct. at 1387. After her encounter with Burns, Brown was unable to walk without assistance for one year. See *Green Light for Brutality*, ROCKY MTN. NEWS, April 29, 1997, at 36A. Brown underwent four corrective knee surgeries, but she may require replacement surgery due to the substantial damage she received upon impact with the ground. See *Justices Limit Suit Against County for Negligent Hiring of Police Officer*, EMPL. POL'Y & L. DAILY (BNA), April 30, 1997, at D-2; see also *Brown*, 117 S. Ct. at 1387.

19. See *Brown*, 117 S. Ct. at 1387; Petitioner's Brief at 8, *Brown* (No. 95-1100). Brown claimed that Burns's actions amounted to excessive force which violated her constitutional rights guaranteed by the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. See Petitioner's Brief at 8, *Brown* (No. 95-1100) (citations omitted).

20. See Petitioner's Brief at 8, *Brown* (No. 95-1100) (citations omitted).

failed to adequately train Burns;²¹ and second, Sheriff Moore, the party responsible for hiring Burns, inadequately screened Burns's application and record.²² Regarding the inadequate screening, Stacy Burns had a string of misdemeanors and driving infractions on his record including public drunkenness, resisting arrest, and assault and battery prior to his employment with Bryan County.²³ At the time of Burns's hiring, Oklahoma statutory law only prohibited the hiring of previous felons for police officer positions.²⁴ Moore revealed at trial that although he had acquired a copy of Burns's record from the National Crime Information Center, he had not reviewed the record carefully.²⁵

During the trial in district court, Bryan County stipulated that Moore was the official policymaker²⁶ for matters concerning the Sheriff's Department of Bryan County.²⁷ On two separate occasions, Bryan County moved for judgment as a matter of law.²⁸ Bryan County argued that it could not be held liable under § 1983 for a single hiring decision by the official policymaker.²⁹ The court denied both motions.³⁰ At the trial's conclusion, the jury found against Bryan County on both the inadequate screening and inadequate training claims and against Burns for his use of excessive force.³¹

21. *See id.*

22. *See Brown*, 117 S. Ct. at 1387. It is interesting to note that Burns was the son of Moore's nephew. *See id.*

23. *See id.*; Petitioner's Brief at 3, *Brown* (No. 95-1100) (citations omitted). Burns fought with members of a fraternity's pledge class when one of them hit Burns's car at the University of Oklahoma. *See* Petitioner's Brief at 3, *Brown* (No. 95-1100) (citations omitted). After the accident, Burns plead guilty to numerous misdemeanors including assault and battery, public drunkenness, and possession of a false identification as well as other traffic offenses. *See id.* at 3-4.

24. *See Brown*, 117 S. Ct. at 1387. Oklahoma law provided:

No person shall be certified as a police or peace officer in this state unless the employing agency has reported to the Council that . . . the Oklahoma State Bureau of Investigation and the Federal Bureau of Investigation have reported that such person has no record of a conviction of a felony or crime involving moral turpitude.

OKLA. STAT. ANN. tit. 70, § 3311(D)(2)(a) (West 1989).

25. *See Brown*, 117 S. Ct. at 1387. During cross-examination, Moore admitted that he had not noticed the assault or public drunkenness convictions. *See* Respondent's Brief at 2, *Brown* (No. 95-1100) (citations omitted); Petitioner's Brief at 4, *Brown* (No. 95-1100) (citations omitted). His reason for his omissions was that "[Burns] had a long record." Respondent's Brief at 2, *Brown* (No. 95-1100) (citations omitted).

26. *See infra* Part III.C for discussion regarding the terms policy and policymaker as used in § 1983 cases.

27. *See Brown*, 117 S. Ct. at 1387 (citations omitted).

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.* The actual damages assessed against Burns and the County were as follows: "\$711,302 in actual damages, \$87,500 in attorneys' fees, and \$20,000 in punitive damages."

The Fifth Circuit Court of Appeals affirmed the district court.³² The court refused to disturb the jury's verdict regarding the § 1983 inadequate training claim.³³ In addressing the inadequate hiring claim under § 1983, the court held that a reasonable jury could have found that allowing an unqualified candidate who had a propensity for violence to administer forcible arrests was the cause of the respondent's injuries.³⁴

The United States Supreme Court granted Bryan County's writ of certiorari to decide whether a single hiring decision by a municipality's policymaker can give rise to an inadequate screening claim under 42 U.S.C. § 1983.³⁵ The Court held that such a decision does not necessarily rise to the level of deliberate indifference³⁶ necessary to impose § 1983 liability on a municipality.³⁷

III. BACKGROUND

Part III.A will begin with a review of the historical origin of 42 U.S.C. § 1983. Part III.B will provide an overview of litigation under § 1983. Finally, Part III.C will analyze the United States Supreme Court's jurisprudence regarding municipal liability under § 1983.

A. Historical Origin of 42 U.S.C. § 1983

At the conclusion of the Civil War, the mandated emancipation of slaves did not necessarily guarantee their safety.³⁸ Congress sought to protect the newly freed slaves by ratifying the Thirteenth, Fourteenth, and Fifteenth Amendments.³⁹ These amendments failed to prevent various acts of violence

Petitioner's Brief at 9, *Brown* (No. 95-1100) (citations omitted).

32. See *Brown v. Bryan County, Okla.*, 67 F.3d 1174, 1185 (5th Cir. 1995), *vacated*, Board of the County Comm'rs v. *Brown*, 117 S. Ct. 1382 (1997). Although the parties appealed many issues to the Fifth Circuit, only rulings regarding the § 1983 claims are relevant for the purpose of this analysis. See generally *Brown*, 67 F.3d 1174 (5th Cir. 1995).

33. See *Brown*, 117 S. Ct. at 1387 (citations omitted); see also Petitioner's Brief at 9-10, *Brown* (No. 95-1100) (citations omitted).

34. See *Brown*, 67 F.3d at 1185. "[T]he policymaker's (Sheriff Moore's) single action of hiring Burns without an adequate review of his background directly caused the constitutional violations of which Mrs. Brown now complains." *Id.*

35. See *Brown*, 117 S. Ct. at 1387 (citations omitted).

36. See *infra* Parts III.C and IV for discussion regarding the term "deliberate indifference" as used in § 1983 cases.

37. See *Brown*, 117 S. Ct. at 1394.

38. See Gerhardt, *supra* note 7, at 547.

39. See Gerhardt, *supra* note 7, at 546-47. The Thirteenth Amendment was adopted in 1866, the Fourteenth in 1868, and the Fifteenth in 1870. See Gerhardt, *supra* note 7, at 546-47.

against the emancipated citizens by such groups as the Ku Klux Klan;⁴⁰ furthermore, state and local officials either participated in the Ku Klux Klan or failed to bring Klan members to justice for their acts of terrorism.⁴¹ As a result of Congress's distrust of the southern states,⁴² Congress enacted the Civil Rights Act of 1866⁴³ pursuant to section two of the Thirteenth Amendment.⁴⁴ The Civil Rights Act of 1866 was constitutionally questionable; therefore, the Forty-second Congress looked to the Fourteenth Amendment as a source of remedial power.⁴⁵ The result was the adoption of section one of the Civil Rights Act of 1871,⁴⁶ now codified at 42 U.S.C. § 1983.⁴⁷

The purpose and language of section two of the Civil Rights Act of 1866 served as the model for section one of the Civil Rights Act of 1871; both sections attempted to prevent constitutional deprivations under color of state law.⁴⁸ By creating a procedural mechanism for both compensatory and injunctive actions, the legislation signaled the growing protective role of the federal government and its intrusion upon state sovereignty.⁴⁹

Although enacted in 1871, another ninety years would pass before § 1983 became a widely used litigation tool.⁵⁰ Much of this can be attributed to the Supreme Court's narrow reading of the term "under color of state law" that in turn limited § 1983's effectiveness.⁵¹ Such limitations eventually gave way as

40. See Gerhardt, *supra* note 7, at 547.

41. See Gerhardt, *supra* note 7, at 547. See also Steven S. Cushman, *Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker*, 34 B.C. L. REV. 693, 694 (1993).

42. See Gerhardt, *supra* note 7, at 547. Congress distrusted the southern states because although such actions of terrorism were rampant, the states did little to protect the emancipated slaves. See Gerhardt, *supra* note 7, at 547.

43. 14 Stat. 27 (1866).

44. See Gerhardt, *supra* note 7, at 546-47. Section two of the Civil Rights Act of 1866 "provided criminal penalties for the deprivation of civil rights by persons acting 'under color of any law.'" Gerhardt, *supra* note 7, at 546 (quoting The Civil Rights Act of 1866, § 2, 14 Stat. 27 (1866)).

45. See Gerhardt, *supra* note 7, at 546.

46. 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1988)).

47. See Cushman, *supra* note 41, at 694.

48. See Gerhardt, *supra* note 7, at 548. For discussion regarding "under color of state law," see *infra* Part III.B.2.

49. See 42 U.S.C. § 1983; 1A SCHWARTZ, *supra* note 4, § 1.3, at 10. The generally accepted goals underlying the Civil Rights Act of 1871 are as follows: one, to deter terroristic groups such as the Ku Klux Klan from violating the constitutional rights of citizens; two, to provide a federal remedy in the event constitutional rights were violated by someone acting under color of state law; three, to provide compensation to plaintiffs deprived of their federally protected rights; and four, to reassert the goals of the Fourteenth Amendment. See Gerhardt, *supra* note 7, at 548.

50. See RICHEY, *supra* note 3, § 4:0, at 4-1.

51. See Gerhardt, *supra* note 7, at 549. For an extensive discussion of the first ninety years' development of 42 U.S.C. § 1983, see Gerhardt, *supra* note 7, at 549-51.

the political tide turned,⁵² and during the mid-twentieth century, the stage was set for the complex development and expansive usage of § 1983.⁵³

B. Overview of Litigation Under 42 U.S.C. § 1983

1. *Functional Role of the Statute*

The practical role of 42 U.S.C. § 1983 is to provide a vehicle for plaintiffs who have suffered federal constitutional or statutory deprivations to bring their claims before the courts.⁵⁴ A plaintiff cannot assert a general violation of § 1983 because the statute conveys no substantive rights.⁵⁵ The sole purpose of 42 U.S.C. § 1983 is to create a doorway to the courts for plaintiffs to enforce their constitutionally guaranteed rights,⁵⁶ thus, § 1983 is simply procedural in nature.⁵⁷

2. *Elements of a Cause of Action Under the Statute*

Section 1983 requires the proof of two elements: one, that the conduct complained of was committed by a person acting under color of state law; and two, that such conduct deprived the plaintiff of federal constitutional or statutory rights.⁵⁸ State and local officials exercising their official powers clearly act under color of state law,⁵⁹ while officials undertaking purely private acts or acting pursuant to federal law will not be considered to have acted under

52. See Gerhardt, *supra* note 7, at 550-51. "[T]he 'nationalists,' who favored a strong federal government, and the 'federalists,' who favored state sovereignty, engaged in a tug of war over the impact of the Fourteenth Amendment on state autonomy." Gerhardt, *supra* note 7, at 550. Through various decisions, the United States Supreme Court limited the extent to which state sovereignty could protect parties sued under § 1983. See Gerhardt, *supra* note 7, at 550-51.

53. See 1A SCHWARTZ, *supra* note 4, § 1.1, at 2-6.

54. See Arthur C. Wallberg, *More Than a Defense: Absolute and Qualified Immunities of State Officials Under 42 U.S.C. § 1983*, 59 FLA. B.J., June 1995, at 108.

55. See 1A SCHWARTZ, *supra* note 4, § 1.4, at 13. Remedies are available under 42 U.S.C. § 1983 only when a plaintiff proves a deprivation of federal constitutional or statutory rights "other than § 1983." See 1A SCHWARTZ, *supra* note 4, § 1.4, at 13.

56. See RICHEY, *supra* note 3, § 4:0, at 4-1.

57. See 1A SCHWARTZ, *supra* note 4, § 1.4, at 13.

58. See 42 U.S.C. § 1983 (1988).

59. See 1A SCHWARTZ, *supra* note 4, § 5.5, at 490. An official can act under color of state law even when such actions are in violation of state law. See RICHEY, *supra* note 3, § 4:70, at 4-40.

color of state law.⁶⁰ Beyond officials, other private parties and entities could be found to act under color of state law in the appropriate circumstances.⁶¹

Section 1983 safeguards against deprivations of federal constitutional or statutory⁶² rights; thus, a violation of rights guaranteed only by state law does not satisfy the second element of a § 1983 claim.⁶³ If the situation arises where rights are protected by both federal and state law, a § 1983 claim is valid in spite of the state law deprivations.⁶⁴ Even though § 1983 covers federal statutory rights, deprivations of those rights may not necessarily give rise to liability under § 1983 in limited circumstances.⁶⁵

3. *Parties Capable of Bringing Suit*

The language⁶⁶ of 42 U.S.C. § 1983 has been construed broadly to allow for a multitude of plaintiffs so long as they have the required standing.⁶⁷ As to natural persons, § 1983 applies to citizens as well as noncitizens.⁶⁸ Regarding other persons, the right to sue has been extended to corporations,⁶⁹ associations,⁷⁰ and unions.⁷¹ As to government entities, states may sue in

60. See 1A SCHWARTZ, *supra* note 4, § 5.5, at 493-94; §5.7, at 506-07.

61. See 1A SCHWARTZ, *supra* note 4, § 5.4, at 490. For further discussion of when actions by private parties actions can constitute state action under the Fourteenth Amendment and thus satisfy the "under color of state law" requirement of § 1983, see RICHEY, *supra* note 3, §§ 4:44-4:47, at 4-23 to 4-26.

62. The phrase "secured by the Constitution and laws" found in § 1983 has been interpreted to include both federal constitutional and statutory rights. See RICHEY, *supra* note 3, § 4:73, at 4-41 to 4-42.

63. See 1A SCHWARTZ, *supra* note 4, § 3.1, at 114.

64. See 1A SCHWARTZ, *supra* note 4, § 3.1, at 116.

65. See RICHEY, *supra* note 3, § 4:73, at 4-42. "A plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) the statute does not create enforceable rights, privileges or immunities with[in] the meaning of § 1983, or (2) Congress has foreclosed such enforcement of the statute in the enactment itself." RICHEY, *supra* note 3, § 4:73, at 4-42.

66. The statute applies to "any citizen of the United States or other person within the jurisdiction thereof." 42 U.S.C. § 1983 (1988).

67. See generally, 1 SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 1.05, at 7-12 (3d ed. 1991) (outlining the possible plaintiffs under § 1983); RICHEY, *supra* note 3, §§ 4:38-4:42, at 4-22 to 4-23 (discussing who has the right to sue under § 1983).

68. See RICHEY, *supra* note 3, § 4:38, at 4-22.

69. See 1 NAHMOD, *supra* note 67, § 1.05, at 8. Regardless of whether the corporation is for profit or nonprofit, it can assert suit under § 1983 "so long as the corporation is suing in its own right." 1 NAHMOD, *supra* note 67, § 1.05, at 8.

70. See RICHEY, *supra* note 3, § 4:40, at 4-22. Standing issues do not arise so long as the association sues for injunctive relief and such relief benefits all injured members of the association. See RICHEY, *supra* note 3, § 4:40, at 4-22.

71. See 1 NAHMOD, *supra* note 67, § 1.05, at 9. Labor unions may sue regardless of whether they are recognized or unrecognized. See 1 NAHMOD, *supra* note 67, § 1.05, at 9.

limited circumstances;⁷² however, this right has not yet been extended to the United States government nor to local municipalities.⁷³

4. *Parties Amenable to Suit*

Proportional to the numerous plaintiffs allowed under § 1983, many defendants are subject to the remedial force of § 1983.⁷⁴ Potential defendants in a § 1983 claim include any natural person acting under color of state law,⁷⁵ municipalities,⁷⁶ and the District of Columbia.⁷⁷ Parties usually immune from suit include the United States and its officials,⁷⁸ states,⁷⁹ and territories.⁸⁰

a. Capacities: Official and Individual

It is essential to establish the capacity in which a state or municipal official is sued due to the repercussions created by the distinction.⁸¹ The capacities in

72. See 1 NAHMOD, *supra* note 67, § 1.05, at 11-12. The Third Circuit Court of Appeals and various district courts in Pennsylvania have allowed the state to sue as *parens patriae* of its citizens; moreover, the United States Supreme Court adopted this approach in a case unrelated to § 1983. See 1 NAHMOD, *supra* note 67, § 1.05, at 8-9.

Parens patriae is "the principle that the state must care for those who cannot take care of themselves It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people" BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) (citations omitted).

73. See RICHEY, *supra* note 3, § 4:42, at 4-23.

74. See RICHEY, *supra* note 3, § 4:43, at 4-23.

75. See 1 NAHMOD, *supra* note 67, § 1.06, at 12-13; *supra* notes 58-61 and accompanying text.

76. See 1 NAHMOD, *supra* note 67, § 1.06, at 13. Although municipalities are amenable to suit, their departments are not. See 1B SCHWARTZ, *supra* note 4, § 7.3, at 14. For further discussion of municipality liability under § 1983, see *infra* Part III.C.

77. See 1 NAHMOD, *supra* note 67, § 1.06, at 13-14.

78. See 1 NAHMOD, *supra* note 67, § 1.06, at 15. It is possible to name a federal official as a defendant in a § 1983 conspiracy action when the official acted under color of state law. See 1 NAHMOD, *supra* note 67, § 1.06, at 15.

79. See RICHEY, *supra* note 3, § 4:50, at 4-26 to 4-27. States are immune from suit unless they waive their Eleventh Amendment immunity or if their officials are sued individually for injunctive or declaratory relief. See RICHEY, *supra* note 3, § 4:50, at 4-26 to 4-27. For further discussion of capacities, see *infra* Part III.B.4.a. Whether state agencies are covered by the Eleventh Amendment shield depends upon the function and characteristics of the agency. See RICHEY, *supra* note 3, § 4:50, at 4-27.

80. See 1 NAHMOD, *supra* note 67, § 1.06, at 14.

81. See 1A SCHWARTZ, *supra* note 4, § 6.5, at 605; see also Karen M. Blum, *Local Government Liability Under Section 1983*, 553 PRAC. L. INST. 655, 662-63 (1996). Plaintiffs should specifically plead in their complaints the capacities in which the defendants are being sued; furthermore, an official capacity suit should name the government entity only to avoid confusion. See Blum, *supra*, at 663. For discussion regarding how the circuit courts of appeal deal with a complaint without a capacity distinction, see Blum, *supra*, at 662-63.

which a defendant official can be sued are official, individual, or both.⁸² Suing a defendant in his official capacity is the equivalent of suing the governmental entity itself.⁸³ In an official capacity claim, the plaintiff must meet any additional burdens of proof usually present in suits against entities; the defendant, however, can only assert immunities⁸⁴ which would be available to the entity since the entity is the true defendant in the action.⁸⁵ In an individual capacity claim, the plaintiff sues the defendant personally for deprivations of the plaintiff's rights under color of state law.⁸⁶ Although the plaintiff does not have to meet any additional burdens of proof when suing an individual personally, individual capacity defendants may have a variety of immunity defenses to their advantage.⁸⁷

b. Immunities: Absolute and Qualified

Individual capacity suits under § 1983 seeking compensatory relief are subject to the defenses of absolute and qualified immunity.⁸⁸ These immunities are assertable regardless of whether a constitutional violation occurred.⁸⁹ Because these immunities serve as a defense to suit, a denial of immunity is subject to an interlocutory appeal.⁹⁰

Absolute immunity is granted because of long standing common law protections that insulate an official due to the nature of his position.⁹¹ Courts readily grant absolute immunity to legislators, judges, prosecutors, witnesses,

82. See 1A SCHWARTZ, *supra* note 4, § 6.5, at 604-05.

83. See 1A SCHWARTZ, *supra* note 4, § 6.5, at 605.

84. For further discussion of immunities, see *infra* Part III.B.4.b.

85. See 1A SCHWARTZ, *supra* note 4, § 6.5, at 605.

86. See Blum, *supra* note 81, at 662.

87. See 1A SCHWARTZ, *supra* note 4, § 6.5, at 605.

88. See 1B SCHWARTZ, *supra* note 4, § 9.1, at 202. These immunities do not apply to official capacity compensatory actions. See 1B SCHWARTZ, *supra* note 4, § 9.1, at 202. Nor do these immunities apply to injunctive or declaratory actions since such actions attempt to change or prevent actions of the entity itself (and thus are usually brought in an official capacity). See 1B SCHWARTZ, *supra* note 4, § 9.1, at 202-03 (citations omitted). "Officials may enjoy absolute immunity for some of their functions and only qualified immunity for others. The determination would rest on the historical basis for the absolute immunity, an analysis of the function and, to some extent, the current public policy implications." Wallberg, *supra* note 54, at 109.

89. See Wallberg, *supra* note 54, at 108.

90. See Wallberg, *supra* note 54, at 110. "As an immunity from suit, . . . absolute or qualified immunity would have little value if its denial could only be appealed after trial. Therefore, an immediate appeal is available from the denial of motions to dismiss or for summary judgment." Wallberg, *supra* note 54, at 110. For criticism of the right to interlocutory appeal, see 1B SCHWARTZ, *supra* note 4, § 9.13, at 336-37.

91. See RICHEY, *supra* note 3, § 4:59, at 4-31.

and jurors,⁹² so long as the defendant was performing an official action when he deprived the plaintiff of his rights.⁹³

Although qualified immunity is more difficult to assert, its scope is more vast than its absolute counterpart.⁹⁴ To assert qualified immunity, a defendant must show that he did not violate clearly established law of which a reasonable person should have known.⁹⁵ One of the most perplexing aspects of this objective test is the phrase "clearly established law."⁹⁶ Although this requirement is vague, it is clear that the right must be sufficiently established so that a reasonable official could know that he was violating that right.⁹⁷ Officials should look to federal constitutional, statutory, and case law as sources of clearly established law.⁹⁸

C. Application of 42 U.S.C. § 1983 to Municipalities

1. *Municipal Immunity*

The first major interpretation of municipal liability under § 1983 came with the decision in *Monroe v. Pape*.⁹⁹ After alleging wrongs by defendants acting under color of state law,¹⁰⁰ the petitioners brought suit against Chicago

92. See RICHEY, *supra* note 3, § 4:59, at 4-32 to 4-33; Wallberg, *supra* note 54, at 108. As to legislative absolute immunity, this privilege has not yet been extended to local legislators. See RICHEY, *supra* note 3, § 4:59, at 4-33. Judicial officers are amenable to suit for injunctive relief regardless of any immunity. See RICHEY, *supra* note 3, § 4:59, at 4-33.

93. See RICHEY, *supra* note 3, § 4:59, at 4-31.

94. See Wallberg, *supra* note 54, at 109. Qualified immunity has been granted to law enforcement officers, prison officials, school officials, administrators of state mental hospitals, highway agency officials, governors, the president of a state university, and state national guard officials. See 1B SCHWARTZ, *supra* note 4, § 9.14, at 339. A policy reason for the defense is that "officials [with discretionary functions] should be able to act without undue fear in the performance of their duties." Wallberg, *supra* note 54, at 109.

95. See Wallberg, *supra* note 54, at 109. The actual test articulated by the United States Supreme Court states that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." Wallberg, *supra* note 54, at 109 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

96. See 1B SCHWARTZ, *supra* note 4, § 9.13, at 337. The Supreme Court has yet to clarify the contours of the phrase "clearly established law." See RICHEY, *supra* note 3, § 4:62, at 4-34; see also 1B SCHWARTZ, *supra* note 4, § 9.13, at 337.

97. See Wallberg, *supra* note 54, at 109. "The particular action need not have been previously held unlawful, but in light of preexisting law the unlawfulness must be apparent." Wallberg, *supra* note 54, at 109.

98. See Wallberg, *supra* note 54, at 109.

99. 365 U.S. 167 (1961), *overruled by* *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978).

100. See *Monroe*, 365 U.S. at 169. The complaint alleged that thirteen Chicago police officers invaded the petitioners' home in the middle of the night, made the petitioners stand

police officers and the city itself.¹⁰¹ The United States Supreme Court extensively analyzed the legislative history behind the Civil Rights Act of 1871 and held that a cause of action against the individual officers was valid; however, the Court held the City of Chicago was immune from suit.¹⁰² The Court deemed the officers' alleged actions as taken under color of state law.¹⁰³ As to the city itself, congressional rejection of the Sherman Amendment to the Civil Rights Act of 1871 was determinative to the Court's decision.¹⁰⁴ Considering this legislative history, the *Monroe* majority held that Congress did not intend for "persons" under § 1983 to include municipalities.¹⁰⁵ Municipalities were then officially immune from suit under 42 U.S.C. § 1983.¹⁰⁶

2. *Municipal Liability: The Reversal of Monroe*

In 1978, the Court in *Monell v. Department of Social Services*¹⁰⁷ overruled *Monroe* and held that municipalities were amenable to suit under § 1983.¹⁰⁸ The Court reanalyzed the legislative history of the Civil Rights Act of 1871 and concluded that Congress had intended to include municipalities as suable

naked in the living room, searched the house without a warrant, and detained Mr. Monroe for ten hours at the police station while questioning him about a two-day-old murder. *See id.* While at the police station, the officers never offered Mr. Monroe the benefit of counsel, the opportunity to speak with a family member, nor did they bring him before an available magistrate. *See id.*

101. *See id.* at 170, 192.

102. *See id.* at 192.

103. *See id.* at 187, 192. The Court interpreted "under color of state law" as "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Monroe*, 365 U.S. at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Under this construction, it was clear that the alleged officers' acts were within the remedial measures of § 1983; accordingly, the Monroes had a valid cause of action against the individual officers. *See Monroe*, 365 U.S. at 187.

104. *See Monroe*, 365 U.S. at 191. Proposed by Senator Sherman of Ohio, the Sherman Amendment would have created municipal liability for acts of violence occurring within a municipality's borders; moreover, the amendment required full compensation to the person damaged by the violence. *See id.* at 188. "The Sherman Amendment would have in effect placed an obligation upon local governments to keep the peace." Cushman, *supra* note 41, at 699.

105. *See Monroe*, 365 U.S. at 191.

106. *See id.* at 187. "The result limited compensation for victims whose constitutional rights had been violated, because they could not reach the deep pockets of the governmental treasury." Cushman, *supra* note 41, at 699.

107. 436 U.S. 658 (1978).

108. *See id.* at 690. At issue was the official policy of both the New York Department of Social Services and Board of Education, which forced pregnant women to take unnecessary leaves of absence. *See id.* at 660-61.

“persons.”¹⁰⁹ As a limit on this newfound liability, the Court rejected the theory of respondeat superior liability.¹¹⁰ To hold a municipality liable under § 1983, the Court required that plaintiffs show either a municipal policy or custom caused the deprivation of the plaintiff’s rights.¹¹¹ This policy or custom requirement essentially created a third element to § 1983 suits against municipalities; however, the Court refrained from detailing the requisite steps to proving policy or custom.¹¹² These determinations would surface only with the development of *Monell*’s progeny.

3. *The Development of Municipal Liability: Post-Monell*

In *Owen v. City of Independence*¹¹³ and *City of Newport v. Fact Concerts, Inc.*,¹¹⁴ the Supreme Court answered whether single acts by officials could satisfy the policy requirements of *Monell*.¹¹⁵ *Owen* involved a city council’s discharge of the Chief of Police without a hearing,¹¹⁶ while *Fact Concerts, Inc.* involved a city’s cancellation of a contract.¹¹⁷ Although these decisions are most frequently cited for other principles,¹¹⁸ the Supreme Court has cited these cases to illustrate that a single decision by a municipal legislative body, though not intended to be generally applicable, is policy for the purposes of municipal liability.¹¹⁹

The next series of cases forced the Supreme Court to address the questions of who a municipal policymaker is and when their actions can impose liability on a municipality for purposes of § 1983. Analogous to *Owen* and *Fact*

109. *See id.* at 665-90.

110. *See id.* at 691. The language of § 1983 mandates that municipal liability will be imposed only when the entity caused a deprivation of federal rights. *See id.* at 692.

111. *See id.* at 690-91. *See also* 1 NAHMOD, *supra* note 67, § 6.07, at 420-25 (discussing applications of the *Monell* policy and custom requirements); 1B SCHWARTZ, *supra* note 4, § 7.6, at 19-24 (analyzing various treatments of the policy requirement).

112. *See* Cushman, *supra* note 41, at 702-03. For criticism of the *Monell* decision, *see* Gerhardt, *supra* note 7, at 541 (implying that the *Monell* decision represented judicial activism).

113. 445 U.S. 622 (1980).

114. 453 U.S. 247 (1981).

115. *See* Board of the County Comm’rs v. Brown, 117 S. Ct. at 1389 (discussing under what circumstances the Supreme Court has previously held a single act to be policy).

116. *See* *Owen*, 445 U.S. at 627-29.

117. *See* *Fact Concerts, Inc.*, 453 U.S. at 249-52.

118. *See* 1B SCHWARTZ, *supra* note 4, §§ 7.1-7.2, at 2-13. “A combined reading of *Owen* and *City of Newport* leads to the conclusions that, while municipal entities are not immune from prospective relief or compensatory damages, even when their officials act in good faith (*Owen*), they are absolutely immune from punitive damages (*City of Newport*).” 1B SCHWARTZ, *supra* note 4, § 7.1, at 2.

119. *See* *Brown*, 117 S. Ct. at 1389; *see also* Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81 (1986).

Concerts, Inc., a plurality in *Pembaur v. City of Cincinnati*¹²⁰ held that a single decision, when made by the appropriate authority, could subject the municipality to § 1983 liability.¹²¹ A plurality of the Court also held that municipalities can only be held liable for the decisions of their officials when those officials have final, and not simply discretionary, authority to establish policy with respect to the unconstitutional action ordered.¹²² Further, the plurality directed that lower courts should look to state law in determining whether an official possessed final authority as to establishing policy.¹²³

In *City of St. Louis v. Praprotnik*,¹²⁴ a plurality of the Court adhered to the *Pembaur* decision in holding that state law should determine who policymakers are for purposes of § 1983; however, the *Praprotnik* plurality went beyond *Pembaur* and held that state law is the *sole* source for such a determination.¹²⁵ Further, such a determination is to be made by the court rather than a jury.¹²⁶

Less than one year after the *Praprotnik* decision, the Supreme Court had the chance to restructure its much criticized definition of policymaker.¹²⁷ Justice Kennedy joined the *Praprotnik* plurality¹²⁸ in deciding *Jett v. Dallas Independent School District*.¹²⁹ The majority in *Jett* reaffirmed the *Praprotnik* plurality's holding that final policymaking authority is a question of state law; however, the *Jett* majority implicitly rejected the assertion that state law was the sole determining factor in the analysis.¹³⁰

An important addition to the *Monell* policy or custom requirements came from the Supreme Court's decision in *City of Canton v. Harris*,¹³¹ involving an

120. 475 U.S. 469 (1986).

121. *See id.* at 481-85 (plurality opinion).

122. *See id.* at 481-82 (plurality opinion). The Court noted that such authority could be found in either a legislative enactment or through a delegation from an official who possesses such authority. *See id.* at 483 (plurality opinion).

123. *See id.* at 483 (plurality opinion). At issue was whether the prosecutor was a final policymaker when he instructed two deputies to forcibly enter the plaintiff's clinic. *See id.* at 484 (plurality opinion). Because Ohio state law allowed a prosecutor to establish policy, the prosecutor was found to be a policymaker with final authority and the municipality was accordingly liable. *See id.* at 484-85 (plurality opinion).

124. 485 U.S. 112 (1988) (plurality opinion).

125. *See id.* at 124-25 (plurality opinion). For further discussion and criticism of the *Praprotnik* decision, see Cushman, *supra* note 41, at 694; Gerhardt, *supra* note 7, 577-79.

126. *See Praprotnik*, 485 U.S. at 124-25 (plurality opinion).

127. *See* 1 NAHMOD, *supra* note 67, § 6.10, at 447.

128. *See* 1 NAHMOD, *supra* note 67, § 6.10, at 447.

129. 491 U.S. 701 (1989).

130. *See id.* at 737; 1 NAHMOD, *supra* note 67, § 6.10, at 447-48. In determining whether someone has final policymaking authority, trial judges should look to the "[r]elevant legal materials, including state and local positive law" as well as custom having the effect of law. *Jett*, 491 U.S. at 737 (citing *Praprotnik*, 485 U.S. at 124 n.1).

131. 489 U.S. 378 (1989) (plurality opinion).

inadequate training claim against the city.¹³² The Court noted that the typical *Monell* policy or custom theories were not sufficient for the plaintiff because the actual policy at issue was constitutional.¹³³ When such policies are unconstitutionally applied by an employee as a result of the employee's inadequate training, a municipality can be held liable so long as the plaintiff can show that the municipality was deliberately indifferent to the rights of the persons coming into contact with the municipal employee.¹³⁴

The *Harris* Court's adoption of the deliberately indifferent standard illustrated a method of imposing liability on a municipality even when the municipality's actions were constitutional. In *Board of the County Commissioners v. Brown*,¹³⁵ the deliberate indifference standard in the context of a single hiring decision was destined to again play a decisive role in determining municipal liability under § 1983.

IV. REASONING OF THE COURT

In *Board of the County Commissioners v. Brown*,¹³⁶ the United States Supreme Court addressed the issue of whether a single hiring decision could trigger municipal liability under 42 U.S.C. § 1983.¹³⁷ After suffering a defeat in the Fifth Circuit Court of Appeals, the petitioner, the Board of the County Commissioners, argued something more than a single decision to hire is necessary to hold a municipality liable for a plaintiff's constitutional injuries that were caused by a municipal employee.¹³⁸ The United States Supreme

132. *See id.* at 387 (plurality opinion). While in the custody of the Canton police department, Geraldine Harris repeatedly collapsed to the floor. *See id.* at 381 (plurality opinion). She brought suit against the City of Canton for failure to train its supervisors in making determinations whether an arrestee needed medical attention while in custody. *See id.* at 381 (plurality opinion).

133. *See id.* at 386-87 (plurality opinion). "There can be little doubt that on its face the city's policy regarding medical treatment for detainees is constitutional." *Id.* (plurality opinion).

134. *See id.* at 387-89 (plurality opinion). "Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Id.* at 389 (plurality opinion).

135. 117 S. Ct. 1382 (1997).

136. 117 S. Ct. 1382 (1997).

137. *See Brown*, 117 S. Ct. at 1387. The decision to hire Burns was constitutional, and it complied with state law. *See id.* at 1387, 1389; *supra* note 24 and accompanying text.

138. *See* Petitioner's Brief at 9-12, *Brown* (No. 95-1100). Petitioner argued:

Sheriff Moore's deliberate indifference may have caused the constitutional violation in a "but for" sense, but it did not directly 'order' or 'authorize' the violation. Where the policymaker's decision does not directly 'order' or 'authorize' the constitutional violation, something more than a single decision is required in order to find that this decision in fact constitutes 'municipal policy' such that we can hold

Court agreed and held that only when a reasonable policymaker could determine that the specific constitutional deprivations caused by an employee were the plainly obvious consequence of the hiring decision could a municipality be held liable for its single hiring decision.¹³⁹

After indicating that a municipality remained subject to suit under 42 U.S.C. § 1983,¹⁴⁰ Justice O'Connor, writing for the majority, stated that a municipality cannot be held liable under the doctrine of respondeat superior.¹⁴¹ Rather, *Monell* and its progeny require a plaintiff seeking compensation under § 1983 to prove that an official policy or unofficial custom of the municipality directly caused the plaintiff's injury.¹⁴²

In resolving whether a municipality could be liable for a single hiring decision by an official policymaker, the Court cautioned that it is insufficient for a plaintiff to show that the single decision is imputable to the municipality.¹⁴³ The plaintiff must also show that the municipality's deliberate conduct was the moving force¹⁴⁴ causing the plaintiff's injuries.¹⁴⁵ Such proof satisfies the need to establish the municipality's requisite culpability¹⁴⁶ and causation; moreover, it forces courts to look beyond the doctrine of respondeat superior when determining municipal liability.¹⁴⁷ The Court reasoned that

the county liable

Id. at 11-12 (quoting *Brown v. Bryan County Okla.*, 67 F.3d 1174, 1186-87 (5th Cir. 1995) (Garza, J., dissenting)).

139. See *Brown*, 117 S. Ct. at 1386, 1391-92.

140. See *Brown*, 117 S. Ct. at 1387-88 (citing *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 689 (1978)).

141. See *Brown*, 117 S. Ct. at 1388 (citing *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818 (1985) (plurality opinion); *id.* at 828 (Brennan, J., concurring); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-79 (1986); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988) (plurality opinion); *id.* at 137 (Brennan, J., concurring); *City of Canton v. Harris*, 489 U.S. 378, 392 (1989) (plurality opinion)).

142. See *Brown*, 117 S. Ct. at 1388. As opposed to respondeat superior, under which a municipality would be liable solely because of the employer-employee relationship, the necessity of finding a "policy" ensures an actual adoption or endorsement of the act by an appropriate legislative or decision making body. See *id.* The Court also noted that "an act performed pursuant to a 'custom' that has not been formally approved by an appropriate decision maker . . ." may still allow an imposition of liability under § 1983 so long as the "practice is so widespread as to have the force of law." *Id.* (citing *Monell*, 436 U.S. at 690-91 (internal citations omitted)).

143. See *Brown*, 117 S. Ct. at 1388.

144. The phrase "moving force" is an alternative way of emphasizing that a municipality's policy, custom, or deliberate indifference was the proximate cause of the plaintiff's injuries. See 1B SCHWARTZ, *supra* note 4, § 7.12, at 36.

145. See *id.*, 117 S. Ct. at 1388.

146. See *id.* Culpability should be examined in any § 1983 analysis; however, § 1983 "itself" contains no state-of-mind requirement independent of that necessary to state a violation of an underlying federal right." *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 330 (1986)).

147. See *Brown*, 117 S. Ct. at 1388.

requiring some affirmative link prevented a finding of municipal liability from implicating federalism questions.¹⁴⁸

Establishing a municipality's culpability and causation is easier when the municipality itself intentionally acted to injure a plaintiff;¹⁴⁹ attribution is much more difficult and the risk of imposing vicarious liability is greater when a municipality's actions, though facially constitutional, indirectly result in an injury or deprivation of federally protected rights.¹⁵⁰ Such is the case of a single hiring decision.¹⁵¹ The majority held that a plaintiff may bring a cause of action against a municipality only when the two following conditions are met: first, the acts of a municipal employee caused a violation of the plaintiff's civil rights; and second, the municipality was deliberately indifferent¹⁵² to the known or obvious consequences of its actions.¹⁵³ Therefore, a municipal actor, such as the hiring sheriff in the present case, can only be deemed deliberately indifferent when the actual deprivation of the plaintiff's constitutional rights will be the plainly obvious consequence of his hiring decision.¹⁵⁴

148. *See id.* at 1394. Underlying Justice O'Connor's reasoning is her awareness of federalism concerns. If the Court had elected to hold Bryan County liable for the single hiring decision by Sheriff Moore which was permitted by state law, then the Court in essence would be taking it upon itself to rewrite the Oklahoma statutes governing the hiring of law enforcement officials. *See id.*

149. *See Brown*, 117 S. Ct. at 1389. The Court stated:

[P]roof that a municipality's . . . authorized decision maker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably. Similarly, the conclusion that the action taken or directed by the municipality or its authorized decision maker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains.

Id.

150. *See Brown*, 117 S. Ct. at 1388-89. When a municipality's actions indirectly injure or deprive a plaintiff of her rights, extreme standards of culpability and causation must be applied in order to prevent municipal liability under the doctrine of respondeat superior, which is not permitted under *Monell*. *See id.* Justice O'Connor noted that the Court has only extended liability to single decisions imputable to a municipality "where the evidence that the municipality had acted and that the plaintiff had suffered a deprivation of federal rights also proved fault and causation." *Id.* at 1389 (citing *Owen v. Independence*, 445 U.S. 622 (1980); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981)).

151. *See Brown*, 117 S. Ct. at 1393-94.

152. The Court defines "deliberate indifference" as "a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown*, 117 S. Ct. at 1391.

153. *See id.* at 1390 (citing *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

154. *See Brown*, 117 S. Ct. at 1392. Justice O'Connor reasoned that although inadequate scrutiny during the hiring process may increase the risk of harmful consequences, this will not satisfy the standard of deliberate indifference which requires that the plaintiff show such inadequate screening will produce a *specific* constitutional violation. *See id.* at 1391. Because of the significance of the test enunciated by the Court, it is stated below in full:

Only where adequate scrutiny of an applicant's background would lead a reasonable

Justice O'Connor found that the district court and the Fifth Circuit Court of Appeals misapplied the deliberate indifference standard.¹⁵⁵ The lower courts' analysis in essence relied on a preponderance of the evidence standard that such inadequate screening would produce *any* constitutional violation.¹⁵⁶ Justice O'Connor determined that the lower courts erred in failing to address whether Burns's hiring, given his background, would make the specific constitutional violation alleged in this case, excessive force, a plainly obvious consequence of Moore's hiring decision.¹⁵⁷ Because the Court found insufficient evidence that Burns's infliction of excessive force was a plainly obvious consequence of the hiring decision, it also found that Sheriff Moore did not act with deliberate indifference to the rights of the Plaintiff and that the district court thus erred in submitting the inadequate hiring claim to the jury.¹⁵⁸

Justice Souter, joined by Justices Stevens and Breyer, dissented from the majority's holding.¹⁵⁹ Souter criticized the majority for creating a new standard of proof for deliberate indifference by requiring plaintiffs to show that a deprivation of a specific constitutional right was the plainly obvious consequence of a single hiring decision.¹⁶⁰ Even under this heightened standard of proof, Souter found there was sufficient evidence to hold Bryan County liable for its policymaker's decision to hire Stacy Burns.¹⁶¹

Justice Breyer, joined by Justices Stevens and Ginsburg, also dissented from the majority's holding.¹⁶² Breyer questioned the ever-developing distinctions set forth in *Monell* between respondeat superior liability and

policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.'

Id. at 1392.

155. See *Brown*, 117 S. Ct. at 1392.

156. See *id.*

157. See *id.* The lower courts should have analyzed whether "this officer was highly likely to inflict the particular injury suffered by the plaintiff." *Brown*, 117 S. Ct. at 1392 (emphasis added).

158. See *Brown*, 117 S. Ct. at 1393.

159. See *Brown*, 117 S. Ct. at 1394 (Souter, J., dissenting).

160. See *id.* at 1397 (Souter, J., dissenting). Justice Souter chastised the majority for redefining the deliberate indifference standards of *Canton* in which the Court construed "constitutional violations generally." See *id.* (Souter, J., dissenting). Justice Souter further argued against establishment of the new standard due to the fact that the petitioner had not requested such action by the Court. See *id.* (Souter, J., dissenting).

161. See *id.* at 1398-1400 (Souter, J., dissenting). During oral arguments, "Souter postulated that the hiring decision set in motion a chain of events that resulted in Brown's constitutional rights being violated." Daniel J. Roy, *High Court Scrutinizes County's Liability for Reserve Officer's Civil Rights Violations*, EMPL. POL'Y & L. DAILY (BNA), at D-4 (November 7, 1996).

162. See *Brown*, 117 S. Ct. at 1401 (Breyer, J., dissenting).

liability that is based on a municipality's policy or custom.¹⁶³ Breyer asserted that the need for the distinction has diminished,¹⁶⁴ the complexity of its application has increased,¹⁶⁵ and factual and legal changes have developed that may no longer require the distinction.¹⁶⁶ As a result, Breyer believed that the time was at hand to reexamine the basic principles set forth in *Monell*, and he therefore dissented from the ongoing application of the *Monell* distinctions.¹⁶⁷

163. *See id.* (Breyer, J., dissenting).

164. *See id.* at 1401-02 (Breyer, J., dissenting). Justice Breyer pointed out that the original basis for the *Monell* distinction was that Congress had rejected the Sherman Amendment to the Civil Rights Act of 1871, which essentially would have allowed vicarious municipal liability for the acts of private citizens. *See id.* at 1401 (Breyer, J., dissenting) (citations omitted); Cushman, *supra* note 41, at 699; *supra* note 104 and accompanying text. Justice Breyer argued that such a rejection does not pertain to vicarious liability for the acts of a municipality's employees. *See Brown*, 117 S. Ct. at 1401-02 (Breyer, J., dissenting) (citations omitted).

165. *See Brown*, 117 S. Ct. at 1401-03 (Breyer, J., dissenting). Using the jury instruction in the case at bar as an example, Justice Breyer noted that extremely slight differences in wording creates vastly different results. "Yet those words, while adding complexity, do not seem to reflect a difference that significantly helps one understand the difference between 'vicarious' liability and 'policy.'" *Id.* at 1402 (Breyer, J., dissenting) (citation omitted).

166. *See id.* at 1401, 1403-04 (Breyer, J., dissenting). Breyer relied on the following three arguments: first, the sheer complexity of both interpretive law and legal distinctions makes it difficult for a municipality to have a clear understanding of what "policy" means; second, municipalities have more at stake in a lawsuit since individual employees have the protection of "qualified immunity;" and third, many states have enacted statutes that in essence create respondeat superior liability through the indemnification of their municipal employees. *See id.* at 1403-04 (Breyer, J., dissenting).

167. *See id.* at 1404 (Breyer, J., dissenting).

V. SIGNIFICANCE

Commentators both commended¹⁶⁸ and criticized¹⁶⁹ the *Brown* decision. Wallace Jefferson, attorney for the petitioner, heralded the decision as beneficial to taxpayers due to the Court's restrictions on municipal liability for hiring decisions.¹⁷⁰ The respondent's attorney, J. Kermit Hill, cautioned that the decision suggests that municipalities are not accountable for their actions.¹⁷¹ Regardless of such praise and criticism, the decision solidified some of the Court's previous views, raised a variety of interesting legal intricacies, and left some questions open to speculation until future decisions determine their outcome.

One of the primary results from *Brown* is that the Court reasserted its federalism concerns regarding respondeat superior liability.¹⁷² After noting that the Court has yet to import respondeat superior theories into questions of municipal liability,¹⁷³ the Court addressed the difficult task of balancing the traditional rules within the sphere of single hiring decisions.¹⁷⁴ The Court held that municipalities can only be held liable when a plaintiff proves the following: first, a municipal employee violated the plaintiff's constitutional rights; and second, the specific constitutional violation was a plainly obvious consequence of the hiring decision.¹⁷⁵ The rationale for its newly enunciated rule lies within the need to prove both a municipality's culpability and

168. See Chris Casteel, *Court Backs Bryan County, Reverses \$818,000 Ruling*, THE DAILY OKLAHOMAN, April 29, 1997, at 01 (statement of petitioner's attorney, Wallace B. Jefferson) (suggesting that without the decision, many municipalities throughout the country might be "more vulnerable to lawsuits over hiring decisions and might be forced into bankruptcy by large judgments"); Savage, *supra* note 12, at A1 (statement of Los Angeles City Attorney James K. Hahn) (suggesting that the decision could reinstate "the original purpose of civil rights laws—as tools against government entities that systematically violate civil rights, rather than as vehicles to sue over occasional police brutality").

169. See Steven P. Garmisa, *High Court Creates Civil Rights Thicket*, CHI. SUN-TIMES, May 21, 1997, at 68 (asserting that the "majority championed the right of municipal officials to hire relatives with criminal records"); *Green Light for Brutality*, *supra* note 18, at 36A (declaring the Court's judicial activism in effect "issued local governments a license for negligence"); *Incoherence at the Court*, RICHMOND TIMES-DISPATCH, May 16, 1997, at A12 (calling the decision "aimless meandering"); James Kilpatrick, *Case of Wayward Nephew "Murkifies" Law Even Further*, THE ST. J. REG. (Springfield, Ill.), June 3, 1997, at 4 (suggesting that the decision further obscures municipal liability litigation); *U.S. Supreme Court Ruling Lets Too Many Off Hook*, SYRACUSE HERALD J., April 29, 1997, at A10 (labeling the decision as ridiculous).

170. See Savage, *supra* note 12, A1.

171. See Savage, *supra* note 12, A1.

172. See *Brown*, 117 S. Ct. at 1394.

173. See *id.* at 1388 (citations omitted).

174. See *id.* at 1388-94.

175. See *id.* at 1392.

causation.¹⁷⁶ A plaintiff who satisfies this burden thus proves the municipality was deliberately indifferent to his rights,¹⁷⁷ and any questions concerning federalism and respondeat superior liability simply evaporate.¹⁷⁸

Brown is important also because the Court further clarified its deliberate indifference analysis set forth in *Canton*.¹⁷⁹ The *Canton* deliberate indifference standard required a plaintiff to show that a municipality shut its eyes to constitutional violations in general.¹⁸⁰ By holding that the specific violation of the plaintiff's civil rights must be the plainly obvious consequence of the municipality's actions,¹⁸¹ the Court arguably created a higher requisite standard for suits involving a municipality's deliberate indifference.¹⁸²

Another result of *Brown* is that its "plainly obvious consequence" test could be applicable to a smorgasbord of constitutional violations.¹⁸³ The test only requires that the specific constitutional violation be plainly obvious at the time of hiring.¹⁸⁴ Because the Court did not restrict this test to excessive force claims or to claims involving single hiring decisions, plaintiffs seeking to redress any constitutional deprivation by showing a municipality's deliberate indifference must now satisfy *Brown*'s "plainly obvious consequence" test.¹⁸⁵

Although the *Brown* majority held that Bryan County and Sheriff Moore were not deliberately indifferent to Brown's constitutional rights, and thus not liable,¹⁸⁶ the Court left open the question of whether a single hiring decision

176. See *id.* at 1394.

177. See *id.* at 1392.

178. See *Brown*, 117 S. Ct. at 1394.

179. See *Brown*, 117 S. Ct. at 1397 (Souter, J., dissenting).

180. See *id.* at 1397 (Souter, J., dissenting); *supra* note 160 and accompanying text.

181. See *Brown*, 117 S. Ct. at 1392.

182. See *Brown*, 117 S. Ct. at 1397 (Souter, J., dissenting); see also Andrew J. Ruzicho & Louis A. Jacobs, *Vicarious Municipal Liability*, 20 EMPL. PRAC. 113, 115 (1997) (stating that *Brown* increased the burden of proof in cases of inadequate screening); Casteel, *supra* note 168, at 01 (statement of petitioner's attorney, Wallace B. Jefferson) ("I think it just makes a plaintiff have to show with a stricter burden of proof that the city or county violated the Constitution."). But see *Brown*, 117 S. Ct. 1392-93 n.1 (majority opinion) ("We do not suggest that a plaintiff in an inadequate screening case must show a higher degree of culpability than the 'deliberate indifference' required in *Canton* . . .").

183. See *High Court Makes It Harder to Successfully Sue Municipalities Over Police Brutality*, STAR-TRIB. (Minneapolis-St. Paul), April 29, 1997, at 04A (suggesting that the *Brown* decision could impact any suit based on deprivation of federal rights); Savage, *supra* note 12, at A1 (asserting that the *Brown* decision could impact various areas of the law such as discriminatory hiring suits, search and seizure cases, sexual harassment claims, and free-speech violations).

184. See *Brown*, 117 S. Ct. at 1392.

185. See *Norris ex rel. West v. Waymire*, 114 F.3d 646 (7th Cir.), *cert. denied*, 118 S. Ct. 337 (1997) (holding municipality not liable for sexual harassment of thirteen-year-old female by police officer, because such harassment was not plainly obvious even though officer had a history of sexually assaulting adult women).

186. See *Brown*, 117 S. Ct. at 1394.

could ever trigger municipal liability.¹⁸⁷ In the past, plaintiffs have had little success with claims based on hiring inadequacies.¹⁸⁸ In light of the history of hiring claims under § 1983 and the stringent test set forth in *Brown*, it is doubtful that litigants claiming inadequate screening will have increased chances of success in the near future.

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187. *See id.* at 1392; *see also* *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1416 (5th Cir. 1997) (recognizing the Court's reluctance to "announce a bright-line rule that municipal officials can never be liable under § 1983 for an isolated hiring decision . . .").

188. *See* 1B SCHWARTZ, *supra* note 4, § 7.18, at 111. Even prior to the *Brown* decision, Schwartz noted the deliberate indifference standard generally proved insurmountable. *See* 1B SCHWARTZ, *supra* note 4, § 7.18, at 111.