Duquesne Law Review

Volume 16 | Number 3 Article 7

1977

# Municipal Liability for Constitutional Violations: Can You Fight City Hall - A Survey of Circuits

Carl Harvison

# Comment

## Municipal Liability for Constitutional Violations: Can You Fight City Hall? A Survey of the Circuits

### INTRODUCTION

When an individual's constitutional rights are violated by a state or local official acting under color of state law, that person's primary legal recourse is a federal suit[1] against the particular official involved brought under 42 U.S.C. § 1983[2] and its jurisdictional counterpart, 28 U.S.C. § 1343(4).[3] Unfortunately, the section 1983 suit does not always provide an adequate remedy. Individual wrongdoers[4] are often difficult to identify, may be judgment-proof, and may have a good faith defense under section 1983 that broadens in scope as their duties and responsibilities expand. Additionally, a wrongdoer may receive sympathy from a jury reluctant to find him liable for just doing his job.[5] Because of these difficulties, the particular municipal corporation that employs the offending local official often presents a more appealing target for liability.

While a suit against a municipality involves none of the above difficulties, plaintiffs are confronted with an even more basic prob-

---

1. It will be presumed that a state action will not be as desirable as one brought in a more "neutral" federal forum.

2. 42 U.S.C. § 1983 (1970) reads:

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

3. 28 U.S.C. § 1343 (1970) reads in pertinent part: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

4. The usual situation giving rise to a § 1983 action is one where a state or local police officer violates the plaintiff's constitutional rights by some act of physical violence. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961). However, the application of § 1983 is far broader, encompassing actions from employment termination to discriminatory zoning.

5. *See* Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 923 (1976) [hereinafter cited as *Damage Remedies*].

lem: in *Monroe v. Pape*[6] the United States Supreme Court held that a municipality is not a "person" under section 1983 and, therefore, is not subject to liability under it. The court in *Monroe* based its holding on a review of the legislative history of the Ku Klux Klan Act of 1871 which contained the language currently found in section 1983. Noting Congress' rejection of an earlier version of the proposed Act that would have held municipalities liable in certain cases,[7] the Court concluded that Congress did not intend that municipalities should be held liable for violations of constitutional rights.[8] Despite heavy criticism that it misinterpreted the Act's legislative history,[9] the Court has consistently upheld its reading.[10] *Monroe* is now regarded as a complete bar to suing municipalities under section 1983.

Because municipalities are desirable defendants[11] and because the possibility of municipal liability has been precluded under section 1983, attorneys have been searching for other ways to sue them. This comment will discuss the geneses and theories of liability of the most frequently used methods of maintaining a cause of action against a municipality under federal statutory and constitutional authority:[12] suits brought under 42 U.S.C. §§ 1981,[13] 1985,[14] 1986,[15]

6. 365 U.S. 167 (1961). In *Monroe*, city officials, acting under color of state law, entered petitioners' home in the early morning, routed the family from bed, and made them stand naked in the living room while the officials searched and ransacked the entire home. They then took Mr. Monroe to the police station and held him on open charges for ten hours without allowing him to contact his family or an attorney. They interrogated him and released him without charge.

Petitioners brought suit under § 1983 against the city and individual officers. Recovery was allowed against the officers, and the case is regarded as establishing § 1983 as an effective means of remedying, in federal court, alleged constitutional wrongs by state officials.

7. The Court noted that during the debate of the bill, the Sherman amendment was proposed. That amendment would have made the residents of a county, city, or parish liable for full compensation to any victim of racial violence, including acts by private citizens. 365 U.S. at 188 n.38. The Court did not decide if Congress would have had the power to make municipalities liable under these circumstances. *Id.* at 191.

8. *Id.*

9. The most common criticism is that because the proposed bill would have made municipalities strictly liable, rejection of the bill by Congress should be interpreted only as a rejection of this broad liability and not as a general rejection of any municipal liability. *See* Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 Nw. U.L. Rev. 770 (1975) [hereinafter cited as Hundt].

10. *See, e.g.*, City of Kenosha v. Bruno, 412 U.S. 507 (1973); Moor v. County of Alameda, 411 U.S. 693 (1973).

11. *See* note 5 and accompanying text *supra.*

12. To keep this comment within manageable limits, certain aspects will not be examined. Those not covered include: a state claim brought in federal court under pendent jurisdiction; equitable relief; claims brought under the fourteenth amendment in combination

1988,[16] and directly under the fourteenth amendment.[17] Decisions from the eleven judicial circuits will then be examined to determine

with some part of the Bill of Rights; and the effects of state common law immunity or eleventh amendment immunity on municipal liability.

13. 42 U.S.C. § 1981 (1970) reads:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

14. Actions brought under 42 U.S.C. § 1985 for civil rights violations of the type examined by this comment are brought under subsection (3). It reads:

> (3) Depriving persons of rights or privileges
>
> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1970).

15. 42 U.S.C. § 1986 (1970) reads:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action. . . .

16. 42 U.S.C. § 1988 (1970) reads:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

17. The key part of the fourteenth amendment for these actions is § 1. It reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction

current trends, and finally, a suggestion will be made as to which theory, if any, is deserving of Supreme Court approval.

## THE ALTERNATIVE CAUSES OF ACTION

### *Those Rejected by the Supreme Court*

The Supreme Court has already rejected several causes of action aimed at securing municipal liability for civil rights violations. As explained above, *Monroe* precludes an action against a municipality for damages under section 1983. In *City of Kenosha v. Bruno,*[18] the Supreme Court relied on *Monroe* to deny an equitable suit against a municipality brought under section 1983. It found no evidence in the legislative history or language of section 1983 "that the generic word 'person' . . . was intended to have a bifurcated application to municipal corporations depending on the nature of relief sought against them."[19]

In *Moor v. County of Alameda,*[20] the plaintiff looked to section 1988 as a basis for a cause of action. Section 1988 authorizes federal courts to apply appropriate state law remedies where the federal remedy available is inadequate for the protection of federal civil rights. The plaintiff argued that since no suit was available against a municipality under section 1983, that section was inadequate for the protection of the rights it guaranteed. Therefore, he contended, the Supreme Court should, under section 1988, apply the state law which held municipalities vicariously liable for torts committed by local officials.

The *Moor* court rejected this argument, saying that section 1988 was intended to allow the incorporation of only a state *remedy* into federal law. The Court said Congress showed no intent that section 1988, standing alone, should allow federal courts to adopt a *cause of action* granted under state law. Instead, the cause of action must

---

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

U.S. CONST. amend. XIV, § 1.

18. 412 U.S. 507 (1973).
19. *Id.* at 513.
20. 411 U.S. 693 (1973).

arise originally from the federal civil rights statutes.[21] In addition, the Court stated that section 1988 is limited to situations where the state law is not inconsistent with the Constitution or other laws of the United States. Since vicarious municipal liability is inconsistent with *Monroe's* interpretation of section 1983, the Court held there was no cause of action under section 1988.[22]

### *The Fourteenth Amendment Cause of Action*

The most frequently employed method of suing municipalities is a direct suit brought under the fourteenth amendment, using 28 U.S.C. § 1331[23] to obtain jurisdiction. The genesis of this theory is *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[24] where the court allowed a federal cause of action for damages resulting from a fourth amendment violation. Writing for the majority, Justice Brennan said that there should be a federal remedy for every violation of a federal right,[25] absent any "special factors" that counsel hesitation.[26] Giving this language an expansive reading, lower federal courts justified a cause of action against individual federal officers for the violation of any civil right, not just those embodied in the fourth amendment.[27] Later the courts further expanded the concept to include municipalities as appropriate defendants for civil rights violations based on the fourteenth amendment.

This second step of including municipalities as defendants poses two potential problems. First, the Supreme Court's decision in *Monroe* could be read as evidencing a finding of congressional intent

21. *Id.* at 702-06.

22. *Id.* at 706-08.

23. 28 U.S.C. § 1331(a) (1970) reads in part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . ."

24. 403 U.S. 388 (1971). In *Bivens*, the plaintiff was arrested by federal agents acting under color of federal law. Without either an arrest or search warrant, they entered his apartment, manacled him in front of his family, searched his apartment and then removed him to the federal courthouse where he was interrogated, booked, and strip searched.

25. *Id.* at 396.

26. What Justice Brennan considered to be "special factors" is not explained. In his concurrence in *Bivens*, Justice Harlan described the limiting factors as "appropriateness," *i.e.*, whether the suit is justified by policy considerations, and "necessity," *i.e.*, the presence of alternative remedies. *Id.* at 407. For a more detailed analysis of these limitations, see Hundt, *supra* note 9, at 776-95.

27. For a listing of cases, see Hundt, *supra* note 9, at 771 n.10.

that municipalities should not be held liable for any violation of any federal civil right. Such a reading of *Monroe* would, of course, preclude the possibility of an action being brought against a municipality under *any* theory. Although it is possible that the Supreme Court will so decide the question of municipal liability,[28] lower courts have apparently assumed *Monroe* to be limited to actions arising under the Ku Klux Klan Act of 1871[29] or section 1983 alone.

The second problem is whether the language in *Bivens* justifies the jump from individual to municipal defendants. There is no express language in *Bivens* that suggests municipalities were meant to be included as defendants. The idea that there should be a federal remedy for every violation of a federal right, the rationale behind the expansion, is arguably satisfied by the ability to sue individual defendants.

The rationale in support of the expansion of *Bivens* to include municipal liability is that without it, there may, in some cases, be no adequate or effective federal remedy, since individual defendants enjoy favorable jury considerations and other legal advantages that may free them from deserved liability, whereas municipalities do not.[30] Since the action against individual defendants is inadequate, public policy requires that one be created against municipal defendants to assure the existence of an adequate federal remedy.[31] Courts receptive to this argument and willing to read *Monroe*[32] narrowly may be convinced that they are free to balance interests and provide relief against municipalities when justified by the facts of a given case.

The persuasiveness of this argument is greatly bolstered by *City*

28. Moor v. County of Alameda, 411 U.S. 693 (1973), seems to indicate that in the Court's view, the legislative history of the Act of April 20, 1871, does not show a congressional intent to preclude all civil rights actions against municipalities. In *Moor,* the Court dismissed a § 1988 action against a municipality, basing its decision in part on its interpretation of § 1988. Since the petitioner also brought the action under § 1983, the Court partially relied on *Monroe* and its reading of the legislative history. However, if the Court had read the legislative history as calling for a complete bar of municipal liability, it could have decided on that point alone, rather than interpreting and deciding on the basis of § 1988. *See* text accompanying notes 21 & 22 *supra.*

29. The Ku Klux Klan Act of 1871 includes what are now §§ 1983, 1985, and 1986. *See* notes 38 & 39 *infra.*

30. *See* note 5 and accompanying text *supra.*

31. For a discussion of the policy arguments for and against municipal liability, see Hundt, *supra* note 9.

32. *See* text accompanying notes 28 & 29 *supra.*

*of Kenosha v. Bruno*[33] where the Supreme Court refused to rule on the cause of action brought against a municipality, saying there was a dispute, to be settled by the district court on remand, as to whether the money requirement of section 1331 had been met. Although the Court's action does not clearly indicate its acceptance of the cause of action against a municipality under the fourteenth amendment, Justices Brennan and Marshall, in a concurring opinion, explicitly stated that if appellees could prove on remand that the $10,000 minimum amount was present, "then § 1331 jurisdiction is available, . . . and they are clearly entitled to relief."[34]

Armed with the language of the concurring opinion, the policy arguments favoring municipal liability, and the interpretations of *Monroe* and *Bivens* outlined above, petitioners have taken their civil rights cases to court and pleaded that the fourteenth amendment and section 1331 give the courts the ability to hold municipalities liable.

### *The Section 1981 Cause of Action*

Prior to 1973, most courts viewed what is now termed the Civil Rights Act, 42 U.S.C. §§ 1981-1988, as one document and said that *Monroe* precluded liability against municipalities brought under any section of the Act, including section 1981.[35] However, in *District of Columbia v. Carter*[36] decided in early 1973, the Supreme Court pointed out that not all sections of the Act have the same historical origin.[37] Section 1983 originated from the Ku Klux Klan Act of 1871

33. 412 U.S. 507 (1973).

34. *Id.* at 516 (citations omitted).

35. *See, e.g.*, Arunga v. Weldon, 469 F.2d 675 (9th Cir. 1972); Jones v. City of Houma, 339 F. Supp. 473 (E.D. La. 1972); Lyle v. Village of Golden Valley, 310 F. Supp. 852 (D. Minn. 1970); Fanburg v. City of Chattanooga, 330 F. Supp. 1047 (E.D. Tenn. 1968); Scolnick v. Winston, 219 F. Supp. 836 (S.D.N.Y. 1963).

36. 409 U.S. 418 (1973).

37. In *Carter*, the court of appeals declared that the District of Columbia was meant to be included in the scope of § 1983. This decision was based on an earlier Supreme Court decision that the district was a "State or Territory" for the purposes of § 1982. The court of appeals reasoned that if this were true for § 1982, it must also be true for § 1983.

The Supreme Court reversed, noting that § 1982 appeared originally as part of the Civil Rights Act of 1866 while § 1983 derived from the Ku Klux Klan Act of 1871. It reasoned that " '[d]ifferent problems of statutory meaning are preseted by two enactments deriving from different constitutional sources.' " *Id.* at 423.

The Court analyzed the Civil Rights Act of 1866 and determined that it was enacted to enforce the thirteenth amendment, to which the District of Columbia was subject. The Ku

which was aimed at implementing the fourteenth amendment,[38] while section 1982 was enacted with section 1981, as part of the Civil Rights Act of 1866, enforcing the thirteenth amendment.[39] The Court said that " '[d]ifferent problems of statutory meaning are presented by two enactments deriving from different constitutional sources.' "[40]

In addition, an examination of the word "person" as used in both sections reveals that they do not encompass the same class. In section 1981, "person" defines those protected from civil rights violations,[41] while in section 1983, the word describes those subject to liability for the violation of the guaranteed rights. In deciding in *Monroe* that municipalities may not be held liable under section 1983, the Supreme Court based its decision on the perceived intent of Congress that the definition of "person" should not be read to include municipalities.[42] Since the word as used in section 1981 represents a different class, it is obvious the *Monroe* definition does not apply.

In light of these distinctions, courts have recently taken a second look at the section 1981 action free from the restraints of the *Monroe* holding.[43] When viewed this way, the scope of the section is very broad. It prohibits all racial discrimination, regardless of the source, and would seem to include municipalities as possible defendants.[44]

---

Klux Klan Act of 1871, however, was enacted to enforce the fourteenth amendment, which was intended to apply to the states or those acting under their authority. The District of Columbia, therefore, was not intended to be included under that Act. Thus, the term "State or Territory" under § 1 of that Act, now § 1983, was not meant to include the District.

38. Section 1983 was enacted with what is now § 1986 as part of the Ku Klux Klan Act of 1871.

39. Section 1981 was enacted with what is now § 1982 as part of the Civil Rights Act of 1866. Part of what is now § 1985 was enacted in 1866, and it was enacted in full in 1871. For another interpretation of § 1981, see Mahone v. Waddle, 564 F.2d 1018, 1030 (3d Cir. 1977) (court expressed its opinion that § 1981 resulted from an attempt to implement both the thirteenth and fourteenth amendments).

40. 409 U.S. at 423.

41. *See* note 13 *supra.*

42. *See* note 7 *supra.*

43. *See, e.g.,* Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977); Sethy v. Alameda County Water District, 545 F.2d 1157 (9th Cir. 1976); Raffety v. Prince George's County, 423 F. Supp. 1045 (D. Md. 1976); Robinson v. Conlisk, 385 F. Supp. 529 (N.D. Ill. 1974).

44. It has been argued that § 1983, which was enacted *after* § 1981, is an implied repeal of § 1981's allowance of a cause of action against a municipality. This argument has been rejected with little discussion. *See* Mahone v. Waddle, 564 F.2d 1018, 1031 (3d Cir. 1977). In addition to making this argument, Judge Garth, in a dissenting opinion, outlined a six-part argument that § 1981 and the Act of 1866 cannot be read to establish a basis for municipal liability. *Id.* at 1037-52 (dissenting opinion).

There is, however, one major drawback to the section 1981 cause of action. Since section 1981 grants all persons the same benefit of the law as is enjoyed by "white citizens," it has been interpreted to supply a cause of action only for racially motivated discrimination.[45] The section apparently does not, for example, supply a cause of action to a white citizen brutalized by a white policeman acting with no racial motive. Therefore, section 1981 does not provide the all-inclusive remedy provided by the fourteenth amendment.

### *The Section 1985 and Section 1986 Causes of Action*

There is no current authority for the proposition that sections 1985 and 1986[46] support a cause of action against a municipality for the infringement of civil rights. The arguments mustered to free section 1981 from the *Monroe* bar are not applicable to these sections.[47] Therefore, the section 1983 definition of "person," applied in *Monroe* to exclude municipalities, applies with equal force to sections 1985 and 1986.

## SURVEY OF THE CIRCUITS

### *The First Circuit*

The First Circuit Court of Appeals recently decided in *Kostka v. Hogg*[48] that no cause of action is provided under the fourteenth amendment against a municipality, apparently rejecting a Rhode Island federal district court decision in which such an action was allowed.[49] In *Kostka,* the plaintiff sued a city and various officials for damages[50] for the shooting death of Stephen Kostka. The plaintiff alleged a fourteenth amendment cause of action, asserting it was supported by an expansive reading of *Bivens.* The court reviewed

45. The Supreme Court in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), made it clear that white citizens may sue under § 1981, but only for racially motivated "reverse" discrimination. *See* 15 DUQ. L. REV. 495 (1977).

46. For the text of these sections, see notes 14 & 15 *supra.*

47. Section 1986 was adopted with § 1983 as part of the Ku Klux Klan Act of 1871. Section 1985 was enacted partly by the Civil Rights Act of 1866 and in total by the 1871 Act. *See* notes 38 & 39 *supra.*

48. 560 F.2d 37 (1st Cir. 1977).

49. Panzarella v. Boyle, 406 F. Supp. 787 (D.R.I. 1975).

50. Suit was filed against the town of Westford, Massachusetts, the city's police chief, policeman David Hogg, and several other officers.

*Bivens* and determined that although it technically allows a cause of action, it also "teaches that a federal court should proceed with caution" when requested to create a supplemental damage remedy directly from the Constitution.[51]

In exercising this caution, the majority held that when the desired remedy is in conflict with federal legislation or a constitutional provision, "it should not be judicially created if the existing remedies adequately protect the constitutional guarantee in question."[52] The court first noted that the plaintiffs had a section 1983 action against the individual wrongdoers, an action that according to *Monroe* may not be brought against a municipality. In addition, the court noted that the Supreme Court in *Aldinger v. Howard*[53] and *Moor v. County of Alameda*[54] refused to hold that municipalities may be liable on other theories. The court found that these decisions exhibited a Supreme Court finding that Congress intended a complete bar to municipal liability for conduct in violation of an individual's constitutional rights.[55]

The court then briefly examined the adequacy of the section 1983 remedy and determined that although "superior opportunities for compensation" may exist in a suit against a municipality, this did not render the section 1983 remedy inadequate.[56] As a final matter, the court asked if the action against a municipality was "indispensible to the effectuation of the Fourteenth Amendment and thus beyond the power of Congress to preclude." Deciding with "no difficulty" and little discussion that it was not, the court denied the remedy.[57]

Although the court said the holding was to be narrow, *i.e.*, limited to a fourteenth amendment action for money damages, it could have broader ramifications. It may preclude a damage action against a municipality under any portion of the Civil Rights Act, including

51. 560 F.2d at 42.

52. *Id.*

53. 427 U.S. 1 (1976). In *Aldinger*, the plaintiff asserted pendent jurisdiction existed as to a state cause of action brought against a city. The Supreme Court rejected the assertion, but stated that the decision was limited to "pendent party" jurisdiction over claims brought under 28 U.S.C. § 1343(3) (1970) and 42 U.S.C. § 1983 (1970). For the argument that *Aldinger* does not apply to action brought under § 1981, see Mahone v. Waddle, 564 F.2d 1018, 1031-32 (3d Cir. 1977).

54. 411 U.S. 693 (1973).

55. 560 F.2d at 43-44.

56. *Id.* at 42.

57. *Id.* at 44.

section 1981, because the court read *Monroe, Moor,* and *Aldinger* as evidencing a Supreme Court determination that municipalities should never be held liable for the violation of federal civil rights.[58] The court realized that section 1981 was derived from a different constitutional source than was section 1983, but found support for its decision in "broader considerations of federalism," which it felt were part of the Supreme Court's reasoning in the above three cases.[59]

### *The Second Circuit*

The Second Circuit Court of Appeals has not yet definitively ruled on the availability of either the fourteenth amendment or section 1981 cause of action. A section 1985 claim was refused in *Spampinato v. City of New York*[60] in 1962.

The key fourteenth amendment case in this circuit is *Brault v. Town of Milton*[61] where the court first allowed a cause of action, but then reversed its decision after a rehearing en banc. The reversal, however, did not constitute a holding that a suit is not cognizable under the amendment as a general matter, but rather that the plaintiffs failed to state a claim for relief under the facts presented. Thus, the question of whether suit may be brought under the amendment is still open,[62] although the dissenters argued that the majority decision effectively precluded any such suit.[63]

Through its failure to decide the issue in *Brault,* the court of appeals has opened the door for a relatively creative group of district courts to find the existence of a cause of action under the fourteenth amendment. These courts have ignored the *Brault* dissenters' pessi-

58. No § 1981 action has been brought in the circuit. A § 1985(3) action was rejected in Curran v. City of Portland, 435 F. Supp. 1063 (S.D. Me. 1977) (city is not a person under either § 1983 or § 1985(3)).

59. 560 F.2d at 44 n.6.

60. 311 F.2d 439 (2d Cir. 1962).

61. 527 F.2d 730 (2d Cir. 1975).

62. Judge Feinberg, in a short concurring opinion, noted that the majority did not decide the question of the availability of a suit under the fourteenth amendment. *Id.* at 741. *See also* Fine v. City of New York, 529 F.2d 70, 76 (2d Cir. 1976) (court noted that the en banc decision in *Brault* did not decide the issue and the court again refused to decide it, relying on other grounds for its decision).

63. Judge Smith, author of the original panel decision allowing the cause of action, joined in a dissent by Judge Oakes commenting "[w]hat the majority here describes as a failure to state a claim is in reality an adjudication on the merits that the Constitution affords no remedy . . . ." 527 F.2d at 741 (dissenting opinion).

mistic view and regard the fourteenth amendment question as unanswered. With the exception of a few cases,[64] the district courts have generally allowed the cause of action. The three most recent cases, *Citizens Council on Human Relations v. Buffalo Yacht Club*,[65] *Adekalu v. New York City*,[66] and *Skyers v. Port Authority*[67] have all held that municipalities may be sued under the fourteenth amendment. In *Buffalo Yacht Club* and *Adekalu*, the courts did not debate the issue, apparently assuming that the cause of action was available.[68]

As to the section 1981 action, at least one district court has held that a cause of action can be stated under it. In *Skyers*, the plaintiff also brought a section 1981 action for the alleged unconstitutional termination of his employment with the defendant. The court rejected the defendant's motion to dismiss, finding that the "reference to 'persons' contained in § 1981 describes those protected by the statute, and not those proscribed from its violation, as in § 1983."[69] The court also noted the different origins of sections 1981 and 1983 and the contrary results reached by other courts in deciding the issue.[70] It accepted the argument that "a municipality, however protected from suit under § 1983, is subject nonetheless under § 1981."[71]

### *The Third Circuit*

In *Mahone v. Waddle*,[72] decided in August of 1977, the issue of municipal liability under both the fourteenth amendment and section 1981 was brought before the Third Circuit Court of Appeals. Judge Rosenn, writing for the majority, held that a cause of action

64. *See, e.g.*, Scolnick v. Winston, 219 F. Supp. 836 (S.D.N.Y. 1963) (city can be sued under either the Civil Rights Act or the fourteenth amendment). *See also* Turano v. Board of Educ., 411 F. Supp. 205, 211 (E.D.N.Y. 1976) (availability of the cause of action questioned).

65. 438 F. Supp. 316 (W.D.N.Y. 1977).

66. 431 F. Supp. 812 (S.D.N.Y. 1977).

67. 431 F. Supp. 79 (S.D.N.Y. 1976).

68. In *Buffalo Yacht Club*, the court simply said the city could be sued if the § 1331 money requirement was satisfied. 438 F. Supp. at 325. In *Adekalu*, the court noted that the weight of authority is in favor of such suits and that the question is still open in the circuit. 431 F. Supp. at 818.

69. 431 F. Supp. at 83.

70. *See* notes 38 & 39 and accompanying text *supra*.

71. 431 F. Supp. at 83.

72. 564 F.2d 1018 (3d Cir. 1977).

against the city of Pittsburgh had been stated under section 1981. *Monroe* was distinguished, once again, on the theory that the use of the word "person" in section 1981 referred to a different class of persons than those described in section 1983. The court also relied on the sections' different legislative origins as support for its conclusions.[73]

Unlike most section 1981 cases, *Mahone* does not deal with discrimination in employment or the making of contracts.[74] Here, the plaintiff's claim for damages allegedly resulting from police misconduct was based on the last part of section 1981 which grants all citizens the right to "full and equal benefit of all laws" and subjects all citizens to punishment equal to that imposed on white persons.[75] The court agreed with the plaintiff that section 1981 clearly extended beyond the right to contract and that the cause of action did fall "within the ambit of the statutory language."[76] It found support for this reading in a "contemporary understanding" of the Civil Rights Act of 1866: the act was to "eradicate *all* discrimination against blacks and to secure for them full freedom and equality in civil rights."[77]

Having decided the section 1981 issue in favor of liability, the court avoided the fourteenth amendment issue, relying on the principle that a federal court should avoid constitutional issues where possible.[78] The fourteenth amendment issue, therefore, is still open in the circuit,[79] and this has caused a debate within the district

73. *See* notes 35-42 and accompanying text *supra*.

74. In *Mahone*, two black residents of Pittsburgh alleged they were stopped by the two named defendants, police officers, and subjected to racially motivated verbal harassment and physical abuse. The incident culminated in their arrest and conviction based on the defendants' allegedly perjured testimony. 564 F.2d at 1020.

75. 42 U.S.C. § 1981 (1970). For the text of the act, see note 13 *supra*.

76. 564 F.2d at 1028.

77. *Id.* For a similar decision, see Maybanks v. Ingraham, 378 F. Supp. 913 (E.D. Pa. 1974)(district court held a cause of action was stated against a municipality under § 1981).

78. *See* Hagans v. Lavine, 415 U.S. 528 (1974). The Third Circuit has also followed the maxim that a federal court should decide nonconstitutional, pendent claims rather than constitutional ones. Gagliardi v. Flint, 564 F.2d 112 (3d Cir. 1977). In *Mahone*, the court viewed *Gagliardi* as requiring this action, and this approach may evidence a trend developing in the circuit to avoid the fourteenth amendment issue. Thus, it seems unlikely the court will decide the issue in the near future.

79. Judge Garth, in his strongly worded and lengthy dissent in *Mahone*, argued that § 1981 does not provide a cause of action and that the fourteenth amendment question should have been decided. He then concluded that no cause of action should be implied. 564 F.2d at 1037 (dissenting opinion).

courts that shows no sign of abating.[80]

The district courts of the Third Circuit, especially the District Court for the Eastern District of Pennsylvania, have been among the most active in the country on the fourteenth amendment question. In the Eastern District of Pennsylvania, at least three decisions since 1974 have stated that a cause of action exists under the fourteenth amendment,[81] and since 1976 three decisions have held to the contrary.[82] With so many recent cases having inconsistent results, no definite trend is discernible. The courts seem to be waiting for guidance from the court of appeals,[83] guidance which appears unlikely to come in the near future since the Third Circuit seems reluctant to decide the issue. This situation leaves the issue of the availability of a cause of action under the fourteenth amendment in the circuit very confused.

As to other possible bases of action, the court of appeals has relied on *Monroe* to preclude an action under section 1986,[84] and two district court cases have held there is no action under section 1985.[85]

### *The Fourth Circuit*

In *Cox v. Stanton,*[86] the Fourth Circuit Court of Appeals opened the door to the possibility of a suit under the fourteenth amendment. The court there reversed a district court dismissal based on an improper reading of a statute of limitations and affirmed a dis-

80. The fight has not been affected either way by two court of appeals decisions which assume or just leave open the question of municipal liability under the Constitution and § 1331. *See* Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976); McCollough v. Redevelopment Authority, 522 F.2d 858 (3d Cir. 1975).

81. *See* Culp v. Devlin, 437 F. Supp. 20 (E.D. Pa. 1977); Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977); Maybanks v. Ingraham, 378 F. Supp. 913 (E.D. Pa. 1974).

82. *See* Jones v. McElroy, 429 F. Supp. 848 (E.D. Pa. 1977); Crosley v. Davis, 426 F. Supp. 389 (E.D. Pa. 1977); Pitrone v. Mercadante, 420 F. Supp. 1384 (E.D. Pa. 1976).

83. In Culp v. Devlin, 437 F. Supp. 20, 22 (E.D. Pa. 1977), the court allowed a cause of action under the fourteenth amendment, but only because it soon expected a decision from the court of appeals. With the trend developing in *Gagliardi* and *Mahone,* it appears unlikely the appellate court will decide the issue in the near future. *See* note 78 *supra.* The district courts may decide to follow the court of appeals in the future and refuse to deal with the question, deciding instead on nonconstitutional grounds.

84. *See* Ocasio v. Bryan, 374 F.2d 11 (3d Cir. 1967).

85. *See* Flesch v. Eastern Pa. Psychiatric Inst., 434 F. Supp. 963 (E.D. Pa. 1977); Redding v. Medica, 402 F. Supp. 1260 (W.D. Pa. 1975). In *Redding,* the court also decided there was no cause of action under § 1981. This portion of its decision is now rendered suspect by the *Mahone* decision. *See* notes 72-79 and accompanying text *supra.*

86. 529 F.2d 47 (4th Cir. 1975).

missal of the plaintiff's section 1983 action against a county. In dictum, the court reminded the district court that the plaintiff also sued under the thirteenth and fourteenth amendments directly, and that under *Bivens* and the Second Circuit Court of Appeals' decision in *Brault v. Town of Milton,* a municipality could be sued on those bases.[87] This reminder has not, however, been interpreted as definitively authorizing a suit.

In *Raffety v. Prince George's County,*[88] the district court reviewed *Bivens, Brault,* and the line of cases authorizing a cause of action under the fourteenth amendment and found them either not controlling or unpersuasive. It thus effectively rejected *Cox* as well. The court was not convinced that the precedents in the area required it to grant a cause of action against a municipality. It reasoned that the "rights of the plaintiffs to vindication of the privileges secured to them by the Federal Constitution would not be significantly enhanced by finding another base of action to be the Fourteenth Amendment."[89]

The *Rafferty* court did hold, however, that the plaintiffs had stated a cause of action under section 1981, and thereby reversed a trend in the Fourth Circuit's district courts against finding a cause of action under any part of the Civil Rights Act. In *Black Brothers Combined of Richmond v. City of Richmond,*[90] the District Court for the Eastern District of Virginia had rejected a cause of action brought under sections 1981, 1983, 1985, and 1988 on the theory that the *Monroe* definition of "person" precluded suit of a municipality under any part of the Civil Rights Act. In *Bennett v. Gravelle,*[91] a court in the same district had refused to impose liability based on section 1981 on the theory that by allowing a damage action under that section, section 1983 is deprived "of its essential significance."[92]

The *Raffety* court distinguished these cases on the ground that the Supreme Court opinion in *District of Columbia v. Carter*[93] dem-

87. *Id.* at 50. Additionally, the concurring and dissenting opinion of Judge Winter in Singleton v. Vance County Bd. of Educ., 501 F.2d 429, 433 (4th Cir. 1974), provides some support for a cause of action directly under the fourteenth amendment.

88. 423 F. Supp. 1045 (D. Md. 1976).

89. *Id.* at 1058.

90. 386 F. Supp. 147 (E.D. Va. 1974).

91. 323 F. Supp. 203 (D. Md.), *aff'd,* 451 F.2d 1011 (4th Cir. 1971), *cert. denied,* 407 U.S. 917 (1972).

92. *Id.* at 215.

93. 409 U.S. 418 (1973). For a complete discussion of how this decision affects a § 1981 action, see note 37 and accompanying text *supra.*

onstrated that the word "person" as used in section 1981 is not to be read to preclude municipal liability. Since *Carter* was decided after *Bennett*, the *Raffety* court felt *Bennett* had little precedential value. In addition, the court noted that although section 1981 had been applied to cases not involving employment in only a few instances,[94] a finding that section 1981 is limited to employment or contract actions would mean the "equal benefit" clause was "meaningless phraseology."[95]

Thus, although the district courts in the Fourth Circuit are not as unsettled as those in the Third Circuit, the established rules there have been seriously questioned by *Raffety*. Although it is only a district court case, *Raffety* has shown that the circuit's precedents can be easily sidestepped. The Fourth Circuit appears, therefore, to be beginning a period of renewed activity.

### *The Fifth Circuit*

The Fifth Circuit Court of Appeals has twice gone to the brink of deciding the fourteenth amendment issue and has both times retreated from the edge, leaving the question undecided. In *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach,*[96] the court said that since the suit was also brought against numerous individual municipal officers, any relief granted would "surely be felt by the City."[97] It therefore did not decide whether the city itself could be sued under the fourteenth amendment. Unfortunately, throughout the remainder of the opinion the court referred to the individual defendants by the collective term "the city," thus giving the appearance it had decided in favor of municipal liability when in fact it had not. In *Traylor v. City of Amarillo,*[98] the court of appeals stated in a footnote that if any violation of the plaintiff's constitutional rights were found, then 28 U.S.C. § 1331 provided a sufficient jurisdictional basis for an action against the city.[99] The

94. In *Raffety*, the plaintiffs, a white husband and his black wife, alleged that various officials of the local police and fire departments illegally and with racial motivation detained and questioned them for many hours in connection with a house fire that killed the plaintiffs' three children. 423 F. Supp. at 1048.

95. *Id.* at 1062.

96. 493 F.2d 799 (5th Cir. 1974).

97. *Id.* at 802.

98. 492 F.2d 1156 (5th Cir. 1974) (court of appeals affirmed district court's decision in favor of the defendant city on the merits, but discussed the viability of the plaintiff's claim).

99. *Id.* at 1157 n.2.

court did not say, however, whether the fourteenth amendment could be used to supply the cause of action to the plaintiff, again leaving that question unanswered.

Therefore, when faced with the same issue in *Schofield v. County of Volusia,*[100] the District Court for the Middle District of Florida encountered no controlling precedents from the court of appeals and felt free to decide that a cause of action was not stated under the fourteenth amendment. The *Schofield* decision is, however, limited in scope, and it may in fact be read to support such a cause of action. The court seems to assume the presence of a claim for relief, but then applies the "necessary and appropriate" test of Justice Harlan's concurrence in *Bivens* to defeat the plaintiff's claim.[101]

This unique approach adds an entirely new dimension to the area. The court seems to indicate that a cause of action is cognizable, but only where necessary and appropriate to vindicate the individual's constitutional rights. The court held that since the plaintiff's rights could be vindicated through an equitable suit available against the county,[102] or through a section 1983 suit against the individual defendants for damages, the fourteenth amendment cause of action did not pass the test.[103] This is a very strict application of Harlan's test. Alternative suits such as those suggested by the *Schofield* court are almost always *available* to a plaintiff, but they may not provide adequate relief.[104] The rigid application used in *Schofield* would bar a fourteenth amendment cause of action in the great majority of fact situations.

With regard to other bases for a cause of action, the Fifth Circuit Court of Appeals has twice rejected a section 1985 claim,[105] and in 1972, a district court refused a claim based on the entire Civil Rights Act.[106] The subsequent holding in *District of Columbia v. Carter,* however, may reopen the section 1981 issue.

---

100. 413 F. Supp. 908 (M.D. Fla. 1976).

101. *Id.* at 909. For a discussion of the test, see note 26 *supra.*

102. This was an employment case and the appropriate equitable relief would have been reinstatement with back pay. *See* notes 124-26 and accompanying text *infra.*

103. 413 F. Supp. at 909.

104. *See* note 5 and accompanying text *supra.*

105. *See* Davis v. Howard, 561 F.2d 565, 572 n.4 (5th Cir. 1977); Traylor v. City of Amarillo, 492 F.2d 1156, 1157 n.2 (5th Cir. 1974). In *Traylor* the court was discussing equitable relief under § 1985. Its refusal to grant equitable relief indicates that a § 1985 action for damages would probably also be denied.

106. Jones v. City of Houma, 339 F. Supp. 473 (E.D. La. 1972).

### *The Sixth Circuit*

The Court of Appeals for the Sixth Circuit has, without extended discussion of its reasoning, twice granted a cause of action against a municipal defendant under the fourteenth amendment. In *Hanna v. Drobnick,*[107] the court cited *Bivens* and *City of Kenosha v. Bruno* and stated that "[w]e agree with appellants that the *Bivens* case does create a cause of action."[108] In *Amen v. City of Dearborn,*[109] the court relied on *Hanna* and *City of Kenosha v. Bruno* and said "it is well settled that municipalities . . . may be sued directly for fourteenth amendment violations . . . ."[110]

It is curious that the Sixth Circuit Court of Appeals has had so little difficulty deciding a question that has baffled other circuit and district courts. The decisions in *Hanna* and *Amen* lack the in-depth analysis accorded the issue in other circuits, raising doubts as to whether the issue was properly briefed and argued before these courts. But whatever the court's reasoning, it appears the fourteenth amendment cause of action is well established in the circuit.

Other forms of action are not so firmly entrenched. Although the court of appeals has not decided the issues, the district courts have refused actions brought under sections 1985 and 1986,[111] and the Civil Rights Act in general.[112] The case which refused the cause of action under the Act in general was decided in 1968, however, and the holding in *District of Columbia v. Carter* may reopen the availability of the section 1981 claim.

### *The Seventh Circuit*

The Seventh Circuit Court of Appeals appears to have accepted the fourteenth amendment cause of action. In *Calvin v. Conlisk,*[113] the court relied on *City of Kenosha v. Bruno* for authority that municipalities could be sued directly under the amendment.[114] Al-

107. 514 F.2d 393 (6th Cir. 1975).

108. *Id.* at 398.

109. 532 F.2d 554 (6th Cir. 1976).

110. *Id.* at 559. A third decision, Bosely v. City of Euclid, 496 F.2d 193 (6th Cir. 1974), arguably supports a finding of a cause of action, though the reasoning is unclear.

111. *See* Veres v. County of Monroe, 364 F. Supp. 1327 (E.D. Mich. 1973), *aff'd mem.*, 542 F.2d 1177 (6th Cir. 1976).

112. *See* Fanburg v. City of Chattanooga, 330 F. Supp. 1047 (E.D. Tenn. 1968).

113. 520 F.2d 1 (7th Cir. 1975), *vacated,* 424 U.S. 902 (1976).

114. *Id.* at 8.

though the *Calvin* decision was vacated and remanded by the Supreme Court on the ground that other parts of the decision conflicted with *Rizzo v. Goode,*[115] the fourteenth amendment ruling apparently remains intact within the circuit. At the very least, it evidences the court of appeals' opinion on the question.[116]

Even if *Calvin's* precedential effect is questionable, however, the availability of the fourteenth amendment cause of action seems settled. The court of appeals has twice taken up the issue since *Calvin,* both times deciding in favor of municipal liability. In *Hostrop v. Board of Junior College District No. 515*[117] and *McDonald v. Illinois,*[118] the court relied on *Calvin* to support its holding. Although the availability of the action seems apparent, its scope has been limited by the *McDonald* decision. There, the court indicated that though a cause of action against a municipality may exist, it is only available where the city has engaged in a *policy* of constitutional deprivation, as contrasted with a single action by one or a few of its officers. The court found that the facts before it failed to evidence such a policy and concluded that "we consider the implication of a federal judicial remedy to the extent which would be necessary to impose liability . . . here would be out of harmony with the doctrine built up under § 1983 . . . ."[119]

The court was careful to apply the theory only to the facts of this case, but the availability of the fourteenth amendment cause of action in the circuit now depends on how strictly the court defines the word "policy" in future factual situations.[120] At the very least, the application of this concept will preclude an action against a municipality for an isolated act of violence or constitutional deprivation by one of its officers.

Regarding other causes of action, the court of appeals in 1972 held that no claim existed under any part of the Civil Rights Act.[121] But,

115. 423 U.S. 362 (1976).

116. *Calvin* dealt primarily with the ability of individuals or groups to sue for court-ordered enforcement of constitutional standards governing police activities. Since *Rizzo* reached an inconsistent result, *Calvin* was vacated, presumably on this ground alone.

117. 523 F.2d 569 (7th Cir. 1975), *cert. denied,* 425 U.S. 963 (1976).

118. 557 F.2d 596 (7th Cir. 1977). *See also* Williams v. Brown, 398 F. Supp. 155 (N.D. Ill. 1975) (court said it would be irrational not to hold municipalities liable).

119. 557 F.2d at 605.

120. If the word "policy" is read to require proof of a series of related constitutional violations, or a conspiracy of such actions, it is unlikely that fourteenth amendment causes of action will frequently be found to exist.

121. *See* Flood v. Margis, 461 F.2d 253 (7th Cir. 1972).

as in various other circuits, the decision came before *District of Columbia v. Carter.* Subsequent to *Carter,* a district court, in *Robinson v. Conlisk,*[122] made an in-depth review of the history, wording, and purpose of sections 1983 and 1981 and concluded that a section 1981 suit was available. Judge Marshall said in a memorandum opinion that section 1981 "prohibits all discrimination, [even if] it be by . . . municipalities. . . . I cannot ignore the legislative history and the broad language of § 1981. Section 1981 means what it says . . . ."[123] The court concluded that a cause of action had been stated under section 1981.

### *The Eighth Circuit*

In *Owen v. City of Independence,*[124] the Eighth Circuit Court of Appeals decided that a cause of action may be stated under the fourteenth amendment. A close examination of the court's opinion, however, reveals that the claim in *Owen* was for equitable relief. The case, therefore, would not be strong precedent in a suit for money damages. *Owen* involved the allegedly unconstitutional discharge of a city police chief. The plaintiff sued for reinstatement, an equitable remedy, and for back pay.[125] Although back pay is a monetary award to be taken from the city treasury, the court expressed the opinion that the award is equitable in nature. The court noted that this situation was not the same as one involving police brutality in which an action for money damages would be appropriate.[126] Thus, while this decision accords with an earlier decision[127] in its holding that a cause of action can be stated under the fourteenth amendment, it leaves open the question of whether a suit for damages can be maintained.[128]

---

122. 385 F. Supp. 529 (N.D. Ill. 1974).

123. *Id.* at 535.

124. 560 F.2d 925 (8th Cir. 1977).

125. *Id.* at 931-32.

126. *Id.* at 933 n.9.

127. In Sheets v. Stanley Community School Dist. No. 2, 413 F. Supp. 350 (D.N.D. 1975), the court said that a cause of action could be stated under the fourteenth amendment, but that the plaintiff had failed to do so. The court did not address the question of whether back pay awards are equitable or monetary. The case was affirmed without comment on this issue. 532 F.2d 111 (8th Cir. 1976).

128. In Bunch v. Barnett, 376 F. Supp. 23 (D.S.D. 1974), the court with little discussion held that a cause of action had been stated under the fourteenth amendment. The plaintiffs had alleged that while some flood victims had received totally rent-free housing, they had

There are few cases in the Eighth Circuit concerning causes of action under the Civil Rights Act. One district court held that there was no action available under the Act in general.[129] Another denied an action under sections 1981-1986.[130] Both of these cases were decided prior to *District of Columbia v. Carter,* however, and are therefore of questionable validity insofar as their denial of a section 1981 cause of action is concerned.

### *The Ninth Circuit*

In *Arunga v. Weldon,*[131] the Ninth Circuit Court of Appeals rejected plaintiff's cause of action against a city brought under section 1981. Four years later, after the decision in *District of Columbia v. Carter,* the Ninth Circuit took a second look at the section 1981 question. In *Sethy v. Alameda County Water District,*[132] the court reversed its prior holding that no distinction existed between sections 1983 and 1981 and distinguished *Arunga,* stating that there the court was not presented with well-defined issues.[133]

The court made a full comparison of the origins of sections 1981 and 1983, noting with particularity the differences in the sections and concluding that a "proper reading of § 1981 today . . . implies the existence of all necessary and appropriate remedies, including the remedy of damages against a municipal corporation in the case of the kind presently before us."[134]

As to the rest of the Civil Rights Act, the only noteworthy case is *Dodd v. Spokane County.*[135] This 1968 decision held the *Monroe* "person" definition applicable to actions brought under sections 1985 and 1986.[136]

In the fourteenth amendment area, the leading case is the district court decision in *Dahl v. City of Palo Alto,*[137] where the court refused

not. Due to the nature of these facts, and the court's limited discussion, it seems unlikely this case will have substantial precedential value when the question arises in the future.

129. *See* Lyle v. Village of Golden Valley, 310 F. Supp. 852 (D. Minn. 1970).
130. *See* Daly v. Pederson, 278 F. Supp. 88 (D. Minn. 1967).
131. 469 F.2d 675 (9th Cir. 1972).
132. 545 F.2d 1157 (9th Cir. 1976).
133. *Id.* at 1159.
134. *Id.* at 1161.
135. 393 F.2d 330 (9th Cir. 1968).
136. The court also held that suit was precluded under §§ 1983 and 1988.
137. 372 F. Supp. 647 (N.D. Cal. 1974).

to follow an earlier district court decision[138] and held that the city could be sued under the fourteenth amendment. Several other district courts within the Ninth Circuit have followed *Dahl*,[139] as has the court of appeals. In *Gray v. Union County Intermediate Education District*,[140] the court of appeals held that the "person" requirement of section 1983 did not apply to a fourteenth amendment claim. The court reached this conclusion without extended discussion, and *Dahl* remains the most persuasive opinion on the question in the circuit.[141]

### *The Tenth Circuit*

Few cases have been brought before either the Tenth Circuit Court of Appeals or the circuit's district courts concerning any of these actions. In *Weathers v. West Yuma County School District*,[142] the plaintiff raised the fourteenth amendment issue before the district court, which refused to decide it.[143] On appeal, the court of appeals also refused to address the issue.[144]

The only case in which the issue has been directly addressed is *Farnsworth v. Orem City*[145] where a district court held no cause of action had been stated under the fourteenth amendment. The court relied on *Bivens* and found "special factors counselling hesita-

138. In Payne v. Mertens, 343 F. Supp. 1355 (N.D. Cal. 1972), the court examined the possibility of § 1331 jurisdiction and dismissed the claim, holding that a finding of municipal liability would "vitiate the Congressional mandate of 42 U.S.C. § 1983." *Id.* at 1358. Despite this language, the court in *Dahl*, decided in the same district, had little difficulty in ignoring *Payne*. The court mentioned the *Payne* language at the outset of its discussion but did not consider it controlling. 372 F. Supp. at 649-50.

139. *See, e.g.*, Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977); Sanfilippo v. County of Santa Cruz, 415 F. Supp. 1340 (N.D. Cal. 1976); Kopetzke v. County of San Mateo, 396 F. Supp. 1004 (N.D. Cal. 1975). In *Chavez-Salido*, the court also found a cause of action under § 1981. Despite its later reported date, the 1977 decision in *Chavez-Salido* was apparently decided before the 1976 decision of *Sethy*, since the court struggled with *Arunga* and expressed the hope of a quick decision by the court of appeals. For a discussion of *Sethy* and *Arunga*, see text accompanying notes 131-34 *supra*.

140. 520 F.2d 803 (9th Cir. 1975).

141. For a list of cases following *Dahl*, see note 139 *supra*.

142. 387 F. Supp. 552 (D. Colo. 1974), *aff'd*, 530 F.2d 1335 (10th Cir. 1976).

143. The court said the remedies sought by the plaintiff were directly dependent on or ancillary to §§ 1983 and 1985, and since no remedy existed against the defendant school district under these provisions, any decision on the fourteenth amendment question would be meaningless. 387 F. Supp. at 556.

144. 530 F.2d at 1342.

145. 421 F. Supp. 830 (D. Utah 1976).

tion"[146] to require dismissal of the suit. The court said that these factors "include considerations of federalism, the proper role of the federal court in fashioning constitutional remedies in the absence of congressional action, and the reluctance of the United States Supreme Court to extend liability to municipal corporations for purported civil rights violations by their officers."[147] In adopting this view of the limiting effect of "special factors," the court did not decide the availability of the cause of action under the particular facts, but rather decided there is no cause of action available against municipalities under the fourteenth amendment. The court's application of "special factors" was to the availability of the cause of action in general, rather than assuming its availability and looking for special factors in the facts of this case. Thus the court's result seems to preclude a fourteenth amendment action, regardless of the facts.

As to other causes of action, a section 1985 action was not permitted in the district court decision in *Salazar v. Dowd.*[148]

In a circuit with so few decisions, it is difficult to draw conclusions concerning trends. Arguably, *Weathers* and *Farnsworth* demonstrate the beginning of a trend against the fourteenth amendment cause of action.

### *The District of Columbia Circuit*

In *Shifrin v. Wilson,*[149] the district court examined the fourteenth amendment issue and in dictum said that municipalities may be held liable under the amendment.[150] Since no other cases have addressed any of the issues, the District of Columbia is in essence undecided as to *all* of the causes of action.[151]

A key question not addressed by the *Shifrin* court is whether the District of Columbia may be held liable at all under the fourteenth

146. *Id.* at 831.

147. *Id.*

148. 256 F. Supp. 220 (D. Colo. 1966).

149. 412 F. Supp. 1282 (D.D.C. 1976).

150. The court in *Shifrin* first said that under the facts presented it did not have to decide the issue of municipal liability under the fourteenth amendment. In dictum, the court decided the issue anyway, finding there could be a cause of action. *Id.* at 1306.

151. The only other case concerning municipal liability was Payne v. District of Columbia, 559 F.2d 809 (D.C. Cir. 1976), where an action was brought under the fifth amendment rather than under the fourteenth.

amendment. In *District of Columbia v. Carter*,[152] the Supreme Court reiterated that the fourteenth amendment applies only to the states, and that "actions of the Federal Government and its officers are beyond the purview of the Amendment. And since the District of Columbia is not a 'State' within the meaning of the Fourteenth Amendment, . . . neither the District nor its officers are subject to its restriction."[153] This language seems to preclude any fourteenth amendment liability as to the District of Columbia.

## Conclusion

The issue of municipal liability for constitutional violations must ultimately be decided on policy considerations that lie at the base of the problem.[154] As the courts' differing analyses indicate, the wording of the Civil Rights Act of 1866 and the Ku Klux Klan Act of 1871, their legislative histories, and many of the cases which provide the basis and justification for the causes of action are arguably subject to interpretation both for and against municipal liability. The acts do not discuss municipal liability, the legislative histories are inconclusive, and the language in cases such as *Bivens* is vague. It is best to admit this at the start and to resolve the issue in terms of which approach makes the most sense and results in the most just law.

Presently, courts are faced with an "all or nothing" dilemma when attempting to resolve the issue. On the one hand is the "nothing" approach, where a municipality could never be held liable under federal law, not even if it conspired to deprive a person of constitutionally guaranteed rights. On the other hand, under the "all" approach, a municipality might be held liable for an isolated action of an official performed with no intent to do harm. In judging the validity of the opposing theories under the present law and attempting to resolve which approach is best, it is advantageous to examine each side of the dilemma.

152. 409 U.S. 418 (1973).

153. *Id.* at 424. For a discussion of *Carter*, see note 37 *supra*.

154. The conflicting policy considerations are, very generally, whether the federal government is justified in imposing federal liability on local municipalities where there is both a state cause of action as well as a federal cause of action against the individual wrongdoers, and on the other hand, whether municipalities should escape federal liability where their agents violate federal civil rights. For other policy considerations involved in the question, see Hundt, *supra* note 9.

The first question to be addressed is whether there is anything unique about municipalities that justifies granting them total immunity from liability for the torts of their officers. Although there are reasons for *limiting* the liability of municipalities, such as the desire to minimize federal interference in the operations of local government, these do not support the concept of total immunity. A municipality occupies no special place in society that requires insulation from liability for its wrongs. More importantly, the legislative history of the Act of 1871, as interpreted in *Monroe,* does not support a reading of congressional intent to immunize municipalities from federal liability under all federal civil rights law.[155] In sum, total immunity is nearly as unjust as strict liability for private torts, as was proposed but rejected in the original Act of 1871.[156]

If it is accepted that municipalities do not "deserve" total immunity, a more difficult question then presents itself: Is there anything in the federal law *requiring* that a municipality be found liable for every tort of its officers? Is section 1981 or the fourteenth amendment really a valid basis for the imposition of total liability, or the "all" approach?

Most of the nation's federal courts certainly seem to think so. As far as the section 1981 action is concerned, those courts that have considered the question since *District of Columbia v. Carter* are nearly unanimous in their support of the cause of action. Only the First Circuit Court of Appeals has indicated that it may not allow a section 1981 claim against a municipality.[157] The courts of appeals in the Third[158] and Ninth[159] Circuits have already adopted it as have district courts in the Second,[160] Fourth,[161] and Seventh[162] Circuits. This shows a definite trend toward acceptance.

155. This is not to say that the *Monroe* court was wrong. Looking at § 1983 alone, the Supreme Court's reading seems correct. Simply stated, Congress was faced with an amendment which would have placed broad liability on municipalities. It rejected this proposal and as a result used the word "person," apparently intending that the idea of municipal liability should not be included in the Act. It is the extension of this conception of congressional intent to other federal actions, such as those brought under the fourteenth amendment and § 1981, that causes problems.

156. For a brief discussion of the Sherman amendment, see note 7 *supra.*

157. *See* notes 48-57 and accompanying text *supra.*

158. *See* note 72 and accompanying text *supra.*

159. *See* note 132 and accompanying text *supra.*

160. *See* notes 69-71 and accompanying text *supra.*

161. *See* notes 88 & 89 and accompanying text *supra.*

162. *See* notes 122 & 123 and accompanying text *supra.*

As the Third Circuit found, section 1981 is the easy way out. A cause of action premised on it relieves the courts of the necessity of deciding the more difficult constitutional question posed by the fourteenth amendment. In addition, section 1981 is more susceptible than the fourteenth amendment to an interpretation that holds municipalities liable. Whereas only a strained adaptation of Brennan's opinion in *Bivens* will support a fourteenth amendment action against municipalities, the wording of section 1981 clearly does so.[163] Unfortunately, section 1981 provides only a partial remedy since in the absence of racially motivated discrimination, the cause of action provides no relief. Thus, even if section 1981 does require or justify municipal liability, it does not completely supplant the fourteenth amendment cause of action.

As to the fourteenth amendment cause of action, only the Sixth Circuit Court of Appeals[164] is definitely in support of it, but the Fourth Circuit is leaning towards acceptance[165] and district courts in the Second,[166] Third,[167] Seventh,[168] and Ninth[169] Circuits have either accepted the theory or have shown a trend toward doing so. In contrast, only the First Circuit Court of Appeals[170] and district courts in the Third,[171] Fifth,[172] and Tenth[173] Circuits have expressly rejected it.[174] Of all the courts, circuit and district, that have decided the issue, the trend is in favor of the fourteenth amendment action, though perhaps "non-commital" more accurately describes the dominant trend. This is especially so in the courts of appeals, since almost all have had the issue before them, but only two have definitely decided it.

---

163. For a discussion of the theory behind the § 1981 cause of action, see notes 35-45 and accompanying text *supra*.

164. *See* notes 107-10 and accompanying text *supra*.

165. *See* notes 86 & 87 and accompanying text *supra*.

166. *See* notes 65-68 and accompanying text *supra*.

167. *See* note 81 and accompanying text *supra*.

168. *See* note 118 and accompanying text *supra*. *See also* Williams v. Brown, 398 F. Supp. 155 (N.D. Ill. 1975).

169. *See* notes 137 & 139 and accompanying text *supra*.

170. *See* note 48 and accompanying text *supra*.

171. *See* note 82 and accompanying text *supra*.

172. *See* note 100 and accompanying text *supra*.

173. *See* notes 145-47 and accompanying text *supra*.

174. The Eighth Circuit and the District of Columbia have not really addressed the issue. In the Third Circuit, district courts have both accepted and rejected a fourteenth amendment cause of action.

The reason for their hesitancy is obvious. Formulating a cause of action under the fourteenth amendment, citing *Bivens* as authority, is a strained argument. Clearly the words of *Bivens* do not in and of themselves require such a result.[175] Justice Brennan only said there should be a federal remedy for every violation of a federal right; there is no indication that he meant to include municipalities as potential defendants.[176] As noted earlier, the key to reading *Bivens* to include municipalities as defendants is the argument that section 1983 does not always provide an adequate remedy in a case involving a civil rights violation by a municipal officer,[177] and that if Brennan's mandate is to be fulfilled, there must be a cause of action against the municipality itself, brought under the fourteenth amendment. The flaw in this theory is that Brennan only said there should be a remedy, he did not say there must be an adequate remedy. Even if inadequate at times, section 1983 provides a remedy and at least technically fulfills Brennan's mandate. To serve as the basis for the fourteenth amendment action, the word "adequate" must be read into Brennan's remark.[178]

It should be. A remedy is the "means by which a right is enforced or the violation of a right is prevented, redressed, or compensated."[179] When attempting to remedy a violation of constitutional rights, the technical existence of one remedy, if inadequate, should not preclude the resort to an adequate remedy. A suit against a municipality, brought directly under the fourteenth amendment, provides such an adequate remedy.[180]

This "all" approach, however, has one major flaw that cannot be overlooked. The theory is based on the assumption that a suit against the individual wrongdoer will be inadequate. If this is not true in a given case, the theory offers no justification for municipal liability. The plaintiff would be able to remedy the violation of his

175. *See* notes 24-32 and accompanying text *supra*.

176. *See* Hundt, *supra* note 9, at 772-78.

177. As mentioned in the text accompanying notes 4 & 5 *supra*, the reasons are that individual wrongdoers are often difficult to identify, may be judgment-proof, have a good faith defense under § 1983 that broadens in scope as their duties and responsibilities expand, and may receive sympathy from a jury reluctant to find them liable for just doing their jobs. *See Damage Remedies*, *supra* note 5, at 923.

178. For the view that a § 1983 damage remedy against an individual defendant is not inadequate, see Kostka v. Hogg, 560 F.2d 37, 42 (1st Cir. 1977).

179. Black's Law Dictionary 1457 (rev. 4th ed. 1968).

180. For the reasons why the remedy against a municipality will be more adequate than those against the individual wrongdoers, see *Damage Remedies*, *supra* note 5, at 923-24.

rights without resort to municipal funds and Brennan's mandate would be fulfilled through the adequate remedy available against the individual wrongdoer. Thus, if the concept of adequacy is to be added to Brennan's words, as it should be, then provision must be made for the situation where municipal liability is not required to guarantee an adequate remedy. This can be accomplished by allowing only limited municipal liability.[181]

In *Bivens,* Brennan limited his imposition of liability to cases where "no special factors counselling hesitation" exist.[182] This limitation has been generally ignored by courts basing their decisions on *Bivens.* But whether or not this limitation is applied as a "necessary and appropriate" test as done by Justice Harlan in *Bivens,*[183] it should hold a major place in the decision of these cases. The use of "special factors" as a limitation allows for the development of a common law to define under what circumstances municipalities may be held liable. Trial judges could determine whether the factual situation of a case justified the imposition of municipal liability, or if any special factor "counselled hesitation" thus warranting the dismissal of the case against the municipality. The substance of the "special factors" test is something that would have to develop as a body of case law, but as a general test the court would determine whether the plaintiff's alternative remedies would be "adequate."

This may sound perilously close to hinging the liability of one party on the ability of the other party to pay a damage award. However, the ability of the individual defendant to compensate the victim is only one of the considerations used to determine the adequacy of the remedy. The judge would also have to consider whether as a matter of justice the factual situation called for imposing liability on the municipality as a whole for the violation. For example, if a local official performed an isolated act that violated a plaintiff's rights, allowing a cause of action against the municipality would not redress any wrong that the municipality could be said to have perpetrated. Thus, a cause of action against the municipality would not be needed to *adequately* remedy the plaintiff's rights. On the other

181. For another proposal for limited municipal liability under the fourteenth amendment, see *Damage Remedies, supra* note 5, at 952-60.

182. 403 U.S. 388, 396 (1971).

183. Justice Harlan interpreted "special factors" to be a "necessary and appropriate" test. *Id.* at 407. For a brief discussion of this test, see note 26 *supra.*

hand, if the municipality knew or should have known the official would commit the act, and either negligently or intentionally encouraged it, then the municipality should be held liable.[184] This approach looks for fault on the part of the municipality acting as a unit, not just the fault of its individual agents. In cases where the municipality can be said to be at fault, only a cause of action against it under the fourteenth amendment will *adequately* remedy the injustice done to the plaintiff. Thus, municipalities would be potentially liable for their wrongs, while at the same time, they would be protected when the plaintiff's rights could be vindicated through another suit.

The disadvantage of this approach is that until sufficient precedents develop, there would be a state of turmoil that inevitably surrounds the development of a new area of law. This is especially true here, since the Supreme Court's guidelines would be necessarily vague. The advantage of this approach is that courts will be able to get away from the "all or nothing" bind that they now face. It is nothing more than a device to better effectuate justice by granting a cause of action with a self-limiting mechanism to be applied by the trial judge where the circumstances justify it.

Whatever approach is taken, the Supreme Court must act on the question. As shown by the above survey of the circuits, the courts are badly divided. The majority of courts favor the existence of some cause of action, but for differing reasons. Since the problem is one that cuts across state, local, federal, and constitutional issues, it can only be finally decided by the Supreme Court. It should be decided soon.

CARL HARVISON

184. For a decision that comes close to applying this theory, see McDonald v. Illinois, 557 F.2d 596 (7th Cir. 1975). *McDonald* held that municipalities could be held liable under the fourteenth amendment, but only where they have been shown to have engaged in a "policy" of constitutional deprivation. Its similarity to the approach suggested here depends on how "policy" is defined in future cases. For the discussion of the case, see notes 118-20 and accompanying text *supra*.