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Developing Governmental Liability under 42 U.S.C. 1983

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I. INTRODUCTION

Federal law allows a person injured by unconstitutional police behavior to recover damages from the offending officer individually, but it does not allow recovery from the governmental body employing the officer. Due to the difficulties in recovering from an individual officer, the effectiveness of the right of recovery is seriously curtailed as a device both to compensate injured plaintiffs and encourage police action consistent with constitutional guarantees. This Note examines two recent developments that may allow an injured individual to recover in a federal court under federal law from local governmental bodies for the unconstitutional conduct of their police officers. The first possibility is the further expansion of the relief available under section 1 of the Civil Rights Act of 1871, codified as 42 U.S.C. § 1983, which gives persons injured by unconstitutional behavior under color of state law a tort-like right of recovery. Recently, the courts have narrowed the rule that governmental bodies are not liable under section 1983 by granting increasingly broad relief. The second possibility is that section 1983 may be read together with section 3 of the Civil Rights Act of 1866, codified as 42 U.S.C. § 1988, which allows state remedies to be

2. Id. (municipal governments); Williford v. California, 352 F.2d 474 (9th Cir. 1965) (state governments).
3. 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. 42 U.S.C. § 1983 (1964).
   As originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, section 1983 provided a remedy for persons deprived of rights "secured by the Constitution of the United States ...." This provision was changed in the revision of 1874 to read rights "secured by the Constitution and laws of the United States ...." For the full text of section 1983 as originally passed, see note 68 infra.
4. 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
used by federal courts for the vindication of civil rights where ordinary federal remedies are inadequate, as incorporating the right to recover tort-like damages directly from local governments. Of course, this second possibility is only available in those states where the state and local governments are liable for the torts of their officials under state law. While the issues discussed apply equally to the liability of both states and their political subdivisions, the approaches suggested in this Note are restricted to the political subdivisions because of the constitutional difficulties in federal imposition of liability directly on the states.6

The several bases of congressional power to impose liability on states and municipalities are the necessary and proper clause, section 5 of the fourteenth amendment, and possibly, the commerce clause. The power of Congress to subject municipalities to standards enforced by the equity powers of federal courts is well established. See text accompanying notes 36-57 infra. The power of Congress to impose financial liability on municipalities is also well established. See, e.g., Jones Act, 46 U.S.C. § 688 (1964); Frame v. City of New York, 34 F. Supp. 194 (S.D.N.Y. 1940); see also notes 45-49 infra. In addition, it is well settled that a municipality is not shielded from suit in a federal court by the eleventh amendment. Lincoln County v. Luning, 133 U.S. 529 (1890). In Monroe the defendant did not raise the eleventh amendment defense.

There is less precedent for federal imposition of liability on states themselves. However, in Damico v. California, 389 U.S. 416 (1967), the Supreme Court granted injunctive relief against the state of California in a suit brought under section 1983. There is weak precedent for an award of money damages based on the commerce clause. California v. United States, 320 U.S. 577 (1944); United States v. California, 297 U.S. 175 (1936). Since Hans v. Louisiana, 134 U.S. 1 (1890) interpreted the eleventh amendment to bar suits against states themselves in federal courts by citizens of the defendant state as well as by citizens of other states, a state may only be sued if it consents. Implied consent, however, has been liberally found. Petty v. Tennessee-Missouri Bridge Comm’n, 359 U.S. 275 (1959); Parden v. Terminal Ry., 377 U.S. 184, rehearing denied, 377 U.S. 1010 (1964). Implied consent has been found in state imposition of liability for the torts of government officers. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), rev’d in part, Sostre v. McGin-
II. ORIGIN AND CRITICISM OF THE RULE OF
GOVERNMENTAL NON-LIABILITY

A. The Monroe Decision

Section 1983 was enacted pursuant to section 5 of the fourteenth amendment to control the disorders caused by the Ku Klux Klan in the Reconstruction South. It lay dormant until the late 1940’s when courts began to use it to provide relief for persons injured by unconstitutional behavior. In 1961, in response to a case of flagrantly abusive police misconduct, the Supreme Court gave section 1983 its present contours. In *Monroe v. Pape*, 13 Chicago police officers broke into the plaintiff’s home in the early hours of the morning. The police forced Mr. Monroe, a Negro, and his family to stand naked in the living room while they ransacked every room in the house, ripping open mattresses and emptying drawers. Mr. Monroe was then taken to the police station and held on open charges for ten hours for interrogation about a two day old murder without being brought before a magistrate, and without being permitted to call his family or an attorney. He was subsequently released without being charged.

In holding the individual policemen civilly liable under section 1983 the Court outlined five major features of relief available under the section. First, section 1983 provides a remedy for infringement of constitutional guarantees applied to states by the due process clause of the fourteenth amendment. Secondly, the phrase “under color of” state law does not restrict relief to cases where injury was inflicted with specific statutory authorization. The phrase was broadly interpreted to mean “[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 . . . .” Thirdly, the injurious act need not be done with a
specific intent to deprive a person of a federal right. Liability is instead determined “against the background of tort liability that makes a man responsible for the natural consequences of his actions.”

Fourthly, the remedy under section 1983 is completely supplemental to state remedies. State remedies, regardless of availability or efficacy, need not be sought before appeal to federal court.

Fifthly, and most importantly, municipalities are not “persons” within the meaning of the phrase that “every person” who deprives another of a right “under color of” state law is liable for the injury. As a result of this definition of “person,” municipalities are not liable under section 1983 for the actions of their police officers. Other courts have subsequently held that state governments are also not “persons” within the meaning of section 1983 and thus not liable for the actions of their officers.

The Court based the rule of governmental non-liability on the legislative history of the 1871 Civil Rights Act. It looked to the reaction in the House of Representatives to a proposed amendment that would have made any “county, city or parish” liable if any “persons riotously and tumultuously assembled together” within its boundaries destroyed or damaged “any house, tenement, cabin, shop, building, barn, or granary . . .” or “whipped, scourged, wounded, or killed . . .” any person. The

U.S. 299 (1941), where the Court had interpreted the same phrase in 18 U.S.C. § 242 (1964).

13. 365 U.S. at 187. It is not clear if a simple negligent act will give rise to a section 1983 action. In Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970), the court accepted arguendo the defendant’s claim that the act of shooting the plaintiff during an arrest was accidental “in the sense that it was not specifically intended,” but allowed recovery because the shooting was “gross or culpable” negligence. The court distinguished the situation before it from one involving simple negligence and refused to speculate on the latter. The dissent in Jenkins argued that the term “deprivation” in section 1983 could not support a damage claim in a case involving negligence, whether characterized as simple or culpable.


15. 365 U.S. at 191. As a result of this ruling the City of Chicago was dismissed as a defendant in Monroe. Plaintiffs had argued that the City of Chicago should be liable under a theory of respondeat superior. Brief for Appellant at 25, Monroe v. Pape, 365 U.S. 167 (1961). They also could have argued that a municipality is strictly liable for the conduct of its officers directly from section 1983, whether or not the technical requirements of respondeat superior are met.


18. CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871).
House defeated the amendment. A modification was submitted and it too was defeated. The Court reasoned that "the response of Congress to the proposal to make municipalities liable... was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them."  

B. PROPRIETY OF Monroe's USE OF LEGISLATIVE HISTORY

It appears upon closer analysis that both the Monroe Court's interpretation of the particular congressional debates and its very use of legislative history as determinative of the meaning of section 1983 are open to criticism. The proposed amendment used by the Court to indicate congressional disapproval of municipal liability would have made a community liable for the enumerated acts by anyone within that community, regardless of either knowledge or assent by the local citizenry or by the local government to the illegal act. The blanket liability for acts not sanctioned by the community, which could easily be perpetrated by outsiders or undesirables, raised the strong opposition noted by the Court. The Court did not consider a separate practice discussed during the same debates whereby governmental bodies were themselves held liable for injury caused by their failure to perform or by their failure to perform properly assumed duties. This liability was noted without disapproval during the debates both by those in favor of and by those opposed to the proposed amendment. If viewed in

19. Id. at 725.  
20. Id. at 749.  
21. Id. at 800-01.  
22. 365 U.S. at 191.  
23. CONG. GLOBE, supra note 18, at 788.  
25. This policy was noted with approval by Congressman Sheshbarger of Ohio, a proponent of the proposed amendment. CONG. GLOBE, 42d Cong., 1st Sess. 751-52 (1871). Congressman Kerr of Indiana, an opponent of the proposed amendment, noted the policy without disapproval. Id. at 788. He stated:  

In the States to which reference has been made it is, I agree, somewhat common to require the municipal organizations created by those States, which are part and parcel of the local machinery adopted by the State governments in the execution of their reserved powers, to require them to perform certain duties which are necessary in the police regulation, government, and protection of society, and to punish them where they fail to execute the duties thus imposed upon them, sometimes by fines and penalties, to be exacted in ways indicated in the laws of those States. But there is no example of the precise character involved in this bill.
terms of the scope of a community's liability, the proposed amendment would have imposed extremely broad liability, while the practice of holding communities responsible for misfeasance or nonfeasance would have imposed narrower liability. *Monroe* itself involved a third scope of liability narrower than either of the previous two: the imposition of liability for the misfeasance of an official amounting to unconstitutional behavior.

The legislative history does not indicate where on this spectrum of liability Congress would have drawn its line of approval. It clearly disapproved of the extremely broad liability of the proposed amendment. There was, however, no apparent disapproval of the middle range of governmental liability for misfeasance and nonfeasance; and one cannot infer therefore that Congress disapproved of the even narrower scope of liability for the unconstitutional behavior of a municipal officer urged by the plaintiff in *Monroe*.

Further doubt is cast on the Court's reasoning by the so-called "Dictionary Act," passed February 25, 1871, two months before passage of section 1983. This Act provided that "the word 'person' may extend and be applied to bodies politic and corporate." As the Court noted in refusing to apply this definition, its application is optional. However, since the two acts were under consideration at the same time, it is improbable that the congressmen were not aware of the effect of the "Dictionary Act" on the Civil Rights Act. While this probable awareness, particularly in view of the optional nature of the Act, does not indicate that Congress intended municipal liability under section 1983, it implies that Congress at least did not disapprove of using the word "person" to include municipalities in statutes subsequently enacted. It seems reasonable to assume that if Congress had been as strongly opposed to municipal liability as the Court concluded in *Monroe*, it would not have used the term "person" in section 1983, but would have used instead an unequivocal term.

The very use of legislative history to determine whether or not Congress intended municipalities to be included as persons under section 1983 is also open to criticism. Section 1983 was a

27. 365 U.S. at 190-91. The statute says that "person" may include municipal corporations, it does not say that it must include them.
ninety year old statute enacted to deal with a situation very different from the one before the Court in *Monroe*. The statute was enacted to control the disorder in the Reconstruction South and was expanded to provide a general federal remedy for unconstitutional behavior "under color of" state law on the principle that a "statute cast in general terms is not limited to effectuating only the specific purposes that brought it into being." In debating the specific purpose for which Congress contemplated this generally worded statute, however, it is reasonable to assume that Congress considered chiefly the effect of section 1983 on the evil it was enacted to remedy and did not engage in a speculative debate on its use by future courts. To determine what Congress would have thought had it been thinking about something it was not is speculative at best and it provides a weak foundation on which to base a judicial decision.

C. *Monroe* as a Policy Decision

The fact that Congress apparently was not opposed to the practice of holding municipalities liable for the misfeasance and nonfeasance of official duties, the passage of the "Dictionary Act," and the difficulties inherent in using legislative history to guide the specific application of a statute such as section 1983 imply that the Court in *Monroe* in fact faced an open choice as to whether or not municipalities could be persons under section 1983. It appears, therefore, that the Court actually may have reached its decision on policy grounds. The Court felt that in *Monroe* it was dealing with a question that "concerns directly a basic prob-


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Id.at 538 (footnotes omitted). See also Willis, *Statute Interpretation in a Nutshell*, 16 CAN. B. REV. 1 (1938) (where it is suggested that most uses of legislative intent are "only a harmless if bombastic, way of referring to the social policy behind the Act"); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

A good illustration of this problem is the use of the same legislative history to support opposite interpretations of the "under color of" state law provision in *Monroe*. See majority opinion, 365 U.S. at 173-87 and Mr. Justice Frankfurter's dissent, id. at 211-46.

lem of American federalism: the relation of the Nation to the States in the critically important sphere of municipal law administration." The Court, in applying a statute that was itself a deliberate advancement of federal power at the expense of state power, decided to extend further the federal power by liberally reading the "under color of" state law provision of section 1983 and by allowing the statute to be used as a remedy completely supplemental to state remedies. It is probable that the Court was unwilling to create a broader expansion of federal authority in a single decision and thus chose to follow the well-established precedent of holding the officers individually liable.

Even if explained as a policy decision, however, the Monroe holding is open to criticism. In Monroe the court recognized a class of injury not recognized in tort. The tort damage

30. 365 U.S. at 222 (Frankfurter, J., dissenting).
31. Speaking in favor of the bill, Senator Matthew H. Carpenter noted that it was authorized by the enabling clause of the fourteenth amendment, which he said was "one of the fundamental, one of the great, the tremendous revolutions effected in our Government . . . ." Cong. Globe, 42d Cong., 1st Sess. 577 (1871). A number of those in opposition to the bill noted that the bill could cause a further major change in the balance between state and federal power. See Whithorne, id. at 337; Lewis, id. at 385; Saulsbury, id. at 599. See also Moreno v. Henckel, 431 F.2d 1299, 1305 (5th Cir. 1970); Landry v. Daley, 288 F. Supp. 189, 223 (7th Cir. 1960); Note, Section 1983: A Civil Remedy for the Protection of Federal Rights, 39 N.Y.U.L. Rev. 839 (1964).
32. See text accompanying notes 11-14 supra.
33. Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278 (1913); Ex parte Young, 209 U.S. 123 (1908). In arguing against the majority's reading of the "under color of" state law provision in section 1983, Mr. Justice Frankfurter observed in a vigorous dissent that the question of expanding federal power would be irrelevant to our duty if Congress had demonstrably meant to reach by § 1979 [§ 1983] activities like those of respondents in this case. But where it appears that Congress plainly did not have that understanding, respect for principles which this Court has long regarded as critical to the most effective functioning of our federalism should avoid extension of a statute beyond its manifest area of operation into applications which invite conflict with administration of local policies. Such an extension makes the extreme limits of federal constitutional power a law to regulate the quotidian business of every traffic policeman, every registrar of elections, every city inspector or investigator, every clerk in every municipal licensing bureau in this country.
34. 365 U.S. at 241-42. The same arguments of course applied to the court's consideration of municipal liability under section 1983.
to the plaintiff was probably solely dignitary, but the Court recognized in the deprivation of constitutional guarantees an independent and serious injury. In creating this new concept of injury, however, the Court provided only a feeble remedy since the injured person generally cannot be compensated to the full extent of his injury due to the extreme difficulty in recovering a judgment from a policeman.35 As a means of curbing unconstitutional police practices and encouraging practices consistent with the Constitution the remedy is also inadequate. The governmental body that directs the conduct of the police officers is not liable for their actions, so liability for unconstitutional misconduct does not provide a financial incentive for them to provide the necessary police services in accordance with constitutional guarantees.36 The result is that while the Court expanded the scope of constitutional protection under section 1983, it provided an extremely inefficacious means of enforcement.37

for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land. It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.

35. See Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493 (1955); Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U. Chi. L. Rev. 345, 346-53 (1936). The fact that the individual officers are usually judgment proof was noted by the Supreme Court in Mapp v. Ohio, 367 U.S. 643 (1961) where it recognized that traditional tort remedies were inadequate to prevent the unconstitutional seizure of evidence.

36. Professor Zechariah Chafee, Jr. has made the common sense observation that the most effective way to insure that the policy making agency compels observance of constitutional guarantees is to make them financially responsible for injuries caused by their agents. Chafee, Safeguarding Fundamental Human Rights: The Tasks of States and Nation, 27 Geo. Wash. L. Rev. 519 (1959). See also Foote, supra note 35; Note, Philadelphia Police Practice and the Law of Arrest, 100 Pa. L. Rev. 1182 (1952); Note, Grievance Response Mechanisms for Police Misconduct, 55 Va. L. Rev. 909 (1969).

37. The U.S. Commission on Civil Rights recognized this problem almost immediately after Monroe was decided. In 1961 it recommended that section 1983 be amended to provide municipal liability, but the recommendation has not led to an amendment. UNITED STATES COMM. ON CIVIL RIGHTS, 1961 COMM. ON CIVIL RIGHTS REPORT: Book V, 25 (1961). Professor Chafee has observed that it would be far better for the legislature to provide new statutory protection against police misconduct. Chafee, supra note 36. But in the absence of any legislative action, there has been a constant stream of suggestions for judicial strengthening
III. POST-MONROE TREATMENT OF THE RULE OF GOVERNMENTAL NON-LIABILITY

The Court in Monroe defined "person" to exclude municipalities from the class of entities against whom an "action at law, suit in equity, or other . . ." action could be brought. The rule has two logical corollaries: it prohibits suits not only for damages, but for all other actions against a government, because section 1983 was not directed at governments; and since the definition of "person" was based on legislative history, the rule should not change as policy considerations change.

The lower federal courts, however, have increasingly limited the rule by ignoring the reasoning behind non-liability and treating it as a policy question. In a section 1983 suit in 1961 the Seventh Circuit Court of Appeals in Adams v. City of Park Ridge enjoined the enforcement of a municipal ordinance and declared it unconstitutional. The court suggested that the Supreme Court based the Monroe rule not on legislative history, but on policy arguments against municipal liability for money damages. Since these arguments did not apply to injunctive and declaratory relief, the court granted it, saying "[n]o reason is apparent why a city and its officials should not be restrained from prospectively violating plaintiffs' constitutional rights pursuant to its own legislative enactment, and an injunction not be granted as provided in § 1983."


38. 365 U.S. at 191.
40. 293 F. 2d 585 (7th Cir. 1961).
41. Id. at 587. The court said:
The facts in Monroe v. Pape suggests [sic] several inherent reasons for excluding municipalities from liability for damages, such as unauthorized misconduct of the officers, lack of power of city to indemnify plaintiffs for such misconduct, and a city's governmental immunity in the exercise of its police powers, from liability for injuries inflicted by policemen in the performance of their duties.
42. Id. at 587.
Half of the circuits now grant injunctive relief against governmental bodies under section 1983. Those that do not have reasoned that because the non-liability rule excludes municipalities from the class amenable to suit under section 1983, it similarly prohibits suits for damages and equitable or declaratory relief. Furthermore, they have determined that policy arguments are not relevant. Those courts that have followed the lead of the seventh circuit have viewed the non-liability rule as one of judicial policy prohibiting governmental liability for money damages. To the extent that they have viewed the rule as one of policy, the lower courts have modified it as policy considerations have changed.

The rule has been further undercut by a succession of suits brought by teachers dismissed by school districts which had adopted plans for racial desegregation. In Smith v. Board of Education and Wall v. Stanley County Board of Education, the plaintiffs based their complaints solely on section 1983. In both cases the courts allowed injunctive and monetary relief. In each of these cases, however, the courts awarded damages measured on contract principles. This action is consistent with the well established rule that states and municipalities may be sued in federal court on their contracts.

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47. 365 F.2d 770 (8th Cir. 1966).

48. 378 F.2d 275 (4th Cir. 1967).


50. 365 F.2d at 784. The court allowed damages measured from the time of dismissal to the time of an offer of re-employment, subject to the usual rules of mitigation. Though the court did not expressly say so, this formula implies that the damages are to be measured by contract principles. See also 378 F.2d at 278.

51. The rule that the contract clause allows a person to sue a state which has violated its own contract in federal court was laid down in Fletcher v. Peck, 10 U.S. (6 Cranch.) 87 (1810). See also Indiana ex rel.
defense of the municipal non-liability rule under section 1983 raised, although it would have been applicable since the Supreme Court reasoned in *Monroe* that a school board or welfare commission is no more a "person" under section 1983 in contract than in tort.

A recent fifth circuit case, however, was directly confronted with the rule of municipal non-liability in a teacher dismissal case and refused to apply it. In *Harkless v. Sweeny Independent School Dist.*, 52 ten Negro school teachers brought a section 1983 action against the district for reinstatement and back pay because their contracts had not been renewed when the district was desegregated. The members of the school board were not sued as individuals after two members of the jury stated at *voir dire* that they would not hold officials of the district individually liable for money damages.

The district court dismissed the suit, holding that neither the district nor the individuals in their official capacities were proper parties under the Supreme Court's ruling in *Monroe*. The court of appeals, reversing, noted that a school district "is of the nature of a municipality" under Texas law, but limited the *Monroe* non-liability rule to situations in which a municipality is sued "for damages under the doctrine of *respondeat superior* for the conduct of its police officers." The court noted that equitable relief was available in section 1983 actions against both municipalities and individuals in their official capacity. It reasoned that since "[t]he prayer for back pay is not a claim for damages, but

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Anderson v. Brand, 303 U.S. 95 (1937), where a teacher's "permanent" contract was terminated after repeal of the tenure law. The court held that this was an unconstitutional impairment of the contract and ordered the teacher reinstated. These cases do not fall within the scope of protection offered by the contract clause. The terminations involved were permissible under contract law, but impermissible under the fourteenth amendment. Since municipal contracts have always been subject to federal scrutiny under the contract clause, scrutiny under section 1983 and the fourteenth amendment was not a large departure from existing practice.

In a similar case, Brooks v. Yeatman, 311 F. Supp. 364 (M.D. Tenn. 1970), the court departed slightly from the clear precedent in contract and awarded damages for the non-payment of welfare benefits. The award in this case was measured by the amount that the plaintiff would have received had the benefits not been terminated, and more closely approximates a contract measure than a tort measure.

52. 427 F.2d 319 (5th Cir. 1970).
54. 427 F.2d at 321.
55. Id.
56. Id. at 323.
is an integral part of the equitable remedy of injunctive rein-
statement,"57 there is nothing to prevent an award of back pay.58
The court implicitly rejected the logic of the non-liability rule
and the policy arguments against depleting municipal reserves,
but did not discuss the reasoning behind this result. It only sug-
gested that the imposition of financial liability on a local govern-
mental body under section 1983 was consistent with increasing
federal power over local governments in civil rights matters.59
The decisions that have allowed injunctive relief and dam-
ages directly against municipalities under section 1983 have been
cases where the liability of the governmental body was non-mon-
etary or limited by the voluntary assumption of obligations as
distinguished from cases where the liability was relatively un-
limited and measured on tort-like principles under section
1983.60 This distinction in the application of the rule of munici-
pal non-liability is not based on Monroe. Instead, it is based on
the policy that it is not desirable to impose unlimited liability on
municipalities which may be unable to meet the financial bur-
den.61 This rationale becomes less convincing, however, as more
and more states, either by court order or legislative action, aban-
don the obsolescent doctrine of sovereign immunity and impose
tort liability on themselves and their political subdivisions.

In Adams and the cases following its lead the lower courts
have greatly expanded the power of federal courts under section
1983 in decisions compelling or prohibiting municipal action
through the use of the courts' equity powers. Such extension in-
volves an imposition of federal power over local governmental
bodies approximately equivalent to the power to assess damages.
The power to nullify the effect of a validly enacted ordinance,62
or the power to order the rehiring of a teacher and payment of
back pay63 affect the autonomy of local government at least as

57. Id. at 324.
58. In response to this reasoning the dissenting judge said: "I am in
agreement with the district court in its holding that Monroe v. Pape . . .
means what it says and that it requires dismissal of appellants' com-
plaint for failure to state a claim upon which relief can be granted." Id.
59. Id. at 323. See also note 65 infra.
60. See note 13 supra.
61. This raises the spectre of a municipality's "court-houses, its
jails, its poorhouses, its hospitals, [and] its schools . . ." being sold to
satisfy judgments. Cong. GLOVZ, 42d Cong., 1st Sess. 763 (1871) (Senator
Casserly).
62. See, e.g., Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir.
1961).
63. See, e.g., Harkless v. Sweeny Independent School Dist., 427 F.2d
319 (5th Cir. 1970).
greatly as the power to assess damages for constitutional violations. Though there are no cases that grant an award of money damages measured on tort principles, there is arguable precedent for such an award, so that a decision to grant the tort measure would not be a major expansion of federal power. Such an expansion would also parallel the rapid growth of federal power over municipal treasuries in the civil rights field. In view of this expansion of section 1983 and the concomitant narrowing of the rule of municipal non-liability, it is possible that in the future the federal courts, under continued pressure from plaintiffs, may hold municipalities liable directly under section 1983 for the conduct of their officers.

IV. USE OF 42 U.S.C. § 1988 TO CIRCUMVENT THE NON-LIABILITY RULE

The fifth circuit has done the most to replace the rule of governmental non-liability with one of liability. But even in Hareless the court still regarded the rule as controlling on the specific facts of Monroe. Despite the prolonged trend that eventually may allow recovery directly against governmental bodies, at present, plaintiffs must attempt to circumvent the rule. The most successful attempts so far have been accomplished by reading 42 U.S.C. § 1988 together with section 1983.

64. See notes 47-51 supra.
65. In the field of education the power of supervision is extensive. In Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964), the Supreme Court held that lower federal courts have the power to enjoin local government bodies from paying county tuition grants or giving tax exemptions and from processing applications for state tuition grants ... [and power to] require the [county] Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system . . . .

Id. at 232-33. See also Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (power to order compliance with a desegregation plan suggested by HEW and power to modify any plan adopted by the school board).

In the area of voting rights the Court has also exercised direct control over the elections basic to any municipality's or state's power to govern itself. Davis v. Mann, 377 U.S. 678 (1964) (power to prohibit elections until reapportionment is effected); WMCA, Inc. v. Lorenzo, 377 U.S. 633 (1964) (power to determine whether elections for the state legislature may be held immediately or must await reapportionment), and Reynolds v. Sims, 377 U.S. 553 (1964) (power to prohibit elections until reapportionment is effected).

66. "[T]he holding in Monroe v. Pape would be restricted by the facts of the case to proscribing a suit against a municipality under the doctrine of respondeat superior for damages." 427 F.2d at 321.
67. For the text of the statute, see note 4 supra.
Section 1988 provides that the Civil Rights Acts shall be "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 [federal remedies] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . , the common law, as modified and changed by the constitution and statutes of the State . . . , 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 [federal] courts. . . ." In order to apply section 1988 courts have held that three things must be shown: (1) a state law provides the desired remedy; (2) the section of the Civil Rights Act in question is deficient in a provision necessary to furnish an adequate remedy to vindicate the plaintiff's civil rights; and (3) the state remedy is

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68. Section 1988 was originally enacted as Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27. It was subsequently re-enacted as Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144, pursuant to § 5 of the fourteenth amendment, which was ratified in 1868. When Congress passed section 1983 as part of the Civil Rights Act of 1871, it specifically incorporated section 1988. Section 1983 (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13) read as follows, before the revision of 1874:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases (emphasis added).

Section 1983 was codified and re-enacted by Congress as R.S. 2d ed. § 1979 (1878), which omitted the reference to the Civil Rights Act of 1866. The omitted reference was at the same time incorporated directly into section 1988 in R.S. 2d ed. § 722 (1878) in the reference to the section of the Revised Statutes titled Civil Rights. The current sections in the United States Code included in the chapter entitled Civil Rights are 42 U.S.C. §§ 1981-83, 1985-87, 1989-92 and 1994 (1964). In the revision of 1874 the coverage of section 1988 was expanded to include 42 U.S.C. §§ 1986 & 1994.

69. Brazier v. Cherry, 293 F.2d 401, 409 (5th Cir. 1961).
70. Id. See also Sherrod v. Pink Hat Cafe, 250 F. Supp. 516 (N.D. Miss. 1965). The Supreme Court used a similar test in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). The following test was used by
not inconsistent with federal law. There was no clear indication of congressional purpose in enacting the statute. The courts have themselves decided that the purpose of section 1988 is to enlarge the relief available under the Civil Rights Acts by incorporating into them whatever remedies have been developed by the states. To use section 1988 with section 1983, the state must have a statute or court ruling allowing suits against the state or municipality for the torts of their agents.

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the court in Brazier:

[What is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in effect. To whatever extent (b) helps, it is automatically available . . . .]

293 F.2d at 409.


72. The case in which state law provided a broader remedy for deprivation of a federally secured right than federal law was not discussed during the debates. The first judicial reference to the Act was in Tennessee v. David, 100 U.S. 257, 299, (1879) (Clifford, J., dissenting). He called it "a mere jumble of Federal law, common law, and State law, consisting of incongruous and irreconcilable regulations . . . ."

73. Pritchard v. Smith, 289 F.2d 153 (8th Cir. 1961).


75. The common law rule is that a governmental body is not liable for damage inflicted in the exercise of its governmental functions. This is the ancient doctrine of sovereign immunity, which had its origin in the idea that the "king can do no wrong." See Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 HARV. L. REV. 1 (1963). Legal scholars have agreed that this general immunity is an anachronism in American law. See, e.g., Borchard, Government Liability in Tort, 34 YALE L.J. 1, 129 (1924); 229 (1925); 36 YALE L.J. 1 (1926); Maguire, State Liability for Tort, 30 HARV. L. REV. 20 (1916).

The common law rule has been modified in some states by statutes and judicial decisions. In the following states the state and its political subdivisions are liable for the torts of their officials:


Wisconsin: Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).
There is precedent for this practice of looking to state law to supplement federal law. The question of whether a particular federal remedy is deficient, thereby allowing use of the state remedy, has provoked little controversy. The courts have found deficiencies in federal laws and procedures such as a district court pro hac vice rule limiting out-of-state attorneys to one appearance a year, a district court requirement for filing petitions for removal from state courts that caused expense and delay, and

In the following states municipalities are liable for the torts of their officials:


In the following states municipalities are liable for the torts of their officials to the extent that the municipalities have insurance:

- New Mexico: N.M. STAT. ANN. § 5-6-20 (1966).

In the following states there is no statutory imposition of municipal liability:

- Alabama, Arkansas, Colorado, Connecticut, Delaware, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Montana, Nebraska, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah and West Virginia.


State law has also been incorporated into section 1983 to provide defenses. Pierson v. Ray, 380 U.S. 547 (1965) (judicial immunity and action in good faith under a statute that is later declared unconstitutional); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislative immunity); Daniels v. Van de Venter, 382 F.2d 29 (10th Cir. 1967) (arrest with probable cause).

Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968).

Brown v. City of Meridian, 356 F.2d 602 (5th Cir. 1966); Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964).
the failure of a statute to provide for damages, or survivorship. The courts that have considered the question have held that the inability to hold municipalities liable for the conduct of their officials is a deficiency in section 1983 within the meaning of section 1988.

This requirement poses a difficult question of construction, particularly when viewed in light of the section 1988 requirement that the state remedy to be incorporated be consistent with federal law. If "deficient" means failure to produce the desired result, the section is an invitation to resort to state law whenever federal law produces undesirable results. This loose reading of the deficiency requirement also raises questions of consistency of federal law. Where a law manifests a federal policy, even though that law may be deficient from the point of view of a plaintiff, an attempt to nullify it by use of a state law will be inconsistent with federal law. This reasoning was used by a California district court in Wilcher v. Gain to deny the recovery of damages directly from the governmental body under sections 1983 and 1988. The court reasoned that Monroe established that Congress, in enacting section 1983, intended to exclude municipalities from the scope of liability under section 1983. Hence, the inability to secure damages from a municipality under section 1983 was not a deficiency in federal law, but a congressional policy manifested in federal law, and any attempt to depart from that policy was inconsistent with federal law.

Two other district courts have suggested another approach that may allow relief under the combination of statutes based on assumptions about Monroe different from those in Wilcher. A New York district court in Sostre v. Rockefeller considered the rule of municipal non-liability as originating from a silence in

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83. The ninth circuit does not allow injunctive relief against municipalities under section 1983. Diamond v. Pitchess, 411 F.2d 565 (9th Cir. 1969).
84. 312 F. Supp. 863 (S.D.N.Y. 1970), rev'd in part, Sostre v. McGinnis, No. 35038 (2d Cir. Feb. 24, 1971). On appeal the state was dropped as a defendant and only individuals were retained. The question of governmental liability therefore was not an issue on appeal and plaintiff
the federal law, rather than from a manifest federal policy against governmental liability. The federal law could thus be called deficient to the extent that it did not deal with the issue before the court; and since the rule was only the result of silence in the law, the use of state law to provide the missing remedy was not inconsistent with the federal law. It reasoned that "if it can be said that Congress has not provided a damage remedy ... under section 1983; and further that there is no other federal remedy because Monroe v. Pape ... left the question open ... then the court looks to New York's remedy ... as provided by 42 U.S.C. § 1988."85: The effect of this reasoning is that the rule of municipal non-liability forbids recovery of damages directly from a municipality under federal law alone. It does not prohibit plaintiffs, however, from supplementing federal law with state law.

A Pennsylvania district court in United States ex rel. Washington v. Chester County Police Dept.86 met the same question in the context of a different civil rights statute, 42 U.S.C. § 1981.87 Under section 1981 the court faced a rule against damage awards that is analogous to the rule against damage awards against gov-

85. Id. at 866-87. The court used N.Y. CONREC. LAW § 6b and N.Y. Cr. Ct. Acct § 8 (1968). The same court in Laverne v. Corning, 316 F. Supp. 629 (S.D.N.Y. 1970), noted that had the suit been filed in time, the plaintiff in that case could have recovered from the village for the misconduct of its police officers under the doctrine of respondeat superior. Evidently the court assumed that the theory of recovery would be a combination of section 1983 with section 1988 and the above New York laws.


87. 42 U.S.C. § 1981 (1964): 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.

The use of section 1981 as a basis of an action for police misconduct is unique to this case and it remains to be seen if other courts will follow this extension of the statute. One court, in Mack v. Lewis, 298 F. Supp. 1351 (S.D. Ga. 1969), has already indicated that it will not. There the court reasoned that since municipalities were not liable for the misconduct of their police officers under section 1983, they should not be liable simply because sections 1981 and 1988 are read together. That statement is dictum since neither section was before the court. The court also found a congressional intent that municipalities not be liable under sec-
ernmental bodies under section 1983.\(^{88}\) When the plaintiff sought to combine section 1981 with section 1988 to provide a damage remedy by incorporating the remedy available under the common law tort of battery, the court acknowledged the force of the rule prohibiting damages under section 1981, but said the issue before it was whether damages could be awarded under section 1981 considered in light of "the mandate of 42 U.S.C. § 1988."\(^{89}\) The court, in denying the defendant's motion to dismiss, said in effect that, while there is a body of interpretive law governing the use of section 1981 disallowing damages, this body of law does not necessarily govern the use of section 1981 when it is read together with section 1988.

The effect of this reasoning is to allow plaintiffs to use section 1988 to supplement civil rights statutes, but it is not as conceptually convincing as the rationale in \textit{Sostre}, because it ignores the difficult question of what constitutes a deficiency in a particular civil rights statute. It is arguable that once section 1988 applies, the court should consider the statutory combination as a different statute than the particular civil rights statute standing alone, thus avoiding the consistency requirement; but the approach does not help in determining whether or not section 1988 applies at the outset.

If either of these approaches is used to incorporate state law into section 1983 by way of section 1988, there are several consequential effects that must be examined. The use of section 1988 will conflict with the attempt to develop a uniform national policy under the Civil Rights Act,\(^{90}\) since governmental bodies will be liable in some states but not in others. Variations already exist with regard to statutes of limitations\(^{91}\) which admittedly have less effect on the remedy than the presence or absence of governmental liability. Here, however, it is apparent from the face of section 1988 that it was not designed to promote national uniformity, but to allow supplemental use of state law. Any inconsistency is the result of its conflict with the policy of uniformity passed nearly a year before section 1983, so congressional intent in passing section 1983 cannot be attributed to section 1981.


\(^{89}\) 300 F. Supp. at 1282.

\(^{90}\) Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

of civil rights statutes. Use of section 1988 also raises the more serious question of the extent to which the court should adopt the state's law. Few states have replaced completely the common law rule of governmental immunity with a rule of liability. Many allow recovery only where the governmental body has insurance and only to the extent of the insurance; others establish defenses, and others require notification of claims within a certain period.

The Supreme Court has not determined the extent to which state law should be incorporated. In Sullivan v. Little Hunting Park the Court noted the need for uniformity and said that any state or common law rule incorporated by section 1988 becomes federal law. The Court, however, did not elaborate since damages were not an issue. As a result the implications of its statement are unclear. Section 1988 provides that federal courts are to apply state remedies in the absence of a suitable federal remedy. But the Court, as Mr. Justice Harlan notes in his dissent, says that the state remedy becomes a federal remedy under section 1988 and is then re-imposed on the states. How much of a particular state remedy is to be incorporated into the federal remedy, what defenses and modifications of the basic remedy must also be incorporated, and whether, in the extreme, the remedy of one state could be imposed upon another as a federal remedy are not discussed by the Court.

The most workable solution to this difficulty appears to be the suggestion of the court in Sostre, adopting the state statute's rule of liability, but not its defenses. It used the federal common law defenses to section 1983 actions instead. This approach is necessary unless recovery against a governmental body under section 1983 is to become a tangle of different state laws. The best resolution appears to be a federal rule that if a state provides for governmental tort liability, that liability will be incorporated into section 1983 through section 1988. This in-

94. See note 85 supra.
95. MINN. STAT. § 466.05 (1969).
97. Id. at 240.
98. Id. at 256-57.
99. 312 F. Supp. at 887.
100. Id.
101. This difficulty was forseen by Mr. Justice Frankfurter in Indian Towing Co. v. United States, 350 U.S. 61, 65-68 (1955), where he refused to read state law into the Federal Tort Claims Act.
corporation will be allowed to vary from state to state on the basis of different provisions in state laws only to the extent that those provisions significantly affect the ability of the governmental body to bear the cost of liability. In this way, state provisions such as those allowing liability only where a municipality has insurance and to the extent of that insurance will be incorporated into the right to recover under section 1983, where a provision allowing municipal liability in suits in state courts but not in federal courts would not be incorporated. This approach will not place a financial burden on governmental bodies that are unprepared or unable to bear it\(^2\) and will hold to a minimum local variation in procedural and substantive rights.

V. CONCLUSION

A growing number of lower federal courts are limiting the rule of municipal non-liability in two distinct ways. First, they are reading the rule as announced in *Monroe* as one based on policy rather than legislative intent, and refusing to apply it where the policy considerations implicit in *Monroe* are absent. Secondly, a few have indicated they may allow recovery of damages under state law as incorporated into section 1983 by way of section 1988. The complete abolition of the rule of non-liability under section 1983 alone will probably have to await widespread municipal liability under state law, or the federal courts will risk imposition of large liability that will impair the functioning of small governmental bodies. Ultimately, this result would be the preferable one because it would provide a nationally uniform policy in vindicating constitutional guarantees. Until that time, however, the combination of statutes, section 1983, section 1988 and state law offers the most promising remedy for aggrieved plaintiffs. It provides more adequate compensation to the injured person than the individual liability now available. In addition, it provides an incentive to the governmental body to provide the necessary police services in a manner consistent with constitutional guarantees. Finally, since this method looks to state law, it will not impose liability on local governmental bodies until they are aware of their liability and have had an opportunity to prepare their treasuries for it.

\(^2\) This approach is consistent with the policy implicit in *Harkless*. See text accompanying note 59 supra. This approach should also minimize the negative incentive for states to provide municipal liability that would be present if federal courts ignored the liability ceilings or insurance-related restrictions imposed by the states.