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Hearing on Examining Civil Rights Litigation Reform, Part II:
Vicarious Liability of Municipal/State Employers under Section 1983

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**Introduction**

Good morning Chair Nadler, Chairman Cohen, Vice Chair Ross, Ranking Member Johnson, and members of the Subcommittee. My name is Karen Blum and I am a Professor Emerita at Suffolk University Law School in Boston, where I taught for over forty years in the areas of Civil Procedure, Federal Courts and Section 1983, with a focus on police misconduct litigation. Since my retirement from full-time teaching in 2017, I have continued to teach my course on police misconduct litigation under Section 1983 during intersession and will be teaching a module of a course on Race and the Law in the fall of 2022. For over 30 years, I have been involved in the training and education of federal district court judges and federal magistrate judges through programs conducted by the Federal Judicial Center. Over the years, I have done countless programs for practicing attorneys on both the Plaintiff and Defense side of Section 1983 cases. Thank you for affording me the opportunity to provide testimony on this important and timely issue of government liability under Section 1983. One of my earliest law review articles was on the Supreme Court's *Monell* decision. [1] I argued then and continue to believe that the Court got it wrong when it rejected vicarious liability under Section 1983. There are four points I would like to make with respect this topic:

**I. Legislative History does not Support the Conclusion that Congress Rejected Vicarious Liability for Local Government Entities under Section 1983**

- In *Monroe v. Pape*,[2] the Court held that local governments were not "persons" who could be sued at all under Section 1983. This total immunity for local governments was based on Congressional rejection of the only form of municipal liability legislatively proposed at the time, the Sherman amendment to the Civil Rights Act of 1871 (Section 1983).
- When the Court in *Monell* self-corrected the error made by the *Monroe* Court, it explained that the rejection of the Sherman amendment constituted a rejection of vicarious liability, but did not support immunity from liability when a local government's own acts or omissions directly caused a constitutional violation. Local governments, like other persons

[1] *See generally* Karen M. Blum, FROM *MONROE* TO *MONELL*: DEFINING THE SCOPE OF MUNICIPAL LIABILITY IN FEDERAL COURTS, 51 TEMP. L.Q. 409 (1978)

[2] 365 U.S. 167 (1961), overturned on other grounds by *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978).

acting under color of state law, could be held liable for their own constitutional wrongdoing.

- But any argument against vicarious liability based on Congressional rejection of the Sherman amendment is misplaced and simply wrong. A reading of the proposed Sherman Amendment reveals that the proposal would have made local governments strictly liable for *private* acts of violence committed against Blacks within the borders of the governmental entity. This was not vicarious liability based on conduct of government employees acting under color of state law.

## II. Scholars and Judges, including Supreme Court Justices, Have Questioned the Soundness of *Monell's* Insistence on the Direct vs. Vicarious Liability Distinction.

- In *Pembaur v. City of Cincinnati*,[3] Justice Stevens criticized the Court's rejection of respondeat superior liability as inconsistent with the legislative history of Section 1983.
- In *Board of County Com'rs of Bryan County, Okl. v. Brown*,[4] Justice Breyer called for a reexamination of "the legal soundness" of the distinction drawn by the Supreme Court between direct and vicarious liability, suggesting that that aspect of *Monell* should be revisited, especially in light of the fact that virtually all states have indemnification statutes that come into play when government employees are sued for conduct performed in the course of their employment.
- Judge Jon O. Newman has long been an advocate of employer liability in Section 1983 cases. His testimony is included in the record for the hearings conducted on qualified immunity before this subcommittee on March 31, 2022.[5]

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[3] 475 U.S. 469, 489 n.4 (1986) (Stevens, J., concurring in part and concurring in judgment).
[4] 520 U.S. 397, 430 (1997) (Breyer, J., joined by Stevens, J., and Ginsburg, J., dissenting).
[5] https://docs.house.gov/meetings/JU/JU10/20220331/114567/HHRG-117-JU10-Wstate-NewmanJ-20220331.pdf
*See also Vodak v. City of Chicago*, 639 F.3d 738, 746 (7th Cir. 2011) ("For reasons based on what scholars agree are historical misreadings (which are not uncommon when judges play historian), … the Supreme Court has held that municipalities are not liable for the torts of their employees under the strict-liability doctrine of respondeat superior, as private employers are."); *Pinter v. City of New York*, 976 F.Supp.2d 539, 551 n.23 (S.D.N.Y. 2013) ("Pinter correctly notes that questions have been raised about the accuracy of *Monell*'s analysis of Section 1983. . . . If it were within the province of a federal district court to question Supreme Court precedent based on indications of dissension, I might be inclined to do so in this case. But this Court's task is to apply Supreme Court and Second Circuit law as it stands. As a result, I am constrained to apply *Monell* and its progeny, although I add my voice to the chorus of those who would encourage the Supreme Court to revisit *Monell*'s analysis.").

- A number of scholars, myself included, when asked what would be at the top of their list to change in the jurisprudence of Section 1983 litigation as it now exists, answered with the adoption of respondeat superior liability. As David Rudovsky, a well-respected scholar and civil rights lawyer, so eloquently put it: The incorporation of respondeat superior as a basis for relief against the governmental entity "in one elegant move removes all of the difficult and irrelevant issues regarding municipal policy and practice and qualified immunity."

## III. As a Practical Matter, *Monell* Claims are Difficult to Plead and Prove, as well as Expensive and Time-consuming to Litigate for both Plaintiffs and Defendants.[6]

- The area of municipal or entity liability has become, in the words of Justice Breyer, a "highly complex body of interpretive law,"[7] indeed, a maze that judges and litigants must navigate with careful attention to all the twists and turns.
- Many trees have been destroyed by scholars, myself included, trying to parse and explain the various theories for holding municipalities liable under Section1983,[8] always cautious about crossing the line the Supreme Court has drawn between vicarious and direct liability.[9]
- Municipal liability claims have become procedurally more difficult for plaintiffs to assert since the Court's imposition of a more stringent pleading standard in *Bell Atlantic*

[6] *See* Karen M. Blum, SECTION 1983 LITIGATION: THE MAZE, THE MUD, AND THE MADNESS, 23 WM. & MARY BILL RTS. J. 913 (2015) [hereinafter, *THE MAZE*]

[7] *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 430 (1997) (Breyer, J., joined by Stevens, J., and Ginsburg, J., dissenting).

[8] The Court has recognized basically four different ways a plaintiff might establish local government liability:

1. Plaintiff may establish that her harm was caused by an application of an officially adopted unconstitutional policy.
2. Plaintiff may establish that her harm was caused by an unconstitutional custom, usage, or practice.
3. Plaintiff may attribute a single unconstitutional decision or act of a final policymaker to the entity, taking caution to distinguish a final policymaker from a final policy-implementing official or even a final decision maker.
4. Plaintiff may establish that a failure to train, supervise, discipline, or adequately screen, while not itself unconstitutional, is deliberately indifferent to and the cause of a constitutional violation by a non-policymaker.

[9] It is also worth noting that courts have mechanically applied the rationale of *Monell* to private corporations like prison management and prison health care corporations sued under Section 1983. *See The Maze*, at 919 n.32.

*Corp. v. Twombly*[10] and *Ashcroft v. Iqbal*,[11] and even more challenging to ultimately prove after the Court's decision in *Connick v. Thompson.*[12] The bottom line is that litigating *Monell* claims is burdensome, expensive, and time-consuming for Plaintiffs, Defendants,[13] and the courts.

## IV. Imposing Vicarious Liability on Governmental Entities under Section 1983 Would Not Open the Floodgates to Litigation or Liability.

- The reality is, as Professor Joanna Schwartz has documented,[14] local and state[15] governments currently are required by state law, or are bound through collective bargaining agreements, to indemnify their employees when civil rights litigation results in a finding of individual liability. Individual officers/officials rarely, if ever, pay anything out of pocket for judgments rendered against them in civil rights suits.
- It's important to realize that there is no liability on the part of anyone unless the Constitution has been violated. The standards the Court has established for various constitutional violations are rigorous and difficult for plaintiffs to make out. Simple, or even gross negligence, will never suffice to prevail on a constitutional claim. Thus, a

[10] 550 U.S. 544 (2007).
[11] 556 U.S. 662 (2009).
[12] 563 U.S. 51 (2011).
[13] Because of the burdensome discovery involved, defendants often seek and are granted bifurcation of the *Monell* claim, whereby the court stays discovery on the *Monell* claim and requires the Plaintiff to proceed first on the underlying constitutional claim against the individual defendant. The municipality is generally required to agree that if the Plaintiff prevails on the constitutional claim against the individual officer, the entity will indemnify, thus precluding any need to proceed with the *Monell* claim. If the Plaintiff fails to make out a constitutional violation against the individual, most courts would dismiss the claim against the entity as well. *See generally* Colbert, *Bifurcation of Civil Rights Defendants*: *Undermining* Monell *in Police Brutality Cases*, 44 Hastings L.J. 499 (1993).
[14] Joanna Schwartz, Police Indemnification, 89 N.Y.U. L. REV. 885 (2014).
[15] While the Supreme Court has construed Section 1983 to preclude suits against states by holding that states are not suable "persons" within the meaning of the statute, Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989), Congress can legislatively define the term "person" to include a State. Furthermore, while the Court has held that Congress did not intend to abrogate Eleventh Amendment immunity when it enacted Section 1983, Quern v. Jordan, 440 U.S. 332, 345 (1979), Congress is free to decide otherwise and may validly abrogate Eleventh Amendment immunity pursuant to its Fourteenth Amendment enforcement power. As Justice Scalia noted in United States v. Georgia, 546 U.S. 151 (2006), "[w]hile the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment, . . . no one doubts that § 5 grants Congress the power to 'enforce ... the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions." *Id.* at 158. Thus, to the extent that a plaintiff must make out an "*actual* violation" of the Constitution to be afforded a remedy under Section 1983, Congress may make that remedy available against states.

government entity will be liable only when the plaintiff has carried the burden of making out the underlying constitutional violation.

- It should also be kept in mind that the Supreme Court has held that punitive damages may not be awarded against a government entity.[16] Adopting vicarious liability would not change that holding.

Thank you to the Committee for your attention to this important topic.

[16] *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981).