CIVIL RIGHTS

PEMBAUR V. CITY OF CINCINNATI: REFINING THE "OFFICIAL POLICY" STANDARD FOR SECTION 1983 MUNICIPAL LIABILITY

In *Monell v. Department of Social Services*,[1] the United States Supreme Court sanctioned section 1983[2] claims against cities, counties, and other local governments[3] by plaintiffs who could prove that an "official policy" or "governmental custom" of the local government deprived them of a constitutional right.[4] The *Monell* decision breathed new life into section 1983 claims against municipalities,[5] but failed to provide a precise definition of the

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1. 436 U.S. 658 (1978). For a comprehensive discussion of *Monell*, see Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213 (1979).

2. 42 U.S.C. § 1983 provides in part:

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

42 U.S.C. § 1983 (as amended December 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284).

Section 1983 established no substantive rights, but provides remedies for deprivations of rights established by the Constitution or federal statute. *See* Maine v. Thiboutot, 448 U.S. 1, 4 (1980).

Two allegations are required to state a cause of action under the statute: an allegation that some person deprived the plaintiff of a federal right, and an allegation that the person depriving him or her of that right acted under color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980). An act executed "under color of state law" need not conform with state law. "Under color" embraces any "[m]isuse of power made possible because the wrongdoer has the authority of state law or power." Monroe v. Pape, 365 U.S. 167, 184 (1961), *quoting* United States v. Classic, 313 U.S. 299, 326 (1940).

3. *Monell* involved a city, but the decision was made applicable to all local governmental units. *Monell*, 436 U.S. at 663, 690, 694. The *Monell* doctrine has generally been extended to cases involving counties, school boards, state universities, and other local government agencies. Snyder, *The Final Authority Analysis: A Unified Approach To Municipal Liability Under Section 1983*, 1986 WIS. L. REV. 633 n.2.

4. *Monell*, 436 U.S. at 690-91, 694.

5. Section 1983 actions against local governments were seldom used by plaintiffs during the years after its creation in 1871. During the first 90 years following its passage, § 1983 was cited only 36 times by the Supreme Court. T. EMERSON, C. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1447 (3d ed. 1967). *See also* Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

What little utility § 1983 had against municipalities disappeared altogether after the Supreme Court held in Monroe v. Pape, 365 U.S. 167 (1961), that municipalities were not "persons" within the meaning of the Civil Rights Act of 1871 and could not, therefore, be held liable under the statute. *Id.* at 187. After *Monroe*, § 1983 could be used against the officials who violated a plaintiff's constitutional rights, but not against the local governmental entity represented by the official. Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L. J. 1483, 1485 (1977).

Monell overruled the limiting effect of *Monroe* by holding that local governments were persons under the Act. *Monell*, 436 U.S. at 691. Since *Monell*, a major use of the statute has been suits against municipalities alleging police misconduct. Kramer, *Section 1983 and Municipal Liability:*

"policy or custom"[6] standard. In a recent decision, *Pembaur v. City of Cincinnati*,[7] the Supreme Court clarified the meaning of "official policy" by holding that a single incident of unconstitutional activity may constitute such a policy if the activity accords with formal rules or established practices of the municipality, or if the activity is directed by officials responsible for formulating governmental policy.

This Comment summarizes the legal background of municipal liability under section 1983 preceding *Pembaur*, and describes *Pembaur*'s effect on that law. *Pembaur* broadens the exposure of municipalities to section 1983 actions by retreating from previous rejections of respondeat superior[8] liability under section 1983. The decision fails, however, to address the inconsistencies between the law's limited applicability and the intent of Congress that the remedy be applied broadly.

THE FACTS OF *PEMBAUR V. CITY OF CINCINNATI*

Bertold Pembaur operated a medical clinic in Cincinnati, Ohio.[9] On May 19, 1977, deputy sheriffs employed by Hamilton County, Ohio, visited the clinic to serve capiases[10] on two employees of the clinic. The deputies entered the public area of the clinic, but were refused entry to the areas where the employees presumably were located. The deputies called their superiors for advice and were told to call the County Prosecutor's office and follow the Prosecutor's instructions. After talking with the Assistant County Prosecutor, who conferred with the County Prosecutor, the deputies were ordered to "go in and get" the subpoenaed employees.[11] Officers from the Cincinnati Police Department, who had joined the confrontation, proceeded to chop through the clinic's inner door with an ax, allowing the deputies to enter and search the building. The individuals named in the capiases were not found by the officers.

Pembaur filed a claim under 42 U.S.C. section 1983 on May 20, 1981 in the federal district court. Pembaur claimed that the city and county officers

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Selected Issues Two Years After Monell v. Department of Social Services, 12 URB. LAW 232, 244-52 (1980). In recent years, the number of such suits has ballooned. In 1985 alone, approximately 19,500 § 1983 suits were filed in federal courts. Priest & White, *Police Misconduct Suits: In Defense of Officers and Municipalities*, FOR THE DEFENSE , Aug. 1986, at 21, 26.

6. Commentators and courts often collapse the "policy" and "custom" concepts into one conceptual category. See Kushnir, *The Impact of Section 1983 After* Monell *on Municipal Policy Formulation and Implementation*, 12 URB. LAW 466, 472-73 (1980); Smith v. Ambrogio, 456 F. Supp. 1130, 1134 n.3 (1978); Eagan, *The Scope of Supervisory Liability Under 42 U.S.C. Section 1983*, 6 CONTEMP. 141, 147-48 (1979). In this Comment, references to "official policy" will generally encompass both "official policy" and "governmental custom."

7. 106 S. Ct. 1292 (1986).

8. *See infra* note 21.

9. The facts of *Pembaur* are set forth at 106 S. Ct. at 1294-97.

10. A capias is a writ of attachment ordering a county official to arrest a subpoenaed witness who has failed to appear before the court. After arresting the witness, the county official is commanded to bring the person before the court to testify and answer for his or her contempt. *See* OHIO REV. CODE ANN. § 2317.21 (Anderson 1981).

11. *Pembaur*, 106 S. Ct. at 1295.

violated his fourth[12] and fourteenth[13] amendment rights when they forcibly entered the private areas of his business without a search warrant.[14] The district court dismissed Pembaur's claims because the plaintiff failed to show that the officers acted pursuant to an "official policy."[15] The Court of Appeals for the Sixth Circuit affirmed.[16] The Supreme Court granted certiorari to consider two issues: First, may a single, discrete action by a municipal policymaker establish the "policy or custom" necessary to incur municipal liability? Second, under what circumstances may the decisions of policymakers establish the necessary "policy or custom?"[17]

THE COMMON LAW BACKGROUND OF MUNICIPAL TORT LIABILITY

Historically, all levels of government enjoyed virtually complete immunity from lawsuits.[18] United States courts generally accepted this legacy, declining to impose liability on governmental entities unless the government abolished a particular immunity or consented to liability.[19] Local municipal

12. The fourth amendment to the Constitution of the United States states:
The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. CONST. amend IV.

13. Section 1 of the fourteenth amendment to the United States Constitution states:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States 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. art. XIV, § 1.

In Wolf v. Colorado, 338 U.S. 25 (1948), the Supreme Court held that security of one's privacy against arbitrary intrusion by the police, which is at the heart of the fourth amendment, is so basic and fundamental in a free society that it is enforceable against the states through the due process clause. *Id.* at 27.

14. *Pembaur*, 106 S. Ct. at 1295.

15. *Id.* at 1296. *See also Monell*, 436 U.S. at 694.

16. Pembaur v. Cincinnati, 746 F. 2d 337, 341-42 (1984), *rev'd*, 106 S. Ct. 1292 (1986).

17. Pembaur v. Cincinnati, 106 S. Ct. 1292, 1294 (1986).

18. PROSSER AND KEETON ON THE LAW OF TORTS, at 1033, 1051 (W. Keeton 5th ed. 1984). State and national governmental immunity is referred to as sovereign immunity. It originated with the concept that "the King can do no wrong." Borchard, *Governmental Responsibility in Tort*, 36 YALE L. J. 1, 17 (1926) (Borchard traced the development of governmental tort liability from the Roman period through the modern legal era. He characterized the sovereign immunity concept as an anachronism in the modern period). The concept also meant that no legal right should exist against the authority that makes the law on which the right depends. Kawanakoa v. Polyblank, 205 U.S. 349, 353 (1907).

19. PROSSER & KEETON, *supra* note 18, at 1033. *See, e.g.*, Mower v. Inhabitants of Leicester, 9 Mass. 247, 249 (1812); Osborn v. Bank of United States, 22 U.S. (9 Wheat) 738, 764 (1824). The federal government's general immunity from tort litigation ended in 1946 when Congress enacted the Federal Tort Claims Act, but this consent by the federal government to liability for tortious acts was subject to several restrictions. Suits could only be brought in federal courts, all claims were to be tried before judges, and claimants had to exhaust all administrative remedies before filing suit. PROSSER & KEETON, *supra* note 18, at 1034-35. Some persons may not file suit against the government because of their pre-existing relationship with the government. For example, members of the armed forces are generally denied tort recovery for service-related injuries caused by government negligence. Feres v. United States, 340 U.S. 135 (1950).

State governments have generally followed the federal example of relaxing the absolute immunity allowed by the heritage of the common law. PROSSER & KEETON, *supra* note 18, at 1044. The great majority of state governments have passed legislation consenting to liability as broad as that

governments enjoyed immunities similar to those accorded state or national governments, except that proprietary operations, as opposed to governmental or public operations, were not protected.[20] Indeed, the doctrine of respondeat superior[21] applied to municipalities' proprietary acts and imposed liability on a municipality for the negligent acts of its employees as well.[22]

ORIGINS OF THE CIVIL RIGHTS ACT OF 1871 AND SECTION 1983

Any analysis of section 1983 law must begin with a consideration of the "events and passions of the time at which it was enacted."[23] Municipal liability for civil rights actions, like those claims brought under section 1983, originated in the widespread vigilante violence that occurred during the Reconstruction Era[24] in the southern states after the Civil War. During that period, black persons living in the southern states suffered widespread persecution by white vigilantes whose actions were often tolerated or condoned by state and local officials.[25] Much of this violence was associated with the Ku Klux Klan.[26] In response to this condition, Congress passed the Civil

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imposed upon the federal government by the Federal Tort Claims Act. *Id.* at 1045. In Arizona, the Arizona Supreme Court abolished sovereign immunity in Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963). For more recent developments, *see generally* Casenote, *Governmental Tort Immunity Revisited*: Ryan v. State, 25 ARIZ. L. REV. 1081 (1983).

20. PROSSER & KEETON, *supra* note 18, at 1051. The distinction between public and private governmental functions was made as long ago as 1842. Bailey v. Mayor of New York, 3 Hill 531, 538-40 (Super. Ct. N. Y. 1842), *aff'd*, 2 Denio 433 (N.Y. 1845). Business-like activities, such as operating a water or electric power company, when undertaken by a municipality, are generally considered proprietary or private. If the activity involves governing functions, such as operating the police or fire department, the activity is considered governmental or public. O. REYNOLDS, HANDBOOK OF LOCAL GOVERNMENT LAW 674 (1982). The tests for determining which functions are proprietary or public varies according to the jurisdiction. *See, e.g.*, Green v. City of Birmingham, 241 Ala. 684, 4 So.2d 394 (1941) (Supreme Court of Alabama indicated that local governments are immune in the exercise of mandatory powers or obligations, but no immunity exists for activities voluntarily undertaken by the municipality); Duran v. City of Tucson, 20 Ariz. App. 22, 509 P.2d 1059 (1973) (Arizona Court of Appeals distinguished between governmental acts which have a clear parallel or similarity to acts performed by ordinary citizens and acts which ordinary citizens would not be called upon to perform); Martinson v. City of Alpena, 328 Mich. 595, 44 N.W.2d 148 (1950) (Supreme Court of Michigan stipulated that the test is whether the act is for the common good of all without special corporate or pecuniary profit); Carter v. City of Greensboro, 249 N.C. 328, 106 S.E.2d 564 (1959)(North Carolina Supreme Court ruled that activities of purely local concern to the community tend to be proprietary while activities of general or statewide concern tend to qualify as governmental).

21. "Let the master answer. This maxim means that a master is liable in certain cases for the wrongful acts of his servant." BLACK'S LAW DICTIONARY 1179 (5th ed. 1979). The justification for this rule of law, sometimes called vicarious liability, can be found in public policy considerations: tortious acts by employees cause losses, and the responsibility for those losses belongs with the employing enterprise as a cost of doing business. Furthermore, the enterprise is generally better able to absorb the cost and will have an incentive to reduce the losses in the future. PROSSER & KEETON, *supra* note 18, at 500.

22. Note, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 956-57 (1979).

23. District of Columbia v. Carter, 409 U.S. 418, 425 (1973).

24. The twelve year period following the conclusion of the Civil War in 1865 is called the Reconstruction Era by historians. *See generally* K. STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877 (1965).

25. *Id.* at 199, 200. *See also* Monroe v. Pape, 365 U.S. 167, 174 (1961).

26. The stated purposes of the Ku Klux Klan organization included a mandate to "protect the weak, the innocent, and the defenseless" as well as to "protect and defend the Constitution of the United States." In pursuit of those goals, members pledged opposition to "negro equality, both social and political," and fealty to a "white man's government." K. STAMPP, *supra* note 24, at 200.

Rights Act of 1871, also known as the Ku Klux Klan Act.[27] President Grant signed the bill into law, and the Act created the statute now designated section 1983.[28] Section 1983 created a remedy for individuals who had been denied constitutional or federal rights by actions of state or local officials. Specifically, section 1983 sanctioned lawsuits in federal or state court for monetary, declaratory, or injunctive relief provided the defendant was acting in an official capacity when causing the constitutional or federal deprivation.[29]

INTERPRETING SECTION 1983'S SCOPE: *MONROE* AND *MONELL*

Monroe: *Gutting Section 1983's Utility Against Municipalities*

In 1961, the Supreme Court handed down *Monroe v. Pape*,[30] a landmark decision that effectively gutted section 1983's utility in cases against municipalities.[31] In *Monroe*, the Court analyzed the legislative history of the Civil Rights Act of 1871 and concluded that Congress did not intend for municipalities to be considered "persons" under the Act.[32] Thus, all section 1983 claims against local governments were precluded.[33] Seventeen years later, the Court reconsidered the issue in *Monell*[34] and concluded that *Monroe* incorrectly construed the Act's intent. The Court held that municipalities were "persons" under the Act after all.[35]

While the Ku Klux Klan was the most visible of the vigilante groups causing violence in the South during this period, the Klan was not the only organization causing problems. The Knights of the White Camelia, the White Brotherhood, and the Pale Faces were among the many groups that focused their energies on intimidating the recently enfranchised black population. *Id.* at 199. An excellent summary of the specific types of activity engaged in by the Klan can be found in T. ALEXANDER, POLITICAL RECONSTRUCTION IN TENNESSEE 176-98 (1950).

27. *See Monroe*, 365 U.S. at 171.

28. *See supra* note 2. *See also Carter*, 409 U.S. at 425-26.

29. Monell v. Department of Social Services, 436 U.S. 658, 691 (1978). The federal government is, however, immune from suits under § 1983.

30. 365 U.S. 167 (1961).

31. G. GUNTHER, CONSTITUTIONAL LAW, CASES AND MATERIALS 1051-52 (1980). *See also* Note, *supra* note 22, at 937 n.13.

32. *Monroe*, 365 U.S. at 187-88. The Court reasoned that congressional rejection of an amendment that imposed liability on cities and towns for racist acts of violence occurring in their jurisdictions revealed a congressional intent not to include local governments within the ambit of the act. *Id.* According to the Court, congressional intent was further clarified by arguments in debate indicating that Congress lacked the power to impose civil liability on local governments. *Id.* at 190. During debate, Representative Poland said, "[T]he House has solemnly decided that...Congress had no constitutional authority to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law." CONG. GLOBE, 42d Cong., 1st Sess. 800-01 (1871).

33. *See supra* note 32. *Monroe* allowed a curious situation to exist. If a city violated a plaintiff's constitutional rights, the plaintiff could not sue the city for damages, but could obtain an injunction enjoining the responsible city official from continuing the unconstitutional policy or custom. If a city employee negligently injured a plaintiff in the course of a proprietary activity, like collecting the garbage, the injured party could sue both the negligent employee and the city for damages. Consequently, *Monroe* allowed a situation in which municipal managers and officials had more reason to concern themselves with the simple negligence of their employees than with the constitutionality of their municipal policies. Schnapper, *supra* note 1, at 214.

34. The Court may have reconsidered the *Monroe* holding because it could have been perceived as inconsistent with other Supreme Court cases allowing section 1983 actions against school boards. *See* Note, *supra* note 22, at 937 n.13.

35. Monell v. Department of Social Services, 436 U.S. 658, 665 (1978). According to the *Monell* Court, the amendments and debates considered in *Monroe* did not apply to § 1 (now § 1983) of

Monell's *"Official Policy" Standard*

Monell allowed section 1983 claims against municipalities, but the Court limited this expansion of liability by requiring that plaintiffs connect the constitutional or federal statutory violation to an "official policy" or "governmental custom" of the municipality.[36] This limitation imposed a double burden on plaintiffs. First, plaintiffs had to prove that a municipal employee or action caused a constitutional or federal statutory violation, and second, the plaintiff was required to show that a policy or custom of the municipality caused the action or conduct of the employee.[37] The purpose of this limitation was to distinguish acts of the municipality itself from mere acts of the municipality's employees.[38] The Court's rejection of respondeat superior liability compelled this limitation.[39]

The particular facts of *Monell*[40] did not require the Court to define the precise boundaries of the "policy or custom" standard, and the Court did not do so, but the Court did provide an advisory outline of what the standard should be: An "official policy" would consist of a formal ordinance, regulation, decision, or policy statement adopted or put in force by the municipality's officers.[41] An action or policy formally approved by a governing body's official decisionmaking channels,[42] or actions or policies made by law-makers or by those whose edicts or acts may be construed as official policy, would also qualify.[43] A governmental custom would consist of informal practices that are permanent and well settled, or persistent and widespread.[44] These practices need not have received approval through the

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the Civil Rights Act of 1871, but rather to other sections of the Act. *Id.* at 665. The Court further held that nothing said in the original congressional debates regarding the Act or its amendments prevented holding a municipality liable under the Act for its own violations. *Id.* at 683. Indeed, statements made by supporters of § 1 of the Act indicated that the Act was intended to provide a broad remedy to victims of constitutional violations. *Id.* at 684.

36. *Id.* at 691.

37. Note, *Municipal Liability Under Section 1983: The Failure to Act as "Custom or Policy"* 29 WAYNE L. REV. 1225, 1240 (1983).

38. *Monell*, 436 U.S. at 694. In enacting the Civil Rights Act of 1871, Congress "never questioned its power to impose civil liability on municipalities for their own illegal acts, [but] Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of others." *Pembaur*, 106 S. Ct. at 1298.

39. *Id.* at 693.

40. The Department of Social Services and the Board of Education of the City of New York required pregnant employees to take leaves of absence before such leaves were medically necessary. The employees sued the city alleging unconstitutional treatment. The defendants did not deny that the leaves constituted the "official policy" of the departments, *id.* at 661-62, so the issue was not disputed and the Court assumed that an official policy did cause the constitutional violations. *Id.* at 694.

41. *Id.* at 690.

42. *Id.* at 691.

43. *Id.* at 694. This vague language has been interpreted by some courts to mean the policymakers or officials "in those areas in which he, alone, is the final authority or ultimate repository of power." Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980). Other courts have echoed this analysis:

> If a higher official has the power to overrule a decision but as a practical matter never does so, the decisionmaker may represent the effective final authority on the question...[E]ven if there is an appeal of an action but the appellate body defers in substantial part to the judgment of the original decisionmaker, the original decision may be viewed as the government's policy.

Bowen v. Watkins, 669 F.2d 979, 989-90 (5th Cir. 1980).

44. Monell v. Department of Social Services, 436 U.S. 658, 691 (1978).

municipality's official channels.[45]

CONTOURS REFINED: INTERPRETATION SINCE *MONELL*

Since *Monell*, several cases have clarified particular aspects of section 1983 liability for local governments,[46] but the *Monell* outline of the "official policy" standard has remained largely unimproved upon. The Court approached the problem in *City of Oklahoma City v. Tuttle*,[47] but that decision did little to clarify the standard. Specifically, the Court tried unsuccessfully to determine whether a single incident of police misconduct could constitute "official policy."[48] Justice Rehnquist authored a plurality opinion, in *Tuttle*, suggesting that a single incident of unconstitutional activity is not sufficient to impose *Monell* section 1983 liability unless the plaintiff can prove that the act or activity resulted from an existing, unconstitutional policy of the municipality.[49] Justice Brennan concurred in the decision, but pointed out that *Monell* did not require the showing of a facially unconstitutional municipal policy.[50] No opinion garnered a majority, and the problem remained unresolved until *Pembaur*.[51]

Pembaur: *Applying and Modifying* Monell

The *Pembaur* Court assumed that the search of the clinic that formed the basis for Pembaur's claim was illegal.[52] Whether this illegal act constituted "official policy" was the central question considered by the Court.[53]

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45. *Id.*

46. In Owen v. City of Independence, 445 U.S. 622 (1980), the Court held that a municipality may not assert the good faith of its officers as a defense to § 1983 claims. *Id.* at 638. In Newport v. Fact Concerts, 453 U.S. 247 (1981), the Court held that § 1983 does not allow punitive damage awards. *Id.* at 271.

47. 471 U.S. 808 (1985). In *Tuttle*, the plaintiff brought a § 1983 claim against the city of Oklahoma City after a city police officer shot and killed the plaintiff's husband. The plaintiff claimed that the city's inadequate police training policies caused the police misconduct that resulted in the death. *Id.* at 810-12.

48. *Id.* at 813, 824.

49. *Id.* at 824. Rehnquist's opinion implies that the existing policy must be facially unconstitutional. *See also* Note, *Municipal Liability Under Section 1983: Rethinking the "Policy or Custom" Standard After* City of Oklahoma City v. Tuttle, 71 IOWA L. REV. 1209, 1224 (1986).

50. *Tuttle*, 471 U.S. at 833 n.8 (Brennan, J., concurring in part and concurring in the judgment).

51. The precedential value of Supreme Court plurality opinions has created confusion for lower courts. *See generally* Davis & Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59; Note, *Lower Court Disavowal of Supreme Court Precedent*, 60 VA. L. REV. 494 (1974).

52. Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1295 (1986). The issue of the constitutionality of the search was not raised on appeal, but the opinion does state that Steagald v. United States, 451 U.S. 204 (1981), prohibited searches of homes or businesses without a warrant in the absence of exigent circumstances. *Id.* at 1295. This is a misstatement of the *Steagald* holding. The facts and holding of *Steagald* focus exclusively on an illegal search of a person's home or residence and the special privacy interests accorded a home or residence. Nowhere in the opinion are any references made to the privacy interests of an office or business. In other contexts, however, the Supreme Court has ruled that fourth amendment protections do extend to business properties. *See* G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977), and Camara v. Municipal Court, 387 U.S. 523 (1967).

The majority opinion also ignored the issue of *Steagald*'s retroactivity, another issue not raised on appeal. *Steagald* was decided four years after occurrence of the events which lead to the *Pembaur* case. Justice Powell's strong dissent argues that *Steagald* should not be retroactive in a case for civil damages. *Pembaur*, 106 S. Ct. at 1305 (Powell, J., dissenting).

53. The Sixth Circuit Court of Appeals held that a single decision by a municipal policymaker

Relying on two cases where section 1983 liability was found to exist for single actions, *Owen v. City of Independence*,[54] and *Newport v. Fact Concerts*,[55] the Court declared that one incident of unconstitutional conduct can constitute the "official policy" required to impose section 1983 liability.[56] The Court warned, however, that not every decision or act by municipal officers or employees could be construed as "official policy."[57] The unconstitutional act must occur under appropriate circumstances.[58]

Pembaur specified three circumstances where single actions or decisions would constitute "official policy." First, any decision made by a properly constituted governing body such as a city council or legislature would obviously qualify.[59] *Owen* and *Newport* support this rule.[60] In both cases, city councils made decisions, and their acts satisfied Monell's requirements.[61]

The Court also interpreted *Monell*'s language as allowing officials or employees beyond those serving on governing boards to create or implement policy.[62] One such circumstance occurs when a single decision is made by a municipal official according to formal rules or understandings.[63] The facts of *Monell* support this premise.[64] In *Monell*, managers forced pregnant women to take leaves of absence before such leaves were medically necessary.[65] Even though the managers were not cloaked with the authority of a governing board, the managers acted to implement the formal will of higher authorities.[66] In a sense, the managers acted as agents of the higher authorities. Consequently, the actions of the managers exposed the city to liability.[67]

The *Pembaur* plurality also held that liability can accrue when a single decision is made by the government's authorized decisionmakers or by those who generally establish policy.[68] It does not matter whether the action is intended to apply to only one particular circumstance or to all future circumstances of a similar nature.[69] The plurality *Pembaur* decision suggested limiting this expansion of liability to those officials who have final authority

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or a single incident of unconstitutional conduct by a municipal employee is not sufficient to establish an "official policy." Pembaur v. Cincinnati, 746 F.2d 337, 341 (1984).

54. 445 U.S. 622 (1980). In *Owen*, a city council fired the plaintiff without a predetermination hearing and § 1983 liability was imposed. *Id.* at 623.

55. 453 U.S. 247 (1981). In *Newport*, § 1983 liability was recognized where a city council cancelled a license for a concert because the council disliked the concert's content. *Id.* at 248.

56. Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1298 (1986).

57. *Id.* at 1299.

58. *Id.*

59. *Id.* at 1298.

60. *See supra* notes 54 and 55.

61. *See* Owen v. City of Independence, 445 U.S. 622, 658-59 (1980), and Newport v. Fact Concerts, Inc., 453 U.S. 247, 255 (1980).

62. The *Monell* Court said that liability should be imposed for the acts of officials "whose acts or edicts may be said to represent official policy." Monell v. Department of Social Services, 436 U.S. 658, 694 (1978). This statement opened the window for an expansion of liability beyond the acts of governing boards or bodies.

63. Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1299 (1986).

64. *See supra* note 40.

65. *Monell*, 436 U.S. at 661.

66. *Id.*

67. *Id.* at 694.

68. Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1299 (1986).

69. *Id.*

to establish governmental policy for the subject in question, but a majority of the Court did not endorse this approach.[70]

Additionally, the majority *Pembaur* decision did not precisely define who qualifies as authorized decisionmakers, but the plurality decision indicated that authority to make policy is a matter of state law.[71] Furthermore, according to the plurality opinion, an official possessing lawful authority to make policy may delegate that authority to another individual.[72]

By holding that one unconstitutional act–even if the act is merely an offhand telephone response as was the case in *Pembaur*–by a decisionmaking offical can constitute "official policy,"[73] the *Pembaur* Court expanded the liability of municipalities under section 1983.[74] In any future attempt to determine whether an action or decision by municipal employees exposes the municipality to section 1983 liability, the key question is whether the action was authorized by someone who had the authority to make policy. That question is best answered by reference to state law.[75]

CONCLUSION

Although *Pembaur*, like *Monell*, expands the liability of municipalities, *Pembaur* also retreats from *Monell*'s sweeping rejection of respondeat superior liability in section 1983 cases. By focusing on the authority of the decision makers, *Pembaur* imposes a hybrid form of respondeat superior liability wherein municipalities are liable for all acts of employees and officials with decision making power, but not for acts of other employees who are without such power.[76]

This adoption of a hybrid form of vicarious liability takes the status of section 1983 liability closer to the probable intent of Congress when it enacted the Civil Rights Act of 1871.[77] As noted in *Monell*, Congress intended the 1871 Act to provide a broad remedy for victims of constitutional depri-

70. *Id.* at 1299-1300. Part II-B of Justice Brennan's opinion was joined by three justices. This part of the opinion also held that municipal liability would exist only where an official responsible for establishing final policy for the subject area in question made a deliberate choice to pursue one course of action from among several existing alternatives. *Id. See supra* note 36. As only four justices supported this part of the *Pembaur* opinion, it has no precedential effect. *See also supra* note 51.

71. *Id.* at 1300.

72. *Id.*

73. *Id.* In a dissenting opinion, Justice Powell wrote that "no official policy could have been created solely by an offhand telephone response from a busy County Prosecutor." Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1305 (1986). The majority decision, according to Justice Powell, fails to define "official policy," and instead contends that "policy is what policymakers make, and policymakers are those who have authority to make policy." *Id.* at 1308.

74. *Id.* at 1299. *See also* Justice Powell's dissent, *id.* at 1308.

75. *Id.* at 1301.

76. *Id.* at 1308.

77. Monell v. Department of Social Services, 436 U.S. 658, 672 (1978) (quoting CONG. GLOBE, 42d Cong., 1st Sess. App. 68, 70 (1871)). *See also* Note, Monell v. Department of Social Services: *One Step Forward and A Half Step Back For Municipal Liability Under Section 1983*, 7 HOFSTRA L. REV. 893, 921 (1979) ("[T]he legislative history of section 1983 does not indicate that Congress intended to exclude respondeat superior from the act. The language of the statute similarly offers no such proof. Since both were relied on by the Court in *Monell*, the dicta [that a municipality should not be liable for the acts of its employees] in that decision is, at best, poorly reasoned...").

vation.[78] Furthermore, the state of the common law in 1871 requires an interpretation that Congress expected municipalities to be held liable under the Act for acts of their employees and agents.[79] Consequently, *Monell*'s rejection of respondeat superior liability may be an anomaly in section 1983 law, and *Pembaur* may be a first step towards expanding the liability of municipalities and eventually fulfilling the intent of Congress.

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78. Monell, 436 U.S. at 684 (quoting J. STORY, COMMENTARIES ON THE CONSTITUTION § 429).

79. Respondeat superior liability for municipalities was...the rule and not the exception when Congress enacted Section 1983...If Congress intended to impose liability on municipal corporations under the statute, as the Monell Court held, it is likely that such liability was seen as following the only model of municipal liability with which most legislators were familiar–respondeat superior.

Note, *supra* note 22, at 960-61.