

1999

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Repository Citation

Gerhardt, Michael J., "Institutional Analysis of Municipal Liability under Section 1983" (1999). *Faculty Publications*. 985.
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INSTITUTIONAL ANALYSIS OF MUNICIPAL LIABILITY UNDER SECTION 1983

Michael J. Gerhardt*

INTRODUCTION

In 1986, Professor Christina Whitman of the University of Michigan Law School joined the chorus of law professors criticizing the Supreme Court's decisions in municipal liability cases under § 1983.¹ Her complaint differed, however, from all of the other criticisms. She argued that the problem in the Supreme Court's 1978 decision in *Monnell v. Department of Social Services*² and its progeny³ involving government responsibility for constitutional torts was that the Supreme Court had mistakenly applied the language of common law torts.⁴ She regarded this tendency as misguided because "tort language leads [Supreme Court justices] to look for individual choices and motives, for an actor or a 'mind' that can be evaluated. In most of these cases the possibility of looking at an institution as a unit distinct from the separate individuals who compose it is not considered."⁵ As an alternative, Professor Whitman proposed that in cases involving governmental responsibility for constitutional torts the Court should:

evaluate harms created by structures and contexts rather than by individuals. . . . [To date,] the Justices fail to see that injuries can be brought about quite inadvertently through the workings of institutional structures—through the massing or fragmentation of authority, or by the creation of a culture in which responses and a sense of responsibility are distorted.⁶

In other words, governmental entities such as municipalities are organic, do not operate monolithically, and create or cause conse-

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1. Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986).

2. 436 U.S. 658 (1978).

3. See *infra* notes 11, 28-30 and accompanying text.

4. Whitman, *supra* note 1, at 234.

5. *Id.* at 226.

6. *Id.*

quences as the result of deliberate misbehavior by certain officials as well as accidental or inevitable harm due to certain structural designs and dynamics.

Since the publication of Professor Whitman's article over twelve years ago, institutional analysis has become increasingly popular in legal scholarship, particularly in the work of law and economics. While such analysis has permeated a good deal of administrative law and constitutional commentary (particularly with respect to congressional operations), neither the Court nor legal scholars have employed it or investigated its utility in § 1983 litigation. Indeed, the Court for more than a decade has taken precisely the opposite direction—striving mightily to curb the possibility of holding cities liable on a respondeat superior basis rather than adopting or following the “structural analysis”⁷ Professor Whitman had found attractive in such earlier cases as *Parratt v. Taylor*⁸ and *Logan v. Zimmerman Brush Co.*⁹ Of course, not long after the publication of her article, the Court overruled *Parratt* in *Daniels v. Williams*.¹⁰ In subsequent cases, including the Court's two 1997 decisions in this area,¹¹ the Court has gone to great lengths to fit the individual tort model to its analysis in municipal liability cases under § 1983.

Part I of this Article attempts to assess the problems engendered by the Court's persistent embrace of the individual tort model in § 1983 cases as the primary means of avoiding holding cities vicariously liable for their employees' mistakes or misconduct.¹² Reevaluating the mode of analysis in municipal liability cases is opportune in light of the fact that three dissenting justices in the 1997 case of *Board of County Commissioners v. Brown*¹³—Justices Souter, Stevens, and Breyer—have taken the position that the time has come to reconsider *Monell*.¹⁴ It is not clear whether the dissenters in *Brown* intend to substitute institutional analysis for the approach undertaken in *Monell* and its progeny. Nevertheless, it is clear that the balance at the heart of *Monell*—between protecting the basic autonomy and financial integrity of city governments and vindicating the federal rights of citizens injured in some fashion by some official municipal action—has

7. *Id.* at 269-70.

8. 451 U.S. 527 (1981).

9. 455 U.S. 422 (1982).

10. 474 U.S. 327, 330-31 (1986).

11. *See Board of County Comm'rs v. Brown*, 520 U.S. 397 (1997); *McMillian v. Monroe County*, 520 U.S. 781 (1997).

12. *See infra* Part I.

13. 520 U.S. 397 (1997).

14. *Id.* at 430.

become overly skewed in favor of the former concern. The original balance between competing concerns at the heart of *Monell* has largely been lost, and it has been lost largely because of the deficient means of analysis employed by the Supreme Court in § 1983 cases involving questions about municipal liability for constitutional torts. Also lost in this balance has been any pretense by the Supreme Court (or at least a working majority of its justices) to interpret § 1983 pursuant to its basic language and purpose.

Part II examines an alternative mode of analysis for deciding questions about government responsibility for constitutional torts under § 1983—namely, institutional competence.¹⁵ The latter approach has at least two advantages over the traditional mode of analysis employed in municipal liability cases: institutional analysis is consistent with the legislative history and text of § 1983, and it posits clear standards for determining municipal responsibility under § 1983 that would constrain judicial discretion while providing clear notice to local and state officials of the kinds of actions for which municipal liability under § 1983 ensues.

The major problem engendered by the use of institutional analysis in § 1983 cases has to do with whether it is consistent with the plain language of § 1983, which imposes municipal liability against any “person” acting “under color of any statute, ordinance, regulation, custom, or usage” that causes the deprivation of federal rights.¹⁶ This problem is largely illusory, because a major point of institutional analysis is to clarify for judges and local and state officials the practices or circumstances that constitute the kinds of governmental actions for which municipal liability under § 1983 would result.

Part III examines the kinds of questions raised by institutional analysis in § 1983 cases.¹⁷ Institutional analysis largely focuses on the likely consequences or outcomes of various external and internal arrangements, including formal and informal modes of operations or understandings. Part III illustrates how this focus would produce different results in some of the major § 1983 cases litigated in recent years.

I.

I will forego repeating either the development of municipal liability jurisprudence under § 1983 or the pertinent legislative history of the

15. *See infra* Part II.

16. 42 U.S.C. § 1983 (1994).

17. *See infra* Part III.

act, for I have previously set forth a view on the former¹⁸ and Professor Jack Beermann has provided an excellent survey of the latter.¹⁹ Nor will I reiterate Professor Whitman's cogent analysis of the Supreme Court's commitment to the individual tort model in municipal liability cases arising under § 1983. Instead, I will briefly clarify how institutional analysis fits within the Court's municipal liability jurisprudence.

The obvious place to begin is *Monroe v. Pape*.²⁰ Prior to *Monroe*, plaintiffs could succeed in § 1983 actions only by showing that an individual was acting pursuant to a state policy or law. Since plaintiffs rarely, if ever, could make such a showing (since the governmental defendants argued that as long as no state law or local ordinance commanded the actions in question, those actions were *ultra vires* and thus not sanctioned nor approved in any way by state or local authority), § 1983 had become virtually dormant. *Monroe* revitalized § 1983, for it held that any "person" who violates the Constitution while acting in his or her official capacity is liable under § 1983.²¹ That is, the fact that someone was acting in an official capacity ipso facto established that he or she was acting "under color of state law" at the time of the constitutional violation.

If the Court had found further that a municipality is a "person" for purposes of § 1983, it would have meant that a city is always liable whenever one of its agents is liable, because agent liability depends upon the fact that the agent is acting in an official capacity. But the Court found otherwise.²² It read the legislative history of § 1983 as precluding such a finding.²³ The Court concluded that the term "person" was not meant to include municipalities, even though the Court had noted that § 1983 had been enacted against the backdrop of the common law of torts in 1871 and that the latter common law allowed corporations generally to be held liable on the basis of the doctrine of respondeat superior.²⁴

After *Monroe*, the Court repeatedly rejected making cities liable on the basis of respondeat superior for the civil rights violations of their employees. Instead, the Court insisted that municipal liability, if it

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

19. Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627 (1999).

20. 365 U.S. 167 (1961).

21. *Id.* at 183-87.

22. *Id.* at 191.

23. *Id.* at 188-91.

24. See *id.* at 190.

were to be possible at all under § 1983, had to be based on some evidence or demonstration of intent on the part of the city to violate the Constitution. The search for intent became the main path by which the Court tried to allow for the vindication of federal rights under § 1983 while avoiding making cities liable on the basis of respondeat superior.

For example, in 1978, the Court in *Monell* had three choices: (1) reaffirm *Monroe* completely; (2) make municipalities vicariously liable for the actions of their employees—an outcome that would have paralleled corporate liability in common law torts; or (3) adopt an intermediate solution. The Court chose the third option. In particular, the majority struck a balance between making municipalities accountable in federal court for their constitutional violations and accommodating federalism concerns, including respect for the autonomy and financial integrity of states and local governments.²⁵ The Court adopted an extremely formal analysis to reject the possibility of vicarious liability. Its formalistic analysis was designed to link municipalities to alleged constitutional injuries in a way that parallels the link between the act of an individual defendant and a plaintiff's injury in tort. As Professor Whitman has explained:

[T]he Court seemed to be looking for something parallel to an individual's decision to act, some indication of will or intent. . . . [F]ormal policies are not in any real sense analogous to individual decisions to act; they are more closely analogous to formal statements or descriptions by individuals of intent to act. The obvious problem with limiting liability to situations in which the actor expresses his or her or its intent to act is that liability can often be avoided by . . . keeping silent. That, presumably, is why the Court included liability based on "official custom" as well as "official policy."²⁶

But, the Court stressed, the "custom" must be "so permanent and well settled as to [have] the force of law."²⁷ In other words, "custom" serves as a substitute for (otherwise) unexpressed intent.

After *Monell*, the Court's search for some demonstration of a municipality's intent has coincided with its persistent rejection of respondeat superior in § 1983 cases. The Court has looked for some written or other official expression of the requisite malicious intent. Hence, the problem after *Monell* has been that the search for a mind has made little sense in suits against governments, for it has sought the

25. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 693-94 (1978).

26. Whitman, *supra* note 1, at 238.

27. *Monell*, 436 U.S. at 691 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)).

particular element that exists in individuals but not in institutions—a state of mind. Asking about negligence or deliberate indifference, at least as a reflection of attitude or motive, has been a misguided inquiry, for institutional defendants lack the characteristics of individual humans. The cast of mind, implicit in many formulations of the negligence requirement, is inappropriate when the defendant is not an individual, but rather an institution or its representative. There is no single human mind.

After *Monell*, the Court has assumed without discussion that government acts as government only when it has played the role of decisionmaker or legislature. Hence, the inquiry has taken the form of a search for the particular persons or particular legislative bodies that make government decisions. Much of the post-*Monell* litigation has revolved around the question of whether a particular official has had sufficient status and authority to act as a decisionmaker for a municipality. All three of the Court's major decisions in the 1980s on municipal liability under § 1983 reflect this focus: *Pembaur v. City of Cincinnati*,²⁸ *City of St. Louis v. Praprotnik*,²⁹ and *City of Canton v. Harris*.³⁰

Subsequent to these three cases, the Court has been increasingly hostile to employing respondeat superior in § 1983 cases. The dominant trend has been to insist that a plaintiff suing a municipality under § 1983 must show something more than that an individual acted in his or her official capacity. For example, in *Board of County Commissioners v. Brown*,³¹ the question was whether a county could be held liable under § 1983 based on the county sheriff's decision to hire a deputy without adequate review of his background.³² The deputy in question turned out to be the son of the sheriff's nephew, who was allegedly prone to violence.³³ A divided Court ruled that "it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality."³⁴ Instead, the plaintiff also must prove that, through "its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal ac-

28. 475 U.S. 469 (1986).

29. 485 U.S. 112 (1988).

30. 489 U.S. 378 (1989).

31. 520 U.S. 397 (1997).

32. *Id.* at 402.

33. *Id.* at 401.

34. *Id.* at 404.

tion and the deprivation of federal rights.”³⁵ The Court explained that:

[As] in any § 1983 suit, . . . the plaintiff must establish the state of mind required to prove the underlying violation. Accordingly, proof that a municipality’s legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably. Similarly, the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complain[ed].³⁶

In so ruling, the Court explained that in order “[t]o prevent municipal liability for a hiring decision from collapsing into *respondeat superior* liability, a court must carefully test the link between the policymaker’s inadequate decision and the particular injury alleged.”³⁷ The Court’s declaration appeared to reintroduce the requirement of culpability on the part of a governmental defendant that its earlier decision in *Owen v. City of Independence*³⁸ had found unnecessary.³⁹ The Court concluded that the requisite “deliberate indifference” had not been shown.⁴⁰

Perhaps the most significant sign of the extent of the Court’s search for a municipal state of mind (and thereby to avoid holding cities liable on the basis of, or similar to, *respondeat superior*) is reflected in the *Brown* Court’s rejection of any pretense that its analysis was grounded in the text or actual legislative history of § 1983.⁴¹ The Court declared that in enacting § 1983 “Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights.”⁴² The Court had never before suggested that its search for a culpable mind in § 1983 cases was legitimized by the legislative history of the statute. As Professor Beermann has shown, the legislative history simply provides no basis for this assertion.⁴³

35. *Id.*

36. *Id.* at 405.

37. *Brown*, 520 U.S. at 410.

38. 445 U.S. 622 (1980).

39. *Id.* at 657.

40. *Brown*, 520 U.S. at 415.

41. *Id.* at 403.

42. *Id.* at 415.

43. Beermann, *supra* note 19, at 665.

Three of the four dissenters in *Brown* (excluding Justice Souter) argued that the time had come to reconsider *Monell*.⁴⁴ Justice Breyer explained that all the prerequisites for reexamination were present: the “doubtful[ness]” of “the original principle,” the “complex” body of interpretive law that the principle had generated, developments that had divorced the *Monell* rule from its “apparent original purposes,” and the lack of significant reliance on the rule itself.⁴⁵

In the Court’s other major recent decision on municipal liability, its aversion to using the doctrine of respondeat superior and thus its search for a mind to attribute to the institutional defendant was quite evident. In *McMillian v. Monroe County*,⁴⁶ the question was whether a county could be held liable under § 1983 for the actions of a county sheriff who allegedly had suppressed exculpatory evidence in a criminal case.⁴⁷ The answer depended on whether the county sheriff was a state or local official for purposes of § 1983.⁴⁸ State law is significant in determining not only who is a policymaking official (as in *Praprotnik*⁴⁹) but also which entity that official represents when exercising a policymaking function.⁵⁰ The Court held that under Alabama law, county sheriffs acting in their law enforcement capacity represent the state and not their counties.⁵¹ Thus, there could be no local municipal liability.⁵² The four dissenters argued that the county sheriff had been acting for the county under Alabama law.⁵³

The majority undertook a heavily formalistic analysis, emphasizing that under Alabama state law, county sheriffs under certain circumstances “represent” the state and thus should have been treated as state officers for § 1983 purposes.⁵⁴ In contrast, the dissenters took a more pragmatic approach, looking past formal labels to examine instead such things as who elected the sheriff (the voters of the county), who paid his salary (the taxpayers of the county), and the scope of his jurisdiction (the county).⁵⁵ As the next section suggests, the dissent’s approach opens the door to, if not embraces, institutional analysis.

44. *Brown*, 520 U.S. at 430-31.

45. *Id.* at 431 (Breyer, J., dissenting).

46. 520 U.S. 781 (1997).

47. *Id.* at 783-84.

48. *Id.* at 783.

49. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988).

50. *McMillan*, 520 U.S. at 786.

51. *Id.* at 793.

52. *Id.* at 783.

53. *Id.* at 797 (Ginsburg, J., dissenting).

54. *Id.* at 787.

55. *Id.* at 799-800 (Ginsburg, J., dissenting).

II.

I have previously suggested that the Court's "policy" or "custom" prerequisite for municipal liability set forth in *Monell* has been based primarily on its balancing of competing constitutional concerns implicated by the statute rather than just the plain language of the text and close reading of the statute's legislative history.⁵⁶ As Professor Beer-mann has shown, this balance has been increasingly skewed over the past decade or so in favor of one set of concerns—those relating to the preservation or protection of municipal (and state) autonomy and finances—at the expense of the other set of relevant concerns—vindicating various federal rights.⁵⁷ The loss of this balance—as well as the pretense to justify the loss on the basis of the text and legislative history of § 1983—has coincided with the Court's increasingly intense search for finding a basis to hold cities liable under § 1983 without employing the doctrine of respondeat superior.

One significant alternative for analyzing municipal liability under § 1983 does have the potential for restoring some of the lost balance in the Court's decisions in this area as well as appropriate fidelity to its legislative history. This alternative view is the so-called "new institutionalism."⁵⁸ Focusing on the peculiar problems posed for legal analysis by the nature of the institutions whose actions or decisions are being examined is, of course, not new. For instance, the legal process school, which became popular in the 1950s, examined the different fora or processes in which legal decisions or judgments for the purpose of making sense of the latter in light of the peculiar aspects or institutional biases or practices of the former.⁵⁹ Legal scholars have developed increasingly sophisticated ways of evaluating how various institutions with the authority to make legal decisions make those decisions and exercise authority.⁶⁰

The point of institutional analysis is that institutions take on a special life of their own and that the attributes or qualities that distin-

56. Gerhardt, *supra* note 18, at 541-43.

57. Beer-mann, *supra* note 19, at 653-54.

58. For two excellent overviews of the "new institutionalism," particularly as it relates to administrative and constitutional law, see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994); Edward L. Rubin, *Institutional Analysis and the New Legal Process*, 1995 WIS. L. REV. 463 (1995) (reviewing KOMESAR, *supra*).

59. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

60. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

guish institutional arrangements need to be understood in order to appreciate the processes and quality of institutional decisionmaking. Institutions are subject to various external pressures, which affect internal operations and perspectives. Moreover, external pressures and internal arrangements pose various consequences for institutional performance. Internal pressures, for instance, influence the perceptions of insiders of internal and external events. In addition, institutions differ in their structures, formal and informal internal arrangements, allocations of decisionmaking authority, and measures of performance. These differences pose various problems and consequences for defining the operations or dynamics of decisionmaking within different institutions.

The most serious advantage of institutional analysis is that it increases our understanding of the degree to which institutional arrangements influence outcomes. In recent years, the new institutionalists have primarily examined certain institutional arrangements in the public and private sectors for the purpose of determining the utility of certain regulatory activities. The new institutionalists have not yet turned their attention, at least systematically, to the realm of § 1983 litigation or legislation. Such an effort would provide not only a fuller examination of the utility of institutional analysis but also a more sophisticated understanding of municipal liability under § 1983.

One of the first steps required in institutional analysis is to define the institutions within the scope of one's study. Municipal liability under § 1983 implicates the involvement of at least two different kinds of institutions. The first is the political process. In any given case raising issues about municipal liability under § 1983, several different political processes are involved—federal (principally Congress), state (including state legislatures, agencies, executives, courts, and political subdivisions), and local (including cities and counties). The relative effectiveness of institutions in solving social problems is based on the differential levels of participation that they allow and the imperfections in participatory processes that are inherent in their organization.⁶¹ Moreover, political processes—local, state, and federal—are vulnerable or subject to special interest groups who can monitor or discipline their membership to avoid free rider problems and thereby extract rents from groups that are too large and diffuse to mobilize their members.⁶² These large groups are sometimes mobilized by

61. KOMESAR, *supra* note 58, at 10-11, 53-58, 65-75, 100-12, 128-38.

62. *See, e.g.*, MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 132-33 (1965).

political entrepreneurs and are able to extract rents from, or even oppress, minorities. These large groups also require considerable effort and means to organize on behalf of a common cause, and the difficulty of arranging such massive mobilization is an impediment to change. In contrast, smaller groups are easier to mobilize and, with substantial funding, can often capture the political process by virtue of their relative ease in organizing their membership and resources.

Public choice theory is one form of institutional analysis that is helpful for clarifying the operations of collegial or legislative bodies, such as Congress or state assemblies.⁶³ Public choice theory suggests that when institutions make decisions by a majority vote, the majority will generate logically inconsistent results unless the voters have very similar preferences.⁶⁴ In other words, it is a mistake to think of the collective action of a collegial body as reflecting a single mindset. Instead, such action reflects an amalgamation of individual choices. Moreover, public choice theory suggests that the most effective means by which to change the orderings of preferences of the individuals participating in a group decisionmaking process is through structural alterations to the system.⁶⁵ For instance, the Senate has tried to check the growth of presidential appointment authority by the efforts of many senators to dictate to the President whom he should appoint to offices in their respective states and by delegating often decisive authority (such as agenda setting) to smaller units such as committees or their chairs, which are potentially subject to domination by a single person or faction.

For purposes of understanding municipal liability under § 1983, the nature of the political process is relevant in at least two significant ways. First, it is important for explaining why § 1983 has not been modified nor changed in any momentous way in spite of the potential liability municipalities have faced after *Monell*. At the congressional level, one would have thought that change or reform, even radical reform, was possible, particularly after the Republicans took control of Congress in 1994. One would have thought, for instance, that, given the commitment of many Republicans to protecting various federalism values (such as curbing federal overreaching and preserving as much state and municipal autonomy as possible), the Republican leadership in Congress would have been inclined to review if not to amend § 1983 for the sake of protecting any threatened federalism

63. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 55 (1991).

64. *Id.*

65. *Id.*

interests of concern to them. In order to make such changes, Republicans (or any other interested parties, for that matter) require organization, means, and incentives for mobilization in favor of change. The absence of any such effort reflects not only the difficulties of organization but also the apparent absence of the means, pressures, or incentives for a critical mass of members of Congress to amend § 1983. In addition, many members of Congress might not perceive that municipal liability jurisprudence under § 1983 poses much of a threat to the federalism values of greatest concern to them. They might perceive, for instance, that § 1983 has largely become the province of the federal judiciary rather than the federal legislature, that the federal judiciary has dealt adequately with the issues involved, and that Congress is better off deferring to the courts in order to allow its members more opportunity to deal with more pressing issues. Any congressional deference to the federal judiciary might also be based on perceptions of or belief in federal judges' greater expertise and greater insulation from volatile public reaction to handle the many controversial civil rights issues that routinely arise in § 1983 litigation.

Moreover, none of the groups one would expect to have an interest in amending § 1983 have moved to amend nor succeeded in reforming § 1983. Indeed, given that it might require fewer resources or personnel to influence one body—Congress—than fifty state legislatures, one might expect Washington-based interest groups or lobbyists to have an advantage in addressing the concerns of their memberships about § 1983. For instance, civil rights groups, which generally have relative ease in mobilizing because of their size and the intense commitment of their membership to the pursuit of certain values, might have an interest in revising § 1983 to allow for greater latitude in suing local governments for civil rights violations. Yet, civil rights groups probably have less influence than state and local governments (and their leaders and constituencies) with a Republican Congress than civil rights groups would have with a Democratically controlled one. Meanwhile, state and local governments might not feel intensively the need to lobby Congress for changing § 1983, because of the possibility of adverse publicity and because the doctrine is relatively congenial to them (for it has become increasingly hard to sue cities for civil rights violations over the past decade). The failure to influence Congress is a function to some extent of states, cities, and other interested parties not having had such sufficient incentive for pressuring Congress to amend § 1983.

The other major institution involved in municipal liability cases under § 1983 is, of course, the federal judiciary. Generally, federal

courts are designed to be protected from external political forces, but this insularity generates high litigation costs and consequently provides restricted access for many individuals and interests. The federal courts generally are most effective when low stakes interests are transformed into high stakes interests by the occurrence of a particular event, such as an injury. Once the parties arrive in court, limitations on the judiciary's competence and scale produce additional imperfections or risks in the process. For instance, judicial concerns about the sizes of caseloads are quite reasonable, given the relatively small number of federal judges in comparison to the sources of disputes in society.

Nevertheless, the federal judiciary has largely dictated the fate of municipal liability under § 1983 for several reasons. First, federal judges have developed much greater expertise in dealing with § 1983 issues because the issues arise so frequently. Second, federal judges pose a much smaller, less dispersed, more accessible target for some groups to try to influence than many other governmental institutions (such as state governments or Congress). Relatively well financed or organized groups or parties can focus their energies on a single judge or small set of judges in order to obtain certain results. Once a court decides a case, the decision often retains influence, not just with that court, but also oftentimes with other courts. The higher the court in an appellate system, the greater the influence it has over other courts. Third, litigation in federal court offers a significant potential for substantial rewards. Hence, the desire for vindicating federal rights and collecting substantial damages are huge incentives for bringing such litigation. No doubt, the tendency of federal judges to protect federalism concerns or to be sympathetic to the vindication of federal rights will prove to be more attractive to one side than another in a municipal liability case (depending of course on the judge's particular leanings). Fourth, the federal judiciary has not lobbied for reform of § 1983 as it did with respect to habeas. This failure might reflect many things, including an absence of a widespread feeling in the judiciary that change is necessary, that the costs and burdens of mobilization outweigh any likely benefits to be achieved from mobilization, or that federal judges are reluctant to relinquish any of their authority over the area to Congress.

After defining the relevant institutions involved in municipal liability cases, one should next consider the extent to which clarifying the nature of these institutions would help to clarify the municipal liability doctrine or effectuate the purposes of § 1983. As long as municipalities qualify as "persons" for purposes of § 1983 litigation, the real is-

sues have to do with causation and culpability. These real issues are how do institutions cause injuries and how should culpability be determined for the injuries caused. The individual tort model sheds no light on how institutions cause harm. Institutional analysis does, however, help to illuminate the relationships among institutional structures, arrangements, practices, and outcomes (including injuries). These relationships illuminate the extent to which references to culpability makes sense with an institutional defendant (for instance, the identification of an internal arrangement that is likely to cause or that has caused harm is relevant for establishing causation, while the assessment of how long this set of circumstances has existed as well as the number of times it has actually resulted in constitutional violations is pertinent to an inquiry about culpability).

The application of institutional analysis to municipal liability questions under § 1983 also raises some serious questions about the impact of such analysis on municipal decisionmaking structure. Some think that it would have little effect, particularly if the costs for change exceed the costs of litigation. Others think that the prospect, if not the fact, of such liability would impose considerable pressure on municipalities to improve their training (or evaluation) of their employees and otherwise to evaluate their organizations or structures in order to adopt the most cost effective means for providing services with the least amount of potential for significant liability costs.

The closest analogy for determining the potential impact of institutional analysis on municipal decisionmaking or structure is the influence of judicial development and enforcement of the doctrine of respondeat superior on private corporations.⁶⁶ First, respondeat superior developed as a means for providing substantial notice to employers and employees (as well as consumers) of the kinds of problems for which the employers may be held liable. Second, the doctrine has provided a test that judges can easily understand and administer and that otherwise constrains their discretion. Third, the doctrine developed in cases involving private defendants in part because those de-

66. See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477 (1996). One of the major problems with making cities liable for any wrongdoing by their employees under the doctrine of respondeat superior is that it is conceivably inconsistent with the plain language of § 1983. Section 1983 makes liable any "person, acting under color of any statute, ordinance, regulation, custom, or usage" that causes the deprivation of federal rights. Respondeat superior focuses on whether someone who works for a city has made a mistake or done something that has hurt someone else but not on whether the person has been acting pursuant to or under the apparent authorization of a "statute, ordinance, regulation, custom, or usage." Institutional analysis avoids this problem, because it places any deprivation of federal rights within an institutional context, which necessarily reflects or exists as the consequence of a "statute, ordinance, regulation, custom, or usage."

defendants had to take claims seriously or otherwise risk bankruptcy if they failed to do so. Because bankruptcy is usually not a realistic possibility for cities, they might not respond to nor deal with the prospect of the applicability of respondeat superior in the same manner as private businesses or employers have done. Indeed, the prospect of possible bankruptcy might lead municipalities to invest in insurance or indemnification that would protect them from insolvency. Such protection might lead municipalities to spend fewer resources on training or avoiding constitutional violations because it is no longer in their economic interests to do so.

Nevertheless, institutional analysis suggests the limitations of this analysis for two reasons. First, it is possible for civil rights groups or other interested parties to try to amend § 1983 to counteract whatever disincentives indemnification would pose for municipalities to take their constitutional obligations seriously (in spite of the expenses involved for doing so). Of course, the absence of any real reform of § 1983 suggests that considerable mobilization would have to occur and considerable pressure would have to be brought to bear in order to effectuate meaningful change. Second, if the financial costs of avoiding violations of constitutional rights were too high for some municipalities to muster, the cities remain vulnerable to lawsuits precisely because of the obvious problems posed or caused by the inadequacies of their expenditures. Third, municipal governments tend to be centralized and consist of relatively few administrators, such that these governments are relatively prone to pressure from well organized and financed interest groups, such as civil rights organizations. The interest groups no doubt could put a great deal of pressure on cities to adopt practices that would reduce or avoid practices that would increase the odds of the occurrence of constitutional violations.

III.

Employing institutional analysis in § 1983 cases requires changing the language and modes of analysis employed in litigating municipal liability under § 1983. Judges and others have had a penchant—indeed, they have been trained—to use formalistic reasoning in handling § 1983 municipal liability issues; such reasoning focuses primarily on the legal labels for and rigid technicalities of various power arrangements in a governmental context. Using the individual tort model to evaluate claims of municipal liability under § 1983 is further supported by the statute's provision of liability only for a "person" (implying some individual) who has "caused" some harm. Institutions operate, however, between the generality of formal rules and

the realm of individual decisionmaking. Institutions provide the arena in which abstract commands of legal rules and the disparate goals of individuals intersect and are given meaning and expression. In the context of cases involving claims of municipal liability for constitutional torts, focusing on institutional operations, arrangements, and dynamics would raise some significant questions, such as: (1) what are the external pressures on each of the major institutional actors involved in municipal liability cases brought under § 1983; (2) what differences do these external pressures make in the performances of these institutional actors; and (3) has any part of the internal operations been captured from interests or factions inside or outside of the organization? Other significant questions include (1) what are the internal organizational structures of each of the major institutions involved in § 1983 cases, and (2) what differences do these internal arrangements make to the performances of those operating inside the institutions as well as the latter's perceptions of the external pressures on the institutions?

Organizational theory provides different perspectives on the internal dynamics or organizations of institutions. These perspectives derive, for example, from the human relations school, decision theory, and a broad range of approaches regarding organization as a bounded, interdependent, and generally self-regulating system.⁶⁷ Building on the insights of these different organizational theories, one might consider whether a municipality's structure encourages or discourages adherence to constitutional standards of behavior; whether a municipality's internal arrangements conceal consequences or dilute responsibility in a way conducive to unconstitutional behavior; and what the incentive systems created by the structure for those operating within the structure are.

As one might expect, asking the questions posed by institutional analysis would almost certainly lead to different reasoning, if not different outcomes, in some of the major municipal liability cases litigated under § 1983. Three examples suffice for present purposes. For instance, in *City of Canton v. Harris*,⁶⁸ the plaintiff sought municipal liability based on the municipality's allegedly inadequate training of its jail personnel to recognize the need for serious or moderately serious health care for prisoners in their charge.⁶⁹ The pertinent questions under institutional analysis would have been: (1) how often health problems requiring specialized medical attention had arisen

67. See Rubin, *supra* note 58, at 471-72.

68. 489 U.S. 378 (1989).

69. *Id.* at 380.

among jail inmates; (2) what kind of training (or resources) had been given to deal with such problems in the defendant municipality; (3) what kind of training had been devoted to such problems in other similarly sized cities; and (4) what consequences were likely to have occurred given the frequency of the problem and the training given or the resources spent. Comparative data might be especially relevant for determining the likelihood of certain consequences or outcomes given a municipality's internal arrangements.

In a second example, *Brown*, the dissenters appear to have employed reasoning akin to institutional analysis. As I have previously indicated, the case dealt with the question of whether a county should have been held liable under § 1983 because of a county sheriff's failure to provide an extensive or thorough background check of a deputy, which would have uncovered the latter's propensity for violence.⁷⁰ Institutional analysis would have focused, as Justice Souter in part did in dissent,⁷¹ on determining the usual procedures for hiring police personnel in the county, whether such procedures were followed in *Brown*, and the likely consequences of deviating from those practices in *Brown*.

Finally, it is also possible that institutional analysis would have posed some different consequences in *McMillian*. Institutional analysis would have focused on the same kinds of issues examined by the dissent, which looked past the formalities of state law to determine the county sheriff's apparent authority.⁷² As Justice Ginsburg concluded her dissent, "[a] sheriff locally elected, paid, and equipped, who autonomously sets and implements law enforcement policies operative within the geographic confines of a county, is ordinarily just what he seems to be: a county official."⁷³

CONCLUSION

The Supreme Court's persistent search for an alternative to holding cities liable on a respondeat superior basis in § 1983 cases has had significant consequences on its resolution of questions about governmental responsibility for constitutional torts. At the very least, the Court's aversion to respondeat superior has resulted in a substantial body of doctrine that has made it more difficult to hold municipalities accountable for any constitutional wrongs committed by its employees. The problem is that institutions can cause harm even in the ab-

70. See *Board of County Comm'rs v. Brown*, 520 U.S. 397, 401-02 (1997).

71. *Id.* at 417-18 (Souter, J., dissenting).

72. See *McMillian v. Monroe County*, 520 U.S. 781, 797 (1997).

73. *Id.* at 804 (Ginsburg, J., dissenting).

sence of the malicious intent of some key employees. Institutions can cause harm as a consequence of the nature of their organizational structure, including formal lines of decisionmaking and informal arrangements or understandings. Oftentimes in institutions the gaps left by formal rules or communications allow for the development of informal practices that take on lives, significance, and perceived legitimacy of their own.

The purpose of this Article has been to sketch the significance of the application of institutional analysis to claims of municipal liability under § 1983. Of course, whether such analysis will be adopted in such cases is uncertain at best. Ironically, whether institutional analysis will become the appropriate mode for examining government responsibility for constitutional torts depends on the decisions or actions of several institutions other than municipalities. To begin with, the Supreme Court has yet to employ institutional analysis explicitly in any area of the law. Moreover, while at least three justices seem disposed to overruling *Monell*, a majority still embrace the language and reasoning of *Monell*, including its “policy” or “custom” requirement for municipal liability. Nor is it certain by any means what, if any, alternative analysis a majority of the Court would adopt if it were disposed finally to overrule *Monell*. In addition, Congress seems disposed to leave the future of municipal litigation under § 1983 for the federal courts to decide. It is also far from certain that substituting something like institutional analysis for the individual tort model in municipal liability cases under § 1983 would be popular with either federal judges or practitioners who operate routinely in the field. Both judges and practitioners, no doubt, have incurred considerable expenses and resources to develop their respective expertise in dealing with *Monell* and its progeny. Their disposition would likely be to resist rather than to accept change readily. As the development of the law on municipal liability under § 1983 demonstrates, change, particularly when institutions are the subjects or instruments of change, is no simple matter. The complexity and difficulty of achieving such change tells a lot about the present state and likely future of municipal liability jurisprudence.