January 1981


Follow this and additional works at: https://openscholarship.wustl.edu/law_urbanlaw

Part of the Law Commons

Recommended Citation
Available at: https://openscholarship.wustl.edu/law_urbanlaw/vol21/iss1/7
Traditionally, courts have granted municipalities absolute immunity for their governmental and discretionary actions. Civil liability in tort attached only for a municipality's proprietary and ministerial acts. Recently, some lower federal courts have accorded municipali-


2. Municipal liability developed in several areas. See generally K. Davis, Administrative Law Treatise, § 25.07 (1956); E. Harper & F. James, The Law of Torts, § 29.6 (1956); W. Prosser, supra note 1, at 970-87; Kate & Kouba, supra note 1, at 143. Cities were routinely sued in tort in both federal and state courts. See Monell v. Department of Social Services of New York, 436 U.S. 658, 687-88 (1978); cf. Cowles v. Mercer Co., 74 U.S. (7 Wall.) 118 (1868) (state-created corporation could be sued in federal court). Courts entertained constitutional violation suits against cities, including suits brought under the Contract Clause. E.g., Benbow v. Iowa City, 74 U.S. (7 Wall.) 313 (1869); Weber v. Lee County, 73 U.S. (6 Wall.) 210
ties a qualified "good faith" immunity for civil rights violations under § 1983, Sec. 1 of the Civil Rights Act of 1871, as long as the responsible municipal official acted in good faith. In Owen v. City of Independence, the United States Supreme Court eliminated "good faith" municipal immunity under § 1983, holding that a municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.

In Owen, by unanimous resolution of the city council, the City of Independence publicly released an allegedly false statement impugning the police chief's honesty and integrity. The city manager
MUNICIPAL IMMUNITY

discharged the chief the next day. The council’s accusations and the chief’s discharge garnered extensive press coverage. Although the accusations did not actually cause the discharge, the temporal sequence of events created an inference of causation in the eyes of the public. The city twice refused the chief’s requests for written speci-

9. After hearing informal reports of “discrepancies” in police department property room administration, city manager Alberg instituted an official investigation through the city counselor’s office. The confidential investigative reports stated that no evidence warranted accusations of illegal or immoral activity. Id. at 625-26. Alberg then unilaterally decided to discharge Owen. Four days before Owen’s discharge, Alberg issued a public statement in which he stated that no evidence supported allegations of illegal activity, and that he had initiated administrative correction. Id. at 626. Alberg discharged Owen the day after the council’s resolution without providing reasons for his action, except that he acted pursuant to City of Independence Charter § 3.3(1), which gave the city manager authority to hire and fire department heads at his discretion. Id. at 629.

10. Id. at 629 n.8.

11. The trial and appellate courts disagreed whether the city actually deprived police chief Owen of his constitutionally protected liberty interest. Owen v. City of Independence, 421 F. Supp. 1110 (W.D. Mo. 1976), aff’d in part and rev’d in part, 560 F.2d 925 (8th Cir. 1977), vacated, 438 U.S. 902 (for remand in light of Monell), on remand, 589 F.2d 335 (8th Cir. 1978), rev’d, 445 U.S. 622 (1980). The district court found that the city did not deprive Owen of his liberty interest because the city’s allegedly stigmatizing actions did not directly cause Owen’s discharge. 421 F. Supp. at 1121-22. The court of appeals disagreed. It found that the city did violate Owen’s liberty interest because the city’s allegedly false accusations blackened Owen’s name and reputation. While the stigmatizing charges were not included in the city manager’s official discharge notice, official city council action released the charges against Owen contemporaneously which, in the eyes of the public, connected the charges with Owen’s dismissal. 560 F.2d at 937. While the court of appeals on remand and the Supreme Court agreed with the district court’s recital of the facts, both agreed with the court of appeals’ original factual interpretation.

The Supreme Court dissent agreed with the district court’s original factual interpretation. On the merits, the dissent emphasized that the city had no knowledge or notice that its actions violated Owen’s rights because the Supreme Court did not decide that employees stigmatized in the course of discharge were entitled to a name clearing hearing until two months after Owen’s dismissal. Owen v. City of Independence, 445 U.S. 622, 658-64 (1980). See Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972) (Powell, J., dissenting). See generally Nelson, Harding, Yeutter, Leonard, and Tate, Discharge from Public Employment and the Right to Procedural Due Process, 4 CURRENT MUNICIPAL PROB. 432 (1977).

fication of the charges against him and an opportunity to clear his name.\textsuperscript{12} Because the city's actions allegedly blackened the chief's name and reputation, he sued the city for the deprivation of his fourteenth amendment liberty interest without due process of law.\textsuperscript{13} The Supreme Court held that the city was not immune from liability under § 1983. In so holding, the Court advanced four rationales: first, the statute's remedial nature protected those wronged by the abuse of governmental authority;\textsuperscript{14} second, § 1983 on its face granted no immunities;\textsuperscript{15} third, denial of immunity would deter future civil rights violations;\textsuperscript{16} and lastly, public policy dictated that the municipality, and not the victim, should bear the cost of civil rights violations.\textsuperscript{17}


\textsuperscript{12} Shortly after Alberg informed Owen of his dismissal, Owen requested specification of the reasons and charges warranting his discharge, but Alberg ignored the request. 445 U.S. at 629. The city and Alberg also denied Owen's subsequent request for an appeal of the discharge decision, claiming that the city charter and ordinances provided no appellate procedure for dismissals. \textit{Id.}

\textsuperscript{13} As part of his action, Owen claimed a potential employer refused to hire him because of the notoriety aroused by the circumstances of his discharge. 421 F. Supp. at 1117.

\textsuperscript{14} 445 U.S. at 650-51.

\textsuperscript{15} \textit{Id.} at 635. \textit{Accord}, Imbler v. Pachtman, 424 U.S. 409, 417 (1976) (By its terms, § 1983 "creates a species of tort liability that on its face admits of no immunities.").

\textsuperscript{16} 445 U.S. at 651-52.

\textsuperscript{17} \textit{Id.} at 654-57. Public policy dictates that the entity which causes the loss should bear the loss. Kates & Kouba, \textit{supra} note 1, at 138. \textit{See generally} Levinson, \textit{Suing Political Subdivisions in Federal Court: From Edelman to Owen}, 11 U. TOL. L. REV. 829 (1980) [hereinafter cited as Levinson]. Because a governmental entity is better able to pay the costs of maladministration than is an injured victim, Kates & Kouba, \textit{supra} note 1, at 136-38; Levinson, \textit{supra} at 858, less compelling reasons exist to protect the entity for acts characterized as official policy of that entity. \textit{See Note, Monell v. Department of Social Services: The Emergence of Municipal Liability under 42 U.S.C § 1983, 8 CAP. U. L. REV. 103 (1978) [hereinafter cited as Monell: Emergence]. Additionally, municipal corporations are better able to prepare for liability by planning and acquiring privately or publicly financed insurance coverage as a cost of doing business. Kates & Kouba, \textit{supra} note 1, at 143; Note, \textit{Local Governments Can Be Sued Directly Under 42 U.S.C § 1983 where Unconstitutional Action is Pursuant to Government Custom or Implements Official Policy,} 10 TEX. TECH. L. REV. 145, 163-64 (1979) [hereinafter cited as \textit{Local Government Suits}]. \textit{See note 38 and accompanying text infra. See generally, K. DAVIS, \textit{supra} note 2, at § 25.17 (Supp. 1970); W. PROS-
At common law, courts granted municipalities immunity from civil liability for their governmental or discretionary acts. Liability attached only for proprietary or ministerial acts. To establish a federal cause of action for victims of civil rights deprivations, Congress enacted section 1 of the Civil Rights Act of 1871 (§ 1983). In passing § 1983, Congress sought to protect those Fourteenth Amendment rights that states were unable to enforce or unwilling to uphold. While § 1983 does not expressly incorporate immunities, courts have construed it to incorporate traditional common law immunities.

Courts recognize four causes of action by which victims of civil rights deprivations may obtain relief from municipalities. Three may be brought under § 1983. First, the victim may sue the municipality for damages. Second, the victim may sue the municipality for equi-

18. See note 1 supra.
19. See note 2 supra.
21. Congress passed the Civil Rights Act of 1871, popularly called the Ku Klux Klan Act, to protect blacks in the South from violence which violated their civil rights under the newly-enacted Fourteenth Amendment. Two purposes of the Act were to provide compensation to victims of past abuses, and to deter future constitutional deprivations. Owen v. City of Independence, 445 U.S. at 651. See Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978); Carey v. Piphus, 435 U.S. 247, 256-57 (1978).
23. See notes 30-32 infra and accompanying text.
table relief. Third, the victim may recover indirectly from the municipality by suing the municipal official or agent, who, acting within an official capacity, was responsible for the civil rights deprivation. If an indemnity contract exists, the municipality may indemnify the official or agent for payment of the judgment. Lastly, ignoring

24. See Diamond v. Pitches, 411 F.2d 565 (9th Cir. 1969) (action by prison inmate for damages and injunction against state, county, sheriff, and male nurse); Deane Hill Country Club, Inc. v. Knoxville, 379 F.2d 321, 323-24 (6th Cir. 1967), cert. denied, 389 U.S. 975 (1967) (action to enjoin enforcement of annexation ordinance, and to recover from city amount of taxes exacted on annexed property); Patton v. Bennett, 304 F. Supp. 297, 299 (E.D. Tenn. 1969) (action by student against teacher, board of education, and member of board to enjoin violation of civil rights). But see, e.g., Harkless v. Sweeney Independent School Dist., 427 F.2d 319 (5th Cir. 1970) (action to enjoin school district to renew contracts and receive backpay for alleged racial discrimination); Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961) (action to enjoin enforcement of alleged discriminatory regulation of charitable solicitations).

The Supreme Court rejected § 1983 injunctive relief against municipalities by extending the Monroe non-person rule, see notes 27-29 and accompanying text infra, which eliminated municipalities from damage liability under § 1983. City of Kenedy v. Bruno, 412 U.S. 507 (1973) (§ 1983 cannot support action for injunction against a city). Cf. Moor v. County of Alameda, 411 U.S. 693 (1973) (§ 1983 cannot be the basis of a damage action against a county which could be held liable under state law).


An official is personally responsible, however, for suits against him/her in an individual capacity. Courts sought to protect officials from such liability by according various immunities. Courts granted absolute immunity to several higher governmental officials sued under § 1983 in their individual capacities. E.g., Stump v. Sparkman, 435 U.S. 349 (1978) (judges absolutely immune when acting within jurisdiction); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors absolutely immune in initiating and presenting state's case); Pierson v. Ray, 386 U.S. 547 (1967) (judges absolutely immune when acting within their jurisdictions); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislator's statement privileged in legislative proceedings). In some cases the Court accorded officials qualified "good faith" immunity. See Butz v. Economou, 438 U.S. 478 (1978) (qualified immunity for federal official even outside scope of authority); Procunier v. Naverette, 434 U.S. 555 (1978) (qualified immunity for prison officials for negligent conduct); O'Connor v. Donaldson, 422 U.S. 563 (1975) (quali-
§ 1983, the victim may sue the municipality in an action for damages brought directly under the Constitution.26

In Monroe v. Pape,27 the Supreme Court narrowed the applicability of the § 1983 damage action by excluding municipalities as defendants in such actions. Believing that Congress intended § 1983 to apply only to natural persons,28 the Monroe court held that municipalities, as artificial entities, were absolutely immune from § 1983 damage actions.29

In Monell v. Department of Social Services of New York, the Supreme Court overruled Monroe's absolute municipal immunity holding.30 The Monell court broadened the applicability of § 1983 by construing congressional intent to include municipalities as persons for purposes of § 1983. This interpretation exposed municipalities to lawsuits under § 1983.31 The Monell court eliminated absolute municipal immunity, but refused to determine which specific municipal immunities remained under § 1983.32

While the Monell court broadened the § 1983 cause of action by limiting municipal immunity, it left to the lower federal courts the

28. See generally, Kates & Kouba, supra note 1, at 133-35 (discussing Monroe court finding that House rejection of Dictionary Act definition of "person" and rejection of Sherman Amendment inferred House hostility to municipal immunity); Developments—§ 1983 and Federalism, supra note 17, at 1191.
31. 436 U.S. at 690-91.
32. Id. at 695, 701.
Two views of municipal immunity under § 1983 emerged. Under the first view, courts carried the Monell expansion of municipal liability to its natural conclusion by eliminating municipal immunity in § 1983 actions. These courts have concluded the following: first, that municipalities may be liable under § 1983 to compensate victims of constitutional deprivations; second, that municipal liability would deter officials from violating constitutional rights; third, that victims should not bear the burden of constitutional violations; and lastly, that municipal liability best spreads the cost of constitutional deprivations to the public at large.
In contrast, under the second view, courts retained a limited form of municipal immunity. These courts fashioned a qualified "good faith" municipal immunity, similar to the one accorded government officials when sued under § 1983 in their individual capacities. These courts supported qualified municipal immunity on the grounds that courts should defer to municipalities' governmental and discretionary actions. These courts reasoned that municipal liability should attach only when the municipality violated constitutional rights knowingly or with notice. The underpinnings of this view


40. Judicial deference to executive discretionary decisions is rooted in the principle of separation of powers. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Johnson v. State, 69 Cal.2d 782, 794 n.8, 447 P.2d 352, 361 n.8, 73 Cal. Rptr. 240, 249 n.8 (1968) (en banc) ("Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government."). Contra, Garner v. Giarrusso 571 F.2d 1330, 1341 (5th Cir. 1978) (no unjust penalty against exercise of discretion). See generally Monell: Emergence, supra note 17, at 122-25.

41. It is not a tort for government to govern. Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting); Accord Schurer v. Rhodes, 416 U.S. 232, 241 (1974) (quoting Dalehite with approval); see Sala v. County of Suffolk, 604 F.2d 207, 211 (2d Cir. 1979) ("Where prior law does not suggest that a municipal policy is constitutionally infirm, it cannot be said in any meaningful sense that the municipality has been 'at fault' in adopting that policy, and we do not believe that § 1983, enacted by a Congress accustomed to a nearly absolute immunity, should be read to implement a doctrine of liability without fault."). (Footnotes omitted.)

Some courts determined that Congress never intended to make municipalities strictly liable in tort suits. See, e.g., Gross v. Pomerleau, 465 F. Supp. 1167 (D. Md. 1979) (Monell did not reject municipal good faith immunity); Ohland v. City of Montpelier, 467 F. Supp. 324 (D. Vt. 1979) (the reasons for strict government liability are weaker than those for vicarious liability which the court rejected).

Some courts suggested liability applied only prospectively, so that municipalities need not predict the future course of constitutional law. E.g., Sala v. County of Suffolk, 604 F.2d 207, 211 (2d Cir. 1979); see Chevron Oil Co. v. Huson, 404 U.S. 97, 105-07 (1971) (prospective application of new legal principle). See generally Freed, supra note 25, at 529; Schnapper, supra note 22, at 248. Liability after Monell, supra note 20, at 1055. See also Cox v. Cooke, 420 U.S. 734, 736 (1975) (per curiam) (prospective application of new legal principle, especially where no one person was responsible for formulating the policy).
are that municipal liability inhibits government action because it inhibits municipal officials and agents from acting forcefully for fear of violating constitutionally protected rights, and that municipalities cannot afford the financial burden of § 1983 judgements.

In Owen, the Supreme Court adopted the absolute municipal liability to which it had adverted in Monell, and rejected qualified "good faith" immunity. Holding that a municipality may not assert the good faith of its officers or agents as a defense to liability, the Owen court eliminated any municipal immunity in § 1983 actions. The Court found § 1983's language broad in its scope of liability and absolute in its cause of action. The Court found neither a tradition of common law municipal immunity nor any policy that justified a qualified immunity.

The Owen court imposed liability in spite of immunities tradition-

42. See, e.g., Devasto v. Faherty, 479 F. Supp. 1069 (D. Mass. 1979) (accorded municipal good faith immunity because threat of liability would deter officials' execution of duties). Some judges suggested a municipal immunity stricter than the one for officials in their individual capacities because broad municipal liability might deter energetic and decisive decision-making. E.g., Paxman v. Campbell, 612 F.2d 848, 863 (4th Cir. 1980) (Haynesworth, J., concurring in part and dissenting in part) (officials in their official capacities should have immunity if they acted in good faith and reasonably in the performance of their tasks); id. at 878-79 (Phillips, J., concurring in part and dissenting in part) (grant municipal good faith immunity if individual defendants acted with reasonable care, because the Forty-Second Congress believed in absolute municipal immunity, and never would have adopted absolute municipal liability). See generally Freed, supra note 25, at 529; Kates & Kouba, supra note 1, at 143; Liability after Monell, supra note 20, at 1055; Local Government Suits, supra note 17, at 164. See also Kostka v. Hogg, 560 F.2d 37, 41 (1st Cir. 1977) (government bodies should have a narrower immunity than individual officials because social policy warrants the compensation of victims of unconstitutional conduct); Leite v. City of Providence, 463 F. Supp. 585 (D. R.I. 1978) (good faith municipal immunity accorded if conduct is non-malicious and in absence of a clearly established right which the government had no reason to know was being infringed.").


44. The Court split 5-4. Justice Brennan, joined by Justices Blackmun, Marshall, Stevens, and White, wrote for the majority, as he had in Monell. Justice Powell wrote for the dissent, joined by Chief Justice Burger and Justices Stewart and Rehnquist.

45. 445 U.S. at 638.

46. Id. at 635-37.

47. Id. at 638.
ally accorded municipal governmental and discretionary actions. The Court rejected governmental action immunity, reasoning that a sovereign may by statute consent to be sued for its governmental improprieties; the Court viewed § 1983 as such a statute. The Court discarded discretionary immunity on the grounds that a municipality has no discretion to violate the Constitution.

The Owen court distinguished the effects of an official's individual liability from the effects of municipal liability. Fearing that the threat of personal liability would deter authoritative decision-making, the Court determined that municipal officials should be personally immune for civil rights violations. The Court asserted that the common law individual immunity accorded government officials acting within the scope of their duties removed this threat. In contrast, the Court believed that municipal liability would not deter forceful official action. To the contrary, the Court stressed that imposition of municipal liability would promote protection of civil rights. The court concluded that decision-making officials whose actions might infringe upon civil rights would act to protect such rights in order to save their municipalities' fiscs from potential § 1983 judgments.

The Owen court posited three policies to support its holding that municipalities could not assert any immunity defense in § 1983 actions. First, since Congress intended § 1983 to remedy civil rights deprivations, courts should not permit a public entity to deny liability for injury it caused. Next, the Court suggested that compensatory judgments against municipalities would deter future constitutional deprivations because officials would circumscribe their actions within

48. Id. at 644-50. For a discussion of how the Court shifted its reading of § 1983 from interpretation of the statute to reliance on policy, see generally Liability after Monell, supra note 20, at 1036; Damage Remedies, supra note 24, at 939.
49. 445 U.S. at 644-48. See generally James, supra note 1, at 615.
52. 445 U.S. at 656 & n.40.
53. Id. at 637-38.
54. Id. at 656. Accord, Kates & Kouba, supra note 1, at 139.
55. Id. at 656.
56. Id. & n.41.
57. Id. at 651.
constitutional limits to protect citizens' rights. Finally, the Court argued that municipal liability, combined with developments in tort law, would spread the cost of constitutional violations to the public at large.\footnote{Id. at 656.}

The Owen dissent, written by Justice Powell, argued for qualified “good faith” municipal immunity.\footnote{Id. at 657-58. See note 17 and accompanying text supra.} Although the majority and dissent agreed that some governmental officials should retain an absolute or qualified immunity in \S\ 1983 actions, they disagreed whether municipalities should be accorded qualified immunity in \S\ 1983 actions.

Powell, indicating weaknesses in the Court's reasoning, contended that the Court erroneously construed congressional silence as abolishing municipal immunity under \S\ 1983.\footnote{Id. at 658. (Powell, J., dissenting).} Powell asserted that the language of \S\ 1983 did not repeal common law traditions of immunity.\footnote{Id. at 667, 675-76.} He claimed that the majority found support for congressional acceptance of liability in general congressional statements supporting \S\ 1983's remedial thrust.\footnote{Id. at 665-67. See Imbler v. Pachtmen, 423 U.S. 409, 421-24 (1976); Pierson v. Ray, 386 U.S. 547, 554-55 (1967); Tenney v. Brandhove, 341 U.S. 367, 376 (1951).} Powell declared that the majority ignored several congressmen's specific statements that municipal liability should attach only when a municipality acted in bad faith, or when its officers had knowledge or notice that its actions violated constitutional rights.\footnote{445 U.S. at 675. (Powell, J., dissenting).}

The dissent posited four reasons why municipalities should retain qualified “good faith” immunity. First, courts must defer to executive discretionary decisions.\footnote{Id. at 671-75.} Second, imposition of retroactive liability on a municipality whose officers were unaware that their conduct caused civil rights deprivations would punish the municipality and its officers for not anticipating the future course of constitutional law.\footnote{Id. at 665. (“[S]trict municipal liability unreasonably subject local governments to damages judgments for actions that were reasonable when performed. It converts municipal governance into a hazardous slalom through constitutional obsta-
Finally, municipal liability would impose financial hardship on the governmental units least able to bear the costs of adverse judgments. 68

Although the Owen majority and dissent posit various reasons for municipal liability and immunity, their analyses fail to accord proper weight to the arguments. Both majority and dissent rely, for example, on § 1983's legislative history. 69 Section 1983's language is silent about possible immunities. 70 Congress passed § 1983 with little debate, and said nothing about municipal immunity for constitutional violations under § 1983. 71 Because congressional intent regarding § 1983 immunity is inconclusive, analysis of the municipal immunity issue should accord little weight to § 1983's legislative history.

The appropriate consideration properly addressed by both the majority and dissent is whether the traditions or policies in favor of municipal immunity are justified in light of the burden that civil rights violations impose on victims. 72 The proper analytical question is: Which party, the plaintiff/victim or the defendant/municipality, though blameless, shall bear the burden of civil rights violations in § 1983 actions? In light of tort liability principles, which spread the cost of liability to the public at large through centralized liability and insurance, 73 the majority's abolition of municipal immunity appears justified.

"Systemic" governmental civil rights violations, in which the governmental entity injures people through no "fault" of the governmental unit, warrant a reexamination of who should bear the burden


69. 445 U.S. at 635 passim; Id. at 644 passim (Powell, J., dissenting).

70. See note 5 supra.

71. See State and Local Liability, supra note 30, at 322 & n.63 (no interpretive guidance in legislative history of § 1983 regarding municipal immunity).

72. 445 U.S. at 635 passim; id. at 665 passim (Powell, J., dissenting).

73. See note 17 supra.

74. "Systemic" injuries result from the combined actions of several governmental units or officials, each of which may be acting in good faith. See 445 U.S. at 652. See generally Developments—§ 1983 and Federalism, supra note 17, at 1218-19.
and cost of constitutional deprivations. Common law justifications for municipal immunity, created to protect municipalities from oppressive judgments when municipalities possessed few means of raising funds, no longer apply in the milieu of broadly-funded governmental entities. Fairness dictates that pervasive governmental units, which increasingly impose themselves into the lives of citizens, should bear and help spread the cost of individuals' civil rights deprivations.

After Owen's invocation of strict municipal liability in § 1983 actions, municipalities may attempt to prevent such actions by strictly enforcing tightened municipal operating procedures. For those § 1983 suits which certainly will occur, municipalities may acquire appropriate liability insurance.

If the Owen court's supposition that municipal liability will promote protection of civil rights proves true, then the decision will stand as a landmark in the history of civil rights. On the other hand, Congress may wish to amend § 1983 if the imposition of municipal liability paralyzes governmental action and renders municipalities bankrupt, as Justice Powell feared in his dissent. Congress may revise § 1983 by adopting the qualified "good faith" municipal immunity which the court rejected in Owen, by including a negligence-based tort standard for municipal liability, or by incorporating state law immunities.

David R. Nachman

75. See 445 U.S. at 657. See generally Kates & Kouba, supra note 1, at 144; Sherry, The Myth that the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Court of Claims, 22 Ad. L. Rev. 39, 58 (1969); Monell: Emergence, supra note 17, at 126.
76. See note 17 supra.
77. See 445 U.S. at 652 and nn. 35 & 36; Schnapper, supra note 22, at 248-49.
78. See note 17 supra.
79. See Kates & Kouba, supra note 1, at 167; Liability after Monell, supra note 20, at 1056 (legislative and not judicial function to correct problem); Damage Remedies, supra note 24, at 927 & n.31.
80. See Jaffe, supra note 1, at 235-37; Nahmod, supra note 11, at 22; Schnapper, supra note 22, at 247-50.
81. See 445 U.S. at 680-83 (Powell, J., dissenting); Kates & Kouba, supra note 1, at 155-61.