City of Newport v. Fact Concerts
No. 80-396

Amicus Brief of ACLU

Substitute Cover Page
(Original Cover Page Not Available)

QUESTION PRESENTED

Does a municipality have an absolute immunity from punitive damages in an action under 42 U.S.C. § 1983?

TOPICAL INDEX

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED

NO. 80-396

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III
Individually and in His Official Capacity
as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR
EDWARD K. CORISTINE, JAMES F. RING,
All individually and in Their Official Capacity
as Members of the City Council for the
City of Newport, Rhode Island,

Petitioners,

vs.

FACT CONCERTS, INC. and MARVIN LERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF ACLU FOUNDATION, SOUTHERN CALIFORNIA AND AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE AS AMICI CURIAE

CONSENT

By consent of the petitioner and respondent herein, filed separately with the Clerk of the Supreme Court by each such party, ACLU Foundation, Southern California and American Civil Liberties Union, Rhode Island Affiliate file this brief as *amici curiae.*

INTEREST OF AMICI CURIAE

The *amici curiae,* the ACLU Foundation, Southern California, and American Civil Liberties Union, Rhode Island Affiliate, nonprofit corporations existing for the purpose of preserving the Bill of Rights of the Constitution of the United States, have the following interests in this case:

a) ACLU Foundation, Southern California and American Civil Liberties Union, Rhode Island Affiliate represent many persons in the federal and state courts in which the plaintiffs therein are seeking enforcement of constitutional rights, and remedies for deprivations of constitutional rights, under 42 U.S.C. § 1983, the issues therein being substantially similar as those in the instant action; and

b) ACLU Foundation, Southern California and American Civil Liberties Union, Rhode Island Affiliate, who frequently represent persons whose constitutional rights have been violated and who lack the resources with which to pursue a vindication of those rights, are interested in the issue of municipal liability for punitive damages, given that such damages may be the only means of redressing constitutional torts which lack compensable damages.

SUMMARY OF ARGUMENT

The question of whether a municipality should be accorded absolute immunity from punitive damages under 42 U.S.C. § 1983 must be viewed in light of the *Monell* rule that municipalities may be held liable under § 1983 only when the entity itself is responsible for the constitutional tort. Previous to *Monell*, this Court had construed § 1983 to apply to only natural persons, excluding municipalities only on the basis of statutory construction.

Unlike the question addressed in *Pape* and *Monell*—*i.e.*, whether the term "person" in § 1983 contemplates fictional persons like a municipal corporation—the question posed here is whether a municipality, though otherwise liable under § 1983, should be accorded a privilege, absolving it of punitive damages for malicious constitutional torts by persons acting on behalf of the municipality. Immunity is accorded when the shielding of an official from liability serves some overriding public interest and the privilege is one that is firmly rooted in the common law. The effect of according the privilege sought by petitioner herein will be to exempt a culpable "person" in derogation of the public policy inherent in § 1983 to deter constitutional torts.

The historical immunity of municipalities from punitive damage awards is qualitatively different from the immunity from punitive damages that petitioner herein is seeking. In the former case, the immunity existed in the context of *respondeat superior* liability for many other torts. The strict liability of the *respondeat superior* doctrine is justified by two public policies: a) The deliberate allocation of risk to the public at large, rather than asking the innocent

victim to bear the cost of injury; and b) To give employers incentive to be careful in the selection, instruction and supervision of their agents.

Conversely, the immunity sought by petitioner is in the context of the *Monell* liability rule, which expressly excludes strict liability per *respondeat superior*. Hence, the deterrent effect of the *respondeat superior* doctrine will not be present in the area of constitutional torts, as it is in other tort fields.

Thus, the immunity from punitive damages sought herein is not an immunity "firmly rooted in the common law". The immunity "firmly rooted in the common law" is the one that exists concurrently with strict liability for the compensable portion of the damages. To implement the immunity sought would result in a privilege significantly broader in net effect than the immunity at common law.

Punitive damage awards are a necessary tool for the enforcement of constitutional rights under § 1983, especially when the constitutional tort did not result in compensable harm. In such cases, there may be no other practical remedy, and therefore no other means of deterring future misconduct. In the absence of a punitive damage remedy, there is no incentive for plaintiffs to attempt to redress petty, but outrageous, constitutional torts. Without that incentive, and without the concomitant penalties, the policy of deterrence under § 1983 is undermined in respect to constitutional torts which, though of significant public importance, result in nominal compensable damage.

Punitive damages would not, in any case, be awardable in a § 1983 action against a municipality until there was an adequate showing of liability under *Monell*.

When the municipality has not directly caused the consti-

tutional tort by legislative enactment or otherwise regulation, municipal liability for the constitutional torts of senior officials will likely be predicated on criteria similar to those developed for supervisors

The rules for the award of punitive damages require proof of malice and bad faith, and courts will reduce an award when it is deemed excessive The fear that the availability of punitive damages will bankrupt municipal corporations is not justified by the historical record for private corporations held similarly liable

The American public as a whole has an affirmative interest in seeing that municipalities are deterred from future violations of the Constitution, particularly malicious acts of misconduct

A municipality and its citizenry are not distinguishable legal entities In many instances, constitutional violations by a municipality may reflect, and may even have been enacted by, the local community Further, this political system is founded on the principle of republicanism, with political decisions reserved to elected representatives responsible to the electorate

If the consequences of punitive damage awards is that the public then punishes the responsible officials at the polls, then the deterrence design of § 1983 is working If the result of awarding such punitive damages against municipalities is the deterrence of future constitutional torts, then that is reason enough to award them

ARGUMENT

I

The Question Of Whether To Extend Absolute Immunity From Punitive Damages Under 42 U.S.C. § 1983 To Municipalities Must Be Viewed In Light Of The Fact That Municipal Liability Under § 1983 Will Otherwise Occur Only When The Municipality Is Itself Responsible For The Constitutional Violation.

The question presented before this Court is whether a municipality, otherwise liable under 42 U.S.C. § 1983 under the standards set out in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), and *Owen v. City of Independence, Mo.*, ... U.S. ....., 100 S. Ct. 1398 (1980), may be held liable for punitive dantages as well. Prior to *Monell*, there was no liability whatever for municipalities under the remedial provisions of 42 U.S.C. § 1983. *See Monroe v. Pape*, 365 U.S. 167 (1961). While *Monroe* was often said to have conferred "immunity" from suit under § 1983 upon all municipalities, in fact the decision merely construed the word "person" to cover only natural persons. *See id.* at 190. In other words, this Court merely held that the statutory language of § 1983 does not contemplate extension of the remedial provisions of § 1983 to governmental entities.

The distinction between an exclusion from liability and an immunity from liability is significant. An exclusion from a statutorily created liability merely reflects a legislative determination as to which parties will be deemed responsible for particular injuries. Thus, while this Court was holding that municipalities may not be sued under § 1983, municipalities

were deemed subject to suit under 42 U.S.C. § 1981. *See Edelman v. Jordan*, 415 U.S. 651, 667 n. 12 (1972); *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1160-61 (9th Cir. 1976) (*en banc*). This distinction was based solely upon the statutory construction of the two sections, with the court relying on the fact that § 1981 does not limit the scope of its applicability by reference to "persons" depriving the rights protected thereby.

An immunity, however, confers a special status for particular "persons" who, though otherwise liable, are shielded from liability to serve some specific public purpose. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity for prosecutors when acting as advocate); *Pierson v. Ray*, 386 U.S. 547 (1967) (absolute immunity for judges when acting within judicial jurisdiction); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (absolute legislative privilege). In each of these cases, this Court concluded that the vigorous and unintimidated performance of critical public functions required that judicial, prosecutorial and legislative officials be afforded the ability to perform their duties without fear of litigation from dissatisfied persons. Similar qualified immunities have been accorded other officials when acting in good faith in the performance of their duties. *See, e.g., Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials and officers); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members); *Scheur v. Rhodes*, 416 U.S. 232 (1974) (governor and other executive officers); *Pierson v. Ray, supra*, 386 U.S. at 555-57 (police officers).

An immunity from liability is thus a privilege conferred upon certain individuals for an ancillary public purpose. A "privilege, simply stated, is a rule of law exempting one from liability for conduct which would otherwise subject him to

it. *Restatement (2d) of Torts* § 10 (1965)." *Jones v. Marshal*, 528 F.2d 132, 139 (2d Cir. 1975). An immunity, if applicable, is posed as a defense to liability otherwise inhering, and the burden of coming forth with evidence thereof rests with the defendant raising the defense. *See Owen v. City of Independence, Mo., supra*, 100 S. Ct. at 1408-09; *Reimer v. Short*, 578 F.2d 621 (5th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979); *Pinckey v. Northampton County*, 433 F. Supp. 373 (W.D. Pa. 1976). *Cf. McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) (Title VII good faith defense).

Thus, a holding that a particular official is immune from suit under § 1983 does not indicate that no violation of a constitutional right has occurred but, rather, that the statutory remedy will not be available vis-a-vis that official due to overriding public interest. The practical effect may thereby render the victim of such a constitutional violation without a remedy. It was this potential that lead this Court to conclude that no qualified, good faith immunity should be accorded a municipality in a § 1983 action. *See Owen v. City of Independence, Mo., supra*, 100 S. Ct. at 1416-19. This Court reasoned that the public policies served by the qualified immunity accorded state officials attenuates when considered in respect to municipalities, and are therefore overridden by the public policy inherent in § 1983 to remedy constitutional violations. *See id.*

Implicit in *Owen* and other decisions of the Court extending or limiting immunities from suit under § 1983 is that the question of immunity does not even arise except in those circumstances wherein, absent a privilege, liability would attach. *See Jones v. Marshal, supra*, 528 F.2d at 139; *Restatement (2d) of Torts* § 10 (1965). Thus, a plaintiff often may be limited to

injunctive relief for a constitutional violation, which will be available even though the guilty officials have acted in good faith and, due to a privilege, are not liable in damages. *See Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977).

Therefore, the decision to deny municipalities the qualified immunity of the good faith defense must be viewed in light of the preceding decision in *Monell* that liability against a municipality may be predicated only upon a finding of actual fault by the municipality itself, as represented by officials in policy-making positions. *See Monell v. New York City Dept. of Social Services, supra*, 436 U.S. at 690-94. The Court expressly rejected the doctrine of *respondeat superior—i.e.*, strict liability for the acts of one's employees--as a basis for finding liability against a municipality. *See id.* Similarly, the question of whether to extend an absolute immunity from punitive damages to all governmental entities must be viewed against the background of this fault standard for municipal liability under § 1983. Inasmuch as a municipality can be held liable under § 1983 only upon a showing of fault by the municipality itself, immunity can be extended only in circumstances wherein a constitutional violation has occurred, and the municipality is itself responsible for the deprivation of rights. Hence, a decision to extend absolute immunity from punitive damage awards under § 1983 to municipalities would be in derogation of the public policy inherent in § 1983 to deter future violations of constitutionally protected rights. *See Owen v. City of Independence, Mo., supra*, 100 S. Ct. at 1415-17; *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978); *Carey v. Piphus*, 435 U.S. 247, 256-57 (1978).

The test for determining whether a particular claimed immunity is implied in § 1983 is a two-pronged one, contemplating

both the prevalence of the immunity at common law, and the compatibility of the public policy served by the privilege with the public policy enforced by § 1983. *See Owen v. City of Independence, Mo., supra,* 100 S. Ct. at 1408-09; *Scheur v. Rhodes, supra,* 416 U.S. at 237-47. Thus, in order to justify the absolute immunity from liability for punitive damages sought by petitioner-municipality herein, in respect to its deprivation of constitutionally protected rights, petitioner must show that the immunity sought was firmly rooted in the common law and that it serves a public policy that justifies the negative impact upon the policies served by 42 U.S.C. § 1983.

II

The Historical Immunity Of Municipalities From Punitive Damage Awards Was In A Context Qualitatively Different Than That Which Exists Under *Monell* Liability.

Municipal liability for the acts of its employees and officials has always occupied a unique position in the law of torts. Both the majority and dissenting opinions in *Owen v. City of Independence, Mo., supra,* extensively discussed the state of municipal liability in the mid-Nineteenth Century. Two undisputed principles appear in respect to the extent of municipal liability. First, there was never a rule applying an absolute sovereign immunity to municipal corporations. *See id,* 100 S. Ct. at 1410-13; *Sethy v. Alameda County Water District, supra.* Second, a municipality will, in appropriate circumstances, be liable for the tortious acts of its employees or agents, without the necessity of proof that the municipality itself was culpable

per the *Monell* standard. *See Owen v. City of Independence, Mo., supra* 100 S. Ct. at 1410-12 (and authorities cited therein).

Petitioner cites several mid-Nineteenth Century cases as authority for its contention that municipal immunity for punitive damage awards was firmly rooted in the common law of the day. While each of the authorities cited do in fact stand for that proposition, each authority also concedes the municipalities' strict liability for negligent torts of its employees, committed within the course and scope of their employment, *i.e.*, liability predicated upon the doctrine of *respondeat superior*. For example, the Alabama Supreme Court, addressing the question as one of first impression, after some discussion of countervailing opinions, stated:

> "Notwithstanding there is some conflict of authority upon the subject, we think the doctrine, that a municipal corporation, in the construction of sewers, acts ministerially, and is responsible for damages caused by the careless and negligent manner in which it discharges that duty, is consistent with reason, demanded by justice, and supported by a preponderance of authority. We therefore adopt it."
>
> *City Council of Montgomery v. Gilmer & Taylor*, 33 Ala. 116, 130, 70 Am. Dec. 562 (1858).

In that court's discussion of potential liability, no distinction was made between the acts of agents of the city and the city itself, as would only be the case under the doctrine of *respondeat superior*. The theory operated under was essentially that a municipal corporation, when acting for the benefit of its members, was little distinguishable from a private corporation. Thus, when a municipal corporation was "performing the same

'proprietary' functions as any private corporation, [it was deemed] liable for its torts in the same manner and to the same extent as well." *Owen v. City of Independence, Mo., supra,* 100 S. Ct. at 1412. *Accord Chicago v. Langlass,* 52 Ill. 256, 4 Am. Rep. 603 (1869); *McGary v. President and Council of Lafayette,* 12 Rob. 674, 43 Am. Dec. 239 (1846); *Hunt v. Boonville,* 65 Mo. 620, 27 Am. Rep. 299 (1877); *Order of Hermits of St. Augustine v. County of Philadelphia,* 4 Clark 124, Brightly NP 116 (1847); *Herfurth v. Corporation of Washington,* 6 Dist. Col. 288 (1868); *Chicago v. Martini,* 49 Ill. 241, 95 Am. Dec. 590 (1869); *Woodman v. Nuttingham,* 49 N.H. 387, 6 Am. Rep. 528 (1870).

The doctrine of *respondeat superior* has two primary policy justifications for its seemingly harsh rule of strict liability. First, it is a "rule of policy, a deliberate allocation of a risk . . . [to the] employer [who] . . . is better able to absorb them, and to distribute them . . . to the community at large." W. Prosser, *Law of Torts,* 458-59 (4th Ed. 1971). *See Jennings v. Davis,* 476 F.2d 1271, 1274-75 (8th Cir. 1973). This allocation of risk to the public as a whole, through the employer-principal, is deemed preferable to obliging the innocent victim to bear the full costs alone, given the often impecunious condition of the employee-agent who therefore would be largely judgment-proof.

A second policy justification for this rule of strict liability of employers for the acts of employees is "the makeweight argument that an employer who is held strictly liable is under the greatest incentive to be careful in the selection, instruction and supervision of his servants, and to take every precaution to see that the enterprise is conducted safely." W. Prosser, *Law of Torts, supra,* at 459. Prosser is thus referring to the

normative effect of damage awards upon the persons held liable. This rationale holds that future torts can be deterred by forcing the employer-principal to recognize his responsibilities in the operation of his business to properly select, supervise and instruct employee-agents.

The deterrence rationale enunciated by Prosser and cited in *Jennings v. Davis, supra,* is essentially the same justification for the award of punitive damages against a tort-feasor. *See, e.g., Carlson v. Green,* ... U.S. ..., 100 S. Ct. 1468, 1473 (1980). In fact, this is the primary justification for the assessment of punitive damages. *See* W. Prosser, *Law of Torts, supra,* at 11-14.

Therefore, in considering the common law immunity of municipalities from awards of punitive damages, and the consequential lack of the deterrent effect, one must also bear in mind whether other types of damage awards are obtainable and, if so, whether they can serve a similar purpose of deterrence. Under the common law scheme portrayed by petitioner, municipalities were not liable for punitive damage awards; however, they were strictly liable for many torts of their agents, thus serving to deter further such torts by making the municipalities responsible for the selection, retention, supervision and instruction of employee-agents. Under *Monell,* municipalities are clearly not strictly liable for the acts of employee-agents. To the contrary, they are liable only for acts committed by persons who, by their positions and authority, are capable of speaking and/or acting on behalf of the municipal entity as a whole. Therefore, the deterrent effect that accrues from implementation of strict liability per *respondeat superior* will be absent in § 1983 enforcement of constitutional protections.

Eliminating municipal liability for punitive damages has some logic when the municipality is accepting *respondeat superior* liability for all of the torts of its agents within the course and scope of employment. *See* W. Prosser, *Law of Torts, supra*, at 12. When the question of whether to bar punitive damage awards for municipalities is in the context of limited liability of the municipality for the acts of its employees--limited to the acts of employees in policy-making positions--the issue presented is qualitatively different

A rule barring the award of punitive damages against a municipality under § 1983, for constitutional violations by the entity itself, will not merely implement a traditional immunity Rather, such a rule will create a privilege significantly broader in scope and weaker in normative effect than the common law immunity, which went hand in hand with *respondeat superior* liability This difference is sufficient to render considerably less significant the historical fact that municipalities were afforded immunity from punitive damage awards. Given the change of context within which the issue of immunity is now arising, the immunity rule being sought by petitioner cannot be said to be "firmly rooted in the common law." Hence, the determinative test for the question raised herein, whether to accord municipalities absolute immunity from punitive damages under § 1983, should be the balance of public interests served by the proposed privilege and the enforcement of constitutional liberties via punitive damage awards.

III

Punitive Damage Awards Are A Necessary Tool For

The Meaningful Enforcement Of Constitutional Rights Through The Remedial Provisions Of 42 U.S.C. § 1983.

"It is almost axiomatic that the threat of damages has a deterrent effect, [citation omitted] . . . . Punitive damages are 'a particular remedial mechanism available in the federal courts', [citation omitted], and are especially appropriate to redress the violation . . . of a citizen's constitutional rights." *Carlson v. Green, supra,* 100 S. Ct. at 1473. There is a significant logic behind the statements of this Court in *Carlson.* In many circumstances a clear and unexcusable violation of constitutional rights has occurred, but the actual damages are nominal. Under such conditions, there may be no effective means of deterring future such violations. *See id.* at 1473 n. 9.

This problem becomes clear when other potential remedies are considered in the context of factual circumstances that are not at all unusual. In *Rizzo v. Goode,* 423 U.S. 362 (1976), this Court ruled that absent a strong showing of causation between official conduct and a pervasive pattern of employee misconduct, federal courts will abstain from affording injunctive relief that significantly interferes with the management of a local agency. Under the facts of that particular case, plaintiffs had alleged approximately twenty incidents of alleged police misconduct, and based upon that, sought federal injunctive relief imposing judicial supervision over police management functions. The Court overruled the lower federal courts, stating that proof of a mere twenty such incidents was insufficient proof to justify such a sweeping federal intrusion into a local police agency, in derogation of the principles of comity and federalism. *See Sims v. Adams,*

537 F.2d 829, 832 (5th Cir. 1976). Further, the Court reasoned that twenty incidents of police misconduct are probably not at all uncommon in large municipalities, and that that evidence alone was insufficient proof that lack of supervision by police management or city officials is causally connected with any one or more of those incidents, sufficient to meet the causation test under § 1983. *See Rizzo v. Goode, supra,* 423 U.S. at 371; *Santiago v. City of Philadelphia,* 435 F. Supp. 136, 149-53 (E.D Pa 1977). This latter causation requirement has been read to require an "affirmative link" between the constitutional deprivations and the alleged acts or omissions of the supervisors against whom liability is sought. *See Rizzo v. Goode, supra,* at 371; *Kite v. Kelley,* 546 F.2d 334, 337 (10th Cir 1976).

Even when the evidence is in a state strongly favoring federal judicial intervention, the mere "prospect of an injunctive order would [create] little incentive to shun practices of dubious legality." *Albemarle Paper Co. v Moody,* 422 U.S. 405, 417-18 (1975).

The abstention rule enunciated in *Rizzo* reserves injunctive relief to only those most aggravated cases, wherein sweeping violations have occurred (*see Holland v. Connors,* 491 F.2d 539, 541 [5th Cir. 1974]), or the officials have acted with such manifest bad faith as to convince a federal court that absent judicial intervention the violations will recur unabated. Thus, injunctive relief will be unavailable for those cases involving less drastic violations, and in those cases deterrence necessarily will have to come from damage awards.

When the sole remedy sought is damages, principles of

comity and federalism are less pertinent. *See Sims v. Adams, supra.* This is so because the court is not intruding into the day-to-day management of the affairs of a local governmental entity. Damages afford a more specific remedy, as they can be directed at the express evil sought to be remedied. Conversely, injunctive relief will often entangle the supervising court in many local affairs only tangentially related to the evil that is the basis for intervention, but which are inseparable therefrom.

However, constitutional violations are not always amenable to monetary valuation. For instance, in *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916, *rehearing denied*, 439 U.S. 886, the Circuit Court of Appeals reversed the damage award of $7500. given by the jury for a finding that defendants had violated plaintiff's First Amendment rights. The court found the amount of damages excessive for a mere loss of First Amendment rights, without a further showing of actual loss. *See id.* at 195-96. Similarly, the Fourth Circuit Court of Appeals, in *Burt v. Abel*, 585 F.2d 613 (4th Cir. 1978), discussed the amount of damages recoverable for a denial of a property right. *See id.* at 615-16. In such cases, there is nevertheless a constitutional tort (*Carey v. Piphus, supra*, 435 U.S. at 266-67), but "in most cases, a plaintiff who suffers only a procedural deprivation will recover no more than nominal damages." *Burt v. Abel, supra*, at 616. An appropriate remedy in such circumstances would be "recovery of punitive damages where the deprivation of procedural due process has been malicious and there is need to deter or punish violations of constitutional rights." *Id.* at 616.

As Prosser noted, in discussing the rule as to the availability of punitive damages in cases wherein there is no proof of actual loss:

> "Since it is precisely in the cases of nominal damages that the policy of providing an incentive for plaintiffs to bring petty outrages into court comes into play, the view very much to be preferred appears to be that of the minority which have held that there is sufficient support for punitive damages."
>
> W. Prosser, *Law of Torts*, *supra*, at 14.

Prosser was thereby recognizing that the critical threshold necessity of any system of deterrence is the willingness of some party to initiate the first steps in that system. *Carey v. Piphus*, *supra*, made it very clear that actual loss was not a prerequisite of an actionable constitutional tort under § 1983, and further provided for the liberal allowance of attorneys fees per 42 U.S.C. § 1988 (*i.e.*, assessable against governmental entity). The logical inference from this holding is that punitive damages may be assessed in a proper § 1983 case, whether or not there is proof of actual loss. *See Silver v. Cormier*, 529 F.2d 161, 163-64 (10th Cir. 1976) (and cases cited therein); *Guzman v. Western State Bank of Devils Lake*, 540 F.2d 948, 953 (8th Cir. 1976) (and cases cited therein). However, few people will pursue civil litigation when the prospect of success offers only nominal damages and attorneys fees, but not even a meaningful deterrence of future tortious conduct. Thus, constitutional deprivations resulting in nominal damages will be without a meaningful remedy, until such time as they become so pervasive as to justify the injunctive remedy repudiated in *Rizzo v. Goode*, *supra*.

This problem becomes severe in those cases wherein the defendant is alleging a defense of qualified immunity on the grounds that his acts were merely the "good faith enforcement

of governmental regulations." *See Milton v. Nelson*, 532 F.2d 1158, 1159-60 (9th Cir. 1976); *Guzman v. Western State Bank of Devils Lake*, *supra*, 450 F.2d at 951-53. This defense can be successfully asserted even though the government regulation is itself ultimately determined to be unconstitutional *Milton v. Nelson*, *supra*, at 1159-60. Thus, if the alleged constitutional violation occurs as a result of the good faith enforcement of unconstitutional government regulations, but the regulations were enacted or retained in patently bad faith by the municipality, punitive damages assessed against the municipality may be the only effective deterrent of future violations. *See Carlson v. Green*, *supra*, 100 S. Ct. at 1473 n. 9. If the plaintiff has not suffered actual loss, and injunctive relief is unavailable or relatively ineffective (*see Albemarle Paper Co. v. Moody*, *supra*), no remedy other than punitive damages will succeed in placing a penalty on the malicious conduct of the municipality's policy-making officials.

As this Court noted in *Owen v. City of Independence, Mo.*, *supra*, a critical purpose of § 1983 is the deterrence of future constitutionnal violations. *See Owen v. City of Independence, Mo.*, *supra*, 100 S. Ct. at 1416. To create a rule of absolute immunity from punitive damages for municipalities would be to insulate such municipalities from a critical deterrent against constitutional torts, often in circumstances when no other practical tool is available for that purpose. The result of such a rule would be inconsistent with the policy underlying § 1983. No countervailing policy upholding municipal immunity justifies so extreme a result. Even the dissenting opinion in *Owen*, *see id.*, at 1419, does not seem to countenance such an extreme result, since the gravamen of the dissent

is that a qualified immunity should be available for municipalities, creating a privilege for *good faith* violations of constitutional protections. In contrast, the liability of a municipality for punitive damages under *Monell v. New York City Dept. of Social Services, supra,* and other decisions relating to the award of punitive damages, *see* discussion *infra,* could only be predicated upon a finding of actual fault and malice by the municipal entity itself. There is little logic in affording a privilege to a defendant who, on the broad spectrum of possibilities, is among the most culpable.

IV

Municipal Liability For Punitive Damages Is Appropriate Because It Will Be Limited To Cases In Which The Municipality Will Be At Fault, And Where There Is A Showing Of Malice Or Bad Faith By Policy-making Officials.

In *Rizzo v. Goode, supra,* this Court provided the standard by which a supervisor may be amenable to suit under 42 U.S.C. § 1983 for constitutional violations perpetrated by employees under his supervision. Specifically, the Court postulated, in effect, that there must be an "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy . . . —express or otherwise—showing their authorization or approval of such misconduct." *Rizzo v. Goode, supra,* 423 U.S. at 371. Although *Rizzo* involved a claim for injunctive relief, the same causation standard has been generally adopted in cases both preceding and following the *Rizzo* decision.

In *Kite v. Kelley, supra,* the Tenth Circuit ruled that the

"'affirmative link' requirement . . . means . . . that before a superior may be held for acts of an inferior, the superior, expressly or otherwise, must have participated or acquiesced in the constitutional deprivations of which complaint is made." *Rizzo v. Kelley, supra,* 540 F.2d at 337. In *Hampton v. Holmesburg Prison Officials,* 546 F.2d 1077 (3d Cir. 1976), the Third Circuit held that, to obtain liability against a supervisor for the acts of an inferior, the plaintiff must show that the supervisor either (a) participated in the act complained of, or (b) had knowledge of the constitutional deprivation and acquiesced in the conduct. *Id.* at 1082. *Accord, Black v. Brown,* 513 F.2d 652, 654 n. 3 (5th Cir. 1975). The Fifth Circuit has also held that a "supervisory defendant is subject to § 1983 liability when he breaches a duty imposed by state or local law, and this breach causes plaintiff's constitutional injury." *Sims v. Adams, supra,* 537 F.2d at 831. The same court added that a "complaint alleging that a . . . supervisor has notice of past culpable conduct of his subordinates and has failed to prevent a recurrence of such misconduct states a § 1983 claim." *Id.* at 832.

Similarly, the Sixth Circuit has ruled that in the absence of a showing that the supervisor "is somehow personally at fault by actively participating in, encouraging or directing the commission of illegal acts by his subordinates, there can be no recovery against him." *Coffy v. Multi-County Narcotics Bureau,* 600 F.2d 570, 580 (6th Cir. 1979). That Circuit added that to make out an actionable case of "nonfeasance", there must be evidence that the supervisor "was put on notice of an alleged scheme . . . that he should have prevented. *Id* The Ninth Circuit has held that a supervisor may be deemed liable for a failure to act when there was a clear duty to act,

whether by virtue of statute or regulation. *See Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978). *Accord, Davis v. Zahradnick*, 600 F.2d 458, 459 n. 1 (4th Cir. 1979) (neglect of duty to supervise prison guards actionable under § 1983). *See, generally, Santiago v. City of Philadelphia, supra*, 435 F. Supp. at 150-53 (and cases cited therein) (exhaustive discussion of causation requirement).

42 U.S.C. § 1983 requires that the "person" held liable either be a direct participant in the alleged deprivation of rights, or have some other causal relationship with the misconduct–*i.e.*, there must be an affirmative link between the supervisory conduct and the alleged deprivation of rights. Liability of municipalities will also result only after a similar showing of an affirmative link between the acts of "its lawmakers or by those whose edicts or acts may fairly be said to represent official policy" (*see Monell v. New York City Dept. of Social Services, supra*, 436 U.S. at 694) and the acts of alleged misconduct. The Second Circuit, following *Monell*, has ruled that such liability may be founded upon a supervisor's failure to supervise when that failure is so severe as to amount to "gross negligence" or "deliberate indifference". *See Owens v. Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979).

The sum of these decisions is that a municipality will not be held liable absent a clear showing of fault by the municipality, as evidenced by the officials and/or bodies which have the authority to act or speak for the governmental entity on matters of policy or practice. Therefore, the issue of punitive damages vis-a-vis a municipality will arise only in those cases where the plaintiff alleges facts sufficient to bring his cause of action within the fault requirement under *Monell*.

As the Second Circuit noted in *Owens v. Haas, supra*, "this concept of 'deliberate indifference' does not hold the county at fault for the actions of its employees on a *respondeat superior* basis; it holds the county liable for its own actions which result in deprivation of constitutional rights." *Id.* at 1246

Once a determination is made that a governmental entity is liable to a plaintiff for constitutional violations resulting from its "own actions", punitive damages may be awarded, but only if the plaintiff can meet the burden of proof that is normally required for such damages. Under normal circumstances, a plaintiff will not be able to recover punitive damages. *See Burt v. Abel, supra*, 585 F.2d at 616. However, "punitive damages may also be awarded in civil rights actions where the defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or a reckless disregard for the civil rights of the plaintiff. [Citations omitted.]" *Guzman v. Western State Bank of Devils Lake, supra*, 450 F.2d at 953. The Tenth Circuit used similar language in providing the standard for liability for punitive damages, stating that a jury may award punitive damages when a "public official manifests a reckless indifference to the property rights of others, ill will, a desire to injure, or malice." *Silver v. Cormier, supra*, 529 F.2d at 163-64 (and cases cited therein).

Conversely, the Third Circuit held that:

> "A superior police officer may not be subjected to punitive damages because of wrongful acts by a subordinate officer if there is no evidence that the superior officer ordered or personally participated in the acts, or knew or should have known that the acts were taking place

and acquiesced in them. *See Restatement (2d) of Torts* § 909."

Fisher v. Volz, 496 F.2d 333, 349 (3d Cir. 1974).

Moreover, even when a jury has properly found the elements prerequisite to an award of punitive damages, a trial or appellate court can modify the award downward if the initial award is excessive. *See Guzman v. Western State Bank of Devils Lake, supra,* at 954 (award reduced by appellate court). Thus, the courts, who will not be as prone as juries might be to make extravagant awards based upon the emotions of the moment, will be able to assure that reasonable and appropriate awards of punitive damages will be made. There is in fact no reason to believe that municipalities will be bankrupted by excessive punitive damage awards. The majority rule has long been to hold private corporations liable for punitive damages for the acts of their agents within the course and scope of their employment. This rule has applied even to those acts not ratified or approved by the corporation—*i.e,* strict liability per *respondeat superior.* W. Prosser, *Law of Torts, supra,* at 12. Prosser added that "this is especially true in the case of corporations, who can only act through their agents." *Id.*

Thus, the award of punitive damages against municipal entities will be limited by the strict application of those rules already in force in respect to such awards against supervisors. Liability for punitive damages will not arise from evidence of "a bare violation of § 1983." *See Addickes v. S. H. Kress & Co.*, 398 U.S. 144, 233 (1970) (Brennan, J. concurring in part and dissenting in part). There does not appear to be any significant policy consideration countervailing the public interest in having the Constitution duly

enforced, including by the means of punitive damages, when necessary to implement the policies inherent in § 1983.

V

The American Public Has An Interest In The Vigorous Enforcement Of Constitutional Protections That Supersedes The Financial Interests Of Individual Communities And The Political Interests Of Local Officials.

The deterrent policies underlying § 1983 are for the benefit of the entire population whose rights are enforced thereby, not merely for the benefit of the individual plaintiff. This is the essence of the private attorney general doctrine, on which attorneys fees rulings were initially based, and upon which this Court has sought to base many of its expansive interpretations of the various civil rights statutes. *See, generally, Carey v. Piphus, supra; Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). The public clearly has an interest in the proper enforcement of constitutional protections, and when government officials abrogate their sworn duty to uphold the Constitution, they must be brought to task. As noted earlier, "punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury." *Carlson v. Green, supra,* 100 S. Ct. at 1473 n. 9. In such circumstances, the public has an interest that there be some remedy for those malicious violations to, at minimum, deter future misconduct.

The notion that a municipality and its citizenry are separable legal persons defies logic. First, the acts of the municipality

are not necessarily distinguishable from those of its citizenry. Participatory democracy at the local level is often very high, with legislative enactments often originating or culminating with a vote of the public at large. In some circumstances, such referenda may result in legislation that is in violation of the United States Constitution. *See Reitman v. Mulkey*, 387 U.S. 369 (1967). (Supreme Court held an initiative concerning housing, passed by statewide referendum, to violate the Fourteenth Amendment to the federal Constitution[1]). Further, this country's political system is founded upon republicanism--*i.e.*, the principle that political decisions on behalf of the public are made by elected representatives, who are in turn responsible to the voters for their decisions and conduct.

The public served by enforcement of the Constitution is not the local population wherein the constitutional violations are alleged to be occurring. Rather, the public interest benefited by enforcement via § 1983 is that of the entire nation. Every citizen is deemed to have an interest in the vigorous enforcement of constitutional rights guarantees, whether the malfeasor is an individual acting under color of state law, or a governmental entity acting in the name of a local population. As this Court stated in *United States v. Classic*, 313 U.S. 299 (1941), the purpose of the Civil Rights Act was to protect against the "misuse of power, possessed by virtue of state law and made

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[10] Amici curiae do not suggest by citation of this case that the State of California, which is immune under the doctrine of sovereign immunity, would or should be liable for any damages. Reitman is offered only as significant example of an unconstitutional enactment by a governmental entity wherein the body politic was directly responsible.

possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 326.

If the consequences of a punitive damage award is that public officials responsible therefor are politically held to account for their actions, that fact is at worst irrelevant (*see Zarcone v. Perry*, 572 F.2d 52 [2d Cir. 1978]), and at best a salutary result intended by damage awards in cases of constitutional torts (*see Owen v. City of Independence, Mo., supra*, 100 S. Ct. at 1418-19 & nn. 40, 41). A punitive damage award can only arise upon a finding that the party so assessed committed a malicious violation of constitutional rights, in derogation of the official's sworn duty to uphold and defend the Constitution. Unlike the issues presented in *Owen v. City of Independence, Mo.* and other cases defining the extent of the good faith immunity of public officials, the issue in this case is the liability for malicious, knowing acts of misconduct. Sympathy for the perpetrators of the acts is surely misplaced.

Petitioner's concern for the political future of the local officials deemed responsible for the violations of plaintiff's constitutional rights, as determined by a jury following trial, only underlines the effectiveness of the deterrent force of punitive damage awards against both the municipality and the individuals. It is only fitting that these individuals should now find themselves compelled to answer to the local body politic for their failure to properly carry out their duties of office. To grant the absolute privilege sought by petitioner would only assist the malfeasant officials in shielding their tortious conduct from public view, with the attendant possibility that their misconduct will be repeated.

Applying liability for punitive damages to municipalities

will compel municipal officials to duly consider the impact of their actions, particularly malicious constitutional torts, on the public treasury, for they will fear being held politically or personally responsible for the consequences. This is as it should be. *See Owen v. City of Independence, Mo., supra*, 100 S. Ct. at 1418 7 n. 41; *Simineo v. School Dist. No. 16, Park City, Wyo.*, 594 F.2d 1353, 1357 (10th Cir. 1979) (punitive damages allowable against municipality); *Fulton Market Cold Storage v. Cullerton*, 582 F.2d 1071, 1073 (7th Cir. 1978) (punitive damages allowable against municipality); *Bradshaw v. Zoological Society of San Diego*, 569 F.2d 1066, 1068 (9th Cir. 1978) (punitive damages allowable against municipality). As Prosser stated, in relating the essential rationale for awarding punitive damages: "If such damages will encourage employers to exercise closer control over their servants for the prevention of outrageous torts, that is sufficient ground for awarding them." W. Prosser, *Law of Torts, supra*, at 12.

CONCLUSION

This Court in *Monell* deemed municipalities to be persons under 42 U.S.C. § 1983, and based upon that statutory construction, limited municipal liability to circumstances in which the municipality itself is culpable in the same sense that fault must be proved against any natural person. Inasmuch as municipal liability has been limited to fault situations, municipalities should have coextensive liability with all natural persons found liable under the terms of § 1983. Therefore, municipalities should be liable for punitive damages to the same extent as natural persons—*i.e.*, when the elements of malice or bad faith

can be directly attributed to officials or governmental bodies in whose name *Monell* liability can be attributed to the municipality.

Respectfully submitted,

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STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding;

My address and place of doing business is 326½ Main Street, Huntington Beach, California 92648, that on FEBRUARY 27, 1981, I served the within BRIEF OF ACLU FOUNDATION, SOUTHERN CALIFORNIA AND AMERICAN CIVIL LIBERTIES UNION; RHODE ISLAND AFFILATE AS AMICI CURIAE (No. 80-396) on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on FEBRUARY 27, 1981, at HUNTINGTON BEACH, CALIFORNIA.

_____

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The affidavit of Fred Okrand, an attorney at law admitted to practice before the Supreme Court of the United States, will be forwarded with reference to the mailing of the original and 40 copies of the within Brief of Amici Curiae to the Supreme Court Clerk.

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