1981

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WHEN COPS ARE ROBBERS—MUNICIPAL LIABILITY FOR POLICE MISCONDUCT UNDER SECTION 1983 AND BIVENS

Brenda D. Crocker*

Municipalities faced with rising crime rates, tighter budgets and an increasingly vocal populace often are pressed to make policy decisions which sacrifice important interests. When fiscal considerations predominate, there arises the danger that local police departments will be unable to fulfill their duty to ensure order in society without disturbing citizens' enjoyment of their civil rights. Until recently, improperly trained, supervised or disciplined police officers merely subjected municipalities to embarrassment. However, with increasing success, citizens are arguing that they should be awarded damages against the municipality in every case where their civil rights have been deprived through police misconduct. Sympathetic courts are moving closer to this position, predicking liability not only upon express municipal policy which violates civil rights but also upon official inaction in the face of recurrent or egregious police misconduct.

In 1972 the Supreme Court recognized the need for redress against official misuse of municipal authority in City of Kenosha v. Bruno. 1 There, the plaintiff citizen's civil rights had been violated by official action; yet relief against a municipality was unavailable because of the Court's interpretation of the governing statute. 2 In

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

At the time of the City of Kenosha opinion, the Court interpreted the legislative history of § 1983 to exclude municipalities from the definition of "persons" and to preclude suit against the municipality when it caused a violation of civil rights. See, e.g., City of Kenosha
startling dictum, the Court urged the lower court on remand to consider the availability of federal question jurisdiction. The Court did not formally suggest that relief in such an action could include the judicially created remedies of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, which had been developed in response to federal police misconduct. However, by encouraging the use of federal question jurisdiction, the Court opened the door to *Bivens* actions against municipalities by suggesting the use of the fourteenth amendment as an alternative to Section 1983 and, thus, as a means of recovering damages against a municipality for civil rights violations.

In 1977, the Court further opened the door to such suits in the unanimous decision of *Mount Healthy City School District Board of Education v. Doyle*. There the Court expressly approved the initiation of a procedural due process claim against a local school board pursuant to federal question jurisdiction, despite the board's argument that the Section 1983 prohibition against suing a municipality should be extended to federal question cases.

In 1978 the Court took another startling turn in *Monell v. Department of Social Services*. Breaking with its traditional interpretation of Section 1983, the Court declared that a municipality could be held liable in damages under Section 1983 for civil rights violations pursuant to its unconstitutional official customs, policies and practices. Expanding the availability of this relief in *Owen v. City of Independence*, the 1980 Court held that a municipality enjoys no immunity defense against a prima facie showing of

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3. 412 U.S. at 514.
4. 403 U.S. 388 (1971). The Court created the *Bivens* remedy by inferring a cause of action for damages directly under the fourth amendment. Jurisdiction was predicated upon 28 U.S.C. § 1331(a). See also notes 73-87 infra and accompanying text.
6. Id. at 279. The Court recognized the importance of deciding whether a *Bivens* cause of action for damages should be inferred under the fourteenth amendment despite the existence of § 1983 but declined to do so, finding the question too important to be "decided on this record." Id. at 278.
7. 436 U.S. 658, 700-01 (1978) (municipality is a "person" within the meaning of § 1983) (overruling Monroe v. Pape but reaffirming *City of Kenosh*a's opinion that the word "person" in § 1983 was to be applied to municipalities according to the nature of the relief sought.
liability.⁹

As a consequence of the Court’s doctrinal expansion under Section 1983, lower courts have been faced with an escalating struggle. Plaintiffs who are injured by police misconduct seek the deep pocket offered by the municipal exchequer. Their primary effort has been to expand the Section 1983 concepts of “official policy” and causation, while seeking alternative relief under Bivens. Municipalities, concerned with protecting their coffers, have met the onslaught by denying legal responsibility for individual officers’ allegedly unconstitutional acts and by arguing the exclusiveness of Section 1983 relief.

The question the Supreme Court must now address is under what circumstance a victim of municipal inaction toward local police misconduct may pursue relief under both Section 1983 and Bivens. Victims are now encouraged by the Supreme Court’s recent willingness to reinterpret formerly well established civil rights theories and, yet, are concerned that relief in lower courts will turn on whether the plaintiff was fortunate enough to be injured in a receptive jurisdiction.¹⁰ It will, therefore, be necessary to press the courts for definitive guidance as to available remedies. To resolve the existing lack of uniformity and prevent further inequity, the Supreme Court should resolve the three issues on which the lower courts are split: whether municipal inaction, despite recurrent police misconduct, will constitute a policy for Section 1983 purposes; whether such inaction can constitute the necessary causation under Section 1983; and whether a plaintiff may seek alternative relief under Bivens via the fourteenth amendment. The following review of the Supreme Court’s doctrinal outline of Section 1983 and Bivens and the lower courts’ conflicting resolutions of the narrower issues will demonstrate the need for clarification in cases of municipal inaction.

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⁹ Id. at 638.

¹⁰ For a discussion of the Supreme Court’s reassessment of civil rights remedies against a municipality and the potential for reassessment of municipal inaction cases, see note 7 supra, notes 20-22 infra and accompanying text. For discussion of conflicting lower court holdings on the availability of relief under § 1983 for municipal inaction, see notes 32-51 infra and accompanying text. For discussion of conflicting lower court decisions as to the availability of alternative relief under Bivens, see notes 66-71 infra and accompanying text.
I. Relief for Police Misconduct Under Section 1983

A. The Prima Facie Case

A plaintiff injured by police misconduct makes a prima facie case against a municipality under Section 1983 when he shows that the entity, through its officers’ acts and under “color of law,” has caused the deprivation of a federally secured right.  

A plaintiff must first show the existence and denial of a right which either arises under a federal statute or which is constitutionally guaranteed by incorporation under the fourteenth amendment. Second, he must show that the acts which denied the right were performed “under color of” state law. This category includes all acts done “under pretense of law,” or “in the course of . . . performance of duties under the [state] statute.” The broad language of Section 1983, “under color of any [state] statute, ordinance, regulation, custom, or usage,” presents the most difficult

11. See note 2 supra. See also Gomez v. Toledo, 446 U.S. 635, 640 (1980) (plaintiff need not allege bad faith by defendant); Board of Regents at the Univ. of the State of N.Y. v. Tomaino, 446 U.S. 478, 486 (1980) (state statute of limitations is applied unless inconsistent with federal law); Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 276 (1977) (allegation of $10,000 in controversy is sufficient for jurisdictional purposes unless court determines “to a legal certainty that the claim is really for less than the jurisdictional amount”); McNeese v. Board of Educ., 373 U.S. 668, 674-76 (1963) (no exhaustion of state remedies required).

12. Maine v. Thiboutot, 100 S. Ct. 2502, 2504 (1980) (denial of welfare benefits to which plaintiff was entitled under 42 U.S.C. § 603 (1976) (Social Security Act)).


15. United States v. Classic, 313 U.S. 299, 325 (1941). “Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.” Id. at 326 (citing Ex parte Virginia, 100 U.S. 339, 346 (1879)).

proof problem. Included in the statute as a means of diminishing violence in the post-bellum South, this phrase was intended to cover every form of official decision. Where the offensive act is authorized by statute, regulation, or like form of state action pursuant to express policy, this element is easily proven. However, where the action is motivated by unwritten policy, such as municipal custom or persistent practice, or by official inaction, a plaintiff's task is greater. The consistency of response necessary to show custom may be difficult to prove, and proof of official inaction may create an inference of either municipal approval or official ignorance of the violations.

Inextricably tied to the problem of proof is the element of causation. A plaintiff must show that the municipality has subjected

17. "A condition of affairs now exists in some states of the Union rendering life and property insecure . . . that the power to correct those evils is beyond the control of state authorities I do not doubt." Message of President Grant to Congress, March 23, 1871, Cong. Globe, 42d Cong., 1st Sess. 274 (1871). See also Cong. Globe, 42d Cong., 1st Sess. 274 (1871) (remarks by Mr. Lowe of Kansas).

18. Section 1983 was passed to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. Monroe v. Pape, 365 U.S. at 180.


20. In Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970), the Court determined that Congress had included customs within § 1983 "because of the persistent practices of state officials," even though those practices are not enforced by state statute. Id. at 167. In Monell the Court ruled that custom would be actionable in a written policy case. 436 U.S. 658, 690 (1978).

21. See Rizzo v. Goode, 423 U.S. 362, 376-77 (1976) where the Court held that official inaction is not actionable if there is no showing of a persistent practice of violations or of official authorization or approval of misconduct.

22. Id. Although the Court refused to base liability on official inaction, Rizzo should be read as being consistent with Monell's statement that custom is actionable. See note 20 supra. Therefore, Rizzo must stand for the proposition that an official inaction claim must be backed by proof of a persistent practice which could not have reasonably escaped official knowledge. It cannot stand for the proposition that official inaction states no claim without proof of official approval or authorization. This interpretation is strengthened by the Court's holding in Estelle v. Gamble, 429 U.S. 97 (1976), in which a prisoner brought action against officials who failed to provide minimal medical care in an emergency. The Court held that the officials' inaction, which rose to the level of "deliberate indifference," was actionable via the eighth amendment prohibition against cruel and unusual punishment. Id. at 106. See also notes 26-28 infra and accompanying text.
him or caused him to be subjected to harm.\textsuperscript{23} In ostensibly clear language, the Court has stated that Section 1983 "should be read against the background of tort liability that makes a [person] responsible for the natural consequences of his actions."\textsuperscript{24} By using general intent language, the Court has defined the causal relationship required in written policy or custom cases. The question left unanswered, however, is how to identify the causal link required in cases of municipal inaction with regard to recurrent misconduct.

The Court has clearly stated that liability cannot be predicated upon respondeat superior.\textsuperscript{25} Further, in \textit{Rizzo v. Goode},\textsuperscript{26} the Court denied recovery against high ranking police and city officials for harm caused by numerous incidents of police misconduct because the plaintiffs were unable to show a persistent practice or official authorization or approval.\textsuperscript{27} Yet, the Court also has indicated its favor toward a claim based on a municipality's failure to enforce existing legislation\textsuperscript{28} and has expressly left open the possibility of predating recovery upon a pure negligence theory.\textsuperscript{29}

\textbf{B. The Lower Courts' Disagreement}

The lower courts are, thus, left to struggle with the Court's reticence to base municipal liability on less than a persistent practice

\begin{footnotes}
\item[23] See note 2 supra.
\item[26] 423 U.S. 362 (1976).
\item[27] \textit{Id.} at 371, 375. However, "systematic maladministration . . . or a neglect or refusal to enforce" facially just laws has been recognized as a liability basis which Congress intended. \textit{Cong. Globe}, 42d Cong., 1st Sess., App. 153 (1871) (remarks by Rep. Garfield). See also Monroe v. Pape, 365 U.S. at 180 (§ 1983 passed partly because of state failure to enforce existing laws). This language is of critical importance in official inaction cases, since the questions of how to define official policy and how to pinpoint causation frequently appear to be the same question. For a general discussion of policy and causation, see notes 32-51 \textit{infra} and accompanying text.
\item[28] Adickes v. S. H. Kress & Co., 398 U.S. at 167-68 n.39. However, a claim cannot be based on a state's, and presumably its political subdivisions' failure to enact corrective legislation. \textit{Id.}
\item[29] Baker v. McCollan, 443 U.S. 137, 140 (1979). The Court saw no need to decide the negligence question since it found no rights violated. \textit{Id.} at 140-46. Last term, the Court again entertained a negligence claim but denied recovery since the harm was so remote as to preclude a showing of proximate causation. Martinez v. California, 444 U.S. 277 (1979), \textit{rehearing denied}, 445 U.S. 920 (1980) (state parole decision merely set in motion a series of events whereby an unforeseeable plaintiff was killed by parolee).
\end{footnotes}
or authorization on one hand, and its suggestion, on the other hand, that liability may be predicated on negligence or on failure to enforce existing legislation. This struggle presents itself in lower court decisions as a search for a workable definition of policy and causation. With respect to policy, the controversy concerns the point at which inaction permits an inference of tacit official approval or authorization. In terms of causation, the issue is the point at which a municipality must take legal responsibility for its lower level officials’ active violations of federal rights and its higher level officials’ failure to take corrective action.

Although these issues appear to be conceptually distinct, they are blended in inaction cases because the same proof is used to satisfy both the policy showing and the causation requirement. Courts that seem to follow a pro-plaintiff pattern appear to ground their decisions in causation language,\(^{30}\) while courts in which the decisions generally have favored municipalities, whether or not they were faced squarely with an inaction case, appear to find an insufficient showing of official policy.\(^{31}\) The danger to plaintiffs in jurisdictions which generally have found for municipalities is not that these courts have disagreed on what facts are necessary to show causation. Rather, the danger is in the precedent set by these courts, which appears to have cut off all discussion of causation and raised a strong barrier to a showing of policy.

In the first category are cases such as \textit{Popow v. City of Margate},\(^{32}\) where the court separated the issues of policy and causation. With little discussion, the court found a \textit{de facto} municipal policy based on the city’s recurrent failure to train and supervise police officers. The same factual basis was used to prove causation.\(^{33}\) Further, the court stated that to show causation the plaintiff must show an affirmative link between municipal inaction and the alleged harm. The link is not supplied by a showing of inaction

\(^{30}\) \textit{See} \textit{notes} 32-34 \textit{infra} and accompanying text.

\(^{31}\) \textit{See} \textit{notes} 35-45 \textit{infra} and accompanying text.


\(^{33}\) 476 F. Supp. at 1246-47.
toward lower level officers' acts of simple negligence. However, the link is provided by proof of inaction toward acts of gross negligence, recklessness or deliberate indifference. Inaction in the face of these more serious acts is proof of official acquiescence in the harm. Without explaining why inaction constitutes the necessary link in one case but not in the other, the court appears to have based its causation finding on an arbitrary distinction between what a citizen should reasonably expect to tolerate from police officers and what can be said to have occurred under the municipality's tacit direction. By way of explanation, the court stated that a municipality's failure to train or supervise subordinates adequately is actionable so long as the municipality knew or reasonably should have known of the subordinates' propensity to violate federal rights. However, municipal inaction in the face of only one violation is not actionable, unless the act is unusually brutal.\textsuperscript{34}

Reading the Popow decision as whole, it appears that the court based municipal liability on general intent shown factually, either through municipal inaction following violations that were reasonably anticipated or following unanticipated but severe violations. Courts which primarily have rendered pro-municipality decisions have given no indication that they differ philosophically with the Popow line of reasoning which establishes a relationship between policy and causation. They do differ, however, in their unwillingness to recognize the existence of a policy.\textsuperscript{35} In fact, the court in one such case, Smith v. Ambrogio,\textsuperscript{36} indicated that it would not base liability on inaction leading to a mere pattern of violations, as did the Popow court.

In Smith, the plaintiff sued the Town of Hamden, the police chief and two officers under Section 1983,\textsuperscript{37} He alleged violations of his civil rights, charging that his arrest was both warrantless and

\textsuperscript{34} Id. at 1245-46. The case specifically turns on inaction in the form of failure to train or supervise adequately. Arguably, inaction to other forms, such as failure to discipline or otherwise correct subordinates after a violative incident, are far more egregious.

\textsuperscript{35} See, e.g., United Black Firefighters v. Hirst, 604 F.2d 844 (4th Cir. 1979); Cale v. City of Covington, 586 F.2d 311 (4th Cir. 1978); Burt v. Abel, 585 F.2d 613, 617 n.9 (4th Cir. 1978); McDonald v. Illinois, 557 F.2d 596 (7th Cir.), cert. denied, 434 U.S. 966 (1977); Smith v. Ambrogio, 456 F. Supp. 1130 (D. Conn. 1978).

\textsuperscript{36} 456 F. Supp. 1130 (D. Conn. 1978).

\textsuperscript{37} Id. at 1132.
without probable cause and that the town officials had failed to institute "reasonable procedures in the selection, supervision, assigning and training of its police officers to prevent such violations." The plaintiff further alleged that this inaction by the town and its agents proximately caused the violations which resulted in plaintiff's harm and that it was foreseeable that the violations would result from the inaction.

Beginning with a discussion of how to recognize the policy for Section 1983 purposes, the Smith court acknowledged that inaction cases present a far more difficult task than do cases of written directives and persistent practices which may have developed into custom. However, the court did not compare the facts which show inaction to those which show a persistent practice. Instead, it merely recited its circuit's holding, basing liability on a de facto policy pursuant to concerted activity which the Smith court was unable to define.

The court then moved to a discussion of causation in inaction cases. It stated that failure to act when action is necessary to abate a continuing violation is likely to result in a claim if the plaintiff can show that an official actually knew of or, by law, was charged with knowledge of the violations. By contrast, the court predicted that failure to act so as to prevent a violation which conforms to a pattern is not likely to result in a claim unless the facts show "the equivalent of approval of the pattern as a policy . . . and hence tacit encouragement that the pattern continue." Categorizing the instant case as a failure to prevent a violation which conforms to a pattern, the court came full circle and declined to infer the existence of a municipal policy from inaction.

The Fourth Circuit also has been hesitant to find a showing of official policy sufficient to incur liability. As in Smith, the Fourth

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38. Id. at 1133 n.2.
39. Id.
40. Id. at 1134-35.
41. Turpin v. Mallet, 579 F.2d 152 (2d Cir. 1978).
42. 456 F. Supp. at 1135-36.
43. Id. at 1136.
44. Id.
45. Id.
46. See, e.g., Cale v. City of Covington, 586 F.2d 311 (4th Cir. 1978); Burt v. Abel, 585
Circuit has strongly stated its commitment to the view that, unless a plaintiff clearly shows the existence of a municipal policy, causation is irrelevant.\textsuperscript{47} In Fourth Circuit cases, this view has been stated in a manner similar but not identical to the language found in\textit{Monell v. Department of Social Services.}\textsuperscript{48} The Fourth Circuit has based liability on express policy and official custom\textsuperscript{49} but has rejected the more far-reaching \textit{Monell} language which recognized that the behavior of high-ranking officials may constitute the policy of the municipality itself.\textsuperscript{50}

By emphasizing the stricter language of \textit{Monell}, the Fourth Circuit has established an obstacle to misconduct victims who must make a showing of policy in order to recover from a municipality. By contrast, the pro-plaintiff view of the \textit{Popow} court gives fuller expression to the \textit{Monell} definition of policy. The \textit{Popow} view recognizes that official inaction toward recurrent police misconduct can constitute as strong a statement of municipal policy as does a written directive. Without attempting to define policy in a municipal inaction context, the \textit{Monell} court may have anticipated that a case such as \textit{Popow} could arise, and sought to leave the way open for a pro-plaintiff result when the municipality takes an inactive approach to its supervisory duty. "By our decision in \textit{Rizzo v. Goode}, we would appear to have decided that the mere right to control without any control or direction having been exercised \textit{and without any failure to supervise} is not enough to support Section 1983 liability."\textsuperscript{51}

\textsuperscript{47} 586 F.2d at 312.
\textsuperscript{48} 436 U.S. 658 (1978).
\textsuperscript{49} 586 F.2d at 312. In \textit{Monell}, the Court cautioned that the language of § 1983 read against the background of the . . . legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable \textit{solely} because it employs a tort-feasor—or, in other words, a municipality cannot be held liable under § 1983 on a \textit{respondeat superior} theory.
\textsuperscript{50} 436 U.S. at 691.
\textsuperscript{51} 436 U.S. at 694 n.58 (emphasis added) (citation omitted).
II. ALTERNATIVE RELIEF UNDER BIVENS

A. Introduction

Plaintiffs who are unfortunate enough to be injured in a jurisdiction which does not recognize municipal inaction as a policy for Section 1983 purposes are left with two alternatives. They may accept what recovery is afforded by the police officer's shallow pocket, or they may attempt to reach municipal coffers through the judicially created remedy of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.52

When a plaintiff chooses to invoke the Bivens alternative against a municipality, he brings a suit for damages for those municipal actions which may have caused a violation of his fourteenth amendment rights. Jurisdiction is predicated upon 28 U.S.C. Section 1331(a), which allows federal district courts to hear cases involving a federal question.

On their face, a Section 1983 action and a Bivens claim involving police misconduct appear coextensive. In each case, the plaintiff seeks monetary relief for the municipality's violation of rights secured to him through the fourteenth amendment. However, the difference between these cases becomes clear upon understanding that neither Section 1983 nor Bivens creates a substantive right in the plaintiff.53 Instead, each is a remedy designed to redress the violation of federally secured rights.54

Section 1983 was passed by Congress pursuant to its enforcement power under the fourteenth amendment.55 Rather than create a substantive right under Section 1983, Congress created a cause of action.56 By contrast, the Bivens remedy is a judicially created form of redress. It is based on the Supreme Court's view

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54. 441 U.S. at 617-18.
55. See Id. at 651 (White, J., concurring); Cong. Globe, 42d Cong, 1st Sess., App. 68, 80, 83-85 (1871).
56. 441 U.S. at 617.
that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."\(^7\)

Bivens relief, then, is wholly equitable relief which federal courts provide as a supplement to relief which Congress has expressly provided. Although the remedy was fashioned in response to civil rights violations by federal officials,\(^8\) there is nothing in the Bivens decision or in its progeny which suggests that it should not be applied to cases of fourteenth amendment violations. Indeed, the above quoted statement from Bivens suggests that redress will be forthcoming merely upon a showing of need and the invasion of a federal right. Despite this suggestion, however, several jurisdictions have refused to allow plaintiffs to seek damages against a municipality on a Bivens theory.\(^9\)

Prior to the Monell Court's reinterpretation of Section 1983 legislative history so as to allow suits against a municipality,\(^10\) the Fourth Circuit suggested that it would rule favorably upon a plaintiff's Bivens claim for damages against a municipality via the fourteenth amendment.\(^11\) At that time, the majority of circuits agreed that this form of relief was an appropriate alternative to Section 1983.\(^12\) The Supreme Court, without ruling precisely on this point, had also indicated that it favored a claim pursuant to federal question jurisdiction\(^13\) as an alternative to Section 1983.\(^14\)

A slight shift in approach began to appear among the various circuits, however, after the Supreme Court announced its decision in Monell.\(^15\) Although the majority of circuits have not yet aban-

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57. 403 U.S. at 392 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).
58. Id. at 391-92.
59. See notes 66-71 infra and accompanying text.
60. See notes 2 & 7 supra and accompanying text.
62. In Cale v. City of Covington, the Fourth Circuit catalogued the circuits' positions on this issue as of 1978. 586 F.2d at 314-15. The Second, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits were in favor of implying such a cause of action while the Third and Tenth Circuits were undecided. The First and Fourth Circuits opposed the implication.
64. See, e.g., City of Kenosha v. Bruno, 412 U.S. 507, 514 (1972). In a concurring opinion, Justices Brennan and Marshall specifically stated that the cause of action did exist. Id. at 516.
doned their *Bivens* policy, there is room to argue the development of a trend.66 The Fourth Circuit, in *Cale v. City of Covington*,67 stated a strong opposition to the inference of a damages action under the fourteenth amendment. Writing for the panel, Judge Widener argued that the existence of federal court jurisdiction to hear an action for damages under the fourteenth amendment does not require a finding that the cause of action exists.68 As persuasive authority, Judge Widener cited Supreme Court decisions contemporaneous with the passage of the amendment in which the Court discussed its refusal to usurp Congress' enforcement power under the fourteenth amendment.69 Judge Widener argued that such cases, when read together, make it clear "that the Congress and Supreme Court of the time were in agreement that affirmative relief under the [fourteenth] amendment should come from Congress."70 By ignoring the *Bivens* Court's finding that federal courts traditionally have provided equitable redress for federal rights violations,71 the Fourth Circuit has thus discouraged police misconduct victims from seeking adequate compensation via the deep municipal pocket.72

66. The Third Circuit decided against the inference of such an action, believing that "it would be a redundant and wasteful use of judicial resources to permit . . . both direct constitutional and § 1983 claims where the latter wholly subsumes the former." Fogin v. Ben-salem Township, 616 F.2d 680, 686-87 (3d Cir. 1980). The Fourth and Ninth Circuits have denied such an action on essentially the same grounds. *Cale v. City of Covington*, 586 F.2d 311 (4th Cir. 1978); *Molina v. Richardson*, 578 F.2d 846 (9th Cir. 1978).

For post-*Monell* decisions favoring this action, see, e.g., *Turpin v. Mailet*, 579 F.2d 152 (2d Cir.) (en banc), vacated and remanded for consideration in light of *Monell sub nom.*, City of West Haven v. Turpin, 439 U.S. 974 (1978), modified on remand., 591 F.2d 426 (2d Cir. 1979) (en banc), *aff'd*, Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980); Dean v. Gladney, 621 F.2d 1331 (5th Cir. 1980); *Reeves v. City of Jackson*, 608 F.2d 644 (5th Cir. 1979); *Jones v. City of Memphis*, 586 F.2d 622 (6th Cir. 1978); *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978); *Jamison v. McCurrie*, 565 F.2d 483 (7th Cir. 1977); *Owen v. City of Independence*, 560 F.2d 925 (8th Cir. 1977), vacated on other grounds, 458 U.S. 902, on remand, 589 F.2d 335 (8th Cir. 1978), rev'd on other grounds, 445 U.S. 622, rehearing denied, 446 U.S. 993 (1980).

67. 586 F.2d 311 (4th Cir. 1978).

68. *Id.* at 314.

69. *Id.* at 315-26 (citing The Civil Rights Cases, 109 U.S. 3 (1883); The Slaughter-House Cases, 111 U.S. (16 Wall.) 36 (1872); *Ex parte Virginia*, 100 U.S. 399 (1880)).

70. *Cale v. Covington*, 586 F.2d at 316.

71. *See note 57 supra and accompanying text.

72. In *Cale*, the plaintiff was denied relief under a *Bivens* theory that he had an alternative to pursue. "[T]he plaintiff here has a remedy, perhaps not perfect, but that which was contemplated by Congress." 586 F.2d at 317.
Consequently, in order to bring about uniformity and thereby diminish the inequity suffered by many plaintiffs, the Supreme Court should address the issue of whether a Bivens claim may be brought against a municipality via the fourteenth amendment. A review of Bivens and its progeny should encourage these plaintiffs to press their claims.

B. The Bivens Decision

In 1967, Webster Bivens brought suit in federal court for damages resulting from federal agents' alleged warrantless search of his premises, use of unreasonable force in effecting his arrest, and lack of probable cause to arrest him.\(^{73}\) Bivens based his claim on both Section 1983\(^{74}\) and the fourth amendment.\(^{75}\) The district court dismissed the claim, finding neither state action nor a federal question.\(^{76}\) The Second Circuit affirmed the lower court, finding no constitutional basis for an action for damages under the Constitution.\(^{77}\) Although the court acknowledged that a common law right of action could arise under the language of the fourth amendment,\(^{78}\) it held that Bivens' only remedy was a tort action in state

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\(^{73}\) Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 276 F. Supp. 12 (E.D.N.Y. 1967). Bivens claimed that his home was searched, that he was handcuffed in front of his family, and that family members were threatened with arrest. The agents then took him to the Brooklyn federal courthouse, where they searched, interrogated and booked him. The charges against Bivens were subsequently dismissed. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. at 388-90.

\(^{74}\) See note 2 supra. Jurisdiction was based on 28 U.S.C. § 1343(3) (1976), which reads as follows:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

It is noteworthy that Congress did not place a jurisdictional amount requirement in the statute.

\(^{75}\) Jurisdiction was based on 28 U.S.C. § 1331(a) (1976), which reads as follows: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

\(^{76}\) 276 F. Supp. at 13-14.

\(^{77}\) 409 F.2d 718, 719 (2d Cir. 1969).

\(^{78}\) Id. at 721.
court.\textsuperscript{79}

In a landmark decision, the Supreme Court reversed the circuit court on two bases.\textsuperscript{80} First, the Court stated that to restrict this case to state tort law is to take "an unduly restrictive view of the Fourth Amendment’s protection against unreasonable searches and seizures by federal agents, a view . . . consistently . . . rejected by this Court."\textsuperscript{81} The Court cautioned that federal agents "[possess] a far greater capacity for harm than an individual trespasser. . . ."\textsuperscript{82} Thus, the Court reasoned, redress should not depend upon the vagaries of state tort law;\textsuperscript{83} nor should redress depend upon the state court’s improper usurpation of the federal courts’ authority to limit the exercise of federal power.\textsuperscript{84}

As its second decisional basis, the Court found that damages traditionally have been considered "the ordinary remedy for an invasion of personal interests in liberty."\textsuperscript{85} Perceiving no conflict with federal fiscal policy, the Court considered Congressional approval unnecessary.\textsuperscript{86} Although the fourth amendment does not provide explicitly for damages recovery, the Court fashioned such a remedy in \textit{Bivens} by inferring its existence from the amendment’s language.\textsuperscript{87}

\textsuperscript{79} Id.
\textsuperscript{80} 403 U.S. at 388.
\textsuperscript{81} Id. at 391.
\textsuperscript{82} Id. at 392.
\textsuperscript{83} Id.
\textsuperscript{84} "[T]he Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”
\textsuperscript{85} Id. (quoting \textit{Bell v. Hood}, 327 U.S. 678, 684 (1946)).
\textsuperscript{86} 403 U.S. at 394 (citing \textit{In re Neagle}, 135 U.S. 1 (1890)).
\textsuperscript{87} Id. at 395.
\textsuperscript{88} Id. at 396.
\textsuperscript{89} On remand the Second Circuit found this cause of action "roughly analogous" to a § 1983 action, but denied immunity to the agents, whom it perceived as having acted in their ministerial capacity. \textit{Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics}, 456 F.2d 1339, 1344-47 (2d Cir. 1972). The court adopted the qualified immunity standard of the Restatement of Torts for police officers' actions within their discretionary capacity, namely acts "within the outer perimeter of [their] line of duty." \textit{Id.} at 1343 (quot-
C. Post Bivens Relief

In the wake of Bivens, federal courts have been called upon to determine whether similar causes of action should be inferred from other constitutional provisions and ultimately whether these claims may be brought against municipalities under the fourteenth amendment.\textsuperscript{88} Although the circuit courts have been active in this area,\textsuperscript{89} the Supreme Court has decided only two cases. In Davis v. Passman,\textsuperscript{90} the Court extended the Bivens theory to fifth amendment due process violations. Last Term, in Carlson v. Green,\textsuperscript{91} the Court added eighth amendment cruel and unusual punishment claims, despite the existence of alternative relief under the Federal Tort Claims Act.\textsuperscript{92}

To date, the Court has not directly addressed the matter of Bivens relief via the fourteenth amendment. Its boldest dictum in favor of inferring such an action was stated in 1972 in City of Kenosha v. Bruno,\textsuperscript{93} six years prior to Monell. In City of Kenosha, Justice Rehnquist stated for the majority that although a Section 1983 claim could not be brought against a municipality, on remand the court should consider the availability of jurisdiction under 28 U.S.C. Section 1331(a).\textsuperscript{94} In a concurring opinion,\textsuperscript{95} Justices Brennan and Marshall added that if the plaintiffs could support their claims of $10,000 in controversy, “then Section 1331 jurisdiction is

\textsuperscript{88} The Supreme Court has resolved the related issue of determining when $10,000 must be in controversy. Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). Where the alleged harm is at least $10,000, “the sum claimed by the plaintiff controls if the claim is apparently made in good faith,” unless the court determines “to a legal certainty that the claim is really for less than the jurisdictional amount.” Id. at 276 (quoting from St. Paul Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938)).


\textsuperscript{90} 442 U.S. 228 (1979).

\textsuperscript{91} 446 U.S. 14 (1980).


\textsuperscript{93} 412 U.S. 507 (1973).

\textsuperscript{94} Id. at 514.

\textsuperscript{95} Justices Brennan and Marshall concurred in the judgment that a municipality is not a “person” under § 1983. Id. at 516.
available . . . and they are clearly entitled to relief." 96 Four years later, however, in City of Charlotte v. Local 660, International Association of Firefighters,97 the Court found Section 1983 grounds dispositive of the case and refused to address the issue of whether the claim could be brought under Section 1331(a).98 Finally, in Carlson, Chief Justice Burger specifically stated his fear that the Court would extend Bivens to fourteenth amendment claims despite the adequate alternative remedy provided by Section 1983.99

Whether a majority of the Court is now willing to give force to the City of Kenosha suggestion is of utmost concern to both municipalities and police misconduct victims. Municipalities necessarily argue that the Court's recent doctrinal expansion of Section 1983 implies a conclusion that Section 1983 is an adequate remedy. Victims, however, have good reason to argue that the Court's recent decisions in Davis v. Passman100 and Carlson v. Green101 foretell the availability of Bivens relief under the fourteenth amendment.

In Davis, Congressman Passman's female secretary sued him for damages and back wages, alleging that her termination constituted sex discrimination in violation of her fifth amendment due process rights.102 The Court inferred a Bivens right of action103 even

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99. 446 U.S. at 31 (Burger, J., dissenting).
100. 442 U.S. 228 (1979).
102. 442 U.S. at 240-41. Mrs. Davis' claim of sexual discrimination was based in part on the following letter by Congressman Passman:
   Dear Mrs. Davis:
   My Washington staff joins me in saying that we miss you very much. But, in all probability, inwardly they all agree that I was doing you an injustice by asking you to assume a responsibility that was so trying and so hard that it would have taken all the pleasure out of your work. I must be completely fair with you, so please note the following:
   You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essen-
though its holding in *Cort v. Ash*\textsuperscript{104} appeared to dictate the opposite result. The court distinguished *Cort* by stating that its standards were addressed to the judiciary's duty to construe Congressional enactments, whereas the judiciary's duty to enforce constitutional rights demanded different standards.\textsuperscript{105}

The *Davis* Court established that a *Bivens* action for damages inferred from the Constitution arises when four criteria are met. First, the claimed liberty interest must be conferred by the Constitution.\textsuperscript{106} Second, there must be no adequate alternative form of relief.\textsuperscript{107} Third, the harm suffered must lend itself to valuation in damages, even though damages traditionally have been the appropriate remedy for liberty interest violations.\textsuperscript{108} Finally, there must be "'no explicit congressional declaration that persons' in petitioner's position . . . may not recover money damages from' those

\begin{itemize}
\item that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion.
\item It would be unfair to you for me to ask you to waste your talent and experience in my Monroe office because of the low salary that is available because of a junior position. Therefore, and so that your experience and talent may be used to advantage in some organization in need of an extremely capable secretary, I desire that you be continued on the payroll at your present salary through July 31, 1974. This arrangement gives you your full year's vacation of one month, plus one additional month. May I further say that the work load in the Monroe office is very limited, and since you would come in as a junior member of the staff at such a low salary, it would actually be an offense to you.
\item I know that secretaries with your ability are very much in demand in Monroe. If an additional letter of recommendation from me would be advantageous to you, do not hesitate to let me know. Again, assuring you that my Washington staff and your humble Congressman feel that the contribution you made to our Washington office has helped all of us.
\item With best wishes,
\end{itemize}

\begin{flushright}
Sincerely,

/s/ Otto E. Passman
OTTO E. PASSMAN
Member of Congress
\end{flushright}

*Id.* at 230 n.3. Section 717 of Title VII prohibits discrimination on the basis of sex. 42 U.S.C. § 2000e-16(a) (1976). However, since Mrs. Davis was not hired into the competitive service as is referenced in 2 U.S.C. § 92, she cannot avail herself of § 717 remedies. 442 U.S. at 230, n.2, 247, nn.26-27.

\begin{itemize}
\item 103. 442 U.S. at 240-41.
\item 104. 422 U.S. 66 (1975).
\item 105. 442 U.S. at 241-42.
\item 106. *Id.* at 248.
\item 107. *Id.* at 245.
\item 108. *Id.*
responsible for the injury."

From this statement of the Court's guidelines for inferring a damages action directly under the Constitution, it would appear that a municipal inaction victim could make a prima facie showing that he is entitled to bring his Bivens claim via the fourteenth amendment. He would do so by pointing to the fourteenth amendment, to the severe obstacle presented by the Section 1983 "policy" requirement, to his compensable harm, and to the fact that Congress has not expressly prohibited him from obtaining relief through a Bivens claim.

The most difficult point to make would be that the pro-municipality courts' view of the "policy" requirement under Section 1983 constitutes a denial of adequate alternative relief under Section 1983 for harm resulting from municipal inaction. In making this point, one must convince the court that he can show a causal link between the municipal inaction and the harm, albeit an insufficient link under the pro-municipality courts' view of Section 1983. To accomplish this, one must show inaction following either a pattern of misconduct or one severe incident, arguing that the municipality was or should have been placed on notice of the need for corrective action. Second, one must argue that if the pro-municipality courts are correct in precluding his recovery by requiring that Section 1983 victims show unmistakable official approval, then they are correct solely because the Court finds that by enacting Section 1983, Congress intended to cover nothing short of virtually express municipal policy, thereby excluding municipal inaction victims. However, to say that Congress did not intend to cover municipal inaction victims under Section 1983 is not to say that it would disapprove of judicially created remedies to cover harm not addressed under Section 1983. Indeed, the entire object of the Court's holdings in Bivens and Davis was to give approval to judicially fashioned remedies for harm not otherwise compensable.

Armed with a strong argument under Davis, the municipal inaction victim should be encouraged further by the Court's recent


110. See notes 57-58 and 73-87 supra and accompanying text.
holding in *Carlson v. Green*.111 There, the Court was faced with a damages action under the eighth amendment.112 Unlike *Davis*, however, the Court was called upon to determine whether a *Bivens* remedy could be applied in a case which simultaneously gave rise to relief under the Federal Tort Claims Act (FTCA).113

In *Carlson*, Marie Green brought suit against federal prison officials on behalf of her son's estate. She alleged that her son received injuries in a severe beating and died because federal prison officials failed to provide him with proper medical care. Further, she alleged that this failure constituted deliberate indifference in violation of her son's eighth amendment rights.114 Claiming jurisdiction under 28 U.S.C. Section 1331(a),115 Mrs. Green sought compensatory and punitive damages.116

Without benefit of the lower courts' discussion, the Supreme Court determined that a *Bivens* remedy can be used to complement FTCA relief.117 The Court held that the victim of an unconstitutional act has "a right to recover damages" under *Bivens* even though no federal statute creates such a right of action in him.118 Further, it held that the defendant cannot defeat this action unless he can show that Congress expressly has declared the alternative remedy to be "a substitute" for *Bivens* relief and "viewed as equally effective"119 or that "special factors [counsel] hesitation in the absence of affirmative action by Congress."120 Without explanation, the Court found that there were no special factors in this

111. 446 U.S. 14 (1980).
112. Id. at 16.
113. Id. In *Davis*, the plaintiff had no alternative federal statutory remedy. See note 102 supra and accompanying text.
114. 446 U.S. at 16.
115. See note 75 supra.
116. 446 U.S. at 16.
117. Id. at 17 n.2. The Court allowed the petitioner to raise the issue even though it had not been presented below. The district and circuit courts agreed that the allegations stated a claim under the eighth amendment and *Bivens*. Id. at 17. However, they disagreed on whether the state wrongful death and survivorship statutes should be applied where they serve to limit the amount of damages recoverable to less than the $10,000 jurisdictional requirement for bringing a *Bivens* action. Id. at 17-18.
118. Id. at 18.
119. Id. at 18-19.
120. Id. at 19 (citing *Bivens* v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. at 396.).
case to counsel hesitation.\textsuperscript{121} In support of its finding that Congress has not expressly declared FTCA relief to be a substitute for \textit{Bivens} relief, the Court pointed to Congress' practice of "explicitly stating when it means to make FTCA an exclusive remedy."\textsuperscript{122} As further support, the Court referred to a Senate report which expressly contemplated contemporaneous \textit{Bivens} and FTCA claims.\textsuperscript{123}

The Court then launched into a seemingly unnecessary discussion of additional factors which demonstrate the inadequacy of FTCA relief and support "our conclusion that Congress did not intend to limit respondent to an FTCA action."\textsuperscript{124} The factors which the Court used to determine the inadequacy of alternative relief are unimportant beyond the facts of this case.\textsuperscript{125} The critical importance of this discussion lies in the fact that the Court explored Congress' unspoken intention, thereby softening its holding that \textit{Bivens} relief is available unless the defendant can show Congress' express declaration that the alternative relief is exclusive and adequate. Without excluding its conclusions regarding Congress' unspoken intention, the Court summarized its holding: "Plainly FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA remedy."\textsuperscript{126}

Justices Powell and Stewart concurred in the judgment, agreeing that the majority correctly indexed the factors which demonstrate FTCA inadequacy in this case and give rise to \textit{Bivens} relief. How-

\textsuperscript{121} Id.
\textsuperscript{122} Id. at 20.
\textsuperscript{123} Id. (citing S. Rep. No. 93-588, 93d Cong., 1st Sess. 3 (1973)).
\textsuperscript{124} Id. at 20-21. The Court cites the following factors: that \textit{Bivens} provides a more effective deterrent because it authorizes suit against individuals; that \textit{Bivens} provides a right to a jury trial and punitive damages; and that \textit{Bivens} supplies uniformity of law, whereas an FTCA claim is not actionable unless the state in which the violation occurred recognizes a corresponding cause of action. \textit{Id.} at 21-23.
\textsuperscript{125} These factors, while controlling on the issue of FTCA relief inadequacy, cannot be read to control other cases without limiting \textit{Bivens} relief to cases involving similar statutes. Instead, they must be read consistently with the Court's philosophy that \textit{Bivens} relief is supplementary. So read, these factors are merely evidence that this plaintiff could not receive as extensive relief under the FTCA as he could under \textit{Bivens}.
\textsuperscript{126} Id. at 23.
ever, they disagreed with the majority’s rationale for inferring a *Bivens* right of action. Their objection lay in the *Carlson* majority’s unwarranted expansion of the *Bivens* doctrine through restatement of the *Davis* guidelines. Under *Davis*, they noted that the defendant can defeat a prima facie case by showing the adequacy of the alternative relief; however, under *Carlson*, the defendant also must show that Congress expressly declared the alternative relief exclusive.127

Although two justices dissented, five justices clearly supported an expansion of the *Davis* guidelines.128 Likewise, seven justices approved the inference of a *Bivens* remedy in a case where the alternative relief was inadequate and where “there are reasonably clear indications that Congress did not intend that statute to displace *Bivens* claims.”129

III. CONCLUSION: THE TEST CASE

The best case to present to the Court is one in which recovery is denied pursuant to the lower court’s view that municipal inaction does not constitute an official policy within the meaning of Section 1983 and that a *Bivens* remedy cannot be extended to fourteenth amendment claims. Such a case would point up the harsh consequences brought on by the lack of uniformity among lower court decisions and would hopefully spur the Court to pronounce ameliorative guidelines.

Whether the Court applies the *Davis* guidelines or the *Carlson* expansion, the municipal inaction victim stands in a secure position to recover. In appealing to the *Carlson* majority for an extension of the *Bivens* remedy to such fourteenth amendment claims, the plaintiff need only point to the fourteenth amendment and to the harm he has suffered from municipal inaction despite recurrent violations. The burden then would shift to the municipality to

127. *Id.* at 25-29. The *Davis* majority actually stated that the plaintiff must allege an inadequacy of alternative relief as part of his prima facie case. 442 U.S. at 243-44.
128. Justice Brennan wrote the majority opinion in which Justices White, Blackmun, Marshall and Stevens joined. Justices Burger and Rehnquist dissented. Chief Justice Burger strongly expressed his fear that the majority soon would consider § 1983 an inadequate remedy. *Id.* at 30. Justice Rehnquist stated his continued opposition to *Bivens* and what he considers the Court’s unwarranted penchant for legislating. *Id.* at 31-54.
129. *Id.* at 28 (Powell and Stewart, JJ., concurring).
show the adequacy of Section 1983 relief and Congress' express declaration that it is exclusive and adequate or the existence of special factors counselling hesitation.\textsuperscript{130} Taking a careful approach so as to persuade seven justices, however, the victim must read \textit{Carlson} conservatively and tailor his argument to the concurring opinion. To do so, he must add to his \textit{Carlson} argument a showing that Section 1983 affords inadequate relief under the pro-municipality courts' rigid policy requirements and be prepared to counter "reasonably clear indications" that Congress intended Section 1983 to be an exclusive remedy.\textsuperscript{131} In so doing, however, he is presented with no more difficult a showing than was required under \textit{Davis}.\textsuperscript{132}

Whether relief as expansive as that provided by the \textit{Carlson} majority will be forthcoming is difficult to predict. However, a sound prediction is that the Court will soon feel compelled to turn its attention to a grievous case of municipal inaction. When it does, the Court will probably force municipalities to reconsider those fiscal policies which sacrifice the quality of police officers' performance and result in the deprivation of civil rights.

\textsuperscript{130} See notes 117-26 \textit{supra} and accompanying text.
\textsuperscript{131} See note 129 \textit{supra} and accompanying text.
\textsuperscript{132} See notes 106-10 \textit{supra} and accompanying text.