

## Louisiana Law Review

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Volume 45 | Number 5  
May 1985

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# Municipal Liability Under 42 U.S.C. § 1983: Bennett v. City of Slidell

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### Repository Citation

Jane Geralyn Politz, *Municipal Liability Under 42 U.S.C. § 1983: Bennett v. City of Slidell*, 45 La. L. Rev. (1985)  
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## NOTES

### Municipal Liability Under 42 U.S.C. § 1983: *Bennett v. City of Slidell*\*

A liquor license applicant brought an action against the City of Slidell and certain city officials under 42 U.S.C. § 1983<sup>1</sup> to recover damages caused by delays in issuing a liquor license and occupancy permit for his lounge. The federal district court granted a monetary judgment against the city and three of its councilmen, who subsequently appealed. In a panel opinion, the Fifth Circuit Court of Appeals held that the city had violated the applicant's rights to due process and equal protection and was liable for damages caused by the delays in issuing the license and permit. On rehearing *en banc*, the court reversed the original panel opinion and held that the city could not be held liable for the delays since the city officer was not acting with sufficient authority to be considered an official within the intent of the civil rights statute. *Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984).<sup>2</sup>

The Supreme Court first considered the issue of municipal liability under the Civil Rights Acts of 1871, now 42 U.S.C. § 1983, in *Monroe v. Pape*.<sup>3</sup> In *Monroe*, the Court held that officers of local governments could be held liable for civil damages under section 1983,<sup>4</sup> but that municipal corporations were immune from liability since it found that they were not "persons" within the meaning of the statute.<sup>5</sup> The Court based its holding of municipal immunity on the legislative history of the Civil Rights Act of 1871, emphasizing the fact that the Sherman

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\* The author dedicates this casenote to her father, the author of the dissenting opinion in *Bennett*, who offered much encouragement but no assistance.

1. Section 1983 provides in part:

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

42 U.S.C. § 1983 (1983).

2. This case was considered by the Fifth Circuit on three separate occasions: a panel (697 F.2d 657 (5th Cir. 1983)), sitting *en banc* (728 F.2d 762 (5th Cir. 1984)), and a *per curiam* opinion (735 F.2d 861 (5th Cir. 1984)). Additionally, at the time this Note was written, a writ of *certiorari* was pending before the United States Supreme Court. 53 U.S.L.W. 3419 (U.S. Sept. 14, 1984) (No. 84-797). After completion of this Note, the Court denied *certiorari*. 53 U.S.L.W. 3882 (U.S. June 17, 1985) (No. 84-797).

3. 365 U.S. 167, 81 S. Ct. 473 (1961).

4. *Id.* at 172-87, 81 S. Ct. at 476-84.

5. *Id.* at 191, 81 S. Ct. at 486.

Amendment,<sup>6</sup> which would have established municipal liability, failed to pass.<sup>7</sup> Thus, the Court concluded, the "response of Congress to the proposal to make municipalities liable . . . was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them."<sup>8</sup>

In the wake of *Monroe*, plaintiffs employed a number of strategies to circumvent the municipal immunity doctrine.<sup>9</sup> Individuals seeking relief for deprivations of their civil rights often resorted to another line of cases that implied a cause of action cognizable in federal courts for constitutional violations. They attempted to invoke the Fourteenth Amendment directly, relying on *Bivens v. Six Unknown Named Agents*.<sup>10</sup> The Court in *Bivens* held that a plaintiff would be entitled to redress his injury through the federal courts if he could demonstrate an injury from a violation of his fourth amendment rights.<sup>11</sup> A number of federal courts used this rationale as a basis for sustaining jurisdiction in actions against municipalities.<sup>12</sup> As federal courts continued attempts to reconcile the reality of damage caused by municipalities with the fact that the Supreme Court had held these bodies not accountable, *Bivens* offered a viable alternative to parties unable to obtain redress under section 1983.

Rather than constitutionalizing a cause of action against local governments using the *Bivens* rationale, in 1978 the Supreme Court overruled *Monroe* insofar as it held that local governments were immune from suit under section 1983. In *Monell v. New York Department of Social Services*,<sup>13</sup> the Court reexamined the legislative history of the Civil Rights Act of 1871 and held that Congress intended that municipalities and other local governmental entities be included among section 1983 "persons."<sup>14</sup> As a result, municipalities may be sued directly under section

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6. Cong. Globe, 42d Cong., 1st Sess. 663 (1871).

7. 365 U.S. at 187-91, 81 S. Ct. at 484-86.

8. *Id.* at 191, 81 S. Ct. at 486.

9. See, e.g., *Moor v. County of Alameda*, 411 U.S. 693, 93 S. Ct. 1785 (1973) (Plaintiff unsuccessfully sought to circumvent the municipal immunity doctrine by bringing a federal cause of action under §§ 1988 and 1983.); *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S. Ct. 2222 (1973) (Plaintiffs unsuccessfully sought only injunctive and declaratory relief for alleged deprivations of their Fourteenth Amendment due process rights.); *Aldinger v. Howard*, 427 U.S. 1, 96 S. Ct. 2413 (1976) (plaintiff unsuccessfully asserted that pendent-party jurisdiction was available to adjudicate state-law claims against a county in federal court). For a thorough view of the expansion of the *Monroe* immunity doctrine, see Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 *Geo. L.J.* 1483 (1977).

10. 403 U.S. 388, 91 S. Ct. 1999 (1971).

11. *Id.* at 397, 91 S. Ct. at 2005.

12. See, e.g., *Roane v. Callisburg Indep. School Dist.*, 511 F.2d 633 (5th Cir. 1975); *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569, 577 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976).

13. 436 U.S. 658, 98 S. Ct. 2018 (1978).

14. *Id.* at 690, 98 S. Ct. at 2035.

1983 “for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.”<sup>15</sup> Furthermore, as the Court subsequently decided in *Owen v. City of Independence*,<sup>16</sup> municipalities do not enjoy the qualified good-faith immunity that is sometimes granted city officials.<sup>17</sup>

Section 1983 imposes liability on a municipality only for conduct which subjects the plaintiff, or causes him to be subjected, to a deprivation of a right secured by the Constitution or other federal laws.<sup>18</sup> The interference with the plaintiff’s rights must be due to a violation for which the city government is itself responsible. In other words, municipalities are liable under section 1983 only for deprivations caused by unconstitutional official policies or customs.<sup>19</sup> To paraphrase the *Monell* Court, Congress did not intend that a municipality be held liable unless an action taken pursuant to official municipal policy caused a constitutional tort.<sup>20</sup> The Supreme Court has held that the official policy must be “the moving force of the constitutional violation” to establish liability under section 1983.<sup>21</sup> But the Court has failed to delineate all of the possible causes of action against municipalities under section 1983.<sup>22</sup>

As a practical matter, municipalities must delegate broad authority to their officials in order to run smoothly,<sup>23</sup> and government decisions and policies are necessarily made by individuals. The problem is to decide which actions by which individuals should be characterized as actions of the government for, “it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.”<sup>24</sup> Difficult questions of what constitutes official policy have been raised in a number of cases arising after *Monell*. The Fifth Circuit Court of Appeals recently struggled with defining the contours of official policy in *Bennett v. City of Slidell*.<sup>25</sup>

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15. *Id.*, 98 S. Ct. at 2035-36.

16. 445 U.S. 622, 638, 100 S. Ct. 1398, 1409 (1980).

17. See *Sheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683 (1974).

18. See *Rizzo v. Goode*, 423 U.S. 362, 370-71, 96 S. Ct. 598, 604 (1976).

19. *Polk County v. Dodson*, 454 U.S. 312, 325-27, 102 S. Ct. 445, 453-54 (1981).

20. 436 U.S. at 691, 98 S. Ct. at 2036.

21. *Polk County*, 454 U.S. at 326, 102 S. Ct. at 454 (interpreting the Court in *Monell*, 436 U.S. at 694, 98 S. Ct. at 2038).

22. See *Languirand v. Hayden*, 717 F.2d 220, 223 (5th Cir. 1983).

23. See *Williams v. Butler*, 746 F.2d 431, 438 (8th Cir. 1984).

24. *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037-38.

25. *Supra* note 2.

Bennett sought damages from the City of Slidell<sup>26</sup> for delays he experienced in securing a liquor license and occupancy permit for his lounge in Slidell, Louisiana. Under Louisiana law, the city council issues liquor licenses. The trial court found that the Slidell city attorney had been slow in reviewing the application and had ultimately advised the council to delay issuance due to a legal question. Additionally, the city building inspector had refused to issue an occupancy permit until Bennett complied with a city ordinance requiring the blacktopping of a parking area of proper size. This requirement had not been uniformly enforced. The city attorney and building inspector also caused plaintiff's electricity to be disconnected for a period of time. The Court of Appeals found that the motivation for this unfair treatment was opposition to Bennett's lounge from an adjacent property owner who was the city auditor and who had openly boasted about his influence with the city.<sup>27</sup> The court held that to find the City of Slidell liable, city officials had to have promulgated an official city policy: liability rests on the city government's policy, not on the policies of individual officers.<sup>28</sup>

The Court of Appeals, in a nine-five *en banc* decision, was unwilling to hold the city liable for the acts of its city attorney and building inspector although it did hold the city attorney personally liable. In deciding whether their acts constituted official policy, the court concentrated on the acts of the building inspector. Since his actions were the source of the controversy, this casenote will focus on that position.

As noted in *Bennett*, a municipality may violate a person's civil rights in two ways: by the direct orders of the governing body, or by setting a course of action for its employees which, when followed, interferes with a constitutional right. A "course of action" may be set by the body's promulgation of rules or ordinances, or by its acceptance of the conduct of its employees.<sup>29</sup> Such acceptance of conduct may be attributed to the body in either of two ways: (1) actual knowledge may be shown by open discussions at council meetings, or by written documents; or (2) constructive knowledge may be found if a body properly exercising its responsibilities would have known of the violation.<sup>30</sup> Therefore, a policy is that of the city if made by an official with the express or implied authority of the governing body. And the conduct of the official, "whether formally declared or informally accepted," must be the policy of the governing body to be the basis for liability.<sup>31</sup>

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26. Also named as defendants were members of the city council, the mayor, the chief administrative office, and the city attorney. 697 F.2d at 658.

27. 728 F.2d at 765.

28. *Id.* at 769.

29. *Id.* at 767.

30. *Id.* at 768.

31. *Id.* at 767.

In the *per curiam* opinion denying a petition for rehearing three months after the *en banc* opinion, the court expressly stated that it rejected the line of authority that would permit policy "to be attributed to the city itself by attribution to any and all city officers endowed with final or supervisory power or authority."<sup>32</sup> To promote consistency in adjudication, the unanimous court offered a definition of official policy in place of the "final authority" rationale:

A municipality is liable under 1983 for a deprivation of rights protected by the Constitution or federal laws that is inflicted pursuant to official policy.

According to the court, official policy is:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's law-making officers or by an official to whom the lawmakers have delegated policy-making authority; or
2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policymaking authority.

Actions of officers or employees of a municipality do not render the municipality liable under 1983 unless they execute official policy as above defined.<sup>33</sup>

In *Monell*, the Supreme Court expressly stated that a city policy for which a city may be held liable may be made either by lawmakers or by those "whose edicts or acts may fairly be said to represent official policy."<sup>34</sup> The Court thus intended to set a legal perimeter for city liability. Unless the actions of officials were in accord with city policy, the municipality would not be liable.<sup>35</sup> In *Monell*, the issue was whether a particular decision involved the making of policy, not the characterization of a position as that of a policymaker. An official formulating a single unconstitutional policy is not outside the scope of *Monell* because he does not frequently make decisions. On the other hand, an official

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32. 735 F.2d 861, 862 (5th Cir. 1984).

33. *Id.* at 862.

34. 436 U.S. at 694, 98 S. Ct. at 2037-38.

35. The *Monell* Court expressly excluded any municipal liability under § 1983 based solely on the doctrine of *respondeat superior*. 436 U.S. at 691, 98 S. Ct. at 2036. For a general discussion of § 1983 Municipal Liability and the doctrine of *respondeat superior*, see Note, Section 1983 Municipal Liability and the Doctrine of *Respondeat Superior*, 46 U. Chi. L. Rev. 935 (1979).

who does make city policy does not necessarily subject the city to liability if he acts outside his authority.

But not all delegated authority is policymaking authority. If an official is delegated authority and violates the Constitution in exercising that authority, then the municipality faces liability.<sup>36</sup> *Monell's* reference to the "body's official decisionmaking channels"<sup>37</sup> suggests that the existence of an official policy should be determined by inquiring into the municipality's rules and practices for delegating authority to make decisions. The issue is whether an official had been delegated final authority in that area.<sup>38</sup>

Consequently, the issue in *Bennett*, as in *Monell*, should have been whether a particular decision made by the building inspector involved the making of policy, rather than the characterization of his position as that of a policymaker. Yet, instead of looking to see if the building inspector has been delegated authority to act in this area, the Court of Appeals concentrated on whether he had policymaking authority. According to the court, in order to be a policymaker, the governing body must acknowledge that the official acts in lieu of the body "to set goals and to structure and design the area of the delegated responsibility, subject only to the power of the governing body to control finances and to discharge or curtail the authority of the agent or board."<sup>39</sup> This viewpoint seems to be contrary to the intent of the Court in *Monell*.

However, had the *Bennett* court examined the building inspector's actions from the *Monell* viewpoint, it probably would have reached the same result. It seems that the court felt that the building inspector's actions did not represent official policy, regardless of whether he was characterized as a policymaker. Rather his actions were those of an individual officer and were not the policy of the city.<sup>40</sup>

The Court of Appeals in *Bennett* found that no policymaking authority had been given to the building inspector. The court stated that the inspector's job was to execute or administer the policy established by the city council in its building code. His authority was derived from the city's chief administrative officer, and his decisions were appealable to the board of zoning adjustments and to the city council. The court concluded that the inspector's decisions were "perhaps discretionary and ministerial, but he had no authority to act in lieu of the council to set or modify city policy."<sup>41</sup>

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36. For a detailed analysis of this concept, see Schnapper, *Civil Rights Litigation After Monell*, 79 Colum. L. Rev. 213 (1979).

37. 436 U.S. at 691, 98 S. Ct. at 2036.

38. See generally *Schnapper*, supra note 36.

39. 728 F.2d at 769.

40. *Id.* at 769-70 (observing that there was no evidence that the unequal application of the ordinance was a course of conduct attributable to the city council).

41. *Id.* at 769-70.

The *Bennett* majority barred any municipal liability for the building inspector's unconstitutional enforcement of the zoning ordinance on the ground that the elected city officials had not authorized the inspector to make official policy. But as previously noted, governmental entities can act only through natural persons. It is only through their actions that official authority may be exercised and official policies enforced.<sup>42</sup> As the Fifth Circuit had previously noted, "[a]t some level of authority, there must be an official whose acts represent governmental policy."<sup>43</sup> In an earlier case, the Fifth Circuit had said that where an official has final authority in a given matter, his choice necessarily represents government policy.<sup>44</sup> Other circuits have followed this rationale.<sup>45</sup> The *en banc* court in *Bennett* found that the building inspector was not the final authority, and therefore that he had not acted in such a way to make the city liable under section 1983. However, as the concurring opinion in *Monell* stated, "[t]here are substantial line-drawing problems in determining 'when execution of a government's policy or custom' can be said to inflict constitutional injury such that 'government as an entity is responsible under § 1983.'"<sup>46</sup> *Bennett* falls into one of these line-drawing problem areas. The line may have been drawn in the wrong place.

There is some question as to what actions represent "final authority." In *Bennett*, the majority of the court said that since the building inspector's decisions were appealable, he did not have final authority. But as the dissent indicates, the appealability of decisions should not be the controlling factor. According to an earlier Fifth Circuit opinion, *Bowen v. Watkins*,<sup>47</sup> if a higher official has the power to overrule an official's action or decision, but as a practical matter never does, the lower official may effectively have final authority in the area. Even where there are appeals of an official's actions, if the appellate body defers to the judgment of the official, then the decision of the official may be viewed as government policy.<sup>48</sup> Another circuit has held that even if an appellate process exists, the official may exercise authority

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42. *Id.* at 771-72 (Politz, J., dissenting).

43. *Bowen v. Watkins*, 669 F.2d 979, 989 (5th Cir. 1982).

44. *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980).

45. See, e.g., *Rookard v. Health and Hosp. Corp.*, 710 F.2d 41, 45 (2d Cir. 1983) ("Where an official has final authority over significant matters involving the exercise of discretion, the choices he makes represent government policy."); *McKinley v. City of Eloy*, 705 F.2d 1110, 1116 (9th Cir. 1983) (City had delegated to the city manager the ultimate responsibility for personnel decisions, and his actions therefore represented official policy.); *Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983) (Since the police chief was responsible for the choice and implementation of department practices and procedures, his acts and omissions reflected government policy.).

46. 436 U.S. at 713, 98 S. Ct. at 2047 (Powell, J., concurring) (quoting *id.* at 694, 98 S. Ct. 2037-38).

47. 669 F.2d 979 (5th Cir. 1982).

48. *Id.* at 989-90.

to set official policy if the appellate body only occasionally reverses his decisions.<sup>49</sup>

Following the prior jurisprudence of the Fifth Circuit, it appears that the building inspector had sufficient authority to qualify as an official making city policy under section 1983. The city council did not direct the building inspector's day-to-day operations. The council was in a position to review his decisions on appeal, but the record in *Bennett* showed his decisions to grant or deny occupancy permits were never challenged. His decisions were in effect final.<sup>50</sup> In practice the building inspector had "unbridled authority to enforce the zoning ordinance as he saw fit,"<sup>51</sup> giving him final authority to act on behalf of the city in situations requiring the exercise of discretion. The city council designated him as the primary authority to interpret and enforce the zoning ordinance; he was the sole person given authority to grant or deny permits. In effect, his decision ended a matter; he should thus be regarded as one "whose edicts or acts may fairly be said to represent official policy" within the intention of *Monell*.<sup>52</sup> By enforcing the zoning ordinance only after the filing of complaints, instead of applying it uniformly to all, the building inspector's application of the ordinance deprived Bennett of his right to due process. Since the building inspector was in fact the final authority, it appears that the line should have been drawn at a different point, that his acts reflected city policy, and that the city should have been held liable under section 1983.

Unfortunately, as noted above, the "final authority" rationale may no longer be even arguable in the Fifth Circuit. In its *per curiam* opinion denying rehearing *en banc*, the court expressly rejected this rationale.<sup>53</sup> This analysis should not be overturned, for to do so "sounds a muted death knell"<sup>54</sup> of the intended application of *Monell*.

The Fifth Circuit first adopted the final authority, or ultimate repository of power, rationale in *Familias Unidas v. Briscoe*.<sup>55</sup> In *Familias Unidas*, the official obtained his policymaking authority by virtue of his elected office. The court stated that:

at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under section 1983.<sup>56</sup>

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49. *Wilson v. Taylor*, 733 F.2d 1539, 1546 (11th Cir. 1984). Note that before October 1981, what is now the Eleventh Circuit was part of the Fifth Circuit.

50. 728 F.2d 772-73 (Politz, J., dissenting).

51. *Id.* at 773 (Politz, J., dissenting).

52. *Id.* (quoting *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037-38).

53. 735 F.2d 861, 862 (5th Cir. 1984).

54. 728 F.2d at 774 (Politz, J., dissenting).

55. 619 F.2d 391 (5th Cir. 1980).

56. *Id.* at 404 (quoting *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037-38).

This rationale was repeated in a number of subsequent cases. In *Schneider v. City of Atlanta*,<sup>57</sup> the court stated that whether a city had delegated final authority in a given area to a given official is a question of fact to be decided by the trier of facts.<sup>58</sup> In *Van Ooteghem v. Gray*,<sup>59</sup> the court noted that the only way a local governmental entity can establish official policy is through the actions of an individual or group of individuals who possess final authority.<sup>60</sup> A theory so deeply rooted in the recent jurisprudence of the Fifth Circuit should not be cast aside so easily.

In the place of the "final authority" rationale, the court's *per curiam* opinion offered the definition of "official policy."<sup>61</sup> Under this definition, an action of an appointed official that is inconsistent with the city's written regulations or undertaken without the knowledge of city policymakers is normally attributable only to the official and cannot constitute official policy within the meaning of *Monell*. This interpretation negates the possibility that municipal liability will be imposed for the unconstitutional acts of an appointed official that are inconsistent with the city's written regulations, unless the acts are part of a widespread custom of which the municipality's governing body had actual or constructive knowledge. Municipalities may thus frequently immunize themselves from liability under section 1983 for unconstitutional actions of their officials "merely by articulating facially constitutional policies in the substantive areas in which the officials perform their delegated duties."<sup>62</sup> In effect, *Monell's* standard for municipal liability has no meaningful application outside a formally adopted or announced policy that is facially unconstitutional. It is recognized, however, that widespread custom which is unconstitutional may be grounds for liability under section 1983.<sup>63</sup>

By disregarding the final authority rationale in defining "official policy," the Fifth Circuit has effectively limited the scope of *Monell*. It is disturbing that the court cast aside such a recent doctrine in such an off-handed manner with so little explanation. Of course the Supreme Court may properly define the scope of *Monell*. Since the circuits disagree on *Monell's* interpretation,<sup>64</sup> the Supreme Court has an appropriate opportu-

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57. 628 F.2d 915 (5th Cir. 1980).

58. *Id.* at 920.

59. 628 F.2d 488 (5th Cir. 1980), modified on other grounds, 654 F.2d 304 (5th Cir. 1981).

60. 628 F.2d at 494. For other Fifth Circuit opinions espousing the final authority rationale, see *Thomas v. Sams*, 734 F.2d 185 (5th Cir. 1984); *Hart v. Walker*, 720 F.2d 1443 (5th Cir. 1983); *Bowen v. Watkins*, 669 F.2d 979 (5th Cir. 1982).

61. See *supra* text accompanying note 33.

62. 728 F.2d at 771 (Politz, J., dissenting).

63. Discussion of custom is beyond the scope of this casenote. See generally Schnapper, *supra* note 36.

64. See, e.g., *Williams v. Butler*, 746 F.2d 431, 437-38 (8th Cir. 1984) (The Eighth Circuit rejected the Fifth Circuit's opinion in *Bennett*, distinguishing *Bennett* from *Williams* on narrow grounds.).

nity to intervene to explain just what actions constitute official policy. In confronting this question, the author submits that the Court should extend *Monell's* application beyond the contours expressed by the Fifth Circuit in *Bennett*; otherwise *Monell's* prescription for municipal liability would be practically meaningless. To avoid a situation where a victim of an unconstitutional application of a municipal ordinance is faced with a choice between suing a municipality which is immune because the ordinance is consistent with constitutional norms, and suing an official who may be immune,<sup>65</sup> the Court should recognize a more expansive view of *Monell* than was recognized by the Fifth Circuit in *Bennett*. If an official who is the final or ultimate repository of authority violates a person's constitutional rights, the municipality should be liable to that person under section 1983.

*Jane Geralyn Politz*

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65. 728 F.2d at 774 (Politz, J., dissenting).