FIRST AMENDMENT RETALIATION SUITS: MUNICIPAL ACCOUNTABILITY

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The last twenty-five years have witnessed an enormous proliferation of litigation involving government power to punish employees for engaging in arguably protected first amendment activity.[1] A basic tension exists between the government's right to operate effectively and efficiently and the employee's right to enjoy the same first amendment freedoms of other citizens.[2] In addition, the public's interest in receiving employees' communications regarding the operation of government is often at stake.[3] Unfortunately, the Supreme Court has sent conflicting signals to the lower courts as to how such tension should be resolved, resulting in much confusion as to which

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1. *See infra* text accompanying notes 38-65.

2. *See infra* text accompanying notes 16-18.

3. *See infra* text accompanying notes 64-75. Several recent Supreme Court decisions have recognized that the first amendment protects not only the right to speak but also the corollary right to receive information. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection is afforded to the communication, to its source and to its recipients both."); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive. . . ."). This right to receive information has been viewed as especially critical where the speech concerns misconduct by government officials. *See* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521, 558 (arguing that this speech "be accorded a level of constitutional protection higher than that given any other type of communication").

precedent should control, what standards to utilize, and how to allocate burdens of proof between the parties.[4]

Although the case law has involved employees at all levels of government employment, this article explores the issue at the municipal level. Recent Supreme Court decisions permitting suits against municipalities for civil rights violations have opened a critical avenue of relief to the government employee allegedly retaliated against for having engaged in protected speech.[5] These decisions, however, leave unresolved several questions regarding municipal liability, which are particularly troublesome in the context of retaliation suits. The Supreme Court has held that municipalities may be liable only for their official policies or customs.[6] Since a great majority of employment decisions are not based on an officially adopted policy and courts have not yet established a definition of "custom," the question of municipal accountability remains uncertain.[7] Finally, even assuming government liability, the question of assessing the value of first amendment rights in order to grant appropriate and effective damages has proved to be especially problematic.[8]

This article provides an analytic framework for resolving these critical issues that arise in litigating first amendment retaliation suits. First the legal issues involving the first amendment are explored. Then the question of municipal accountability for employee decisions is analyzed. Finally, the damage issue is clarified.

I. THE FIRST AMENDMENT AS PROTECTING THE SPEECH OF GOVERNMENT EMPLOYEES

The notion that government may not retaliate against its employees for engaging in first amendment activities has evolved only during the past twenty-five years. In earlier times, courts universally held that government employees had no such rights. In his classic articulation of the "right-privilege distinction," Justice Holmes in *McAuliff v. Mayor of New Bedford*[9] stated that "the petitioner may have a constitutional right to talk politics, but he has no constitu-

4. *See infra* text accompanying notes 16-45.

5. *See* Owen v. City of Independence, 445 U.S. 662 (1980); Monell v. Department of Social Servs., 436 U.S. 658 (1978).

6. Monell v. Department of Social Servs., 436 U.S. 662, 690-95 (1978).

7. *See infra* notes 116-49 and accompanying text.

8. *See infra* text accompanying notes 150-204.

9. 155 Mass. 216, 29 N.E. 517 (1892).

tional right to be a policeman."[10] Holmes went on to explain that government employees take their employment on the terms that are offered to them.[11] The United States Supreme Court still espoused this view as late as 1952 in the case of *Adler v. Board of Education*,[12] which upheld a provision of the New York Civil Service Law disqualifying from the civil service and public school system any person who "advocates, advises or teaches" governmental overthrow by force or violence or who organizes or joins any group advocating such doctrine.[13] The Court reasoned that public school teachers have the right to assemble, speak, think and believe as they will, but they have no right to work for the state and the school system on their own terms.[14] In short, the state has the right and duty to screen teachers as to their fitness in order to maintain the integrity of the schools as part of an ordered society.[15]

It was not until 1967 that the Supreme Court declared that government cannot condition employment on relinquishing first amendment rights.[16] The Court subsequently clarified its position in *Pickering v. Board of Education*,[17] finding that a public school teacher could not be dismissed for writing a letter to a local newspaper criticizing the School Board's allocation of funds. Justice Marshall characterized the problem as requiring a balance "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[18] He specifically refused to set down a general standard, but noted that the dispute implicated no question of maintaining discipline by superiors or harmony among co-workers.[19] In addition,

10. *Id.* at 220, 29 N.E. at 517. For a discussion of the development and eventual decline of the "right-privilege" distinction, see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

11. 155 Mass. at 220, 29 N.E. at 518.

12. 342 U.S. 485 (1952).

13. *Id.* at 487-88 n.3.

14. *Id.* at 492.

15. *Id.*

16. *See* Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967) ("the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected").

17. 391 U.S. 563 (1968).

18. *Id.* at 568.

19. *Id.* at 570.

the employee's speech concerned an issue of "legitimate public concern," requiring free and open debate.[20]

Justice Marshall thus suggested that the government cannot penalize its employees for making even false, negligent statements about matters of public concern unless it can demonstrate an overriding interest, for example, the need for strict confidentiality or for preservation of harmony in the work place.[21] The latter concerns developed into the so-called "*Pickering* defense" to first amendment retaliation suits—a defense that the government has had to raise and prove.[22] In addition, Marshall noted in dicta that an employee whose statements were entirely without foundation so as to evidence his general incompetence would not be protected by the first amendment.[23] In essence, the dismissal under these circumstances would then be for reasons other than protected speech.

The Supreme Court elaborated on the *Pickering* analysis in its next major retaliation case, *Mt. Healthy City School District v. Doyle*.[24] A school teacher claimed that the Board refused to renew his contract because he had exercised first amendment rights. Doyle, however, had engaged in several questionable incidents not involving protected speech, that is, he argued with other teachers and staff and

20. *Id.* at 571-72.

21. *Id.* at 572-73.

22. The Court in *Pickering* suggested that the government had to prove the restriction was necessary to prevent actual impairment of the efficient operation of the services it performs as an employer. 391 U.S. at 568-73. Then the court was to balance the government's interests against countervailing first amendment interests. *Id.* at 568, 573. Courts of appeals read the decision as requiring defendant to raise and establish the unprotected character of the employee's speech. *See, e.g.*, Columbus Educ. Ass'n v. Columbus City School Dist., 623 F.2d 1155, 1159 (6th Cir. 1980) (defendant carries the burden of proving that its interest in the efficient administration of education outweighs the plaintiff's free speech rights); Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976) (the state must be able to show that the prohibited conduct would materially and substantially interfere with the operation of the school); Smith v. United States, 502 F.2d 512, 517 (5th Cir. 1974) (in order for the government to constitutionally remove an employee from government service for exercising his first amendment rights, it must "clearly demonstrate that the employee's conduct substantially and materially interferes with the discharge of duties and responsibilities in such employment"); Smith v. Losee, 485 F.2d 334, 339 (10th Cir. 1973) ("the defense must assume the burden of showing that the plaintiff's acts materially and substantially interfered with the requirements of appropriate discipline in the operation of the school").

23. 391 U.S. at 573 n.5.

24. 429 U.S. 274 (1977).

made obscene gestures to girls in the cafeteria.[25] The alleged protected incident involved Doyle's telephone call to a disc jockey at a radio station regarding a newly adopted teacher dress-code. The termination letter informed Doyle that the basis for the dismissal was his lack of tact in handling professional matters.[26] Specific references were made to both the radio station incident and to the obscene gesture incident. The district court found that the first amendment clearly protected the telephone call to the radio station, and that since it played a substantial part in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with back pay.[27] The Sixth Circuit affirmed in a per curiam opinion.[28]

The Supreme Court unanimously upheld the lower court's finding that the speech was constitutionally protected.[29] It cited *Pickering*, noting that there was "no suggestion by the Board that Doyle violated any established policy, or that the Board's reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action making the memorandum public."[30] Since the record was unclear, however, as to whether the school board would have failed to renew Doyle's contract in the absence of the radio station incident, the Supreme Court felt it was necessary to remand for further proceedings. The Court established the following standard for consideration upon remand:

1. Initially the plaintiff bears the burden to show both that his conduct was constitutionally protected and that such conduct was a substantial or a motivating factor in the Board's decision not to rehire him.[31]
2. The burden then shifts to the defendant to show by a preponderance of the evidence that it would have reached the same decision as to plaintiff's reemployment even in the ab-

25. *Id.* at 281-82.

26. *Id.* at 282-83.

27. *Id.* at 283.

28. 529 F.2d 524 (6th Cir. 1975).

29. 429 U.S. at 284.

30. *Id.*

31. *Id.* at 287. Note that this "bad motive" standard was heavily criticized by Professor Thomas Emerson as placing too heavy a burden on one deprived of first amendment rights. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 470 (1980). Provided courts adopt the prima facie case analysis suggested in this article, *infra* notes 46-49 and accompanying text, the burden is not an unreasonable one.

sence of the protected conduct.[32]

The decision thus adds a new defense to a retaliation suit. Even if the plaintiff survives *Pickering*, because the government fails to prove an overriding interest in suppressing the employee's speech, he may still lose his case if the government can establish that it would have made the same employment decision even absent the protected conduct.

This analysis is reflected in the Supreme Court's subsequent decision of *Givhan v. Western Line Consolidated School*.[33] The Court initially looked to *Pickering* to establish that the communication was protected by the Constitution. It stated that the school had no greater interest in limiting a teacher's contribution to public debate than a similar contribution by any member of the general public.[34] As in *Pickering*, the Court suggested that the agency's institutional efficiency might be threatened when an employee personally confronted his superior.[35] But in this case, such was not at stake. The Court went on, however, to remand in light of the intervening *Mt. Healthy* decision in order to give the school the opportunity to establish that it would have made the same decision not to rehire even without the protected conduct.[36] Although the Court of Appeals had rejected this defense, the Supreme Court found that the issue should be heard by the trial court.[37]

The appellate courts have adopted divergent views as to the resolution of employee retaliation suits, reflecting disagreement regarding the proper application of the *Pickering* and *Mt. Healthy* standards.[38]

32. 429 U.S. at 287.

33. 439 U.S. 410 (1979).

34. *Id.* at 416.

35. *Id.* at 415 n.4.

36. *Id.* at 417.

37. *Id.*

38. The confusion among the circuits is noted in Wren v. Jones, 635 F.2d 1277, 1285 (7th Cir. 1980). The court there applies *Mt. Healthy* analysis, but then notes that the same result would be reached under *Pickering*. *Id.* at 1286. It makes reference to two conflicting appellate court decisions, *i.e.*, Janusaitus v. Middlebury Volunteer Fire Dep't., 607 F.2d 17, 28 (2d Cir. 1979), in which the court held that *Pickering* and not *Mt. Healthy* should be used to resolve an employee dismissal dispute, and Rosaly v. Ignacio, 593 F.2d 145, 148-49 (1st Cir. 1979), in which the court relied solely on *Mt. Healthy* in a similar case. Other courts have also ignored the *Pickering* balancing approach. *See, e.g.*, Selzer v. Fleisher, 629 F.2d 809 (2d Cir. 1980) (the majority applied the *Mt. Healthy* test without mentioning *Pickering*, which the concurrence cited as improper); Williams v. Board of Regents, 629 F.2d 993 (5th Cir. 1980) (no need to submit a *Pickering* issue to the jury), *cert. denied*, 452 U.S. 926 (1981). Other courts

The Supreme Court's cursory references to *Pickering* in its most recent retaliation cases suggests the continued vitality of the earlier ruling,[39] but it is unclear when and how the balancing of interests is to occur. As noted previously, after *Pickering* many lower courts imposed the burden on the defendant to raise the "*Pickering* defense."[40] The Supreme Court's statement in *Mt. Healthy* that the plaintiff initially carries the burden "to show that his conduct was constitutionally protected"[41] should not be interpreted as having altered the government's burden. In *Mt. Healthy*, the Court cited *Pickering* and then summarily concluded that plaintiff's speech was clearly protected.[42] Some federal courts have erroneously read the decision to impose on the plaintiff the burden of proving the protected nature of his activity in order to survive summary judgment for the defendant.[43] Other courts, while noting that the burden rests with the plaintiff, have proceeded to assume the speech to be protected[44] in order to first consider a *Mt. Healthy* defense. Still others have avoided the issue, simply stating that the court must initially decide whether the

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have utilized a three-prong analysis, combining *Mt. Healthy* and *Pickering* to require plaintiffs to establish the protected nature of the speech, and that the speech was a motivating factor, then shifting the burden to the defendant to show he would have made the same decision even without the protected activity. *See, e.g.*, Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981); Anderson v. Evans, 660 F.2d 153 (6th Cir. 1981); Trotman v. Board of Trustees, 635 F.2d 216 (3d Cir. 1980).

There is also confusion as to who should do the balancing, *i.e.*, judge or jury, and at what point the balancing should be done. *See infra* text accompanying notes 70-74. Note also that several courts have pointed out the inappropriateness of granting summary judgement to defendants in cases where a *Pickering* balance is required. *See, e.g.*, Kim v. Coppin State College, 662 F.2d 1055 (4th Cir. 1981); Nathanson v. United States, 630 F.2d 1260 (8th Cir. 1980).

39. *See supra* text accompanying note 30 for a discussion of *Mt. Healthy*. *See also supra* text accompanying note 37 for a discussion of *Givhan*.

40. *See supra* note 22.

41. 429 U.S. at 284.

42. *Id.*

43. *See, e.g.*, Marcum v. Dahl, 658 F.2d 731 (10th Cir. 1981) (holding that the speech was not a matter of public concern and thus unprotected); Correa v. Nampa School Dist., 645 F.2d 814 (9th Cir. 1981) (upholding dismissal based on plaintiff's failure to establish that the conduct was constitutionally protected); Foster v. Ripley, 645 F.2d 1142 (D.C. Cir. 1981) (upholding summary judgment for defendant because employee failed to establish the speech was constitutionally protected); Endicott v. Huddleston, 644 F.2d 1208 (7th Cir. 1980) (affirming district court's judgment n.o.v. based on plaintiff's failure to establish that the speech was protected).

44. *See infra* note 49.

first amendment protects the speech.[45]

In order to safeguard the vital first amendment freedoms at stake, while at the same time recognizing government interests, the plaintiff should initially carry the burden of establishing only: 1) that he engaged in speech or conduct that is "arguably" protected because the speech or conduct falls within the scope of the first amendment;[46] and 2) that the first amendment incident was a motivating factor in the alleged retaliatory action. This analysis comports with the Supreme Court's reasoning in the *Mt. Healthy* and *Pickering* decisions.[47] It requires the plaintiff to present a prima facie case without relieving the state of its usual obligation to justify the suppression of speech with compelling reasons.[48] Furthermore, by imposing upon the plaintiff only the burden of showing that his speech is arguably protected by the first amendment, a difficult constitutional balance may be avoided in all instances in which the government relies on a *Mt. Healthy* defense, that is, where it can prove that the speech incident, even if protected, was not crucial to its employment decision.[49]

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45. *See, e.g.*, Kim v. Coppin State College, 662 F.2d 1055 (4th Cir. 1981); Williams v. Board of Regents, 629 F.2d 993 (5th Cir. 1980), *cert. denied*, 452 U.S. 926 (1981); Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980).

46. In the context of retaliation suits, this generally would require the employee to establish that the retaliatory action had a chilling effect on the exercise of his first amendment rights. *See infra* notes 75-76 and accompanying text. Also note that in Perry v. Sindermann, 408 U.S. 593 (1972), the Supreme Court held that the plaintiff presented a "bona fide constitutional claim," precluding summary judgment, based on simple allegations that non-retention resulted from his testimony before legislative committees which was protected by the first amendment. *Id.* at 598.

47. Again note that although the Court in *Mt. Healthy* suggested that plaintiff carry the burden of proving his speech to be protected, in reality it brushed over this requirement. *See supra* note 42 and accompanying text. Furthermore, the Court in *Pickering* suggested that the defendant carries the burden of proving that its interest in efficient administration outweighs plaintiff's free speech. 391 U.S. at 568. *See supra* note 22.

48. *See infra* notes 57-58 and accompanying text.

49. Several courts have recognized the importance of avoiding the constitutional issue and have, therefore, assumed the protected nature of the speech, proceeding oftentimes to conclude that the plaintiff had failed to establish that defendant's action was retaliatory. *See, e.g.*, McClure v. Cywinski, 686 F.2d 541 (7th Cir. 1982) (upholding a judgement n.o.v. that a reasonable jury could not have found that the employee would not have been discharged absent his assumed protected apolitical stance); Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 550-51 (5th Cir. 1982) (lack of cooperation, not speech, was the reason for dismissal and the plaintiff failed to show that non-renewal of the contract was based on the exercise of first amendment rights); Hildebrand v. Board of Trustees, 662 F.2d 439, 444 (6th Cir. 1981) (court assumed speech was protected, but defendant proved plaintiff would have been denied tenure

Assuming plaintiff presents a prima facie case, the burden would shift to the defendants who could raise two possible affirmative defenses.[50] First, as previously noted, the defendant could rebut the prima facie case by proving by a preponderance of the evidence that it would have made the same decision even without the alleged protected speech incident.[51] For example, in *Mt. Healthy* the incidents of impropriety having nothing to do with protected speech could be utilized by the defendants to prove that the speech incident really was not critical to its termination decision.[52] Again, it should be recalled

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even without the protected activity); Lindsey v. Mississippi Research and Dev. Center, 652 F.2d 488, 492 (5th Cir. 1981) (per curiam) (plaintiff failed to establish speech as a motivating factor); Mayberry v. Dees, 663 F.2d 502, 510 (4th Cir. 1981) (failure to recommend tenure was based on the need to reduce the number of faculty members, not first amendment activity); Stone v. Board of Univ. Sys., 620 F.2d 526 (5th Cir. 1980) (denial of raise was based on valid school policy, not protected speech); Dohne v. Board of Regents, 620 F.2d 526 (5th Cir. 1980) (defendants carried their burden under *Mt. Healthy* of establishing that they would have made the same decision even absent the protected conduct); Smith v. Price, 616 F.2d 1371 (5th Cir. 1980) (other reasons for plaintiff's dismissal, including conduct which was prohibited by valid rules and regulations, justified the defendant's action). Note that this approach of avoiding unnecessary constitutional issues comports with the well established doctrine of necessity which Justice Brandeis discussed in Ashwander v. T.V.A., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). *See also* N.Y. Transit Auth. v. Beazer, 440 U.S. 568, 582-83 n.22 (1979); Rescue Army v. Municipal Ct., 331 U.S. 549, 568-69 (1947). This precedent was specifically cited in Tanner v. McCall, 625 F.2d 1183 (5th Cir. 1980) to justify its avoidance of the first amendment issue. *Id.* at 1190.

50. The significance of characterizing these defenses as affirmative defenses is two-fold: First it requires the defendant to properly raise the issue or it will be deemed waived. FIELD, CIVIL PROCEDURE 41 (4th Ed. 1978) (citing FED. R. CIV. P. 12(b), 8(c) to support this conclusion). *See also* Mitchell v. Williams, 420 F.2d 67 (8th Cir. 1969); CLARK, CODE PLEADING § 97 (2d ed. 1947); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 4.9 (2d ed. 1977). Second, it is generally established that the party with the burden of pleading also carries the burden of proof. CLARK, *supra* at § 607; F. JAMES & G. HAZARD, *supra* at § 7.8; E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 75 (1956).

This allocation of burdens is further justified by the traditional rule that the burden should rest with the party having greater access to the facts. F. JAMES & G. HAZARD, *supra* at § 7.8; E. MORGAN, *supra*, at 75 n.98. In the case of retaliation suits, the government is in a better position to establish that its operation demands the suppression of employees' speech. Also implicit in any analysis are considerations of policy and fairness. F. JAMES & G. HAZARD, *supra*, at § 7.8; Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 11-12 (1959). Policy concerns have long favored protection of vital first amendment concerns, again supporting a requirement that the defendant carry the burden of justifying his actions.

51. *See Mt. Healthy*, 429 U.S. at 287.

52. *Id.* at 286-87.

that the Supreme Court's primary concern in *Mt. Healthy* was that an employee not be permitted to insulate himself by simply engaging in protected conduct.[53]

Alternatively, the defendant can argue that although the speech incident was a motivating and critical factor in its decision, the speech must give way to paramount state interests.[54] The nature of this second defense requires further elaboration. Although in *Pickering* the Court stated that it was a matter of balancing the first amendment rights against the government concerns, the Court found that the government failed to assert any substantial interests.[55] Thus the case provides little guidance as to how to balance when valid claims are raised by both parties. Subsequent Supreme Court decisions, however, have recognized the critical weight that should be accorded first amendment rights in our society.[56] A close analysis of these decisions suggests that the burden on the defendant should be to prove that the restriction of speech is necessary to the achievement of some important government interests, and that it cannot achieve its goal through less drastic means.[57] Many Supreme Court cases have indicated that the State cannot restrict the speech of its employees absent a compel-

53. *Id.* at 286. *See also supra* note 49 for cases in which defendants sustained this burden.

54. The defendants were successful in establishing the unprotected nature of the speech in several cases. *See infra* notes 61-62.

55. The Court basically concluded that the teacher's dismissal could not be supported by the government's interest as an employer. The school board had no factual evidence that Pickering's speech had actually impaired the operation of the school system, nor had it established that Pickering's public statements were detrimental to the school system's interests. 391 U.S. at 570-71.

56. *See infra* notes 57-58.

57. One of the first cases imposing least drastic means analysis was Shelton v. Tucker, 364 U.S. 479 (1960) in which the Court struck down an Arkansas statute compelling each teacher, as a condition of employment in a public school, to file annually an affidavit listing every organization with which he or she had been affiliated within the previous five years. While recognizing the state's interest in investigating the competence of prospective teachers, the Court was troubled by the overbreadth of the requirement. *Id.* at 488. More recently in Elrod v. Burns, 427 U.S. 347, 362 (1976), the Court indicated that employment cannot be conditioned on religious or political beliefs absent some vital government end and means which are least restrictive in achieving that end. *See also* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Comment, *CIA and First Amendment*, 82 COLUM. L. REV. 662, 678-82 (1982) (citing lower court cases which have used least drastic means analysis to uphold employee's speech); Comment, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

ling justification.[58]

Drawing on this precedent, the Fifth Circuit has required proof that "the regulation of speech was necessary to prevent a material and substantial interference with the operation of the public department."[59] Other circuits similarly have required the government to establish that the speech substantially disrupts the workplace,[60] or that it demonstrates the employee's total incompetence or lack of qualifications for the position,[61] or that it completely undermines the

58. *See, e.g.*, Branti v. Finkel, 445 U.S. 507, 515-16 (1980); Elrod v. Burns, 427 U.S. 347, 362-63 (1976); Buckley v. Valeo, 424 U.S. 1, 64-65 (1976). Note the one exception has been the Court decisions dealing with the government's right to limit the employee's involvement in partisan political activities. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 226 n.23 (1977); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564 (1973); United Pub. Workers v. Mitchell, 330 U.S. 75, 95-96 (1947). Such restrictions have been upheld as remedial, noncensorial provisions actually intended to further the first amendment rights of employees by shielding them from being coerced into supporting their employers' political campaigns.

59. Van Ooteghem v. Gray, 628 F.2d 488, 492 (5th Cir. 1980). While *Pickering* suggested that insubordination and disharmony are sufficient justification to curtail speech, most lower courts have replaced these factors with a test requiring "material and substantial disruption," based on the Court's language in Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503, 513 (1969).

60. *See, e.g.*, Kim v. Coppin State College, 662 F.2d 1055, 1065 (4th Cir. 1981) (the professor's speech in joining a picket line is protected unless it *substantially* interferes with school activity); Key v. Rutherford, 645 F.2d 880, 885 (10th Cir. 1981) (performance and operational efficiency objections must be substantial and legitimate before they can serve as a basis for discipline or discharge of a public employee); Bickel v. Burkhart, 632 F.2d 1251, 1257 (5th Cir. 1980) (plaintiff's criticism of the department had no adverse effect on the efficiency of the public services performed); Nathanson v. United States, 630 F.2d 1260, 1263 (8th Cir. 1980) (summary judgment is permitted only where the uncontradicted facts show that plaintiff's expression hindered the operation of the department); Tygrett v. Barry, 627 F.2d 1279, 1282 (D.C. Cir. 1980) (employee's discharge cannot be upheld unless it impairs the employee's ability to perform or interferes with the efficient operation of the agency); McGill v. Board of Educ., 602 F.2d 774, 777 (7th Cir. 1979) (the employee's speech is protected unless it is so disruptive as to impede the employee's performance or to interfere with the operation of the government); Rosada v. Santiago, 562 F.2d 114, 117 (1st Cir. 1977) (plaintiff's criticism did not cause significant interference with the efficient operation of the department and was therefore protected).

61. This defense was first suggested by the Court in *Pickering*. *See supra* note 22 and accompanying text. *Accord* Anderson v. Evans, 660 F.2d 153 (6th Cir. 1981) (the teacher's inflammatory remarks cast doubt on her judgment and competence as a school teacher); Correa v. Nampa School Dist., 645 F.2d 814 (9th Cir. 1981) (the court affirmed the limitation on plaintiff's associational ties finding an impairment of plaintiff's ability to fulfill his job duties).

effective working relationships with co-workers or superiors.[62] Thus, although the Court in *Pickering* suggested an ad hoc balancing in assessing the protection to be afforded employee speech, many appellate courts have clearly imposed on the government the burden of establishing that the restriction is necessary to prevent actual impairment of the efficient operation it performs.[63]

Courts have been especially reluctant to suppress employee speech concerning the functioning of government.[64] Several commentators have noted the importance of the public's interest in discovering official improprieties and government waste,[65] a concern reflected in

62. *See, e.g.*, Marcum v. Dahl, 658 F.2d 731 (10th Cir. 1981) (statements made to the press regarding internal controversy disrupted the team and the program and were thus unprotected); Foster v. Ripley, 645 F.2d 1142 (D.C. Cir. 1981) (plaintiff's activity was unprotected because it completely disrupted the working relationship of the employees); Smalley v. City of Eatonville, 640 F.2d 765 (5th Cir. 1981) (plaintiff's letter threatened serious disruption of working relationship which required cooperation and loyalty); Janusaitis v. Middlebury Volunteer Fire Dept., 607 F.2d 17 (2d Cir. 1979) (a fireman's verbal attack on persons with whom he had to function in the closest coordination was unprotected); Sprague v. Fitzpatrick, 546 F.2d 560 (3d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977) (public criticism of the district attorney by his first assistant precluded any future working relationship between the parties and hence was unprotected). *Contra* D'Andrea v. Adams, 626 F.2d 469 (5th Cir. 1980) (stressing the *Pickering* concept that employees can disagree with administrators without being subjected to retaliation, the court found that plaintiffs statements were not so personal or of such an intimate nature as to undermine seriously the effectiveness of the working relations).

63. An exception to the strict standard has been developed by some courts where the speech of police or firemen is implicated. For example, in Wilson v. Taylor, 658 F.2d 1021, 1027 (5th Cir. 1981), the court noted that more deference may be given the state interest in preserving the morals and integrity of police departments than in other contexts. The same point was made regarding a volunteer fire department. *See* Janusaitis v. Middlebury Volunteer Fire Dept., 607 F.2d 17 (2d Cir. 1979). *Contra* Williams v. Board of Regents, 629 F.2d 993 (5th Cir. 1980), *cert. denied*, 452 U.S. 926 (1981). The Fifth Circuit rejected the defendant's attempt to justify its action based on the necessity of maintaining discipline in its police department, but Justice Rehnquist, dissenting from the denial of certiorari, argued that the appellate court struck the wrong balance. *Id.* at 928-30 (Rehnquist, J., dissenting).

64. Several cases applying *Pickering* have explicitly considered the public's interest in receiving employee's communication in determining whether the speech restriction is valid. *See, e.g.*, Allaire v. Rogers, 658 F.2d 1055 (5th Cir. 1981); Foster v. Ripley, 645 F.2d 1142, 1148 (D.C. Cir. 1981); Williams v. Board of Regents, 629 F.2d 993, 1003 (5th Cir. 1980), *cert. denied*, 452 U.S. 926 (1981); Downing v. Williams, 624 F.2d 612, 624 (5th Cir. 1980); Lindsey v. Board of Regents, 607 F.2d 672, 674 (5th Cir. 1979); Hanneman v. Breier, 528 F.2d 750, 755 (7th Cir. 1976); Meehan v. Macy, 392 F.2d 822, 837 (D.C. Cir.), *modified*, 425 F.2d 469 (1968), *vacated per curiam*, 425 F.2d 472 (1969); Hoope v. City of Chester, 473 F. Supp. 1214, 1223 (E.D. Pa. 1979).

65. *See* Blasi, *supra* note 2; Comment, *First Amendment Standards for Subsequent*

Congress' recent passage of the Civil Service Reform Act of 1978.[66] The central purpose of the Act is to provide increased protection for "whistle-blowers," federal employees seeking to disclose wrongdoing in the government. The Act specifically authorizes the Merit Systems Protection Board to order "corrective action" by government agencies whose officials have sought to retaliate against "whistle-blowers."[67] The Supreme Court in *Pickering* stressed this same interest in receiving communication from government employees who are "most likely to have informed and definite opinions."[68]

Many lower federal courts have relied upon this same factor in upholding the first amendment rights of state or local government employees. In *Williams v. Board of Regents*,[69] the Fifth Circuit concluded that the plaintiff was communicating a matter of public concern, a critical factor in balancing the interest of the employee as a citizen against the interest of the government: "When the matter is as important to the public as that involved here, the employee's right to speak must be vigorously protected if the public is to be informed."[70] The case involved falsification of an official document by one official for the protection of another official. The court viewed this as a grave miscarriage of the public trust and concluded that the trial court did not err in balancing in favor of protection of the first amendment rights and in refusing to even submit the issue to the jury.[71] The

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Punishment of Dissemination of Confidential Government Information, 68 CALIF. L. REV. 83, 90 (1980). *See also* Arnett v. Kennedy, 416 U.S. 134, 228 (1974) (Marshall, J., dissenting) (stressing the importance of assuring public employees of their right to "inform the public of abuses of power and of the misconduct of their superiors").

66. 5 U.S.C. §§ 1101-8913 (Supp. III 1979).

67. *Id.* at § 2301(b)(9). Congress intended these provisions to encourage employees to disclose agency wrongdoings and abuse by eliminating the prospect of prejudice to their careers. S. REP. NO. 969, 95th Cong., 2d Sess. 22. The Act details a list of prohibited personnel practices, including appointment, promotion, transfer, reemployment, performance evaluation, decisions with regard to paid benefits, awards, etc 5 U.S.C. § 2302(b).

68. 391 U.S. at 572. The Court went on to note that when the subject matter of the communication pertains to the operation of government services, the public's interest was particularly strong because it lies at "the core value of the Free Speech Clause of the First Amendment." *Id.* at 573. At least a plurality of the Supreme Court has similarly adopted the view that some areas of human concern are more important for first amendment purposes than others, and that political speech is thought to rank very high. *See* New York Times v. Sullivan, 376 U.S. 254 (1964).

69 629 F.2d 993 (5th Cir. 1980), *cert. denied*, 452 U.S. 926 (1981).

70. *Id.* at 1003.

71. *Id.*

appellate court affirmed that the *Pickering* defense was unavailable in the case as a matter of law.[72] In *Allaire v. Rogers*,[73] the Fifth Circuit summarily concluded that since the speech involved concerned issues of public importance, it merited constitutional protection "absent proof of false statements knowingly or recklessly made."[74] These cases reflect the need to protect rigorously the public's right to receive information necessary to check government abuse.[75] This should serve as a model for other courts facing the same problem.

Finally, it should be noted that the discussion concerning retaliation applies not only to dismissals but also to other retaliatory actions, such as demotion, failure to reappoint, reduction in pay, and transfers. Although there is some division among the lower courts, most have found the same standards should be applied to any type of retaliatory action that is likely to chill the exercise of constitutionally protected rights.[76] The *Pickering* decision referred to this standard,[77]

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72. *Id.*

73. 658 F.2d 1055 (5th Cir. 1981).

74. *Id.* at 1065. The court relied upon the analysis in *Pickering* in which a similar analogy was drawn to the New York Times malice standard used in libel actions where the object of the libel is a public official or public figure. *See*, *Pickering*, 391 U.S. at 574. Overturning the trial court's ruling that speech was not a motivating factor, this court proceeded to uphold the employee's lobbying efforts as "obviously" entitled to first amendment protection because of their public importance.

75. *See supra* note 3.

76. The court in Stone v. Board of Regents, 620 F.2d 526 (5th Cir. 1980) noted the conflict among courts as to whether public employees can maintain actions based on a claim that their employer altered the conditions of employment. *Id.* at 529 n.7. The court cited McGill v. Board of Educ., 602 F.2d 774 (7th Cir. 1979) (a retaliatory transfer gives rise to a first amendment claim), and contrasts it with Morey v. Indiana School Dist., 312 F. Supp. 1257, 1262 (D. Minn. 1969), *aff'd*, 429 F.2d 428 (8th Cir. 1970) (denial of usual scheduled salary increase did not rise to a constitutional level). Rejecting the latter, the Fifth Circuit then assumed that denial of increase in salary or granting of an inadequate raise, if done in retaliation, is an actionable injury. *See also* Bart v. Teford, 677 F.2d 622, 625 (7th Cir. 1982) (subjecting an employee to harassment and ridicule for exercising the right of free speech is actionable if found to deter a person from that exercise); Bickel v. Burkhart, 632 F.2d 1251, 1255 n.6 (5th Cir. 1980) (denial of promotion constitutes a violation of the first amendment); Swilley v. Alexander, 629 F.2d 1018 (5th Cir. 1980) (placement of a letter of reprimand in a teacher's personnel file implicated the first amendment); Yoggerst v. Stewart, 623 F.2d 35 (7th Cir. 1980) (the court reversed the trial court's decision that the incident did not rise to a constitutional level, finding that the placement of a verbal reprimand in plaintiff's file might have a chilling effect on the exercise of free speech, creating a prima facie case); Simpson v. Weeks, 570 F.2d 240 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979) (retaliatory transfer is actionable); Rosada v. Santiago, 562 F.2d 114 (1st Cir. 1977) (a transfer constitutes a first amendment violation, although the court

as do other Supreme Court cases that stress the deterrent effect the condition exerts on the exercise of constitutional rights rather than the condition itself.[78] Although some retaliatory actions, such as simply a verbal reprimand may not result in the award of significant damages,[79] this should not affect the question of whether the plaintiff has established a prima facie case of a first amendment violation. The only inquiry should be whether the action taken would chill the exercise of first amendment rights. Thus, a denial of a promotion, a transfer, a letter of reprimand placed in an employee's personnel file, or other changes in conditions of employment might all suffice to satisfy the initial burden of establishing that the employer's action implicates first amendment rights.

In short, despite some rather confusing signals from the Supreme Court, government employees should be able successfully to litigate first amendment retaliation suits unless the employer carries the burden of proving that his action was not truly motivated by the speech incident or that compelling justifications warrant the suppression of the employee's rights.

II. MUNICIPAL LIABILITY FOR RETALIATORY CONDUCT

As noted at the beginning of this article, many plaintiffs recently have brought suits against municipalities or other local government entities, alleging retaliation for the exercise of first amendment rights.[80] Until 1978 such litigation was precluded due to the Supreme Court interpretation of the key civil rights provision, 42 U.S.C. section 1983, as permitting suits only against natural persons.[81] Al-

proceeded to hold that damages in the form of past wages would be justified only if the transfer constituted an effective discharge). *See also* Note, *First Amendment Limitations on Patronage Employment Practices*, 49 U. CHI. L. REV. 181 (1982) (arguing that all adverse personnel actions taken because of an employee's political affiliation are unconstitutional).

77. 391 U.S. at 574.

78. *See* United States v. Robel, 389 U.S. 258 (1967) (statute was found to be overbroad because of its chilling effect on protected conduct); Keyishian v. Board of Regents, 385 U.S. 589, 606 (1967) (stressing that expression can be infringed "by the denial of or the placing of conditions upon a benefit or a privilege").

79. *See* Rosada v. Santiago, 562 F.2d 114 (1st Cir. 1977).

80. *See, e.g.*, Correa v. Nampa School Dist., 645 F.2d 814 (9th Cir. 1981); Smalley v. City of Eatonville, 640 F.2d 765 (5th Cir. 1981); Columbus Educ. Ass'n. v. Columbus City School Dist., 623 F.2d 1155 (6th Cir. 1980); Hoopes v. City of Chester, 473 F. Supp. 1214 (E.D. Pa. 1979).

81. 42 U.S.C. § 1983 (1976) reads:

though government officials were named as defendants in these suits, relief was limited by the existence of absolute and qualified immunity defenses.[82] The Supreme Court has held that judges, prosecutors and legislators are totally immunized from damage suits,[83] leaving their employees almost remediless.[84] Other government officials are entitled to a good faith defense, and a defendant can escape liability for damages by establishing that he neither knew, nor should have known, that he was violating constitutional rights.[85] In light of the difficulty courts have had in balancing the employee's right to engage in first amendment activity against the government interests,[86] it is clear how this defense would bar most damage awards. Unless the government official knew, or should have known, that the govern-

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> 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 in an action at law, suit in equity, or other proper proceeding for redress.

In Monroe v. Pape, 365 U.S. 167, 187 (1961) the Court held that Congress did not intend to bring municipal corporations within the ambit of § 1983.

82. *See, e.g.*, Hickman v. Valley Local School Dist. Bd. of Educ., 619 F.2d 606, 610 (6th Cir. 1980) (school board members who refused to renew teacher's contract on the basis of recommendations grounded on constitutionally impermissible reasons were entitled to immunity from damage liability); Sullivan v. Meade Independent School Dist. No. 101, 530 F.2d 799 (8th Cir. 1976) (since the school board acted in good faith in discharging plaintiff for living "without benefit of marriage" with a male friend, no damages could be awarded).

83. *See* Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutorial immunity); Pierson v. Ray, 386 U.S. 547 (1967) (judicial immunity); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislative immunity). Recently the Supreme Court added the President of the United States to this list. Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

84. The Supreme Court has confirmed that legislative immunity extends to § 1983 actions seeking declaratory or injunctive relief as well as damages. Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980). On the other hand, the Supreme Court specifically left open the question as to whether judicial immunity extends to suits for declaratory or injunctive relief, noting the division among the courts of appeals on this issue. *Id.* at 735.

85. The Court has established this immunity for a number of types of officials. *See, e.g.*, Harlowe v. Fitzgerald, 102 S. Ct. 2727 (1982) (federal executive officials); Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials and officers); Wood v. Strickland, 420 U.S. 308 (1975) (local school board members); O'Connor v. Donaldson, 422 U.S. 563 (1974) (superintendent of state hospital); Scheuer v. Rhodes, 416 U.S. 232 (1974) (state governor and other state executive officers); Pierson v. Ray, 386 U.S. 547 (1967) (law enforcement personnel).

86. *See supra* notes 38-45 and accompanying text.

ment's interests were outweighed by the employee's right to engage in first amendment activity, he could not be held liable for his actions.

In 1978, the Supreme Court opened a new door. In that year the Court held, in *Monell v. Department of Social Services*,[87] that political subdivisions, including cities, counties, school boards, welfare departments, and other public entities, may be sued as "persons" under the Civil Rights Act of 1871. Two years later, in *Owen v. City of Independence*,[88] the Court held that a municipality does not share the good faith defense of its officials. Thus, although under previous case law an employee might be entitled only to an injunction against an employer reinstating him to his position,[89] *Owen* made possible the recovery of damages from the governmental entity for violation of first amendment rights.[90]

Both *Monell* and *Owen* made clear, however, that liability was not absolute. In *Monell*, Justice Brennan expressly indicated that local government cannot be held liable solely on the basis of respondeat superior, that is, government liability cannot rest simply on the employer-employee relationship.[91] An employee must point to a "policy statement, ordinance, regulation or decision officially adopted . . . [or] governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels."[92] Thus, liability, if it is to be established, requires a causal link between some official policy or custom and the conduct that deprived a person of his first amendment rights.[93]

Although in *Owen* the Supreme Court adhered to its view that respondeat superior may not be a basis for establishing liability, the Court, at the same time, stressed the importance of enforcing section

87. 436 U.S. 658 (1978).

88. 445 U.S. 622 (1980).

89. See cases cited *supra* in note 82.

90. Recent decisions awarding substantial damages against local governments to compensate for first amendment violations are discussed *supra* note 180 and accompanying text.

91. 436 U.S. at 691.

92. *Id.* at 690.

93. The causation requirement stems from the language of § 1983 (*supra* note 81) as well as Supreme Court case law reflecting the importance of this element. *See infra* notes 118-25 and accompanying text for discussion of *Rizzo v. Goode* and its progeny. *See also* Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 234-35 (1979) (construing the causation requirement of § 1983).

1983 as a deterrent to future unconstitutional deprivations.[94] The decision also focused on the concern for equitable loss spreading, that is, the notion that the cost of improper conduct should be spread to the community as a whole on a loss spreading insurance theory.[95] The Court stated, "no longer is individual blame-worthiness the acid test of liability; the principle of equitable loss spreading has joined fault as a factor in distributing the cost of official misconduct."[96] The implication from the case is that when a local government is deemed responsible, distributing the cost to the citizenry should not be viewed as a raid on the public treasury, but rather as a means of compensating remediless victims and of preventing future misconduct. The decision thus supports a liberal reading of the policy or custom requirement.

A. *Liability for Official Policies*

The Court in *Monell* made it clear that liability can be imposed when a city's written statutes, ordinances or regulations subject or cause the deprivation.[97] Thus, if a given personnel decision can be deemed to have been "officially adopted and promulgated by [the city's] officers," *Monell* would appear to be satisfied.[98] It is highly unlikely, however, that a municipality will adopt a statute or ordinance actually authorizing retaliation for the exercise of protected speech.[99] Furthermore, although a government employer may be

94. 445 U.S. at 655.

95. *Id.* at 657.

96. *Id.* In addition, most cities and counties plan for losses and buy insurance, thus discounting exaggerated claims of impending bankruptcy. *See* Note, *Local Government Entities No Longer Absolutely Immune Under Section 1983*, 28 DEPAUL L. REV. 429, 447 (1979); Note, Monell v. Department of Social Services: *The Emergence of Municipal Liability Under 42 U.S.C. § 1983*, 8 CAP. U. L. REV. 103, 124 (1979).

97. 436 U.S. at 690.

98. *Id. See* Burt v. Abel, 585 F.2d 613, 617 n.9 (4th Cir. 1978) (discharges are municipal acts when the discharging body is authorized by the municipality to make such decisions); Himmelbrand v. Harrison, 484 F. Supp. 803, 810 (W.D. Va. 1980) (citing *Monell* for the view that municipal liability may be predicated upon the conduct of a single official, so long as his conduct actually represents the official position of the city in a given matter).

99. There have been a few instances, however, where government regulations aimed specifically at the speech of their employees have been struck on the grounds of overbreadth, i.e., as impermissibly encompassing protected speech. *See, e.g.*, Mescall v. Rochford, 655 F.2d 111, 113 (7th Cir. 1981) (overbroad rule prohibiting police officers from joining certain labor organizations violates their first amendment rights); Barrett v. Thomas, 649 F.2d 1193, 1199 (5th Cir. 1981) (regulations prohibiting "un-

acting pursuant to a general statute permitting punishment or discharge "for cause," such provisions have been facially upheld.[100] On the other hand, it is arguable that when a vague statute vests broad discretion in a government employer who engages in unconstitutional action, this should be deemed sufficient to impose liability on the municipality. The Fifth Circuit specifically recognized this in a case involving the county treasurer's dismissal of his assistant for exercising his free speech: "A county must be held accountable for more than its officially-codified policies; in cases where the written law of a local government entity vests unbridled authority . . . in an individual, his decisions become the controlling law and official policy of the entity."[101] Thus, even though the government body had not adopted an explicit policy that sanctioned retaliatory conduct, it had through its vague laws "caused" the violation of the employee's rights. Other courts have reached the same conclusion by holding that the actions of policy-making officials are deemed governmental acts.[102] This analysis will be explored in the next section.

B. *Single Acts by High-Level Officials as Reflecting Municipal Policy*

In the absence of a written regulation, plaintiffs must look to either unwritten or de facto policy or custom in order to establish municipal

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authorized public statements and denying department employees their right to speak to reporters on any "controversial" topic struck as inhibiting protected expression).

100. The Supreme Court in Arnett v. Kennedy, 416 U.S. 134 (1974) upheld a civil service dismissal for "such course as will promote the efficiency of the service." *Id.* at 161-62. It reasoned that the quoted standard was "essentially fair" and that requiring greater specificity was not feasible "[b]ecause of the infinite variety of factual situations in which public statements by government employees might reasonably justify dismissal for 'cause.'" *Id.* at 161. The Supreme Court sustained a similarly vague statute in Parker v. Levy, 417 U.S. 733 (1974). *See also* Davis v. Williams, 617 F.2d 1100, 1105 (5th Cir. 1980), upholding on authority of *Arnett* and *Parker* the facial validity of a rule prohibiting "conduct prejudicial to good order" as used against a public employee who was fired for speaking with a reporter; Key v. Rutherford, 645 F.2d 880, 882-83 (10th Cir. 1981), upholding the facial validity of a city regulation prohibiting employees from "discussing complaints or problems with city council members."

101. Van Ooteghem v. Gray, 628 F.2d 488, 495 (5th Cir. 1980). *See also* Schnapper, *Civil Rights Litigation after* Monell, 79 COLUM. L. REV. 213 (1979), similarly arguing that "[i]f an employee exercising such delegated authority decides upon a goal or on a method of achieving it which violates the Constitution, that decision is the government policy." *Id.* at 219.

102. *See infra* notes 108-12.

liability.[103] Several difficult questions interpreting "custom" have arisen in the courts of appeals. For example, should a single act of a supervisory official such as the mayor or chief of police be deemed binding on the municipality? Since most personnel decisions are made by high-level officials, this issue has been especially critical in retaliation suits. The appellate courts are generally in agreement that single actions taken by a lower level official are not sufficient to bind the municipality.[104] On the other hand, when the police chief, mayor, city council, school board, county commissioners or other department head performs the unconstitutional action, such conduct reflects official municipal policy.[105] Since a municipal corporation is a fictitious entity that acts only through its officials, "[a] government should not be able to free itself from liability by merely subdelegating duties and responsibilities to such officials."[106] Justice Brennan recognized this when he stated that a section 1983 violation may be

103. *Monell*, 436 U.S. at 690-91.

104. *See, e.g.*, Powe v. City of Chicago, 664 F.2d 639, 651 (7th Cir. 1981) (a single incident of arrest or unlawful search and seizure is insufficient); Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1980) (single incidents are not normally sufficient to impose liability); Landrigan v. City of Warwick, 628 F.2d 736, 747 (1st Cir. 1980) (single failure to investigate perjury charge is not a "custom"); Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), *cert. denied sub nom*. Rashkind v. Marrero, 450 U.S. 913 (1981) (city could not be sued for single incident of unlawful search and seizure); Hamrick v. Lewis, 515 F. Supp. 983, 986 (N.D. Ill. 1981) (a single instance of individual misconduct, however reprehensible if true, does not indicate systematic, city-supported abuses of the nature to which *Monell* makes reference). *Contra* Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979) (a single brutal incident may be a sufficient causal link between the county's failure to train and violation of constitutional rights); Wilkinson v. Ellis, 484 F. Supp. 1072, 1089 (E.D. Pa. 1980) (a colossal intimidation might suffice to impose liability). *See also* Note, *Allocating Liability for Constitutional Torts: Reconciling the Officials Liability for Unconstitutional Conduct, the Entitie's Liability for Unconstitutional Official Policy, and the Immunity Doctrine*, 46 ALB. L. REV. 475, 492 n.81 (1982).

105. This concept stems from the language in *Monell* that liability may be imposed where a constitutional wrong results from acts (or omissions) by the entity's "lawmakers or by those edicts or acts [that] may fairly be said to represent official policy." 436 U.S. at 694. For a more limited reading of this language, see Note, *supra* note 104, arguing that a senior official's actions should not impose liability absent a closer connection between the conduct and the entity either through ratification or approval of the senior official's conduct by others or the involvement of subordinates in enforcing the official's scheme. This more stringent interpretation has been adopted by only a few lower courts. *See infra* note 112.

106. Comment, *New Damage Remedies for Violations of Constitutional Rights*, 31 BAYLOR L. REV. 67, 74-75 (1979). *See also* Peters, *Municipal Liability after* Owen v. City of Independence *and* Maine v. Thiboutot, 13 URB. LAW. 407, 411-12 (1981); Schnapper, *supra* note 101, at 215-19; Note, Monell v. Department of Social Services:

chargeable to a municipality when the constitutional tort can be traced to "those whose edicts or acts may fairly be said to represent official policy. . . ."[107]

Adopting this analysis, several circuits have held local governments liable for the unconstitutional conduct of those who occupy policymaking positions. Thus, when the police chief is the final repository of city power in charge of the police department, his employment decisions have been held to bind the municipality.[108] Similarly, a city may be held liable for the actions of its mayor because his actions may fairly be said to represent official policy.[109] The same conclusion has been reached with regard to school board trustees,[110] the head of the department of corrections at a state institution,[111] and other high ranking officials.[112] Generally, the court examines the

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The Emergence of Municipal Liability Under 42 U.S.C. § 1983, 8 CAP. U.L. REV. 103, 115 (1979).

107. *Monell*, 436 U.S. at 694.

108. Black v. Stephans, 662 F.2d 181, 191 (3d Cir. 1981) (the acts of the police chief represent the official policy of the city because the chief is the final authority in charge of the police force).

109. Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 448 (2d Cir. 1980) ("the mayor is the one city official whose edicts and acts represent municipal policy").

110. Kingsville Indep. School Dist. v. Cooper, 611 F.2d 1109, 1112 (5th Cir. 1980) ("School district personnel decisions by the body entrusted with such decisions are 'officially adopted and promulgated.' "). The court explained that the actions of the board of trustees bind the district "because the only way the district can act, practically as well as legally, is by and through its Board of Trustees." *Id.* at 1112. *Accord* Moore v. Tangipahoe Parish School Bd., 594 F.2d 489, 493 (5th Cir. 1979).

111. *See* Schneider v. City of Atlanta, 628 F.2d 915, 920 (5th Cir. 1980) (in those areas in which the director is "the final authority or ultimate repository of city power," his conduct and decisions are binding).

112. *See, e.g.*, Barrett v. Thomas, 649 F.2d 1193, 1201 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3838 (1982) (the sheriff's acts in demoting an officer may fairly be said to represent county policy); Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980) ("at least in those areas in which [the judge] is the final authority . . . , his official conduct and decisions must necessarily be considered those . . . for which the county may be held responsible"); Gay Student Servs. v. Texas A. & M. Univ., 612 F.2d 160, 164 (5th Cir. 1980) (action of university officials denying official registration to a homosexual student organization subjects the university to liability under § 1983); Goss v. San Jacinto Junior College, 588 F.2d 96, 98 (5th Cir. 1979) (college president who recommended firing of instructor is one whose acts represent official policy); Burt v. Abel, 585 F.2d 613, 617 n.9 (4th Cir. 1978) (discharge from employment is an "official act" where the discharging body—school board members—is authorized by the city to make such decisions). *Contra* Johnson v. Granholm, 662 F.2d 449, 450 (6th Cir. 1981) (even if county board of commissioners was the employer of

statute granting power to determine whether in fact the individual has been given final authority over particular employment decisions.[113] Thus, even a single action of firing or punishing a government employee for engaging in protected activity should suffice to satisfy the policy requirement imposed by the *Monell* decision.[114] Any municipal employee who holds a significant policymaking position affecting the rights of others should be deemed to represent the government entity and thus create liability on the part of that entity. As one court noted, "[A] discharge from municipal employment is quite clearly an official action where the discharging body is authorized by the municipality to make such decisions."[115]

C. *Actions of Lower Level Officials: The Respondeat Superior Barrier*

When the employment decision is not rendered by a high ranking government official, the question of municipal liability becomes more difficult. As noted, it is well established that a single action taken by a lower level official is normally insufficient to bind the municipality.[116] Thus, where an employee's immediate supervisor allegedly retaliates against him for having engaged in protected first amendment activity, the employee may be relegated to suing the person individually. A plaintiff may be able to impose liability, however, on a mu-

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individual defendants, the board was not liable unless it can be shown that the acts complained of were taken pursuant to "policy or custom" of the municipal body), *cert. denied*, 50 U.S.L.W. 3975 (1982); Di Maggio v. O'Brien, 497 F. Supp. 870, 874 (E.D. Pa. 1980) (city council member and building inspector did not have authority to make policy); Hoopes v. City of Chester, 473 F. Supp. 1214, 1225-26 (E.D. Pa. 1979), *modified sub nom.* Hoopes v. Nacrelli, 512 F. Supp. 363 (E.D. Pa. 1981) (mayor's defamatory campaign directed against the city's police chief, culminating in his demotion, was action taken for the mayor's own personal gain and was not binding on the city); Vasquez v. City of Reno, 461 F. Supp. 1098, 1100 (D. Nev. 1978) (city policy chief and psychologist did not create policy when they developed and administered a test which discriminated in hiring).

113. *See, e.g.*, Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982) (the question is one of identifying the official who has authority to make policy; then municipal liability attaches to acts performed pursuant to that policy). The court noted that: "[W]hen an official has final authority in a matter involving the selection of goals or of means of achieving goals, his choices represent governmental policy." *Id.* at 989. *See also* Schneider v. City of Atlanta, 628 F.2d 915, 920 (5th Cir. 1980); Schnapper, *supra* note 101, at 213-21.

114. *See* cases cited *supra* note 112.

115. Burt v. Abel, 585 F.2d 613, 617 n.9 (4th Cir. 1978).

116. *See supra* note 104.

nicipality by establishing a custom or usage.[117] The meaning of these words is far from clear.[118] Earlier Supreme Court rulings appeared to give a narrow reading to these terms. In *Rizzo v. Goode*,[119] the Supreme Court refused to issue even an injunction against the police commissioner, city managing director and mayor based on incidents of police misconduct on the part of some officers. The Court reasoned that "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct."[120] The Court distinguished earlier decisions in which injunctive relief had been granted based on a "pervasive pattern flowing from a deliberate plan" to suppress constitutional rights.[121]

Subsequent decisions have sought to narrow the *Rizzo* requirement of "affirmative action." In *Estelle v. Gamble*,[122] the Supreme Court held that "deliberate indifference" to civil rights states a cause of action under section 1983.[123] Several lower federal courts have expanded on this rationale, holding that failure to act in face of actual or imputed knowledge of violation of federal rights creates a viable cause of action under section 1983.[124] Justice Marshall, citing these

117. *See supra* note 92 and accompanying text.

118. Justice Brennan in the *Monell* decision referred to Justice Harlan's definition of "custom" in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). 436 U.S. at 691. Justice Harlan defined custom as a "persistent and widespread" practice. 398 U.S. at 167-68. *See also* Ballen, *Municipal Liability under § 1983: the Meaning of "Policy of Custom,"* 79 COLUM. L. REV. 304, 315-17 (1979); Kushnir, *Government Tort Liability*, 12 URB. LAW. 466, 471-73 (1980); Seplowitz, *Municipal Liability*, 47 BROOKLYN L. REV. 517, 548-51 (1981); Comment, *Municipal Liability under § 1983 for Civil Violations after* Monell, 64 IOWA L. REV. 1032, 1041-45 (1979).

119. 423 U.S. 362 (1976).

120. *Id.* at 371.

121. *Id.* at 373-75, discussing Hague v. CIO, 307 U.S. 496 (1939) (police misconduct was rooted in the adoption and enforcement of deliberate policies by the defendants) and Allee v. Medrano, 416 U.S. 802 (1974) (persistent pattern flowed from an intentional, conspiratorial effort of defendants to deprive labor organizers of their first amendment rights).

122. 429 U.S. 97 (1976).

123. *Id.* at 106.

124. *See, e.g.*, Duchesne v. Sugarman, 566 F.2d 817, 832 (2d Cir. 1977) ("where conduct of the supervisory authority is directly related to the denial of a constitutional right, it is not to be distinguished as a matter of causation, upon whether it was action or inaction"); Illinois Migrant Council v. Pilliod, 540 F.2d 1062, 1069 (7th Cir. 1976) (*Rizzo* does not apply where the record established a pattern or practice of violations);

decisions with approval, has stated that the basis for denying relief in *Rizzo* was the lack of evidence that defendant officials had knowledge of their subordinates' unconstitutional actions.[125] In addition, the injunctive relief sought was quite intrusive, counselling restraint on the part of the Court.[126]

Even more significant is the fact that *Rizzo* dealt with holding *individual* supervisory officials liable for the conduct of their subordinates.[127] The Court's unwillingness to impose liability on such individuals is reflected in its development of qualified and absolute immunity.[128] The immunity defense is predicated upon the policy concerns that personal liability would have an undue chilling effect on the exercise of official responsibility; that it would be unjust to subject officials to liability when they are legally required to exercise discretion; that it would create a danger that the official would be deterred in his willingness to execute his office with decisiveness that is required for the public good; and that it might deter citizens from holding public office.[129] These concerns are not applicable to municipal liability, leading to the Court's rejection of any qualified immu-

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Sims v. Adams, 537 F.2d 829 (5th Cir. 1976) (supervisory defendant is liable where he has notice of past culpable conduct of subordinates and fails to prevent recurrence in violation of a state statutory duty).

125. Lewis v. Hyland, 434 U.S. 931, 933 (1977) (Marshall, J., dissenting to the denial of certiorari).

126. *Id.* at 933-34. *See also* Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976) (distinguishing *Rizzo* on the ground that plaintiffs sought an affirmative decree requiring less court supervision).

127. *Rizzo* was decided before *Monell* permitted suits against municipalities; therefore, the only question was that of supervisory liability. Later decisions have recognized that different considerations are presented when municipal liability is at issue. *See* Bowen v. Watkins, 669 F.2d 979, 989 (5th Cir. 1982); Walters v. Ocean Springs, 626 F.2d 1317, 1322-23 (5th Cir. 1980); Turpin v. Mailet, 619 F.2d 196, 199 (2d Cir. 1980), *cert. denied*, 449 U.S. 1016 (1980). *See also* Note, *Damage Remedies Against Municipalities*, 89 HARV. L. REV. 922, 956-57 (1976); Comment, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 948 (1979).

128. *See supra* notes 83-85 and accompanying text. In the recent decision of Harlowe v. Fitzgerald, 102 S. Ct. 2727 (1982), the Court further expanded the protection of government officials by eliminating the subjective element of official immunity which had previously precluded summary judgement for government officials whenever allegations of malicious intent were made. The Court held that government officials are insulated from having to defend against civil damage suits provided their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 2738.

129. *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

nity for local government.[130] In addition, the very fact that officials enjoy such immunity, leaving the victim remediless, counsels in favor of a relaxation of the policy or custom requirement with respect to municipal liability.[131] Thus, the *Rizzo* mandate that there be an affirmative link between the occurrence of the various incidents of police misconduct and the supervisory officials should not be binding on plaintiffs seeking to hold the government unit rather than individuals liable.

D. *Establishing Liability Through a Pattern or Practice of Abuse*

Several lower court decisions have given a liberal construction to the custom or policy requirement. In some cases, the plaintiff has been able to establish liability by arguing a pattern of conduct or a series of acts violative of constitutional rights.[132] Such allegations raise an inference of municipal policy. For example, in *Owen*, the Supreme Court did not challenge the Eighth Circuit ruling that the series of actions taken by government officials during the course of Owen's discharge amounted to official policy.[133] Similarly, in *Glaros*

130. Owen v. City of Independence, 445 U.S. 622, 635-57 (1980).

131. *See supra* text accompanying notes 95-96.

132. This concept is derived from the Supreme Court's language in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials . . . although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.* at 167-68. The case has been cited and relied upon to establish an actionable custom in several cases. *See, e.g.*, Knight v. Carlson, 478 F. Supp. 55, 58-59 (E.D. Cal. 1979); Mayes v. Elrod, 470 F. Supp. 1188, 1192-94 (N.D. Ill. 1979).

133. The facts indicated that Owen was discharged and stigmatized in violation of his constitutional rights. The Court of Appeals determined that the city stigmatized Owen when it acted upon the city councilman's slanderous charges and directed that the investigation report alleging police department mismanagement be referred to the county prosecutor for presentation to the Grand Jury. 589 F.2d at 337. Following Owen's dismissal, the city manager publicly announced the referral of the controversial report. Based on these facts, the Eighth Circuit was persuaded that the series of actions amounted to official policy, a conclusion not challenged by the majority of the Supreme Court. This suggests a flexible approach whereby a series of occurrences, joined together, may rise to the level of official policy sufficient to subject the city to liability under § 1983. Justice Powell, dissenting from the decision, argued that respondeat superior absolved the city of liability. While conceding that accusations made before a city council meeting by a councilman accusing Owen of gross inefficiencies and other inappropriate actions were "neither measured nor benign," Powell contended that "the statements of a single councilman scarcely rise to the level of municipal policy." 444 U.S. at 660, 663-64 (Powell, J., dissenting).

v. Perse,[134] the First Circuit held that the plaintiff's allegation that he was continuously under surveillance by members of the Cambridge Police Department supported a claim that the police department engaged in a policy of unconstitutional investigation into political groups.[135] Further, the Second Circuit, in *Heimbach v. Village of Lyons*,[136] found allegations that village authorities unconstitutionally prevented plaintiffs from opposing a redevelopment plan by wrongfully evicting and illegally arresting various members were sufficient to support their suit against the municipality.[137] The Seventh Circuit reached the same conclusion in *Powe v. City of Chicago*,[138] holding that Powe's allegations that he was a victim of a series of unlawful arrests, each based upon the same invalid warrant, were sufficient to raise the inference that municipal defendants were responsible for the alleged arrests.[139]

Thus, a plaintiff may be able to impose municipal liability by arguing that the action taken against him is simply one in a series of retaliatory actions taken against him and/or other government employees, thus establishing a type of pattern or practice that should have been rectified by the municipality. The existence of a pattern of abuse tends to indicate a complete failure to supervise,[140] gross negligence,[141] or deliberate indifference on the part of the municipality,[142]

134. 628 F.2d 679 (1st Cir. 1980).

135. *Id.* at 686.

136. 597 F.2d 344 (2d Cir. 1979).

137. *Id.* at 346.

138. 664 F.2d 639 (7th Cir. 1981).

139. *Id.* at 651.

140. *See, e.g.*, Hays v. Jefferson County, Ky., 668 F.2d 869, 874 (6th Cir. 1982) (complete failure to train or training so reckless that future misconduct is almost inevitable); Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1981) (official policy may be established by omissions, as well as by affirmative acts). *Accord* Cameron v. Montgomery County Child Welfare, 471 F. Supp. 761 (E.D. Pa. 1979); Mayes v. Elrod, 470 F. Supp. 1188, 1193 (N.D. Ill. 1979).

141. Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979) (liability may be imposed where a municipality is *grossly negligent* in supervising its agents, and the negligence results in a constitutional deprivation); Popow v. Margate, 476 F. Supp. 1237, 1243 (D. N.J. 1979) (gross negligence should be the subject of § 1983 actions even where simple negligence is not); Redmond v. Baxley, 475 F. Supp. 1111, 1116 (E.D. Mich. 1979) (inadequate supervision alone may be actionable where the supervisor's failure to rectify the problem approaches recklessness); Leite v. City of Providence, 463 F. Supp. 585, 590 (D. R.I. 1978) (municipality may be liable if it trains its officers in a reckless or grossly negligent manner). The majority of lower courts have held, however, that simple negligence is not actionable. *See* Bonner v. Coughlin, 545 F.2d 565

all of which should be deemed sufficient to hold the government accountable.[143]

E. *Establishing Liability Through Authorization or Acquiescence in the Unconstitutional Conduct*

A second and related possibility arises when a plaintiff can establish that high level officials actually knew of possible constitutional violations and yet took no action. When the plaintiff has complained to a higher authority but did not find his claim satisfied, this should provide another avenue for the imposition of municipal liability. This situation arose in the case of *Herrera v. Valentine*,[144] where several complaints of police brutality against Indians had been lodged with the appropriate officials. The complaints were taken under advisement, but officials initiated no action.[145] In addition, the plaintiffs had appeared before the city council and made known their various complaints.[146] These facts satisfied the court that the city was adequately notified that its police force needed close and continuing supervision. The court held the city's failure to remedy the problems

(7th Cir. 1976); Smith v. Hill, 510 F. Supp. 767, 772 n.6 (D. Utah 1981) (listing several cases which have reached this conclusion). The minority position is reflected in the cases cited at 510 F. Supp. at 773 n.7. The Supreme Court recently held, contrary to this precedent, that since § 1983 imposes no state of mind requirement even claims of simple negligence are actionable. Parratt v. Taylor, 451 U.S. 527 (1981). The question of actionability is, of course, analytically distinct from that of municipal damage liability in light of the respondeat superior barrier. *Parratt* does mean, however, that even negligent actions of high level officials should be binding upon the municipality. *See* discussion *supra* notes 104-115 and accompanying text.

142. *See, e.g.*, Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1981) (liability attaches where failure to promulgate policies and regulations rose to the level of *deliberate indifference* to individual rights); Reeves v. City of Jackson, 608 F.2d 644, 650 (5th Cir. 1979) (callous and conscious indifference to plaintiff's medical needs gives rise to an eighth amendment claim under § 1983). *Accord* Turpin v. Mailet, 619 F.2d 196, 201 (2d Cir. 1980); Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979); White v. Rochford, 592 F.2d 381 (7th Cir. 1979). *Contra* Edmonds v. Dillins, 485 F. Supp. 722 (N.D. Ohio 1980) (specifically rejects the deliberate indifference standard in favor of a "recklessness requirement").

143. *See* Levinson, *Suing Political Subdivisions in Federal Court: From* Adelman *to* Owen, 11 TOLEDO L. REV. 829, 844-45 (1980); Peters, *Municipal Liability*, *supra* note 106, at 422-25; Note, Monell *and* Owen *in the Police Injury Context: Municipal Liability Under § 1983 Without Supervisorial Fault*, 16 U.S.F.L. REV. 517, 522-28 (1982).

144. 653 F.2d 1220 (8th Cir. 1981).

145. *Id.* at 1225.

146. *Id.*

associated with its overzealous police force sufficient to impose liability.[147]

Similarly in the case of retaliation suits, it is arguable that failure to reverse an improper employment action is implicit ratification of the action by those with ultimate decisionmaking authority.[148] Several lower federal courts have held that if a city impliedly or tacitly authorizes, approves or encourages the alleged unconstitutional conduct, it should be deemed to have promulgated an official policy within the meaning of *Monell*.[149] This analysis suggests the impor-

147. *Id.* at 1224. "A municipality's continuing failure to remedy known unconstitutional conduct of its police officers is the type of informal policy or custom that is amenable to suit under § 1983" (citing Monell v. Department of Social Serv., 436 U.S. at 690-91 & n.56). 653 F.2d at 1224.

148. Peters, *Municipal Liability*, *supra* note 106, at 439-43 (a municipality should expect to be responsible under § 1983 for terminations done in derogation of constitutional rights). *Accord* Kramer, *Section 1983 and Municipal Liability: Selected Issues Two Years After* Monell v. Department of Social Services, 12 URB. LAW. 232, 244 (1980).

149. *See, e.g.*, Vercher v. Harrisburg Hous. Auth., 454 F. Supp. 423, 425 (M.D. Pa. 1978) (allegations that plaintiff was fired for speaking out on matters of public concern and that the authorities ratified the firing is clearly sufficient to establish liability). *See also* Powe v. City of Chicago, 664 F.2d 639, 649 (7th Cir. 1980) (a municipality "acts" by countenancing the practices of its employees); Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1980) (liability will be imposed on the county where the board's action constituted tacit authorization of plaintiff's sterilization); Murray v. City of Chicago, 634 F.2d 365, 367 (7th Cir. 1980) (arrests and strip searches if occurring frequently with knowledge of the defendants might show dereliction of duty of a constitutional dimension); Fulton Market Cold Storage Co. v. Cullerton, 582 F.2d 1071 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979) (policy was made when members of the board of appeals encouraged assessors to discriminate against the plaintiff); Turpin v. Mailet, 579 F.2d 152, 164 (2d Cir. 1978) (actions of employees will be binding upon the municipality if they are authorized, sanctioned or ratified at a policy-making level); Smith v. Hill, 510 F. Supp. 767, 771 (D. Utah 1981) (the cause of action is available under § 1983 "when the defendant was in a position of responsibility, knew or should have known of the misconduct, and yet failed to act to prevent future harm"); Popow v. City of Margate, 476 F. Supp. 1237, 1246-47 (D. N.J. 1979) (persistent failure to discipline or control subordinates in face of knowledge of their propensity for improper use of force may constitute an actionable official policy or *de facto* policy).

Some courts have imposed a stricter standard for the imposition of municipal liability, relying to a large degree upon the language in *Rizzo*. *See, e.g.*, Spriggs v. City of Chicago, 523 F. Supp. 138, 143 (N.D. Ill. 1981) (municipal liability will be imposed only where an action creates a substantial probability that undesirable subordinate behavior will manifest itself in increased and significant amounts). *See also* Ballen, *Municipal Liability under § 1983: the Meaning of "Policy or Custom,"* 79 COLUM. L. REV. 304 (1979). Ballen argues that Congress intended in enacting § 1983 to impose an affirmative duty on state and local governments to protect their residents against a

tance of exhausting any available administrative remedies, as was done in *Herrera*, in order to support a claim for municipal liability.[150]

Thus, plaintiffs may be able to establish government liability for retaliatory conduct based on either the presence of a persistent and widespread practice, reflecting the failure of the government to supervise or control, or the presence or imputation of knowledge and inaction on the part of those in authority. This, coupled with the doctrine that the municipality is liable for the actions of those in policymaking positions, should enable most government employees to avoid the respondeat superior barrier.

III. THE RELIEF ISSUE: DAMAGES FOR VIOLATION OF FIRST AMENDMENT RIGHTS

Having explored the liability issues in first amendment retaliation cases, it is next important to examine the relief question. Before the Supreme Court's rulings in *Monell* and *Owen*, injunctive relief in suits naming individual officials as defendants was the primary vehicle for vindicating first amendment rights.[151] Since damages were generally unavailable both because of immunity defenses[152] as well as the financial limitations of individual government officials, employees sought reinstatement to positions they had lost or promotions that had been denied because of their exercise of first amendment rights. The importance of the recent decisions opening the door to municipal liability is that now damages are available to vindicate the employee's rights.[153] Assuming plaintiff can overcome the liability

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wide range of official action or inaction which denied them enjoyment of their constitutional rights. Ballen's careful analysis of the legislative history of § 1983 supports this conclusion.

150. The Supreme Court recently clarified that exhaustion of administrative remedies is not a prerequisite to a § 1983 action. Patsy v. Board of Regents, 102 S. Ct. 2557 (1982). Nonetheless, this discussion suggests tactical reasons for pursuing administrative remedies—namely to establish municipal liability through the ratification of a subordinate's decision.

151. In addition to reinstatement, a few courts granted back pay in retaliation suits, avoiding the good faith defense by characterizing the award as equitable relief. *See* Bertot v. School Dist. No. 1, 613 F.2d 245 (10th Cir. 1979); Rosada v. Santiago, 562 F.2d 114 (1st Cir. 1977).

152. *See supra* notes 82-86 and accompanying text.

153. The Supreme Court's decision in *Monell* permitted suits naming municipalities as defendants, while the *Owen* decision denied cities the immunities which were

hurdles discussed in the first two sections,[154] he is entitled to full relief, including an award of damages, against the government.

Generally three types of damage relief should be considered in bringing retaliation cases: 1) presumed damages for violation of plaintiff's substantive first amendment rights;[155] 2) compensatory damages to recover for actual injury sustained, including both out-of-pocket expenses, such as lost earnings, as well as compensation for mental distress and humiliation, which are often suffered in retaliation situations,[156] and 3) nominal damages.[157] The Supreme Court in the recent case of *City of Newport v. Fact Concerts, Inc.* [158] held that one form of relief, punitive damages, is not available against municipalities. Therefore, plaintiffs are limited to the recovery of punitive damages against officials in their individual capacity in suits wherein they can establish that the officials acted with malice or reckless disregard.[159]

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held to insulate individual officials from damage liability. *See supra* text accompanying notes 87-88.

154. These include both the substantive barriers imposed by the *Pickering* and *Mt. Healthy* defenses to retaliation suits (*see supra* text accompanying notes 17-32) as well as the hurdle of respondeat superior (*see supra* text accompanying notes 91-93).

155. *See infra* notes 160-78 and accompanying text.

156. *See infra* notes 179-92 and accompanying text.

157. *See infra* notes 193-204 and accompanying text.

158. 453 U.S. 247 (1981).

159. For a discussion of the propriety of punitive damages in constitutional tort cases, see Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242, 1274-81 (1979). There is a great degree of confusion among the courts of appeals as to the proper standard to be utilized in determining whether an award of punitive damages is permissible. *See, e.g.*, Brown v. Bullard Indep. School Dist., 640 F.2d 651 (5th Cir. 1981) (no evidence of the type of "malevolent, outrageous or abusive conduct" to justify punitive damages); Cochetti v. Desmond, 572 F.2d 102 (3d Cir. 1978) (punitive damages may be awarded to punish persons who have engaged in particularly egregious conduct and to deter such conduct in the future); Simpson v. Weeks, 570 F.2d 240 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979) (punitive damages require a showing of "gross disregard for plaintiff's rights"); Rosada v. Santiago, 562 F.2d 114 (1st Cir. 1977) (something more than intentional interference with constitutional rights must be found in order to justify punitive damages in a retaliatory transfer case, *i.e.*, plaintiff must establish "aggravating circumstances"); Guzman v. Western Bank, 540 F.2d 948 (8th Cir. 1976) (reckless indifference must be shown). The Supreme Court recently heard arguments in the case of Smith v. Wade, 51 U.S.L.W. 3315 (Oct. 26, 1982), as to whether a showing of actual malice on the part of the defendant is required to support an award of punitive damages.

A. *Presumed Damages for Violation of First Amendment Rights*

As to the question of presumed damages for deprivation of constitutional rights, the Supreme Court in *Carey v. Piphus*[160] held that a plaintiff could recover only nominal damages for a procedural due process violation in the absence of proof of actual injury.[161] Arguments have been made in the lower courts that *Carey* should control all cases where damages are sought for the deprivation of constitutional rights per se.[162] In *Carey*, however, the Court specifically noted that cases awarding damages for deprivation of substantive constitutional rights were not affected by its decision.[163] It directed lower federal courts to inquire whether the specific constitutional guarantee at stake had a common law analogue.[164] The Court reasoned that "in some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. In such cases, it may be appropriate to apply the tort rule of damages directly to the § 1983 action."[165]

In the context of retaliation suits, an analogy should be drawn to the interests protected by the common law dignitary torts, which are actions that involve some confrontation with the plaintiff in person or some indirect affront to his personality, including assault, battery, in-

160. 435 U.S. 247 (1978).

161. *Id.* at 247-48. For a critical discussion of the Court's conclusions in the *Carey* case, see Love, *supra* note 159, at 1247-70. *See also* Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 HARV. L. REV. 966 (1980).

162. *See* Kincaid v. Rusk, 670 F.2d 737, 746 (7th Cir. 1982) (plaintiffs in § 1983 actions must demonstrate some compensable injury in order to recover, even though the case alleged first amendment violations); Basiardanes v. City of Galveston, 682 F.2d 1203, 1220 (5th Cir. 1982) (first amendment violations unaccompanied by "any real injury," justify an award of only nominal damages); Williams v. Board of Regents of Univ. Sys., 629 F.2d 993, 1005 (5th Cir. 1980) (stating as a general principle that damages must be proved, rather than presumed in § 1983 actions, citing *Carey* as authority), *cert. denied*, 452 U.S. 926 (1981); Familias Unidas v. Briscoe, 619 F.2d 391, 402 (5th Cir. 1980) (awarding only nominal damages for deprivation of first amendment association rights—arguing this was mandated by *Carey*); Pierce v. Stinson, 493 F. Supp. 609 (E.D. Tenn. 1979) (damages for unlawful arrest and incarceration will not be presumed; absent proof of actual injury, recovery is limited to nominal damages).

163. 435 U.S. at 265.

164. *Id.* at 257-58. Section 1988 explicitly authorizes the use of common law remedies in § 1983 actions. 42 U.S.C. § 1988 (1976).

165. 435 U.S. at 258.

tentional infliction of mental anguish, libel and slander.[166] Even though the injury that results is not an economic loss, the common law has always redressed these torts with substantial damages. The compensation is usually characterized as general damages—the type that generally flow from the wrongful act, and that do not require specific proof of emotional harm to the plaintiff.[167] The value that is placed upon the dignitary loss is a question for the jury, subject, of course, to review by the courts.[168] The Supreme Court in *Carey* implicitly recognized the doctrine of presumed damages as it applies to the dignitary torts of libel and defamation.[169] It reasoned that in such cases injury is almost certain to result from the wrongful act, and that the specific injury is difficult to prove. Moreover, since the resulting injury is so likely, no purpose is served by requiring proof of this kind.[170]

While still in the minority, a few courts of appeals are beginning to recognize that substantial damages may be awarded for the violation of substantive constitutional rights, including the first amendment.[171] The difficulty, of course, is in assessing the value of the right violated. In an earlier suit involving unlawful interference with the first

166. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 7.1, at 509 (1973).

167. *Id.* § 3.2, at 138-39. *See also* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 8 (1935); H. MCGREGOR, DAMAGES 15-20 (13th ed. 1972).

168. *See* Wayne v. Venable, 260 F. 64, 66 (8th Cir. 1919); Comment, *Presumed Damages for Fourth Amendment Violations*, 129 U. PA. L. REV. 192, 204-07 (1980). Courts have expressed reluctance, however, "to invade the particular province of the jury in evaluating the value of civil rights." Vetters v. Berry, 575 F.2d 90, 96 (6th Cir. 1978). *See also* Flores v. Pierce, 617 F.2d 1386, 1392 (9th Cir. 1980).

169. 435 U.S. at 262.

170. *Id.*

171. *See, e.g.*, Corriz v. Naranjo, 667 F.2d 892, 897 (10th Cir. 1981) (damages are available for violation of plaintiff's substantive rights, *i.e.*, his liberty interests and bodily integrity); Williams v. Trans-World Airlines, Inc., 660 F.2d 1267, 1272 (8th Cir. 1981) ("[D]amages for emotional harm are to be presumed where there is an infringement of a substantive constitutional right."); Herrera v. Valentine, 653 F.2d 1220, 1228 (8th Cir. 1981) (substantial compensatory damages are recoverable for violation of liberty and privacy interests protected by the fifth and fourth amendments); Konczak v. Tyrrell, 603 F.2d 13, 17 (7th Cir. 1979) (damages available for a deprivation of due process rights springing from unlawful arrest and related matters); Hodge v. Seiler, 558 F.2d 284, 285 (5th Cir. 1977) (damages may be presumed from the denial of a constitutional right); Batista v. Weir, 340 F.2d 74, 88 (3d Cir. 1965) (damages for due process violations); Mickens v. Winston, 462 F. Supp. 910, 913 (E.D. Va. 1978), *aff'd.*, 609 F.2d 508 (4th Cir. 1979) (damages may be awarded since "official racial segregation is inherently injurious"); Manfredonia v. Barry, 401 F. Supp. 762, 772 (E.D. N.Y. 1975) (damages for deprivation of liberty in wrongful arrest).

amendment right to demonstrate, the District of Columbia Circuit urged that compensation "not be approached in a niggardly spirit,"[172] and that the amount be sufficient to "assure that rights are not lightly to be disregarded. . . ."[173]

More recently the Eighth Circuit, in an appeal challenging jury instructions, properly stressed the need to compensate fully civil rights violations: "No monetary value we place upon constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation."[174] The court went on to instruct the jury that it should consider the importance of the right in our system of government, the role that this right has played in the history of our republic, and the significance of the right in the context of the activities which the plaintiff was engaged in at the time of the violation of the right.[175]

Using these guidelines, it is important to note that the first amendment has enjoyed a special place in the hierarchy of constitutional values, reflecting the view that free speech is critical in protecting all other rights guaranteed under our constitutional system.[176] In fact, presumed damages were long ago recognized in voting rights cases when the same critical first amendment rights are at stake.[177] The

172. Tatum v. Morton, 562 F.2d 1279, 1282 (D.C. Cir. 1977).

173. *Id.* at 1287. *Accord* Dellums v. Powell, 566 F.2d 167, 195 (D.C. Cir.), *cert. denied*, 428 U.S. 916 (1977) (loss of opportunity to express oneself constitutes a deprivation of an intangible first amendment interest entitling plaintiff to recover "not insignificant" damages).

174. Herrera v. Valentine, 653 F.2d 1220, 1227 (8th Cir. 1981).

175. *Id.* Language very similar to that utilized by the Eighth Circuit was specifically approved by the Tenth Circuit in Corriz v. Naranjo, 667 F.2d 892, 897 (10th Cir. 1981). The jury was similarly instructed as to the great value of constitutional rights, and then the same factors were enumerated. Note also Congress' recognition of the value of liberty and privacy interests in Title VIII, in which it identified $100 a day as the proper award for victims of unlawful wiretapping. *See* 18 U.S.C. § 2520 (1976).

176. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 576 (1980); Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521, 552.

177. *See* Wayne v. Venable, 260 F. 64 (8th Cir. 1919). "In the eyes of the law this right is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing. . . ." *Id.* at 66. Plaintiff was awarded $2,000 in general damages for being barred from the polling booth. The Supreme Court in Carey v. Piphus, observed that it had allowed damage actions to be maintained for wrongful deprivation of voting rights. 435 U.S. at 265 n.22. It cited with approval the old English case of Ashby v. White, 1 Eng. Rep. 417 (H.L. 1703), in which substantial compensatory damages were awarded without proof of actual loss. Further, in the case of Wiley v. Sinkler, 179 U.S. 58

difficulty in attaching a dollar value to voting rights lead to the adoption of a presumed damage rule.[178] Thus, before even addressing the question of compensation for injury sustained, a jury should be instructed on the issue of damages for violation of first amendment rights per se. The importance of such instructions will become clearer upon examining the inadequacies of the other forms of relief.

B. *Compensatory Damages in Retaliation Suits: Tangible and Intangible Losses*

The most obvious form of relief available in retaliation suits is the recovery of lost wages resulting from unconstitutional dismissals, demotions, transfers, or denial of promotions.[179] It is important, however, to seek not only actual out-of-pocket expenses, but also compensatory damages for mental anguish, humiliation and embarrassment that is often suffered by employees in this context. Parallels should again be drawn to tort concepts reflected in libel suits where substantial damage recovery has always been permissible.[180] The Ninth Circuit in a first amendment retaliation suit expressly noted that compensatory damages "are not limited to the out-of-pocket pecuniary loss the complainant suffered. Damages can also be awarded for emotional and mental distress caused by the intentional tort."[181]

Although the issue is just beginning to be litigated in the appellate courts, a few have awarded substantial relief for intangible losses sus-

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(1900), the Supreme Court held that a complaint alleging $2,500 in damages for the deprivation of voting rights without asserting any actual losses satisfied the jurisdictional amount requirement of $2,000.

178. *See* Wayne v. Venable, 260 F. 64, 66 (8th Cir. 1919).

179. Such damages fall within the rubric of special damages, *i.e.*, those awarded for past pecuniary losses arising out of circumstances peculiar to the plaintiff's case and recoverable only upon proof of actual loss. *See* D. DOBBS, *supra* note 166, at § 3.2; C. MCCORMICK, *supra* note 167, at § 8; H. MCGREGOR, *supra* note 167, at 15-20. Several courts of appeals have upheld proved back pay awards in retaliation suits. *See, e.g.*, Brown v. Bullard Indep. School Dist., 640 F.2d 651 (5th Cir. 1981) (upholding an award for lost wages, although such was mitigated by the plaintiff's post-teaching earnings); Kingsville Indep. School Dist. v. Cooper, 611 F.2d 1109 (5th Cir. 1980) (holding that a teacher in a first amendment retaliation suit was entitled to back pay continuing until effective reinstatement); Simineo v. School Dist. No. 16, 594 F.2d 1353 (10th Cir. 1979) (upholding an award for loss of income in a first amendment retaliation suit); Rosada v. Santiago, 562 F.2d 114 (1st Cir. 1977) (awarding $7,000 in back wages in a retaliatory transfer case).

180. *See* D. DOBBS, *supra* note 166, at § 7.2.

181. Donavan v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970).

tained in retaliation suits.[182] For example, in the case of *Busche v. Burkee*,[183] the Seventh Circuit upheld a $10,000 award of compensatory damages based entirely on injury to reputation and emotional distress. The court stated that although no out-of-pocket expenses were established, the damage award was justified to compensate the plaintiff for emotional distress and damage to reputation.[184] Similarly, the Fifth Circuit, in *Williams v. Board of Regents*,[185] upheld a substantial award of compensatory damages in a case involving a wrongful discharge of the plaintiff for having disclosed that a police accident report had been altered to protect the city police chief. The court of appeals, while rejecting the theory of presumed damages, upheld the award as supported by ample evidence of mental anguish endured by the plaintiff.[186]

As to the evidentiary issue noted in the last case, the Supreme Court in *Carey* declined to discuss the matter of the amount of proof required to sustain an award of damages for intangible losses such as mental anguish and injury to reputation.[187] Lower federal courts have expressed widely divergent views on this issue. Many have

182. *See, e.g.*, Brule v. Southworth, 611 F.2d 406 (1st Cir. 1979) (upholding an award of $1,000 for mental distress suffered as a result of defendant's retaliatory conduct); Simineo v. School Dist. No. 16, 594 F.2d 1353 (10th Cir. 1979) (upholding an award of $60,000 in compensatory damages, which included relief for injury to reputation and to mental health); Stoddard v. School Dist. No. 1, 590 F.2d 829 (10th Cir. 1979) (upholding an award of $33,000 in compensatory damages for wrongful discharge). In addition to the aforementioned retaliation suits, courts have awarded substantial compensatory damages in the following suits, involving emotional distress sustained during an unlawful arrest. *See* Corriz v. Naranjo, 667 F.2d 892, 898 (10th Cir. 1981) (upholding damages for psychological harm suffered as a result of an unlawful arrest); Konczak v. Tyrrell, 603 F.2d 13, 17 (7th Cir. 1979) (upholding $10,000 and $2,500 awards to two plaintiffs for the mental distress, humiliation and general pain and suffering they had endured); Baskin v. Parker, 602 F.2d 1205, 1209 (5th Cir. 1979) (recognizing the appropriateness of awarding damages for "personal humiliation, embarrassment and mental distress" imposed as a result of the deprivation of constitutional rights). *See also* Garner v. Giarrusso, 571 F.2d 1330, 1339 (5th Cir. 1978); Rivera Morales v. Benitez de Rexach, 541 F.2d 882, 886 (1st Cir. 1976); Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569, 579-80 (7th Cir.), *cert. denied*, 425 U.S. 963 (1976); Williams v. Matthews Co., 499 F.2d 819, 829 (8th Cir.), *cert. denied*, 419 U.S. 1021, 1027 (1974); Seaton v. Sky Realty Co., Inc., 491 F.2d 634, 637 (7th Cir. 1974).

183. 649 F.2d 509 (7th Cir. 1981).

184. *Id.* at 519.

185. 629 F.2d 993 (5th Cir. 1980), *cert. denied*, 452 U.S. 926 (1981).

186. *Id.* at 1005.

187. 435 U.S. at 267 n.25.

adopted a very stringent evidentiary standard, refusing to award anything other than nominal damages based on plaintiff's own statement of his emotional distress or psychological discomfort.[188] Other courts of appeals have taken a less restrictive approach, requiring no proof of mental distress beyond the plaintiff's testimony.[189] Thus, the jury is allowed to infer mental distress from the plaintiff's statements coupled with proof of the surrounding circumstances.[190] While the court in *Carey* failed to address this question, it did state that the "distress" for which recovery is permissible may be evident by one's conduct and observed by others.[191] This language lends ample support to the more liberal approach to this issue, an approach that has long been used with regard to other tort actions.

188. *See, e.g.*, Nekolny v. Painter, 653 F.2d 1164, 1172-73 (7th Cir. 1981) (the court reversed an award of damages for emotional and mental distress, concluding that the evidence, consisting of isolated statements by various parties that they were depressed, humiliated, and despondent, as a result of their termination based on political affiliation, was insufficient to constitute proof of compensable mental or emotional injury); Rosada v. Santiago, 562 F.2d 114 (1st Cir. 1977) (the court held that $10,000 in damages for mental distress was excessive in light of the evidence which showed that plaintiff at most felt pressure and embarrassment before his friends, neighbors and family); Perez v. Rodriguez Bou, 575 F.2d 21, 25 (1st Cir. 1978) (the court disapproved of an award of more than nominal damages in an action by suspended public school students because "the only evidence of actual injury was plaintiff's own statements that they experienced some psychological discomfort as a result of their suspensions." The court implicitly required medical expert testimony to substantiate mental distress and explicitly required proof of "significant harm" to recover for loss to reputation).

189. *See, e.g.*, Busche v. Burkee, 649 F.2d 509, 519 (7th Cir. 1981) (the court rejected defendant's suggestion that the testimony of medical or psychiatric experts is necessary to establish a compensable emotional injury, relying upon the language in Carey v. Piphus, discussed *infra* note 191 and accompanying text); Halperin v. Kissinger, 606 F.2d 1192, 1208 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981) (harm may be demonstrated through "direct testimony of the plaintiffs or inferred from the circumstances"); United States *ex rel.* Larkins v. Oswald, 510 F.2d 583, 590 (2d Cir. 1975) (the court upheld $1,000 compensatory damage award, stating that it required no proof of mental distress beyond the plaintiff's testimony); Seaton v. Sky Realty Co., Inc., 491 F.2d 634, 637-38 (7th Cir. 1974) (holding that compensatory damages may be awarded for the humiliation suffered by plaintiffs "whether inferred from the circumstances or established by testimony").

190. *See supra* note 189. In addition, lower courts in cases involving housing discrimination, brought under 42 U.S.C. § 1982 have similarly permitted inference of compensable loss from surrounding circumstances and have sustained recoveries based solely upon the plaintiff's testimony. *See, e.g.*, Lamb v. Sallee, 417 F. Supp. 282 (E.D. Ky. 1976); Walker v. Shonfeld, 409 F. Supp. 876, 879 (N.D. Cal. 1976); Walker v. Fox, 395 F. Supp. 1303 (S.D. Ohio 1975).

191. 435 U.S. at 264 n.20.

The lower courts' varying approaches to the damage question illustrates the importance of seeking both presumed damages for violation of first amendment rights as well as compensatory damages for proved mental anguish or emotional distress. As indicated, some courts have rejected the presumed damage theory, while others have imposed stringent evidentiary standards to recover for intangible losses. In addition, it is impossible to determine which arguments will be best received by a jury. On the other hand, the problem of double recovery cannot be ignored. A jury should be advised that presumed damages are limited to non-personal losses reflecting the value of free speech generally in our society. If presumed damages are awarded based on the perception that mental anguish is assumed to flow from the deprivation of the right, an additional award for proved emotional distress would be unjust. Through careful jury instructions, however, this problem may be avoided.[192]

C. *Nominal Damages for Violation of First Amendment Rights*

As a last resort, plaintiffs should always include a request for nominal damages. Even in the absence of an award of substantial compensatory or presumed damages for violation of constitutional rights, the Supreme Court in *Carey* stated that nominal damages should be awarded for the purpose of declaring and vindicating legal rights, regardless of proof of harm.[193] Although nominal damages, usually in the sum of one dollar, are obviously insufficient to compensate for constitutional wrongs, they remain an important vehicle for asserting that rights have been violated and that the plaintiff has prevailed as a matter of law.[194] This finding is critical to alert municipalities of wrongdoing and to sustain an award of attorney's fees pursuant to

192. Note that the common law precedents reflect the same limitation of presumed damages to nonpersonal, intangible losses. A few courts which have allowed presumed damages in constitutional tort cases have followed this rule in restricting coverage to the inherent loss caused by the first amendment violation. *See* Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977); Thonen v. Jenkins, 374 F. Supp. 134 (E.D.N.C. 1974), *modified*, 517 F.2d 3 (4th Cir. 1975).

193. 435 U.S. at 266-67.

194. The court in *Carey* specified that the nominal damage award should not exceed the standard sum of $1.00. 435 U.S. at 267. Note that this standard is the one followed in tort cases. *See* D. DOBBS, *supra* note 166, at § 3.8. Several federal courts have awarded nominal damages to vindicate the first amendment freedoms of speech and association. *See, e.g.*, Davis v. Village Park II Realty Co., 578 F.2d 461 (2d Cir. 1978); Familias Unidas v. Briscoe, 544 F.2d 182 (5th Cir. 1976); Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975).

the Civil Rights Attorneys' Fees Act.[195]

Finally, in assessing the damages to be awarded in retaliation suits, a jury should be instructed as to the basic functions served by section 1983. The law was passed in order to deter future governmental action that violates civil rights, as well as to compensate the injured party.[196] When these purposes are achieved, the substantive constitutional guarantee at stake is vindicated and the harmed party is made whole.

Keeping in mind these goals, it is clear that nominal damages are so insubstantial that they have no more than a symbolic effect.[197] Compensatory damages, for intangible losses such as emotional distress as well as damage to reputation, have thus far not proved to be terribly effective in the civil rights area. A combination of strict standards of proof adopted by some courts of appeals coupled with a lack of understanding on the part of juries as to the value of constitutionally protected interests has failed to ensure adequate compensation for the infringement of these constitutionally protected intangible interests.[198] In addition, such compensatory damages have generally been too insubstantial to provide a significant deterrent to violation of first amendment rights.[199] The unavailability of punitive damages against municipalities, which were used by common law courts to achieve the objective of deterrence, further aggravates the problem.[200] This has led a few authorities to urge presumed damages as the only way to accomplish the goals of the civil rights act: "An award of presumed general damages provides effective vindication and adequate compensation for the infringement of all constitution-

195. In a 1976 amendment, Congress authorized the court, in its discretion, to award a reasonable attorney's fee as part of the cost to the prevailing party in an action brought under 42 U.S.C. § 1988 (1976). An award of nominal damages has been held to qualify the plaintiff as a prevailing party under the statute. *See, e.g.*, Perez v. University of Puerto Rico, 600 F.2d 1 (1st Cir. 1979); Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192, 197-98 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979). A court in its discretion may still decline, however, to grant attorney's fees to a plaintiff who has recovered no more than nominal damages. *See, e.g.*, Huntley v. Community School Bd., 579 F.2d 738, 742 (2d Cir. 1978).

196. *See* Owen v. City of Independence, 445 U.S. at 651-52; Newman, *Suing the Lawbreakers: Proposals to Strengthen the § 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 451 (1978).

197. *See* Love, *supra* note 159, at 1281.

198. *See supra* note 188.

199. Love, *supra* note 159, at 1282.

200. *See supra* note 159 and accompanying text.

ally protected interests, including those losses not readily subject to evidentiary proof."[201]

Unfortunately too many courts have shown a reluctance to award presumed damages, many of them erroneously relying on *Carey* to support their position.[202] There is no reason why the injury to our critical constitutional freedoms, as well as the intangible losses that often flow from their invasion, should not be accorded the same weight that judges and juries have given various tortious injuries.[203] Otherwise, the dual purposes of section 1983—compensation and deterrence—will not be achieved.[204]

IV. CONCLUSION

The Supreme Court, through its abandonment of the right-privilege distinction, has in recent years recognized the importance of protecting the first amendment rights of government employees, while simultaneously protecting the efficient and effective operation of government institutions. This article has sought to provide an analytic framework for applying Supreme Court precedent that will give adequate protection to the valuable first amendment interests at stake. As suggested herein, the government should be required to prove that its employee's speech was not critical to its employment decision or that compelling justifications warranted the suppression of speech.[205]

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201. Love, *supra* note 159, at 1282-83 (suggesting the need for legislation to set specific presumed damage awards for violation of civil rights). *Accord* Newman, *supra* note 196, at 465 (urging a liquid damage sum in addition to any actual damages); Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 HARV. L. REV. 966, 976-77 nn.68-69 (1980) (arguing the inadequacy of a remedial scheme making recovery of damages contingent on proof of actual injury).

202. *See supra* note 162.

203. This analysis was suggested recently in Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979). "The hurt done to feelings and to reputation by an invasion of constitutional rights is no less real and no less compensable than the cost of repairing a broken window pane or a damaged lock. Wounded psyche and soul are to be salved by damages as much as the property that can be replaced at the local hardware store." *Id.* at 1209.

204. *See* Newman, *supra* note 196, at 465. "Inadequate awards defeat both the compensatory and deterrent objectives of a section 1983 damage suit. The lack of adequate compensation not only provides paltry monetary incentive to sue but also adds a final indignity to the denial of constitutional rights—the assessment by the judge or jury that the victim's rights were not worth much anyway. And low awards, whether borne by defendants or by their employers, obviously provide scant incentive to refrain from similar abuses in the future." *Id.*

205. *See supra* notes 55-63 and accompanying text.

As to the issue of municipal liability, government should not be permitted to escape responsibility through the assertion of respondeat superior. The doctrine should be limited by recognizing that, in effect, official policy is created whenever officials in command render personnel decisions.[206] Further, the concept of custom or usage should be broadly interpreted to encompass both situations where a series of wrongful retaliatory actions have been taken as well as the situations where complaints to those in command fell on deaf ears. Acquiescence or inaction should be deemed to constitute a "custom or usage."[207] Finally, on the question of damages in retaliation suits, courts should recognize the concept of presumed damages for violation of first amendment rights.[208] In addition, courts should begin to award more liberal compensatory damages, recognizing the mental anguish and emotional distress that is suffered by government employees subjected to unconstitutional retaliatory action.[209] The adoption of these recommendations would enhance the capacity of section 1983 to vindicate the critical first amendment rights at stake.

206. *See supra* notes 104-13 and accompanying text.
207. *See supra* notes 132-49 and accompanying text.
208. *See supra* notes 160-78 and accompanying text.
209. *See supra* notes 179-92 and accompanying text.