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PAYING THE PRICE: IT'S TIME TO HOLD MUNICIPALITIES LIABLE FOR PUNITIVE DAMAGES UNDER 42 U.S.C. § 1983

*Gloria Jean Rottell**

INTRODUCTION

The United States Court of Appeals for the Second Circuit recently held in *Ciraolo v. New York* (“*Ciraolo*”)¹ that the City of New York was immune from an award of punitive damages in a § 1983² action brought by a woman who was arrested for a misdemeanor and subjected to an unlawful strip search of her person.³ The city’s established policy of strip-searching all arrestees,⁴ regardless of whether there was a reasonable belief

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¹ *Ciraolo v. New York*, 216 F.3d 236 (2d Cir.), *cert. denied*, 121 S. Ct. 484 (2000).

² 42 U.S.C. § 1983 (1976). Section 1983 was originally section 1 of the Civil Rights Act of 1871, 17 Stat. 13. *See infra* Part I.A (describing § 1983 actions).

³ *Ciraolo*, 216 F.3d at 242.

⁴ *Id.* at 237. In July 1996, the New York City Correction Department had adopted “guidelines [for] the acceptance of all Police Cases for the Manhattan Court Division, providing that [a]ll police prisoners received shall be strip search[ed] by the officer assigned to the search post.” *Id.* (alterations in original) (internal quotations omitted). In October 1996, the Executive Officer of the Manhattan Detention Complex implemented the guidelines by sending a

that the arrestee possessed contraband, was clearly unconstitutional in light of the established law of the Second Circuit.⁵ Despite the city's disregard of the court's prior decision, the Second Circuit reversed the award of punitive damages against the city⁶ based on the United States Supreme Court's decision in *City of Newport v. Fact Concerts, Inc.* ("*Fact Concerts*")⁷ holding that municipalities are immune from punitive damages under § 1983.⁸

The result that the Second Circuit reached in *Ciraolo*,⁹ while in accordance with precedent established by the Supreme Court, is inconsistent with the policies and purposes underlying § 1983.¹⁰ In fact, the holding in *Ciraolo* created such considerable cognitive dissonance in the mind of Judge Calabresi, who wrote the majority opinion, that he was compelled to also write a separate concurring opinion to express his concern that "the policies and purposes underlying § 1983 would be better furthered by a different outcome."¹¹

memo to all personnel ordering that, "[e]ffective immediately, all female police prisoners arriving at this facility. . . be strip searched." *Id.* at 238 (alteration in original) (internal quotations omitted).

⁵ See *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (holding that strip/body cavity searches of arrestees for misdemeanors or other minor offenses violate the Fourth Amendment unless the prison officials have a reasonable suspicion that the arrestee possesses contraband).

⁶ *Ciraolo*, 216 F.3d at 238. The district court had concluded that the city's strip search policy violated the settled law of the Second Circuit, and, therefore, the city was liable for punitive damages. *Id.* The jury found that the city acted in "wanton disregard" of *Ciraolo*'s rights when she was strip-searched, awarding her \$5,000,000 in punitive damages in addition to compensatory damages of \$19,645. *Id.* at 237.

⁷ 453 U.S. 247 (1981).

⁸ *Id.* at 271.

⁹ *Ciraolo*, 216 F.3d at 242.

¹⁰ See *infra* Parts I.B-C, Parts III.A-C. With regard to municipal liability, the policies and purposes of § 1983 have been of considerable consternation to the Supreme Court; this is evidenced by the on-going interpretation of the legislative history surrounding the enactment of § 1983, which has been thoroughly examined in the leading cases involving the scope of municipal liability. See *infra* note 55.

¹¹ *Ciraolo*, 216 F.3d at 242.

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While municipalities are exempt from punitive damages under the holding of *Fact Concerts*,¹² the Court did leave open, in footnote number twenty-nine (“footnote 29”), the possibility that punitive damages could be imposed on a municipality in “an extreme situation where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights.”¹³ A number of courts have considered footnote 29;¹⁴ none have opted to uphold an award of punitive damages against a municipality.¹⁵ Moreover, it is unclear whether the Supreme Court will find circumstances that warrant holding taxpayers directly responsible for municipal action.¹⁶ Consequently, lower courts have found footnote 29 to be poorly defined.¹⁷ Rather than rule counter to precedent, these courts have barred punitive damages against municipalities despite the exception provided for in footnote 29.¹⁸

¹² *Fact Concerts*, 453 U.S. at 271.

¹³ *Id.* at 267 n.29. “It is perhaps possible to imagine an extreme situation where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights. Nothing of that kind is presented by this case. Moreover, such an occurrence is sufficiently unlikely that we need not anticipate it here.” *Id.*

¹⁴ *Ciraolo*, 216 F.3d at 240 (finding that footnote 29, rather than being a general exception, provides an exception only for outrageous abuses for which the taxpayers are directly responsible); *Webster v. Houston*, 689 F.2d 1220, 1229 (5th Cir. 1982) (finding that footnote 29 provides an exception only for particularly egregious violations of constitutional rights), *rev’d on other grounds*, 735 F.2d 838 (5th Cir. 1984) (en banc); *Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist.*, 670 F.2d 1, 2-3 (1st Cir. 1982) (concluding that the taxpayers were not directly responsible, under footnote 29, because only a small number of taxpayers violated the constitutional rights of the housing developer).

¹⁵ See cases cited *supra* note 14.

¹⁶ The Supreme Court did not provide a test or an adequate means of assessing when the taxpayers would be directly responsible for municipal action. See *Fact Concerts*, 453 U.S. at 267 n.29 (stating that a situation that would fall under this footnote was not before the Court and so unlikely that it required no further discussion).

¹⁷ See cases cited *supra* note 14. The three circuit courts that have analyzed footnote 29 have based their conclusions on different interpretations of the footnote. See *supra* note 14.

¹⁸ *Ciraolo*, 216 F.3d at 242; *Webster*, 689 F.2d at 1229; *Heritage Homes*,

The absolute immunity from punitive damages that municipalities enjoy is detrimental to the protection of constitutional rights under § 1983 and fails to be meaningfully justified.¹⁹ To comport with the intent of § 1983, the Court should, at the very least, reconsider the scope of municipal immunity from punitive damages. Even under the most conservative reading of § 1983, a city that knowingly violates the clearly established law of its judicial circuit should be held liable for punitive damages.

Part I of this note examines how the Supreme Court has interpreted the legislative history behind § 1983 municipal liability and the consequences of the “impenetrable barrier to punitive damages”²⁰ established by the Court in *Fact Concerts*.²¹ Part II analyzes the meaning of footnote 29, details the *Fact Concerts* decision, and then discusses the Court’s intent in creating an exception to municipal immunity from punitive damages.²² Part II also examines the policy reasons that support a more liberal reading of footnote 29. Through an analysis of case law,²³ Part III of this note demonstrates how the precedent established in *Fact Concerts* has created unintended consequences for subsequent litigants. The section concludes that, while the Court correctly decided *Fact Concerts*, it erred in creating such a broad holding that threatens the intent of § 1983.²⁴ As a means of upholding the purpose of § 1983, Part IV proposes two ways for the Supreme Court to rework footnote 29. Finally, Part V suggests that the rationale for the barrier to punitive damages, which supports the outcome in *Fact Concerts*, does not support

670 F.2d at 3.

¹⁹ *Ciraolo*, 216 F.3d at 250 (Calabresi, J., concurring); *Webster*, 689 F.2d at 1237 (Goldberg, J., specially concurring) (arguing that in certain cases failure to impose punitive damages on municipalities undermines the policies of § 1983).

²⁰ *Webster*, 689 F.2d at 1231 (Goldberg, J., specially concurring).

²¹ See discussion *infra* Parts I.B, Parts III.A-C.

²² See discussion *infra* Part II.

²³ *Ciraolo*, 216 F.3d at 236; *Webster*, 689 F.2d at 1220; *Heritage Homes*, 670 F.2d at 1.

²⁴ See discussion *infra* Parts I.A-C, II, III.A-C.

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the holdings of the subsequent cases.²⁵

I. LEGISLATIVE HISTORY OF § 1983

A. *An Overview*

Congress enacted the Civil Rights Act of 1871,²⁶ also known as the “Ku Klux Klan Act,”²⁷ at the urging of President Grant.²⁸ The legislative intent behind the Act was to provide broad federal remedies to people who were deprived of their constitutional rights,²⁹ in particular, their right to equal protection.³⁰ While the

²⁵ *Webster*, 689 F.2d at 1231-32 (Goldberg, J., specially concurring).

I am in agreement with the Supreme Court in *Newport* not only in regard to rationale and result, but also in regard to the Court’s overall approach to section 1983. What disturbs me is that the very methodology and rationale that dictate the result in *Newport* dictate a contrary result now.

Id.

²⁶ 42 U.S.C. § 1983 (1976).

²⁷ *See* S. Rep. No. 1, 42d Cong., 1st Sess. The Civil Rights Act of 1871 was commonly referred to as the Ku Klux Klan Act because it was enacted in response to the wave of Klan violence at the time. *Id.*

²⁸ CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871). On March 23, 1871, President Grant sent a message to Congress reading:

A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty and property, and the enforcement of law in all parts of the United States.

Id.

²⁹ CONG. GLOBE, App. at 81. In the words of Representative Bingham, the author of section 1 of the Fourteenth Amendment, the purpose of the Act is to “enforc[e] . . . the Constitution on behalf of every individual citizen of

Klu Klux Klan had engaged in a reign of terror in the southern states,³¹ the state and local authorities either participated in the violence against the “loyal Republicans and freedmen”³² or did nothing to stop it from occurring.³³ The Act was a legislative response to this failure of state and local governments to protect

the Republic . . . to the extent of the rights guaranteed to him by the Constitution.” *Id.* Furthermore, the remedial nature of the Act led to the sentiment of liberal construction. *See* GLOBE. App. at 68 (1 *Story on Constitution*, sec. 429). Even opponents of section 1 of the Act thought that it was to be far reaching. *Monell*, 436 U.S. at 686. Senator Thurman, who critiqued the Act found that “[there] is no limitation whatsoever upon the terms that are employed [in the bill], and they are as comprehensive as can be used .” CONG. GLOBE. App. at 217. *See, e.g.*, CONG GLOBE. App. at 50, 160, 179, 216 (citing comments made by Mr. Kerr of Indiana, Mr. Golladay of Tennessee, Mr. Voorhees of Indiana, and Senator Thurman of Ohio, respectfully opposing the Act because of the breadth of the remedy provided).

³⁰ Civil Rights Act of 1871, ch. 22, 17 Stat. 13. The Civil Rights Act of 1871 was passed to enforce the Fourteenth Amendment of the United States Constitution. *Id.* It reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . 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 proceeding for redress.

Id.

³¹ *See supra* note 28 and accompanying text (describing the inability of many Southern states to ensure enforcement of the law due to the Klu Klux Klan’s unbridled dominion of violence).

³² Ken Ballen, Note, *Municipal Liability Under Section 1983: The Meaning of “Policy or Custom,”* 79 COLUM. L. REV. 304, 308 (1979).

³³ *Monroe v. Pape*, 365 U.S. 167, 180 (1961). The Court wrote:

It is abundantly clear that one reason the legislation was passed was to afford a federal right in the federal courts, because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the fourteenth amendment might be denied by the state agencies.

Id.

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the constitutional rights of their citizens.³⁴ Furthermore, the Act was to serve as a judicial remedy to citizens who were denied equal protection by their states.³⁵

Section 1 of the Civil Rights Act, now codified as § 1983, passed with almost no legislative debate and without amendment.³⁶ While other sections of the Civil Rights Act of 1871 were being considered,³⁷ Senator John Sherman of Ohio proposed an amendment³⁸ to the Act (the “Sherman Amendment”) that would hold municipalities “liable to pay full compensation to the person or persons damnified [by certain acts of violence] if living, or to his widow or legal representative if dead.”³⁹ Congress rejected the Sherman Amendment, however, because of its expansive view of municipal liability.⁴⁰ While not intending to alter § 1983,⁴¹ the amendment is relevant in

³⁴ *Id.* at 176 (comments of Senator Osborn):

That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should, so far as they have authority under the Constitution, enact the laws necessary for the protection of citizens of the United States.

Id.

³⁵ CONG. GLOBE, 42d Cong., 1st Sess. 459 (1871) (stating the remarks of Rep. Coburn).

³⁶ CONG. GLOBE, 42d Cong., 1st Sess. 522 (1871).

³⁷ *Monroe*, 365 U.S. at 180-81 (indicating that section 2 in particular created great controversy).

³⁸ The Sherman Amendment, CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871).

³⁹ *Id.*

⁴⁰ See *Monell v. Dep’t of Soc. Serv.*, 436 U.S. 658, 692 (1978) (indicating that the amendment was rejected by Congress because it imposed liability on municipalities for the wrongs of a few private citizens even if the municipality had “done everything in its power” to prevent the unlawful acts); *Fact Concerts*, 453 U.S. at 264 (“It was generally understood that the extent of the proposed public liability went beyond what was contemplated under § 1.”).

⁴¹ *Monell*, 436 U.S. at 666 (stating that the Sherman Amendment was to be added to the end of the bill as section 7). The Sherman Amendment was

considering the legislative intent regarding the constitutionality of congressionally imposed civil liability on municipalities.⁴²

According to Senator George Edmunds, who was then Senate Manager of the Act and Chairman of the Senate Judiciary Committee, municipalities are bound by the duty of protection that the Fourteenth Amendment imposes on states.⁴³ While Congress defeated the Sherman Amendment primarily because it imposed vicarious liability on municipalities,⁴⁴ nothing in the

adopted by the Senate. CONG. GLOBE, 42d Cong., 1st Sess. 704-05 (1871). However, it did not pass in the House. *Id.* at 725.

⁴² The Supreme Court has analyzed the Sherman Amendment as a means to determine the legislative intent behind § 1983 because § 1983 was passed with little debate. *See Monroe*, 365 U.S. at 190 (concluding that Congress excluded municipal corporations from the coverage of section 1 of the Civil Rights Act based on the House's rejection of the Sherman Amendment); *Monell*, 436 U.S. at 682 (overruling *Monroe* insofar as it held municipalities immune from liability under section 1 of the Civil Rights Act based on a fresh interpretation of the Sherman Amendment); *Fact Concerts*, 453 U.S. at 265 (reasoning that, based on Congress' rejection of permitting punitive damage awards against municipalities in the context of the Sherman Amendment, punitive damage awards are also forbidden under § 1983). *See generally* Owen v. City of Independence, 445 U.S. 622 (1980) (holding that municipalities have no immunity from damages resulting from their constitutional violations under § 1983).

⁴³ CONG. GLOBE, 42d Cong., 1st Sess. 459 (1871). Senator Edmunds stated:

[The Fourteenth Amendment] which speaks to the protection which the States must afford to all their inhabitants equally under the law . . . does speak . . . to municipal authorities existing under State law directly; and when, therefore, they fail to perform the duty of protection, which the theory of this law implies that they are bound to perform . . . then the Constitution has declared that Congress, by appropriate legislation, may apply to them the duty of making reimbursement.

CONG. GLOBE, 42d Cong., 1st Sess. 756-57 (1871). *See also Monell*, 436 U.S. at 690 (“Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.”).

⁴⁴ *See Monell*, 436 U.S. at 691-95 (indicating that while the proponents of the Sherman Amendment viewed it as only coming “into play when a locality

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legislative history of the Amendment mitigated the duty that the Act imposed on local governments to protect “persons” subject to their coverage.⁴⁵ The rejection of the Sherman Amendment, therefore, does not alter the municipality’s responsibility to protect its citizens from a denial of equal protection.⁴⁶ Furthermore, the rejection of the Amendment suggests that Congress, in enacting section 1 of § 1983, did not impose a prerequisite that the state or municipality act with the intent to deprive someone of a constitutional right.⁴⁷ Thus, Congress’ major objectives in enacting § 1983 were twofold. First, it intended to impose an obligation on state and local governments to protect the already existing rights of its citizens.⁴⁸ Second, it sought to create an affirmative duty on the states to protect its citizens by stating that denial of equal protection and any failures to proactively protect its citizens’ rights violate the Act.⁴⁹ Therefore, the legislative history of § 1983 supports the

was at fault or had knowingly neglected its duty to provide protection,” other proponents, and ultimately Congress, viewed it as a means to vicariously hold municipalities liable for the unlawful acts of local citizens).

⁴⁵ Ballen, *supra* note 32, at 315.

⁴⁶ See Ballen, *supra* note 32, at 314. There is no indication that there was any debate over the validity of Senator Edmund’s statement regarding municipal obligation under the Fourteenth Amendment when the Sherman Amendment was rejected. See Ballen, *supra* note 32, at 314.

⁴⁷ CONG. GLOBE, 42d Cong., 1st Sess. 755 (1871). The existence of a specified intent requirement, that the rioters have acted “with the intent to deprive any person of any right conferred upon him by the Constitution” in the rejected Sherman Amendment, indicates Congress would have included a similar provision in § 1983 if it desired to do so. *Id.* See also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-26 (1968) (supporting the proposition that Congress would provide a specific requirement with express language had that been its desire, and, therefore additional requirements should not be read into the Act); Eric Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213, 242 (1979) (noting that the legislative history of § 1983 indicates that “except as to certain specific provisions, Congress attached no importance to the intent involved”).

⁴⁸ CONG. GLOBE, 42d Cong., 1st Sess. ch. 22, 17 Stat. 13 (1871). The Civil Rights Act of 1871 was entitled “An Act to enforce The Provisions of the Fourteenth Amendment. . . .” *Id.*

⁴⁹ Ballen, *supra* note 32, at 313.

proposition that, when a municipality disregards a prior ruling by its own judicial circuit, it should be held liable.

B. The Supreme Court's Interpretation of § 1983

The legislative history of § 1983 suggests an overarching policy; statutes that are meant to protect and remedy wrongs to people should be liberally construed.⁵⁰ Senator Edmunds stated the following:

The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under the color of any State law, and it is merely carrying out the principles of the civil rights bill, which has since become a part of the Constitution.⁵¹

In enacting § 1983, the legislature had three main goals: to override any state legislation endangering the constitutional rights and privileges of the citizens of the United States;⁵² to provide a “remedy where state law was inadequate;”⁵³ and “to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.”⁵⁴

The Supreme Court has thoroughly analyzed the legislative history behind the enactment of the Civil Rights Act of 1871 to determine whether municipal liability exists under § 1983.⁵⁵ This

⁵⁰ *Monell*, 436 U.S. at 684 (according to Representative Shellabarger, the courts would and should interpret section 1 with a broad effect).

⁵¹ CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871). The civil rights bill referred to by Senator Edmunds is the Act of April 9, 1866, 14 Stat. 27. This bill became part of the Constitution through the Fourteenth Amendment.

⁵² *Monroe*, 365 U.S. at 173.

⁵³ *Id.*

⁵⁴ *Id.* at 174.

⁵⁵ *See, e.g., Monroe*, 365 U.S. at 168-92 (discussing the legislative history of § 1983 explicitly throughout its twenty-four page opinion); *Monell*, 436 U.S. at 660-702 (conducting a renewed analysis of § 1983 leading to the Court's overruling of *Monroe* insofar as it holds local governments wholly immune from suit under § 1983); *Owen v. City of Independence*, 445 U.S. 622, 635 (1980) (noting the necessity to conduct an analysis of the “language

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process, however, has not been easy. In 1961, *Monroe v. Pape*⁵⁶ raised the question of whether the forty-second Congress intended to include municipalities within the ambit of § 1983.⁵⁷ The Court concluded that because the Sherman Amendment, which proposed municipal liability, received such an “antagonistic”⁵⁸ response from Congress and was rejected for this reason,⁵⁹ Congress could not have intended the word “person,”⁶⁰ as used in the Act, to include municipalities.⁶¹ Seventeen years

of the statute itself” to determine the scope of a municipality’s immunity from liability under § 1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (examining the common-law background and policy considerations of § 1983); *Oklahoma City v. Tuttle*, 471 U.S. 808, 813 (1985) (declaring that “[a]lthough this Court has decided a host of cases under [§ 1983] in recent years, it can never hurt to embark on statutory construction” prior to deciding the question of whether “a single isolated incident of the use of excessive force by a police officer establishes an official policy or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. § 1983”); *Pembaur v. Cincinnati*, 475 U.S. 469, 481 (1986) (basing its opinion on the “principles underlying § 1983” to conclude that a municipality is equally responsible under § 1983 whether a particular course of action directed by those who establish governmental policy is to be undertaken only once or to be taken repeatedly).

⁵⁶ 365 U.S. 167 (1961).

⁵⁷ *Id.* at 170.

⁵⁸ *Id.* at 191.

⁵⁹ CONG. GLOBE, 42d Cong., 1st Sess. 804 (1871). Mr. Poland, speaking about the Sherman Amendment’s proposal to hold municipalities liable, stated: “We informed the conferees on the part of the Senate that the House had taken a stand on that subject and would not recede from it; that that section imposing liability upon towns and counties must go out or we should fail to agree.” *Id.*

⁶⁰ *See Monroe*, 365 U.S. at 191. The Court explained that Senator Sherman proposed the Sherman Amendment while the Act of April 20, 1871 was being debated in Congress. *Id.* at 188. While Congress was debating this amendment, they relied on the Act of February 25, 1871, entitled “An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof” for a definition of the word “person.” *Id.* at 190. Section 2 of the Act of February 25, 1871 provided that a permissible, but not mandatory definition of the word “person” “extend[ed] and [could] be applied to bodies politic and corporate.” *Id.* at 191.

⁶¹ *Id.* (concluding that “[t]he response of the Congress to the proposal to

later, in *Monell v. Department of Social Services*,⁶² the Supreme Court re-examined the legislative history behind § 1983 and overruled *Monroe*.⁶³ The Court concluded that the *Monroe* Court misunderstood the meaning of the Act,⁶⁴ thereby suggesting the possibility of municipal remedies for § 1983 violations.⁶⁵ The holding of *Monell*, however, did not directly address this issue; thus, the question remained open.⁶⁶ Finally, in 1981, the Court addressed the issue of whether municipalities could be held liable for punitive damages in *City of Newport v. Fact Concerts, Inc.*⁶⁷ It held, after an analysis of the legislative history behind § 1983,⁶⁸ that municipalities are immune from punitive damages.⁶⁹

C. Fact Concerts:⁷⁰ *The Impenetrable Barrier to Punitive*

make municipalities liable for certain actions being brought within federal purview of the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in [§ 1983] to include them").

⁶² 436 U.S. 658 (1978).

⁶³ *Monell*, 436 U.S. at 664-89. *Monell* overrules *Monroe* insofar as *Monroe* held that local governments are not "persons" and are immune from suits under § 1983. *Id.*

⁶⁴ *Monell*, 436 U.S. at 700-01. The Court stated:

It is simply beyond doubt that, under the 1871 Congress' view of the law, were section 1983 liability unconstitutional as to local governments, it would have been equally unconstitutional as to state officers. . . . [T]here can be no doubt that section 1 of the Civil Rights Act intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights. Therefore, absent a clear statement [to the contrary] there is no justification for excluding municipalities from the "persons" covered by section 1.

Id.

⁶⁵ *Id.*

⁶⁶ See *Monell*, 436 U.S. at 664-89; see generally Ballen, *supra* note 32 (describing the elusiveness of the Court's decision and proposing a model of municipal liability).

⁶⁷ 453 U.S. 247 (1981).

⁶⁸ See discussion *infra* Part I.C.

⁶⁹ *Fact Concerts*, 453 U.S. at 271.

⁷⁰ 453 U.S. 247 (1981).

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Damages

In an action brought under § 1983, Fact Concerts, Inc., a musical concert promoter, sued the City of Newport, Rhode Island for a violation of its First Amendment rights.⁷¹ Fact Concerts, Inc. had obtained permission from the Rhode Island Department of Natural Resources to present several jazz concerts at a state park in Newport.⁷² When a regularly scheduled performer was unable to appear at the concert, Fact Concerts engaged the group *Blood, Sweat and Tears* as a replacement. The Newport City Council attempted to prevent *Blood, Sweat and Tears* from performing because it feared the band would attract a rowdy audience to the city.⁷³ Although the concert went on, ticket sales were significantly lower due to the media attention covering the city council's vote to cancel the contract.⁷⁴ Fact Concerts, Inc., therefore, sued the city to recover lost ticket profits. At the conclusion of a six day trial in district court, the jury awarded Fact Concerts \$200,000 in punitive damages against the city, as well as damages from the individuals involved.⁷⁵

The City of Newport moved for a new trial, arguing that § 1983 prevents the assessment of punitive damages against a municipality, and in the alternative, that the award was excessive.⁷⁶ The district court proceeded to consider the merits of the city's arguments.⁷⁷ It concluded, however, that municipal liability was appropriate under the circumstances presented.⁷⁸ The

⁷¹ *Id.* at 252 (alleging, *inter alia*, "that the license cancellation amounted to content-based censorship, and that its constitutional rights to free expression and due process had been violated under color of state law").

⁷² *Id.* at 249-50.

⁷³ *Id.* at 250.

⁷⁴ *Id.* at 251.

⁷⁵ *Id.* at 253. The rest of the punitive damages awarded, amounting to \$75,000, was spread among the seven individual officials. *Id.*

⁷⁶ *Id.* at 253.

⁷⁷ *Id.* at 253-54.

⁷⁸ *Id.* at 254. The court noted, however, that caution was warranted in this area because of the burden that would be imposed on the taxpayers. *Id.* It also

court of appeals, unable to find any appellate decisions that had barred punitive damage awards against municipalities, affirmed the district court's decision.⁷⁹

The question presented to the Supreme Court on *certiorari* was whether a municipality could be held liable for punitive damages under § 1983.⁸⁰ The Supreme Court analyzed the claim of municipal liability using a "two part approach."⁸¹ First, it considered the legislative history relevant to § 1983 and the common law pertaining to municipal liability for punitive damages.⁸² Second, it evaluated the policies behind punitive damages and the relevancy and relation of those policies to § 1983. Finally, it concluded that municipalities are immune from punitive damages under § 1983.⁸³

In assessing the legislative history, the Court compared the treatment of private corporations and municipalities under common law.⁸⁴ According to the Court, in 1871 municipalities and private corporations were both subject to suits for tortious conduct and were required to pay compensatory damages if found

concluded that the \$200,000 award of damages was excessive and it ordered a remittitur, reducing the punitive damages to \$75,000. *Id.*

⁷⁹ *Fact Concerts*, 626 F.2d 1060 (1980). The court noted the "distinct possibility that municipalities, like all other persons subject to suit under § 1983, may be liable for punitive damages in the proper circumstance." *Id.* at 1067.

⁸⁰ *Id.* at 254.

⁸¹ *Id.* at 258-59. The Court has applied this "two-part approach" since it decided *Monell*. *Id.*

⁸² *Id.* at 258-59.

⁸³ *Id.* at 271. The Court stated:

In sum, we find that considerations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials. Because absolute immunity from such damages obtained at common law and was undisturbed by the 42d Congress, and because that immunity is compatible with both the purposes of § 1983 and general principles of public policy, we hold that a municipality is immune from punitive damages under 42 U.S.C. § 1983.

Id.

⁸⁴ *Id.* at 259-71.

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liable.⁸⁵ Courts were, and continue to be, however, disinclined to subject either entity to punitive damages.⁸⁶ Absent a specific congressional provision altering the common-law scheme, however, the Court concluded that § 1983 similarly barred punitive damages.⁸⁷ Furthermore, the Court looked to the Sherman Amendment, which only provided compensatory damages for injuries sustained from acts of mob violence.⁸⁸ It reasoned that since Congress did not intend to permit punitive damage awards against municipalities in the Amendment, it would not have meant to impose them “sub silentio under § 1 of the Act.”⁸⁹

Additionally, the legislative history of section 1⁹⁰ indicated Congress’ concern that local governments would not be able to support the financial burden an assessment of punitive damages would impose upon them.⁹¹ Congress also indicated that punitive damages would unjustly punish taxpayers for actions taken by other persons.⁹² The Court concluded that the legislative history surrounding § 1983 and the common law of 1871 suggest that compensatory damages, not punitive damages, are appropriately awarded against a municipality when it has committed a wide range of tortious activity.⁹³

Since Congress did not intend to alter the common law

⁸⁵ *Id.* at 259.

⁸⁶ *Id.* at 260 n.21.

⁸⁷ *Id.* Cf. *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (determining that if Congress had intended to abolish punitive damages it would have done so explicitly).

⁸⁸ *Fact Concerts*, 453 U.S. at 264.

⁸⁹ *Id.* at 265.

⁹⁰ 42 U.S.C. § 1983.

⁹¹ CONG. GLOBE, 42d Cong., 1st Sess. 795 (1871) (comments of Representative Blair) (arguing that the obligations imposed by the amendment might “utterly destroy the municipality”). See also *Fact Concerts*, 453 U.S. at 265.

⁹² *Fact Concerts*, 453 U.S. at 266 (citing the remarks of Senator Stevenson who feared that the amendment “under[took] to create a corporate liability for personal injury which no prudence or foresight could have prevented”); CONG. GLOBE, 42d Cong., 1st Sess. 762 (1871).

⁹³ *Fact Concerts*, 453 U.S. at 259-61.

scheme when it enacted § 1983, the Court then looked to see if public policy considerations should override Congress' intent.⁹⁴ The purposes underlying punitive damages are twofold: to punish the "tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct."⁹⁵ The Court easily dismissed the retributive goal of punitive damages because the tortfeasor would not be made to suffer from his unlawful actions⁹⁶ and the innocent taxpayers would instead foot the bill.⁹⁷

Next, the Court examined the rationale of § 1983 in relation to the deterrent objective of punitive damages. It rejected respondent's argument that the deterrent purpose of § 1983 would be fulfilled by assessing "[p]unitive damages awards against municipalities for the malicious conduct of their policymaking officials [by inducing] voters to condemn official misconduct through the electoral process, [so that] the threat of such awards [would] deter future constitutional violations."⁹⁸ Instead, the Court found it uncertain that policymaking or other municipal officials would be deterred if the city were to pay such damages.⁹⁹ Superiors, the Court believed, would take corrective

⁹⁴ *Id.* at 266-70.

⁹⁵ *Id.* at 266-67. *See* *Smith v. Wade*, 461 U.S. 30, 38-55 (1983) (concluding that there is no reason to depart from the common law standard of assessing punitive damages in a § 1983 action); RESTATEMENT (SECOND) OF TORTS § 908 (1979); W. PROSSER, *LAW OF TORTS*, 9-10 (4th ed. 1971).

⁹⁶ *Fact Concerts*, 453 U.S. at 267 (emphasizing the importance of punishing the wrongdoer for his unlawful conduct and noting that punitive damages assessed against a municipality fail to serve the retributive goal because "[a] municipality . . . can have no malice independent of the malice of its officials").

⁹⁷ *Id.* (stating that punitive damages "are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill," even though they did not participate in the commission of the tort).

⁹⁸ *Id.* at 269.

⁹⁹ *Id.* The Court has also noted that damages assessed against an individual are more likely to deter conduct than the threat of damages against a municipality. *See* *Carlson v. Green*, 446 U.S. 14, 21 (1980) (stating that "responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity").

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action against the offending officials even without the assessment of punitive damages.¹⁰⁰ Finally, the Court expressed its concern that municipalities would become financially unstable if held liable for such damages.¹⁰¹ As such, it concluded that policy does not warrant an abandonment of municipal immunity.¹⁰²

The Court, however, left open the opportunity for an award of punitive damages in footnote 29 by suggesting that, perhaps in extreme situations, punitive damages are appropriate. This footnote indicates that the barrier to punitive damages may not be impenetrable, after all.

II. ANALYSIS OF FOOTNOTE 29¹⁰³

Footnote 29 of *Fact Concerts* reads as follows: “It is perhaps possible to imagine an extreme situation where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights. Nothing of that kind is presented by this case. Moreover, such an occurrence is sufficiently unlikely that we need not anticipate it here.”¹⁰⁴ The circuit courts are split in their interpretation of these words. Their divergent views suggest the need for review of the Supreme Court’s intent behind the footnote, and concise examples of the situations that would trigger liability. The First and Second Circuits, in analyzing the application of footnote 29, have focused on the taxpayers’ involvement in the unlawful action.¹⁰⁵ In contrast, the Fifth

¹⁰⁰ *Fact Concerts*, 453 U.S. at 268-69.

¹⁰¹ *Id.* at 270. When juries determine the size of a punitive damage award, they are allowed to consider the size and wealth of the municipality. *Id.* The Court expressed concern that this would lead to unpredictable and large punitive damage assessments. *Id.* These factors could strain the local treasuries and negatively impact innocent citizens who would be deprived of other services otherwise available to them. *Id.* at 271.

¹⁰² *Id.* at 271.

¹⁰³ *Fact Concerts*, 453 U.S. at 267 n.29.

¹⁰⁴ *Id.*

¹⁰⁵ *Ciraolo*, 216 F.3d at 241 (finding that the taxpayers cannot be held responsible when an “unconstitutional policy has been adopted by municipal officials without any clear endorsement of the policy by the electorate”);

Circuit has focused more on the outrageousness of the constitutional abuse rather than the taxpayers' responsibility for the incident.¹⁰⁶ Despite conflicting methods of interpretation, subsequent courts have uniformly taken an inflexible approach to the precedent established in *Fact Concerts* and have declined to apply footnote 29 in order to create an exception to its sweeping holding.¹⁰⁷

It is argued that the Court would not have created footnote 29 if it had not intended to create an exception to municipal immunity from punitive damages.¹⁰⁸ While the circumstances in *Fact Concerts* clearly did not present an appropriate situation for the assessment of punitive damages against the municipality, other fact patterns do call for it.¹⁰⁹ Certainly, a contractual breach

Heritage Homes, 670 F.2d at 2 (analyzing the reality of deterrence by the number of taxpayers in the Seekonk Water District compared to the number of taxpayers who actually participated in the crucial meeting).

¹⁰⁶ *Webster*, 689 F.2d at 1229 ("The plight of Randy Webster, however reprehensible, however tragic, does not rise to the level of outrageous conduct. . . . [W]e believe that it would take a far more serious violation than that we confront to ground punitive damages against Houston.").

¹⁰⁷ See *Ciraolo*, 216 F.3d 236; *Webster*, 689 F.2d 1220; *Heritage Homes*, 670 F.2d 1. It has been argued that footnote 29 is not an exception, rather it precludes an exception. *Webster*, 689 F.2d at 1231 (Goldberg, J., specially concurring).

¹⁰⁸ Myriam E. Gilles, Symposium, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 871-75 (2001) (agreeing with Judge Calabresi's concurring opinion in *Ciraolo* and arguing that the assessment of punitive damages against a municipality is necessary "to cause the municipality to internalize the full social costs of its unconstitutional policy or custom"). The Supreme Court, when referring to punitive damages imposed on a municipality, could simply have stated "[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *Fact Concerts*, 453 U.S. at 267. However, instead of ending its analysis there, in footnote 29 the Court went on to hypothesize about a possible situation where it would be appropriate to impose punitive damages on a municipality. *Id.* at 267 n.29. Thus, the mere presence of the footnote indicates that it be construed as an exception to municipal immunity from punitive damages.

¹⁰⁹ See *infra* Part III.A-C (analyzing three cases where punitive damage awards should have been assessed against municipalities, but were denied based on the holding in *Fact Concerts*).

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resulting in a violation of First Amendment rights is not an “extreme situation” where an assessment of punitive damages would be proper.¹¹⁰ Only a few taxpayers were members of the city council that voted for the cancellation; therefore, punitive damages would have likely burdened innocent taxpayers.¹¹¹ Moreover, while *Fact Concerts, Inc.* suffered a loss in ticket sales due to the adverse publicity,¹¹² this loss could not be said to constitute “an outrageous abuse of constitutional rights.”¹¹³ These facts aside, footnote 29 should be interpreted in the spirit of § 1983, as a means to deter municipalities from constitutional violations in cases with exceptional fact patterns.¹¹⁴

The consequences of municipal immunity are detrimental to citizens whose constitutional rights have been violated and threaten to subvert the utility of § 1983 actions. An examination of the cases in which subsequent courts have declined to apply footnote 29 highlights the inequity of the holding in *Fact Concerts* to other litigants.

III. IMPACT OF *FACT CONCERTS*

In its holding in *Fact Concerts*, the Court effectively barred

¹¹⁰ *Fact Concerts*, 453 U.S. at 267 n.29. The fact that the Court created footnote 29 stating that “[i]t is perhaps possible to image an extreme situation, [however,] [n]othing of that kind is presented by this case,” suggests that the facts of *Fact Concerts* do not warrant punitive damages assessed against the municipality. *Id.* See generally *Webster*, 689 F.3d at 1231-38 (Goldberg, J., specially concurring).

¹¹¹ *Fact Concerts*, 453 U.S. at 250-52.

¹¹² *Id.* at 252. The adverse publicity resulted in less than half the tickets for the concert being sold. *Id.*

¹¹³ *Id.* at 267 n.29.

¹¹⁴ *Webster*, 689 F.2d at 1229. The majority opinion in *Webster* interpreted *Fact Concerts* as allowing punitive damages to be assessed against a city in an outrageous case. *Id.* But see *Webster*, 689 F.2d at 1231-38 (Goldberg, J., specially concurring) (suggesting that *Fact Concerts* has created an absolute bar to an assessment of punitive damages against a city). See also *infra* Part IV (proposing two ways for the Supreme Court to rework footnote 29 to insure that the purpose of § 1983 is upheld).

punitive damages against municipalities in any future case.¹¹⁵ The result of this holding has been far reaching and has created situations where there is no redress for people whose constitutional rights have been knowingly violated. In subsequent cases, appellate courts have been forced, under the precedent set forth in *Fact Concerts*, to bar punitive damages assessed against municipalities even when the results are incongruous with the plain meaning of § 1983.¹¹⁶

Other courts have applied the rule established in *Fact Concerts* to more inequitable factual situations than the relatively unoffensive conduct of the Newport officials.¹¹⁷ In fact, the

¹¹⁵ *Fact Concerts*, 453 U.S. at 271. See also, *Webster*, 689 F.2d at 1230-31 (Goldberg, J., specially concurring).

¹¹⁶ See, e.g., *Ciraolo*, 216 F.3d at 242 (citing *Fact Concerts* as the constraining precedent for its reversal of a punitive damages award assessed against a municipality for a Fourth Amendment violation); *Webster*, 689 F.2d at 1229 (reversing the trial court's verdict imposing punitive damages on the city based on the precedent established in *Fact Concerts*); *Heritage Homes*, 670 F.2d at 2 (reversing the district court's judgment awarding punitive damages against the Seekonk Water District in light of the *Fact Concerts* decision).

¹¹⁷ Examples of factual situations that command one's attention are those found in *Ciraolo*, *Webster*, and *Heritage Homes*. In each of these cases, the city's officials participated in clearly unconstitutional conduct by adopting a policy that it unquestionably knew, or should have known, would violate the Fourth Amendment by strip-searching all arrestees brought to the police station regardless of whether there was probable cause to believe they possessed contraband, by encouraging a policy of using "throw down" weapons to conceal police errors, and by taxpayers voting for the exclusion of a housing developer from access to water based on racist motivations. See *Ciraolo*, 216 F.3d 236 (2d Cir. 2000); *Webster*, 689 F.2d 1220 (5th Cir. 1982); *Heritage Homes*, 670 F.2d 1 (1st Cir. 1982). Judge Goldberg, in *Webster*, noted the extreme differences in factual situations when he contrasted the facts in *Fact Concerts* (referred to below as *Newport*):

In *Newport* the challenged activity was an ad hoc decision; here it is a widely followed municipal policy. In *Newport* there were specifically identifiable wrongdoers; here it is impossible to point to any person or persons responsible for the offending policy. In *Newport* the very nature of the wrong makes it public, whereas here the very nature of the wrong tends towards concealment. Finally, in *Newport* the consequence of the wrong was lost ticket sales; here it is needlessly,

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breadth of the *Fact Concerts* holding has forced lower courts to grant immunity to municipalities in circumstances not contemplated by the Court.¹¹⁸ Based on the fact pattern before it, the Court rightly concluded that the City of Newport should not be subjected to punitive damages. When applied to cases with different and compelling fact patterns, however, blanket municipal immunity from punitive damages undermines the policies behind § 1983 and, thus, should lead the Court to overcome this presumption.

A. *Heritage Homes of Attleboro, Inc. v. Seekonk Water District*¹¹⁹

In *Heritage Homes*, the First Circuit Court of Appeals denied the imposition of punitive damages against the Seekonk Water District, a municipal corporation under state law, even though taxpayers in the district had voted in favor of excluding a housing developer from access to water due to his willingness to sell

tragically, lost life.

Webster, 689 F.2d at 1233.

¹¹⁸ See *Ciraolo*, 216 F.3d at 241; *Webster*, 689 F.2d at 1229; *Heritage Homes*, 670 F.2d at 3. *Ciraolo*, *Webster*, and *Heritage Homes* each cited to *Fact Concerts* as the basis for reversing the lower court's award of punitive damages. See *Ciraolo*, 216 F.3d at 241 (“[D]espite what might be the salutary effects of punitive damages in a case such as this, we are constrained by the Supreme Court’s holding in [*Fact Concerts*] to reverse the award of punitive damages.”); *Webster*, 689 F.2d at 1229 (“The plight of Randy Webster, however reprehensible, however tragic, does not rise to the level of outrageous conduct to which Justice Blackmun [in *Fact Concerts*] referred.”); *Heritage Homes*, 670 F.2d at 3 (finding that the court was “not only bound by the holding of *Fact Concerts* but it must also defer to its reasoning”). However, each of those cases noted the seeming inadequacy of applying the broad holding in *Fact Concerts* to factual situations presented before them. In his concurring opinion in *Webster*, Judge Goldberg noted that “a policy under which policemen are permitted literally to get away with murder by perpetrating a fraud in a subsequent investigation is more offensive to the principles of section 1983 than is a municipal breach of a contract for a concert site that results in lost ticket sales.” *Webster*, 689 F.2d at 1235.

¹¹⁹ 670 F.2d 1 (1st Cir. 1982).

houses to black families.¹²⁰ The First Circuit had previously upheld the district court's award of punitive damages but was compelled to reverse that aspect of its decision in light of *Fact Concerts*.¹²¹ The policy that the taxpayers in *Heritage Homes* had voted for was unquestionably unconstitutional and had followed "blatantly racist discussions."¹²² Nonetheless, the court analyzed footnote 29 to the letter, focusing only on the taxpayers involved in the unconstitutional action.¹²³ It reasoned that since only a minority of the members participated in this vote, it would not be fair to assess punitive damages against the municipality and to punish those taxpayers who did not vote for this particular policy.¹²⁴

¹²⁰ *Id.* at 3.

¹²¹ 648 F.2d 761 (1st Cir. 1981), *on remand*, 670 F.2d 1 (1982) (reversing the district court's award of punitive damages against the Seekonk Water District, a municipal corporation under state law).

¹²² *Id.* at 2; *see, e.g.*, *Heritage Homes of Attleboro, Inc. v. Seekonk Water District*, 498 F. Supp. 463 (D. Mass. 1980). At the Seekonk Water District meeting, in which a motion to include the property of Heritage Homes in the water district was raised, the gist of conversations between the voters discussing among themselves the Heritage Homes project was as follows:

[T]he project would bring in black people from nearby East Providence; that Water District members would have to sell their houses at a loss because they didn't want colored people in Seekonk; and that the subdivision must be stopped if the voters were to protect the value of their property.

Id. at 465. During the floor discussion, the following occurred:

One speaker said that he understood that the houses proposed by Heritage Homes would bring black people to the area. Another man asked where the builder was. When DesVergnes [the builder] understandably hesitated to identify himself the man demanded to see the builder who planned "to put up this low income housing in this town." DesVergnes then stood up . . . he was asked by the same voter "What kind of shacks are you going to build in this town?"

Id. at 466. After the meeting, another voter (who did not recognize DesVergnes) said to him "if we don't stop this thing here tonight . . . you will have all the niggers in town." *Id.*

¹²³ *Heritage Homes*, 670 F.2d at 2.

¹²⁴ *Id.* at 4. The court stated that "[t]he actions of a small claue of voters would burden several thousand non-participants, many of whom presumably

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Heritage Homes exemplifies the difficulties courts must face as a result of the vague nature of footnote 29. The court sought, but was unable to discern, how to assess taxpayer responsibility for an unconstitutional action.¹²⁵ It commented that “[t]he exact number of members of the District is not crucial to our holding, though this might be a different case were there only 100 members instead of several thousand.”¹²⁶ The fact that only a small number of taxpayers were culpable troubled the court. An award of punitive damages would burden many taxpayers “unaware of the entire controversy.”¹²⁷ In addition, the definition of a knowing and culpable taxpayer was unclear from the *Fact Concerts* decision.¹²⁸ Therefore, the court lacked guidelines to determine when an award of punitive damages would be a successful deterrent.¹²⁹ Since the scope of footnote 29 was poorly

were unaware of the entire controversy.” *Id.*

¹²⁵ *Heritage Homes*, 670 F.2d at 2. The court struggled to determine when to hold a taxpayer responsible:

If the theory is that most of the taxpayers knew that a group of voters intended to discriminate but wanted to disassociate themselves by staying away from the meeting, this raises a number of troubling questions. How much did they know? How serious was the threat? When must a citizen or taxpayer attend a meeting or remain away, vote or abstain, at his or her peril?

Id.

¹²⁶ *Id.* at 2 n.1.

¹²⁷ *Id.* at 2 (“Absent widespread knowledgeable participation by taxpayers, the analogy to municipal officials seems apt: to award punitive damages against the Water District would not serve the purposes of punishment or deterrence.”).

¹²⁸ *Fact Concerts*, 453 U.S. at 267 n.29. The Court simply stated that “where the taxpayers are directly responsible,” the assessment of punitive damages on a municipality would be appropriate. *Id.* However, it did not indicate a means to establish when a taxpayer is directly responsible or how many taxpayers would justify this measure. Significantly, the Court expressed its belief that such a situation is “sufficiently unlikely” to occur; thus, it did not have to anticipate these concerns. *Id.*

¹²⁹ Due to the Court’s now obvious misjudgment of the likelihood of such occurrences, subsequent courts lack the necessary guidance to determine the boundaries of the *Fact Concerts* precedent. Therefore, the Supreme Court’s deliberate notation that punitive damages would appropriately serve to deter

defined in *Fact Concerts*, the First Circuit concluded that this case did not fall within the Supreme Court's caveat.¹³⁰

Heritage Homes presents a perfect scenario in which the deterrent objective of punitive damages, consistent with the policy of § 1983, would be furthered by a finding of municipal liability. Instead, the court's reversal of the award of punitive damages against the Seekonk Water District left the plaintiffs without remedy.¹³¹ This decision, moreover, did not impose any form of deterrence on the taxpayers who were responsible for depriving the housing developer of his constitutionally protected rights. While the court found it unlikely that a few responsible voters would be deterred by the threat of punitive damages, the purpose of § 1983, namely providing a broad federal remedy for a deprivation of constitutionally protected rights, was undermined because plaintiffs were denied both compensatory and punitive damages.¹³² In *Fact Concerts*, the Court stated "[it had] never . . . suggested that punishment is as prominent a purpose under the statute as are compensation and deterrence."¹³³ Thus, the complete denial of damages for a § 1983 violation under these facts amounted to "an extreme situation where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights."¹³⁴

abuses of constitutional rights "where taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights" has been undermined. *Fact Concerts*, 453 U.S. at 267 n.29.

¹³⁰ *Heritage Homes*, 670 F.2d at 2. The court stated that "[w]ithout a more compelling showing, we have no doubt that the Court would reaffirm its reasoning that 'neither reason nor justice suggests that . . . retribution should be visited upon the shoulders of blameless and unknowing taxpayers.'" *Id.* (quoting *Fact Concerts*, 453 U.S. at 267).

¹³¹ *Id.* at 1. The first time the appellate court heard this case it affirmed the district court's finding that *Heritage Homes* failed to prove compensatory damages. *Heritage Homes*, 648 F.2d 761, 761 (1st Cir. 1981). This finding was not challenged on *writ of certiorari*; therefore, on remand from the Supreme Court, the appellate court only addressed the award of punitive damages. *Heritage Homes*, 670 F.2d 1, 1 (1982).

¹³² *Heritage Homes*, 670 F.2d at 2.

¹³³ *Fact Concerts*, 453 U.S. at 268.

¹³⁴ *Id.* at 267 n.29.

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B. Webster v. City of Houston¹³⁵

The Fifth Circuit similarly held that footnote 29 does not provide an exception to the bar against punitive damages from municipalities under the facts of *Webster*.¹³⁶ In that case, a § 1983 action was brought by the parents of a seventeen-year-old boy who was shot and killed by the Houston police following a car chase, despite the fact that he was unarmed and attempting to surrender.¹³⁷ Since the crime scene appeared suspicious because the boy was shot while unarmed, officers at the scene attempted to cover their tracks by placing a gun near the boy's body.¹³⁸ At trial, it was revealed that the police department had an unwritten policy of carrying "throw-downs,"¹³⁹ guns or knives to be placed near suspects who had been shot in unclear circumstances.¹⁴⁰ On appeal, the Fifth Circuit reversed the award of punitive damages assessed against the City of Houston based upon the reasoning that this crime was not outrageous enough to fall within the exception provided for in footnote 29.¹⁴¹

In a concurring opinion, Judge Goldberg regretfully acknowledged that the court was bound by the precedent established in *Fact Concerts*.¹⁴² He was compelled to write separately because, if he agreed with the majority that there was an exception in footnote 29 for "egregious cases,"¹⁴³ this case would, in his opinion, surely fall within its ambit.¹⁴⁴ Under his

¹³⁵ 689 F.2d 1220 (5th Cir. 1982).

¹³⁶ *Id.* at 1229-30.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1220-23.

¹³⁹ *Id.* at 1224.

¹⁴⁰ *Id.* at 1223.

¹⁴¹ *Id.* at 1229.

¹⁴² *Webster*, 689 F.2d at 1230 (Goldberg, J., specially concurring) ("It is with considerable grief that I write to specially concur in the result denying punitive damages against the City of Houston.").

¹⁴³ *Id.* at 1231.

¹⁴⁴ *Id.* ("If there were any narrow gap around [*Fact Concerts*] for an egregious case, this one would slip through; I am aghast at the thought that any violation of constitutional rights more appalling, more threatening than the

interpretation of *Fact Concerts*, however, an “impenetrable barrier to punitive damages”¹⁴⁵ had been erected.

Judge Goldberg felt that the analysis the Supreme Court used to establish that punitive damages were inappropriate against the City of Newport compels a different result when applied to the facts of *Webster*.¹⁴⁶ While the retributive purpose of punitive damages is not served when the economic burden of an unconstitutional action falls on blameless taxpayers, the deterrent purpose of punitive damages is fulfilled when a city is subjected to punitive damages as a result of certain circumstances, such as those in *Webster*.¹⁴⁷

Several notable differences are apparent between *Webster* and *Fact Concerts*. First, there is a difference between the actors. Individual officials were responsible for the action taken in *Fact Concerts*, while the official policy of the police department was to blame for the action taken in *Webster*.¹⁴⁸ Second, the ability to sanction the offending officials plays a large role. The Court in *Fact Concerts* concluded that punitive damages were not necessary to deter the individual conduct of Newport’s officials; superiors would likely take action by sanctioning the misconduct.¹⁴⁹ In contrast, the superiors of the police officers in *Webster* could not be relied upon to sanction the officers’ misconduct because they were implicitly responsible, by means of their collective inaction, to stop this unconstitutional departmental policy.¹⁵⁰ While not necessary to deter individual misconduct, punitive damages would have been an effective means to deter group or municipal conduct, as was the case in *Webster*. Third, in *Fact Concerts* the Court believed that the damages should be assessed against those individuals directly

one that occurred here might actually exist.”).

¹⁴⁵ *Id.* at 1231.

¹⁴⁶ *Id.* at 1231-32.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1233.

¹⁴⁹ *Fact Concerts*, 453 U.S. at 269.

¹⁵⁰ *Webster*, 689 F.2d at 1236 (Goldberg, J., specially concurring).

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responsible for the harm.¹⁵¹ When there is an unwritten policy, however, it is nearly impossible to single out those individuals who are responsible for its implementation.¹⁵² Therefore, it is unclear whether to punish those who acted under it, those who taught it, or those who knew about it and did nothing.¹⁵³

Moreover, in *Fact Concerts* the Court expressed fear that an assessment of punitive damages would deprive citizens of other benefits or services because of the resulting financial burden placed on the municipality.¹⁵⁴ Conversely, in a case such as *Webster*, this is exactly what Congress intended.¹⁵⁵ Judge Goldberg reasoned that “[i]t is necessary that the threatened damages cause some deprivation for the populace so that they will be nudged out of their blissful ignorance, ‘and the effect will be most wholesome.’”¹⁵⁶

Finally, a police policy of using throw-downs is more offensive to the underlying goals in § 1983 than is a municipal breach of contract.¹⁵⁷ The distinctions between the cases clearly demonstrate the need for punitive damages to punish and deter municipalities from supporting unconstitutional behavior.

*C. Ciraolo v. New York*¹⁵⁸

Following a complaint from her neighbor,¹⁵⁹ Debra Ciraolo

¹⁵¹ *Fact Concerts*, 453 U.S. at 270. “The Court previously has found, with respect to such violations, that a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer.” *Carlson v. Green*, 466 U.S. 14, 21 (1980).

¹⁵² *Webster*, 689 F.2d at 1236 (Goldberg, J., specially concurring) (suggesting that the policy at issue in *Webster* could not be traced to any specific individuals, but instead was a function of “the outgrowth of the collective inaction of the entire police department”).

¹⁵³ *Id.* at 1237 (addressing a problem with the Court’s suggestion in *Fact Concerts* that damages assessed directly against the offending officials are a better deterrent than those assessed against the municipality).

¹⁵⁴ *Fact Concerts*, 453 U.S. at 267.

¹⁵⁵ *Webster*, 689 F.2d at 1237 (Goldberg, J., specially concurring).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1235.

¹⁵⁸ 216 F.3d at 240.

was arrested for aggravated harassment in the second degree, a misdemeanor.¹⁶⁰ When she was brought to Central Booking at the police station, two female Corrections Department employees subjected her to a strip and body cavity search.¹⁶¹ The search of Ciraolo was in accordance with an established New York City policy that required all arrestees brought to the police station to be “strip searched by the officer assigned to the search post.”¹⁶² Ciraolo brought suit under § 1983 against the city, the police department, and the individual police officers involved in her arrest and search.¹⁶³ The district court concluded that the city’s strip search policy was in contravention of the law of the circuit¹⁶⁴ and charged the jury that “punitive damages could be awarded against the city if they found that the city had acted maliciously or wantonly.”¹⁶⁵ The jury concluded that the city had violated Ciraolo’s rights when she was strip-searched and awarded her compensatory and punitive damages.¹⁶⁶ On appeal, the city argued that the punitive damages award was foreclosed by *Fact Concerts*,¹⁶⁷ which granted municipalities immunity from

¹⁵⁹ *Id.* at 237 (indicating that Ciraolo and her neighbor were involved in a legal dispute).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (describing the circumstances of the strip search where Ciraolo was “ordered to strip naked and made to bend down and cough while she was visually inspected”). Charges against Ciraolo were subsequently dismissed. *Id.* After this experience, however, she was diagnosed with post-traumatic stress disorder, sought therapy and began taking antidepressants. *Id.*

¹⁶² *Id.* (referring to the New York City Correction Department “guidelines [for] the acceptance of all Police Cases for the Manhattan Court Division”).

¹⁶³ *Id.* at 238.

¹⁶⁴ *See supra* note 5 (citing to *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986), where the Second Circuit held it unlawful to subject a misdemeanor arrestee to a strip search unless there is reasonable suspicion that the arrestee possesses contraband).

¹⁶⁵ *Id.*

¹⁶⁶ *See supra* note 6 (stating the jury’s award).

¹⁶⁷ *Ciraolo*, 216 F.3d at 238. It should be noted that the city did not contest the district court’s holding that the strip-search policy violated the established law of the Circuit. *Id.*

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punitive damages under § 1983.¹⁶⁸

Strictly interpreting footnote 29, the Second Circuit in *Ciraolo* followed the line of precedent established in *Fact Concerts*, *Heritage Homes* and *Webster*.¹⁶⁹ The court concluded that the footnote would only apply in cases where there was a close link between the taxpayers' actions and the adoption of an unconstitutional municipal policy.¹⁷⁰ Therefore, although this case exhibited an outrageous abuse of constitutional rights, the bar to punitive damages was upheld.¹⁷¹ The court reasoned that while New York City's conduct was unconstitutional, the taxpayers could not be held accountable for the police department's policy.¹⁷² The denial of punitive damages in this case, however, is simply unjust.

The court admitted that there would be "salutary effects of [assessing] punitive damages in a case such as this."¹⁷³ It has been argued that "punitive damages should be assessed whenever a tortfeasor has a significant likelihood of escaping liability."¹⁷⁴ In the instant case, New York City had, or should have had, knowledge that its strip-search policy was unconstitutional.¹⁷⁵

¹⁶⁸ *Fact Concerts*, 453 U.S. 247.

¹⁶⁹ See *supra* Parts I.C, III.A-B (detailing the Supreme Court's finding in *Fact Concerts* that municipalities are immune from punitive damage liability under § 1983, and demonstrating the unjust results that the interpretation and application of *Fact Concerts* has had on subsequent cases).

¹⁷⁰ *Ciraolo*, 216 F.3d at 241.

¹⁷¹ *Id.*

¹⁷² *Ciraolo*, 216 F.3d at 241-42 ("[W]hile we emphatically deplore the City's conduct in adopting a policy that this Circuit had earlier clearly held unconstitutional, the taxpayers cannot be held to be responsible for the policy under the reasoning of *Newport*.").

¹⁷³ *Id.* at 242. See Ivan E. Bodensteiner, Commentary, *Limiting Federal Restrictions on State and Local Government*, 33 VAL. U.L. REV. 33, 41 (1998) (noting that "[a]wards of punitive damages could cause elected officials to take civil rights violations seriously, even absent large awards of compensatory damages").

¹⁷⁴ *Ciraolo*, 216 F.3d at 244 (citing A. Polinsky & Steven Sharvell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 870, 888 (1998)).

¹⁷⁵ See *supra* note 5 (citing *Weber v. Dell*, 804 F.2d 796, a Second Circuit

Thus, it acted with blatant disregard of the law by subjecting Ciraolo to a strip search of her person.¹⁷⁶ While Ciraolo was awarded minimal compensatory damages, the city effectively escaped liability since it was immunized from punitive damages.¹⁷⁷ In addition, the Supreme Court noted that “[a] higher ratio” of punitive to compensatory damages “may . . . be justified in cases in which the injury is hard to detect.”¹⁷⁸ Thus, in a case such as *Ciraolo*, the only way to deter the municipality is to assess punitive damages.¹⁷⁹

This case should have been decided under a broader interpretation, following the spirit rather than the letter of footnote 29. The circuit court, because it confined itself to the wording of footnote 29, was unwilling to find taxpayers directly responsible for the constitutional violation.¹⁸⁰ The court viewed the creation of footnote 29 as intending to further the retributive goal of § 1983¹⁸¹ and was, therefore, cautious in applying the footnote so as not to unfairly punish taxpayers.¹⁸² However, the precedent for strictly construing the statute to require an “immediate connection between the taxpayers’ behavior and the

case holding it unconstitutional to strip-search a person arrested on misdemeanor charges without reasonable suspicion that the arrestee possess contraband).

¹⁷⁶ *Ciraolo*, 216 F.3d at 237-38.

¹⁷⁷ See *supra* note 6 (illustrating the gross disparity between the compensatory damage award of \$19,645 that Ciraolo received and the punitive damage award amounting to \$5,000,000 that the Second Circuit invalidated).

¹⁷⁸ *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996).

¹⁷⁹ See Gilles, *supra* note 108 (arguing that municipalities should internalize the full costs of their constitutional violations and that the “availability of punitive damages . . . will place unconstitutional policies and customs on the radar screens of responsible officials”).

¹⁸⁰ *Ciraolo*, 216 F.3d at 240-42.

¹⁸¹ *Id.* at 240. The retributive purpose of § 1983 was not furthered in the case of *Fact Concerts* because the burden of punitive damages would have fallen on the taxpayers. See *Fact Concerts*, 453 U.S. at 267.

¹⁸² *Ciraolo*, 216 F.3d at 241 (declining to apply footnote 29 because the court faced what it considered to be a “common situation in which an unconstitutional policy has been adopted by municipal officials without any clear endorsement of the policy by the electorate”).

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unconstitutional municipal policy” is not firmly rooted.¹⁸³ Not only have the circuit courts differed in the interpretation of cases premised on footnote 29,¹⁸⁴ but Judge Goldberg stated that “he believed the Supreme Court’s holding [in *Fact Concerts*] swept too broadly, and was both unwarranted and unwise in a case like Randy Webster’s.”¹⁸⁵ The similarities in the *Webster* and *Ciraolo* cases support the proposition that municipal immunity from punitive damages should be reviewed.¹⁸⁶ The application of the *Fact Concerts* holding to these cases is contrary to the purposes of § 1983.¹⁸⁷

The Supreme Court has recognized that deterrence against future constitutional violations is an important purpose of § 1983.¹⁸⁸ This objective, however, is undermined when

¹⁸³ *Id.* at 240.

¹⁸⁴ See *Webster*, 689 F.2d 1220 (5th Cir. 1982); *Heritage Homes*, 670 F.2d 1 (1st Cir. 1982). While the Fifth Circuit focused on the outrageousness of the constitutional violation, the First Circuit held that the taxpayers involvement was the deciding aspect in determining whether punitive damages could be assessed. *Webster*, 689 F.2d 1220 (5th Cir. 1982); *Heritage Homes*, 670 F.2d 1 (1st Cir. 1982). Furthermore, Judge Goldberg’s concurring opinion in *Webster* took a third and different perspective on footnote 29 and found that no exception was created. *Webster*, 689 F.2d at 1231 (Goldberg, J., specially concurring).

¹⁸⁵ *Ciraolo*, 216 F.3d at 241 (citing Judge Goldberg’s concurring opinion in *Webster*, 689 F.2d at 1231-32).

¹⁸⁶ *Webster* and *Ciraolo* are similar in that they both involve an unconstitutional police policy and a violation of Fourth Amendment rights. The same distinctions that Judge Goldberg drew between *Webster* and *Fact Concerts* may also be made as between *Ciraolo* and *Fact Concerts*. See *supra* Part III.B.

¹⁸⁷ See generally *Ciraolo*, 216 F.3d at 242-50 (Calabresi, J., concurring); *Webster*, 689 F.2d at 1230-39 (Goldberg, J., specially concurring).

¹⁸⁸ See *Fact Concerts*, 453 U.S. at 266-67 (stating that, by definition, punitive damages serve as a means to punish and deter the tortfeasor and others from similar conduct); *Owen v. City of Independence*, 445 U.S. 622 at 651-52 (1980) (suggesting that “[t]he knowledge that a municipality will be liable for all of its injurious conduct . . . should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens’ constitutional rights”).

municipalities are held immune from punitive damages.¹⁸⁹ Since the behavior of a municipality is likely to be influenced to some extent when it is forced to bear the costs associated with its behavior, assessing punitive damages against a municipality would serve as an effective deterrent.¹⁹⁰

In *Ciraolo*, Judge Calabresi stated that “[p]unitive damages can ensure that a wrongdoer bears all the costs of its actions, and is thus appropriately deterred from causing harm, in those categories of cases in which compensatory damages alone result in systematic underassessment of costs, and hence in systematic underdeterrence.”¹⁹¹ Thus, when a rational actor¹⁹² determines whether or not to undertake an activity based on a “cost-benefit analysis,”¹⁹³ the risk of underdeterrence is high when that actor reaps the advantages but does not bear the costs of its actions.¹⁹⁴ While compensatory damages, when promoting an accurate

¹⁸⁹ *Ciraolo*, 216 F.3d at 249 n.11 (Calabresi, J., concurring). In *Amato v. Saratoga Springs*, 170 F.3d 311 (2d Cir. 1999), the Second Circuit acknowledged the importance of affixing fault on municipalities through punitive damages. The court stated:

Perhaps even more important to society, however, is the ability to hold a municipality accountable where official policy or custom has resulted in the deprivation of constitutional rights. A judgment against a municipality not only holds that entity responsible for its actions and inactions, but also can encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue. In short, finding against the officers in their individual capacities does not serve all the purposes of, and is not the equivalent of, a judgment against the municipality.

Id. at 317-18.

¹⁹⁰ See *Owen*, 445 U.S. at 652 n.34 (stating that “one must wonder whether this entire litigation would have been necessary had the [Independence City] Council members thought that the city might be liable for their misconduct”).

¹⁹¹ *Ciraolo*, 216 F.3d at 242 (Calabresi, J., concurring).

¹⁹² *Id.* Judge Calabresi noted that *Fact Concerts* and § 1983 are premised on the assumption that a municipality does not always act rationally. *Id.* at 243 n.1.

¹⁹³ *Ciraolo*, 216 F.3d at 243 (Calabresi, J., concurring).

¹⁹⁴ *Id.*

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“cost-benefit analysis,”¹⁹⁵ can provide an adequate means of deterrence,¹⁹⁶ there are other cases where the costs are not sufficiently represented.¹⁹⁷ As Judge Calabresi noted, “[c]osts may not be sufficiently represented in compensatory damages for several reasons, most of which go to the fact that not all injured parties are in fact compensated by the responsible injurer.”¹⁹⁸ When only compensatory damages are assessed, an injured party may be unable to, or may choose not to sue.¹⁹⁹ The consequence of providing municipalities with immunity from punitive damages, therefore, undermines the deterrence aspect underlying § 1983.

It is evident from a more thorough understanding of the reasons behind § 1983’s enactment that municipal immunity from punitive damages should be re-examined. In 1871, the Civil Rights Act was enacted in response to the failure of state and local governments to protect the constitutional rights of its citizens.²⁰⁰ Yet, today, nearly 150 years later, there are still city police departments freely violating the constitutionally protected rights of its citizens.²⁰¹ This occurs even when the established law of the circuit states that a police department’s policy is illegal. Because of this complete defiance of the law, courts should

¹⁹⁵ *Id.* at 242 (Calabresi, J., concurring).

¹⁹⁶ *Id.* at 243 (Calabresi, J., concurring).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (“[A] victim may not realize that she has been harmed by a particular actor’s conduct, or may not be able to identify the person or entity who has injured her.”) *See, e.g., Ciraolo*, 216 F.3d at 243-44 (Calabresi, J., concurring) (noting that the lack of compensation is reflected in an evaluation of the “time, effort, and stress associated with bringing a lawsuit,” as compared with “the compensation she can expect to receive”); Polinsky & Sharvell, *supra* note 174, at 888 (explaining that someone may not bring a suit “if the costs and value of the time and effort he would have to devote to the suit exceed the expected gain” or if the likelihood of establishing causation is low).

²⁰⁰ *See supra* notes 28, 33 and accompanying text (explaining the circumstances that compelled Congress to enact § 1983).

²⁰¹ *See Ciraolo*, 216 F.3d at 236.

interpret footnote 29 less strictly than they have to date.²⁰² The legislative history suggests that § 1983 should be broadly construed.²⁰³ Yet footnote 29 has been narrowly read,²⁰⁴ thus limiting the application of a meaningful remedy for a § 1983 violation.²⁰⁵

While the Court has feared that municipalities will be unable to financially sustain the burden of punitive damages, such a risk to their “financial integrity” would only be prevalent when “government employees and agents regularly engage in serious violations of civil rights.”²⁰⁶ A municipality facing the prospect of punitive damages would take the civil rights of its citizens more seriously.²⁰⁷

Furthermore, the distinction the Court draws between the ability of municipal officials and municipalities to handle an assessment of punitive damages is weakened by state statutes on indemnity.²⁰⁸ Since municipal officials in their individual

²⁰² See Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 852 (1996) (arguing for a flexible interpretation of statutes to conform to the current society’s issues).

²⁰³ See *supra* note 29 and accompanying text (referring to comments by legislators describing their intent in enacting § 1983).

²⁰⁴ See *supra* Part III (analyzing the three cases where the courts declined to find footnote 29 applicable and, thus, denied or reversed the award of punitive damages against municipalities).

²⁰⁵ Society will benefit from municipalities being subject to a punitive damages remedy. Punitive damages provide a meaningful remedy when the plaintiff would otherwise not bring a § 1983 action. See *supra* note 199 and accompanying text. They also insure that municipalities act to protect, not violate, our constitutional rights. See Gilles, *supra* note 108; see generally Wells, *supra* note 202 (arguing that punitive damages assessed against a municipality are necessary to deter constitutional violations and that compensatory damages “ignore or undervalue the nonmonetary nature of most constitutional rights”).

²⁰⁶ Bodensteiner, *supra* note 173, at 41 (arguing that there should be a serious risk to the “financial integrity of a municipal entity that tolerates and/or encourages official lawlessness”).

²⁰⁷ *Id.* (suggesting that the threat of punitive damages to be paid by the municipality would cause elected officials to act more responsibly and consider the civil rights of citizens).

²⁰⁸ *Ciraolo*, 216 F.3d at 249 n.11 (Calabresi, J., concurring).

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capacities are not insulated from punitive damage liability, the city is essentially footing the bill for punitive damages when it indemnifies its employees.²⁰⁹ Therefore, if it is permissible for municipalities to pay punitive damages for purposes of indemnification, they should not be immune from paying punitive damages for their own liability.²¹⁰

The denial of punitive damages against New York City cannot be justified under the “two part approach” the Court relied on in *Fact Concerts*.²¹¹ First, the legislative history pertaining to § 1983 and the common law of municipal liability are severely undermined by New York City’s policy of indemnifying its municipal officials.²¹² The concern that punitive damages would financially burden local governments loses considerable strength in light of this practice.²¹³ Moreover, the taxpayers ultimately end up footing the bill, despite the Court’s concern that they should only pay when “directly responsible” for the abuse of constitutional rights.²¹⁴

Second, the policies underlying both § 1983 and punitive damages are clearly unfulfilled by the result in *Ciraolo*.²¹⁵ The city not only escaped punishment under this holding, but was also

²⁰⁹ *Smith v. Wade*, 461 U.S. at 30, 41, 51 (holding that where a defendant has acted recklessly or with callous disregard for the plaintiff’s rights, punitive damages can be obtained).

²¹⁰ *Ciraolo*, 216 F.3d at 249 n.11 (Calabresi, J., concurring).

²¹¹ 453 U.S. at 259, 266. The “two part approach” refers to the Court’s examination of the common-law background of § 1983 and then its public policy considerations.

²¹² *Ciraolo*, 216 F.3d at 249 n.11 (Calabresi, J., concurring).

²¹³ Indemnity is defined as:

Reimbursement or compensation for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty.

BLACK’S LAW DICTIONARY 772 (17th ed. 1999).

²¹⁴ *Fact Concerts*, 453 U.S. at 267 n.29.

²¹⁵ See *supra* Parts I.A, III.C (discussing the policies behind § 1983 and punitive damages and analyzing them in relation to the court’s holding in *Ciraolo*).

undeterred from behaving in an unconstitutional manner in the future.²¹⁶ It is inconceivable that the police department's actions, which clearly violated the constitutional rights of its citizens, and disregarded the established law in the circuit, have gone unpunished.²¹⁷ Deterrence should be of foremost importance when an established policy in a municipal department violates the constitutional rights of its citizens.²¹⁸ The lack of action taken against the city indicates that the court implicitly accepts the police department's behavior.²¹⁹ Section 1983 was enacted to prevent unconstitutional actions taken "under the color of law,"²²⁰ where citizens are denied their rights and not protected by their city.²²¹ The legislative history of § 1983 unquestionably admonishes the behavior of the police department in *Ciraolo* and compels an assessment of punitive damages on the city. Unless the Supreme Court revisits footnote 29, future municipal policy-makers will not be deterred from violating the established laws of their judicial circuits in these situations.

²¹⁶ See Schnapper, *supra* note 47 at 245 (stating that "[a]ny construction of section 1983 which significantly reduces the likelihood that a city will be held responsible in damages for municipal policies will tend to frustrate [the deterrence] purpose of section 1983"). See generally Wells, *supra* note 202 (arguing that in order to promote deterrence of constitutional violations, the Supreme Court should lift the restrictions it placed on the availability of punitive damages under *Fact Concerts*).

²¹⁷ *Ciraolo*, 216 F.3d at 242-50 (Calabresi, J., concurring) (arguing that the result the majority reached in this case is incongruous with the purposes underlying § 1983).

²¹⁸ *Id.* at 242, 250 (noting that the Court in *Fact Concerts* and *Owen* recognized that the purpose of § 1983 is to deter against future constitutional violations, and concluding that "the prospect of damages awarded pursuant to the statute manifestly fails to deter a municipality from adopting a policy that it clearly knows or should know violates the Fourth Amendment").

²¹⁹ Granting a municipality immunity from punitive damages, in the face of a clear violation of § 1983, contradicts the reason for which it was enacted. See *supra* Part I.A.

²²⁰ 42 U.S.C. § 1983 (1976). "In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *United States v. Price*, 383 U.S. 787, 794 n.7 (1966).

²²¹ See *supra* Part I.A (discussing the legislative history behind § 1983).

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IV. PROPOSAL TO MODIFY FOOTNOTE 29

The Supreme Court's failure to provide a test or an adequate means of assessing when municipal action should be subject to punitive damages under footnote 29 has led to the protection of municipal policies and behaviors that are clearly unconstitutional. Moreover, the Act was specifically designed to protect against municipal conduct of this sort. The Court stated in footnote 29 that not only did the facts of the case not present an "extreme situation," but also that "such an occurrence [was] sufficiently unlikely that we need not anticipate it here."²²² The unfortunate reality is that such extreme situations have occurred. *Ciraolo* and *Webster* presented the perfect scenarios to which the exception should have been applied.²²³ The Supreme Court should modify footnote 29 in light of the split in the circuits regarding its applicability and the painfully written concurring opinions of two well-respected judges.²²⁴

One way the Supreme Court could modify footnote 29, so as

²²² *Fact Concerts*, 453 U.S. at 267 n.29.

²²³ See *Ciraolo*, 216 F.2d at 242-60 (Calabresi, J., concurring); *Webster*, 689 F.2d 1230-39 (Goldberg, J., specially concurring).

²²⁴ See *Ciraolo*, 216 F.3d at 250 (Goldberg, J., specially concurring); *Webster*, 689 F.2d at 1230-31 (Calabresi, J., concurring). Judge Goldberg wrote:

It is with considerable grief that I write to specifically concur in the result denying punitive damages against the City of Houston . . . I am aghast at the thought that any violation of constitutional rights more appalling, more threatening than the one that occurred here might actually exist [it is] with troubled human conscience [that] I concur in this unfortunate result.

Id. at 1230-31. Judge Calabresi also wrote separately, concurring with the result in *Ciraolo*:

I respectfully suggest that the purpose of § 1983, to protect federal constitutional rights against infringement by state actors, is not served when—as in the case before us—the prospect of damages awarded pursuant to the statute manifestly fails to deter a municipality from adopting a policy that it clearly knows or should know violates the Fourth Amendment.

Ciraolo, 216 F.3d at 250.

to further the policies of § 1983, is to impose punitive damages on a municipality when it has utterly disregarded a prior ruling by its own judicial circuit or by the United States Supreme Court.²²⁵ This proposed standard is consistent with the legislative history and the policies underlying § 1983.²²⁶ In *Monell*, the Supreme Court declined to hold local governments responsible under a strict liability theory since Congress rejected the Sherman Amendment.²²⁷ The Court, however, left undefined the scope of a municipality's duty of protection under § 1983. While not directed at municipal liability, the amendment²²⁸ adopted in place of the Sherman Amendment suggests Congress' intent pertaining to the duty of protection.²²⁹ It sets forth three guidelines for municipal liability: 1) knowledge or notice of a potential constitutional violation; 2) neglect or refusal to act when in power to do so; and 3) failure to exercise reasonable diligence to prevent the harm.²³⁰ Application of these three factors to the proposed modification of footnote 29 indicates that a municipality should clearly be held liable when it disregards the established law.²³¹ First, a municipality that violates a prior ruling applicable to it has the requisite knowledge that its actions are

²²⁵ This proposal does not require the Supreme Court to overrule *Fact Concerts* or any other case it has decided. Simply stated, it calls for applying footnote 29 to comport with the framers' intent when they created § 1983. See *supra* Part I.A (discussing the legislative history behind § 1983). Clearly the Court foresaw a necessity to create an exception to its sweeping holding in *Fact Concerts*, otherwise it would have been unnecessary to have created the footnote in the first place. See *Fact Concerts*, 453 U.S. at 267 n.29.

²²⁶ See *supra* Part I.A (providing an overview of the legislative history of § 1983).

²²⁷ *Monell v. Dep't of Soc. Serv.*, 436 U.S. at 694. The Court stated that "a local government may not be sued under § 1983 for any injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983." *Id.*

²²⁸ Civil Rights Act of 1871, ch. 22, § 6, 17 Stat. 13.

²²⁹ Ballen, *supra* note 32, at 318.

²³⁰ Ballen, *supra* note 32, at 318.

²³¹ Ballen, *supra* note 32, at 318.

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unconstitutional.²³² Second, that municipality possesses fault for its actions by refusing or neglecting to prevent the constitutional violation when it was capable of doing so.²³³ Third, the municipality fails to “exercise reasonable diligence”²³⁴ in preventing the constitutional violation. Moreover, the only way to fulfill the deterrent rationale of § 1983, when the municipality has disregarded a prior judicial ruling, is with punitive damages. It is not feasible that a municipality would be deterred by an injunction or contempt sanction because it is unlikely that the individual bringing the suit would be subject to the same conduct in the future.²³⁵ Moreover, these remedies are applicable only to the plaintiff seeking them and would fail to prevent other individuals from being subjected to identical constitutional violations.²³⁶ Thus, the legislative history and policies underlying § 1983 support the proposition that the only way to deter a municipality that knowingly disregards a prior ruling by its own

²³² In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Supreme Court held that, apart from decisions that clearly break from precedent, municipalities are responsible for anticipating developments in the law. See *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 185 (1990) (analyzing *Owen* to determine whether a decision should be applied retroactively). Considering that the Supreme Court upheld the imposition of retroactive liability on a municipality for violating subsequent developments in the law, it is fair to hold a municipality liable for actions it takes in knowing violation of the law. *Id.* (stating that the determination in *Owen* “makes municipalities, like private individuals, responsible for anticipating developments in the law”).

²³³ See *supra* note 232.

²³⁴ See *supra* note 232.

²³⁵ Judge Calabresi noted that the doctrine of standing would prevent a § 1983 plaintiff from seeking an injunction because of the difficulty in establishing the likelihood of being subjected to the same constitutional violation in the future. *Ciraolo*, 216 F.3d at 248. See also *Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983) (denying an injunction against police chokeholds because the plaintiff had only been injured once by such conduct, and thus lacked standing). It should also be noted that class action lawsuits only have a limited deterrent impact on unconstitutional municipal conduct. *Ciraolo*, 216 F.3d at 248. Therefore, they should not be relied upon to combat underdeterrence. *Id.*

²³⁶ See *supra* note 235 (discussing the effect of standing).

judicial circuit or by the Supreme Court is by imposing punitive damages.²³⁷

The Court's premise for denying punitive damages as a remedy in actions brought against municipalities is flawed.²³⁸ The Court expressed concern about the fact that the burden of punitive damages would fall on the innocent taxpayers.²³⁹ However, the Court's contention is premised "on an assumption that the municipality and the taxpayers who compose it are wholly distinct entities—an assumption that, as courts have recognized in the case of corporations, cannot withstand close scrutiny."²⁴⁰ Thus, a municipality, like a corporation, will be deterred by punitive damages because the taxpayers will likely express their displeasure with its actions, as shareholders would, and cause the city to comply with constitutional standards.²⁴¹ To ensure that the legislative aims and policies encompassing § 1983 will be upheld, it is time the Court reconsiders footnote 29.

²³⁷ See *Ciraolo*, 216 F.3d at 250 (Calabresi, J., concurring) (urging that deterrence is necessary to uphold the purpose of § 1983 where a municipality adopts a policy "that it clearly knows or should know violates the Fourth Amendment").

²³⁸ *Fact Concerts*, 453 U.S. at 268-69 (expressing concern that municipal officials would not be deterred by the potential imposition of punitive damages that would be footed by the taxpayers).

²³⁹ *Id.* at 267 ("Neither reason nor justice suggests that such retribution [such as an increase in taxes or a reduction of public services] should be visited upon the shoulders of blameless or unknowing taxpayers.").

²⁴⁰ *Ciraolo*, 216 F.3d at 249 (Calabresi, J., concurring).

Thus, in *Fischer v. Johns-Manville*, 103 N.J. 643, 512 A.2d 466 (1986), the New Jersey Supreme Court, upholding an award of punitive damages against an asbestos manufacturer, rejected defendant's argument that punitive damages "unfairly punish[ed] innocent shareholders" and declined its invitation to draw a distinction between a corporation and its shareholders, pointing out that shareholders have the power to affect corporate action.

Id. at 476 (quoting Justice Blackmun) (emphasis in original).

²⁴¹ *Ciraolo*, 216 F.3d at 249 (Calabresi, J., concurring) (noting that the threat that taxpayers will be unhappy when they have to pay more and get less in return directly impacts the political considerations of a city such as the power to tax and to stay in office).

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Further modification of footnote 29, in accordance with the purposes of § 1983, should include an exceptionally egregious standard. The Fifth Circuit has suggested that conduct rising to an “outrageous” level would warrant the imposition of punitive damages on municipalities under footnote 29.²⁴² Without a standard with which to measure the conduct, however, the court in *Webster* declined to fit the facts within the footnote’s exception.²⁴³ Deterrence of official misconduct is a primary purpose of § 1983;²⁴⁴ therefore, the Supreme Court should define egregious official conduct and modify footnote 29 to include that standard as an exception to municipal immunity from punitive damages. The Court determined that it was appropriate to apply the “shocks the conscience”²⁴⁵ test to uphold an individual’s right to due process protection from arbitrary governmental actions.²⁴⁶ Similarly, § 1983 serves to prevent individuals from being subjected to official action taken “under the color of law.”²⁴⁷ Thus, it would be appropriate to apply the “shocks the conscience” test as a means to evaluate the exceptionally egregious standard.

The foundation for applying the “shocks the conscience” test has been established in several Supreme Court decisions.²⁴⁸ This

²⁴² *Webster*, 689 F.2d at 1229-30.

²⁴³ *Id.*

²⁴⁴ See *supra* Part I.A-B (examining the deterrent effect that § 1983 is intended to invoke).

²⁴⁵ The Supreme Court first applied this test in *Rochin v. California*, 342 U.S. 165, 172 (1952) (reversing the conviction of the petitioner based on the conduct of the police officers in securing the conviction, which was found to “shock the conscience” and thus offend the Due Process Clause).

²⁴⁶ See *Sacramento v. Lewis*, 523 U.S. 833 (1998) (holding that the “shocks the conscience” test was applicable to determine whether a high-speed police chase, resulting in the death of the plaintiff, was a violation of the Fourteenth Amendment’s guarantee of substantive due process).

²⁴⁷ 42 U.S.C. § 1983 (1976).

²⁴⁸ See *Lewis*, 523 U.S. at 833; *Rochin*, 342 U.S. at 165. *But cf.* *Washington v. Glucksberg*, 521 U.S. 702 (1977) (rejecting the “shocks the conscience” test and instead adopting an objective test to protect those rights that are “deeply rooted in this Nation’s history and tradition . . . and implicit in the concept of ordered liberty”).

test should be used as a starting point to assess whether the official conduct in question warrants municipal immunity from punitive damages.²⁴⁹ To determine whether official action has reached a “shocking” level, the Court has emphasized that attention be given to the time and opportunity the official had to deliberate prior to taking action.²⁵⁰ Situations of high pressure, in which an immediate decision is required, raise the threshold of shocking conduct.²⁵¹ Incorporating an exceptionally egregious standard into footnote 29 would provide a means for courts to determine which fact patterns demand punitive damages, thereby fulfilling the purpose of § 1983. As Judge Goldberg noted, “social costs of the gravest nature” result when we protect the police department, which instead of protecting us from violence, inflicts violence upon us.²⁵² He further stated, “[i]t is only by threat of punitive damages that we can be sure policymakers will be cognizant of this grave social cost.”²⁵³ Footnote 29 is dictum and, therefore, should not be interpreted inflexibly so as to unconditionally immunize municipalities from punitive damages. Exoneration of official misconduct undermines § 1983. To remedy this, footnote 29 should be modified to include the

²⁴⁹ *Lewis*, 523 U.S. at 850. Note that the “shocks the conscience” test is used as a means to assist the Court in determining whether there was a violation of due process, rather than as a hard and fast rule. *Id.* at 847. Justice Kennedy pointed out that the “shocks the conscience” test is highly subjective, and that the Court should objectively determine whether the conduct is consistent with the accepted and required action in question. *Id.* at 857 (Kennedy, J., concurring).

²⁵⁰ *Lewis*, 523 U.S. at 853. The Court acknowledged that certain positions or situations afford officials more time than others to think before they act:

When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking. But when unforeseen circumstances demand an officer’s instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates “the large concerns of the governors and the governed.”

Id. (quoting *Daniels v. Williams*, 474 U.S. 327 (1986)).

²⁵¹ *Id.* at 854.

²⁵² *Id.*

²⁵³ *Id.*

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exceptionally egregious standard as described above.

V. CONCLUSION

The bar to the assessment of punitive damages on municipalities found liable of unconstitutional conduct should be reconsidered by the Supreme Court. Modification of footnote 29, so that it comports with the policies and purposes of § 1983, would not require the Court to overrule *Fact Concerts*,²⁵⁴ but should set out a standard with which to apply it. Municipal immunity from punitive damages presents an obstacle in certain cases to the realization of the objectives of § 1983. The Supreme Court has stated that, while there is a higher threshold for review in the area of statutory interpretation as compared to constitutional interpretation,²⁵⁵ a precedent becomes more vulnerable when it “has been found to be inconsistent with the sense of justice or with the social welfare.”²⁵⁶ Today, municipal immunity from punitive damages in certain § 1983 actions has resulted in outcomes that can be classified as unjust and contrary to social welfare.²⁵⁷ In *Heritage Homes*, the municipality’s immunity from punitive damages not only left the plaintiffs without a remedy, but also left the perpetrators of the

²⁵⁴ Therefore, considerations of *stare decisis* do not present a problem for the Court. When faced with the question, for example, of whether to overrule the interpretation of 42 U.S.C. § 1981, adopted by the Court in *Runyon v. McCrary*, 427 U.S. 160 (1976), Justice Kennedy stated that overruling a statutory interpretation requires a “special justification” because of the considerations of *stare decisis*. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

²⁵⁵ See *Patterson*, 491 U.S. at 172-73. Justice Kennedy stated that “considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.” *Id.*

²⁵⁶ *Runyon*, 427 U.S. at 191 (Stevens, J., concurring) (quoting B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921)).

²⁵⁷ See, e.g., *Ciraolo*, 216 F.3d 236; *Heritage Homes*, 670 F.2d 1; *Webster*, 689 F.2d 1220.

unconstitutional action undeterred.²⁵⁸ The injustice created by municipal immunity from punitive damages is further exemplified by the exoneration of the unconstitutional police department policy of using “throw downs” in *Webster*.²⁵⁹ The result in *Webster* directly contradicts the purpose of § 1983 because it effectively condones the police department’s policy of violating the constitutional rights of its citizens.

Finally, footnote 29 compels modification when applied to the facts of *Ciraolo*.²⁶⁰ At the very least, a municipality should be liable for punitive damages when it knowingly violates not only the law established in its judicial circuit, but also the Federal Constitution. If there is no action taken to punish cities when they breach the law, then the law itself and the values it promotes are severely undermined. Compensatory damages are not enough to deter municipalities from violating § 1983. In accordance with applying a broad construction of § 1983, footnote 29 should, therefore, be modified. Only then will the courts fully realize the purpose and spirit of the statute and once again provide remedies to those who are deprived of their constitutional rights.

²⁵⁸ See *Heritage Homes*, 670 F.2d 1. As noted by the Supreme Court in *Fact Concerts*, prevention of future misconduct is a fundamental objective of punitive damages, and the underlying goal of § 1983 is to deter future abuses of power. *Fact Concerts*, 453 U.S. at 268. Thus, the denial of punitive damages in *Heritage Homes* is counterproductive.

²⁵⁹ See 689 F.2d at 1230-38 (Goldberg, J., specially concurring).

²⁶⁰ See *supra* Part III.C (analyzing the Second Circuit’s interpretation of footnote 29 and explaining the unjust result the court reached).