

Brooklyn Law Review

Volume 68

Issue 4

Symposium:

Responsibility & Blame: Psychological & Legal

Perspectives

Article 10

6-1-2003

Not Enough Blame to Go Around: Reflections on Requiring Purposeful Government Conduct

Susan Bandes

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Susan Bandes, *Not Enough Blame to Go Around: Reflections on Requiring Purposeful Government Conduct*, 68 Brook. L. Rev. 1195 (2003).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol68/iss4/10>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

NOT ENOUGH BLAME TO GO AROUND: REFLECTIONS ON REQUIRING PURPOSEFUL GOVERNMENT CONDUCT*

Susan Bandes[†]

How should we think about blame and responsibility when a governmental entity, rather than an individual, is accused of wrongdoing? Neither blame nor responsibility is a term capable of precise definition. Blame, however, is a concept with particular resonances. I suggest that a tendency to premise government liability on blame rather than responsibility has become increasingly pronounced, and that it is worth noticing both for its consequences and for the particular emotional variables it injects into the question of government accountability.

To place the workings of blame and responsibility in a concrete context, let me briefly describe one particular situation with which I am quite familiar. It involves, as is so often the case with governmental wrongdoing, a complex series of interlocking actions and inactions by a variety of actors. As I summarize the situation, think about the concepts of “responsibility” and “blame” and where they might attach.

I. WHO’S TO BLAME FOR POLICE TORTURE?

During a period of at least thirteen years beginning in the early 1970s, more than sixty men, all of them African-American, alleged that they had been tortured by several named police officers in the Area Two Violent Crimes Unit on Chicago’s South Side.¹ Complaints were filed with the

* © 2003 Susan Bandes. All Rights Reserved.

[†] Professor of Law, DePaul University. I wish to thank Lawrence Solan and Brooklyn Law School for organizing the superb conference, “Responsibility & Blame: Psychological and Legal Perspectives,” at which this Article was presented.

¹ The following account is taken from Susan Bandes, *Patterns of Injustice*:

applicable administrative agencies, the mayor, the state's attorney and the United States Attorney, and allegations were raised in numerous judicial proceedings. These complaints and allegations came from numerous unconnected sources; were corroborated by, among others, hospital personnel and defense attorneys; described alarmingly similar acts of torture; and named the same police officers over and over. The response, until 1990, was one of inaction and denial. The internal police agency charged with investigating such allegations, the Office of Professional Standards, tended to treat each allegation as *sui generis*, and dismiss it for lack of credibility. It did not conduct an investigation of the alleged pattern of torture until 1990, and when it did, the city suppressed its report finding systematic torture for two years. The Area Two unit commander and ringleader, John Burge, was not fired until 1993. The other officers involved have been subjected to no discipline, and many have been promoted, commended and allowed to retire with full benefits. Ten men who allege their confessions were the product of torture in Area Two spent years on death row. In January 2003, Governor George Ryan pardoned four men who had spent a total of sixty years on death row, finding that they had confessed to crimes that they did not commit after being tortured.²

Inaction was the prominent behavior that permitted the torture ring to continue for so long. Supervisors at Area Two looked the other way and failed to supervise, as did Illinois Assistant Attorneys General who took statements from the torture victims and as did doctors and other personnel at Cook County Hospital, where the men were sometimes brought for treatment. Police departments failed to accept complaints, the State's Attorney and United States Attorney failed to investigate, several successive chiefs of police and at least one mayor of Chicago³ ignored complaints, and a series of state and

Police Brutality in the Courts, 47 BUFF. L. REV. 1275, 1276-78, 1288-1305 (1999). See the article and sources cited therein for a fuller account of the Area Two scandal.

² Steve Mills & Christi Parsons, "The System has Failed": Ryan Condemns Injustice, Pardons 6 and Paves the Way for Sweeping Clemency, CHI. TRIB., Jan. 11, 2003, at 1. The remaining men who had alleged their confessions were the product of torture were part of the group who had their sentences commuted to life without parole. See Steve Mills & Maurice Possley, *Decision Day for 156 Inmates*, CHI. TRIB., Jan. 12, 2003, at 1.

³ For an account of the current Mayor Daley's role in the widespread governmental failure to act, see Bandes, *supra* note 1, at 1302.

federal judges failed to suppress confessions or to allow inquiry into the possibility of a pattern.

The scandal I've described crosses all sorts of jurisdictional boundaries—a dizzying array of governmental agencies let down the Area Two torture victims. This fact alone makes it difficult to affix responsibility in legally manageable ways. We might have a wide-ranging discussion about moral blame, but legal responsibility requires a legally cognizable actor: either an individual or an entity. As to individual legal responsibility, the question seems relatively straightforward. Several police officers, clothed with the authority of law, spent at least thirteen years torturing suspects, and then consistently lied about doing so on the witness stand and elsewhere. Thus, as to the street-level officers and even some supervisory personnel there are no really hard lines to draw between action and inaction; negligence, intent and malevolence; responsibility and blame; or even legal and moral blame. Commander Burge and his men satisfy the conventional story of evil men bent on evil acts. If they had been disciplined, fired or even criminally prosecuted for their individual acts, we might say that the most blameworthy actors had received their just punishment, but this would be shortsighted. The role of the government entities raises all the most difficult issues, given that the entities have yet to address the systemic problems that allowed the scandal to continue unchecked for so long. How do notions of blame and responsibility help—or hinder—the inquiry into how to deal with the applicable entities?

The question of how to measure and enforce the accountability of entities, governmental or private, has always been complicated by the abstract nature of the wrongdoer. There is an initial hurdle: how to think about the entity's capacity for acting wrongly. The law often approaches this question by considering whether the corporation, municipality or agency should be considered a person within the reach of some common law or statutory scheme.⁴ But even once the entity is recast as a person for this purpose, there remains the

⁴ See, e.g., VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* 83-93 (2000) (discussing legal approaches to corporate liability, including jury instructions informing that "[a]ll persons are equal before the law, and corporations, big or small, are entitled to the same fair consideration that you would give any other individual party"). See also *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989) (holding that a state and instrumentalities of a state are not persons subject to suit under Section 1983).

practical difficulty of determining when this constructive person has acted. For reasons I explore below, courts have difficulty answering this question without analogizing an entity to an actual person. At times, the law looks to the question of which actual persons have acted *for* or *as* the entity.⁵ Alternatively, it may attempt to understand or evaluate an entity's behavior using human behavior as a yardstick or analogue.⁶ It is not surprising, and not necessarily problematic, that abstract entities are so insistently anthropomorphized. The explanations for the drive to transform an abstract notion into something human and manageable can be understood through multiple lenses: narrative, linguistic, psychological and philosophical, among others. The tendency to humanize becomes problematic when the reasons for the transformation are forgotten or papered over; when heuristic goals are confused with descriptive accuracy. It becomes a problem when, for example, a municipality is confused with an actual person who ought not to be held responsible unless his actions are blameworthy.

It is neither coherent nor helpful to talk about government responsibility in the abstract. The responsibilities of government entities, like their very existence, derive from a complex web of regulatory schemata. In order to think about blame and responsibility and how they work when government is the wrongdoer, I want to focus in particular on the major source of municipal liability: Section 1983.⁷ The development of decisional law interpreting this statute will illustrate my concern about the shift from responsibility to blame.

When the Supreme Court in *Monell v. Department of Social Services of New York*⁸ overruled *Monroe v. Pape*⁹ to hold that municipalities are persons within the meaning of Section 1983, it transformed a marginally useful statute into a potentially powerful force for governmental accountability. At the same time, *Monell* began a quarter century (and counting)

⁵ See *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

⁶ See, e.g., *Bd. of County Comm'rs v. Brown* (Bryan County), 520 U.S. 397 (1997) (discussed *infra* note 10 and accompanying text). See also HANS, *supra* note 4, at 83 (noting that "elements of the personhood conception continue to play a significant role in shaping legal treatment of the corporation").

⁷ 42 U.S.C. § 1983 (2002).

⁸ 436 U.S. 658 (1978).

⁹ 365 U.S. 167 (1961).

of torturous grappling with when, exactly, a municipality had acted, and could therefore be held accountable.

How should the Court determine when a municipality has subjected someone to a deprivation of rights? There are a variety of defensible directions the Court could have taken in interpreting the reach of municipal liability, and a variety of defensible tools it could have used to determine which direction was best. My particular focus is on how the debate over the proper scope of the doctrine has been influenced by the seductive pull of the notion of blame.

II. MUNICIPAL LIABILITY: THE OFFICIAL STORY

The Supreme Court consistently portrays itself as faced with a conundrum: The municipality is an aggregation of persons, it can act only through those persons, yet the municipal entity must be distinguished from its agents for purposes of the statute.¹⁰ The perceived statutory mandate to distinguish municipality from agents is the driving force behind the Court's municipal liability jurisprudence. This perceived conundrum is, in complex ways, both the source and the result of the troubled state of current municipal liability jurisprudence. It rests on the mistaken notion that the municipality can *in fact* be distinguished from its agents. Municipal liability, as Larry Kramer and Alan Sykes persuasively argued, "is necessarily vicarious."¹¹ Municipal actions are always carried out by agents. Any means of distinguishing the municipality from those agents will be prescriptive rather than descriptive. The Court's efforts to resolve the perceived conundrum have driven many of its crucial interpretive choices about the scope of municipal liability, yet the prescriptive nature of those choices is rarely acknowledged. Indeed, the conundrum itself is largely the result of the Court's own doctrinal choices. For example, it would disappear if the Court adopted respondeat superior liability, rendering the municipality liable for its agents' acts.

The drive to distinguish the municipality from its agents also has a deeper source: the need to render an abstract

¹⁰ See, e.g., *Bryan County*, 520 U.S. at 410; *City of Canton v. Harris*, 489 U.S. 378, 391-92 (1989). See also Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 337 (1992).

¹¹ Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 253.

entity understandable—not just legally, but cognitively. How are we to think about wrongdoing in relation to a bureaucracy, a complex regulatory creation with “no soul to be damned, and no body to be kicked?”¹² We tend to try to grasp the concept either by focusing on particular individual actors of the entity, or by humanizing, anthropomorphizing the entity itself.¹³ At times courts attempt to identify the particular employees who act on behalf of the municipality, thus transforming an abstract sovereign into a more familiar aggregation of human actors, with familiar human attributes. To the extent there is room for the notion of the municipality itself as wrongdoer, the measures of its wrongdoing often take human form—it is cast as an actor with motives, emotions and volition. These may be useful devices in their place, but the question then becomes: What is that place? The Court all too often seems to forget *why* it resorts to these devices, and its lack of clarity has consequences.

The starting point in defining municipal liability must be the statute itself. One of the challenges of interpreting Section 1983 is that the language of the statute is famously spare and unhelpful, and the relevant legislative history virtually non-existent. The language of the statute imposes liability on any “person” who, under color of state law, “subjects or causes to be subjected” a person within United States jurisdiction to a deprivation of federal rights.¹⁴ How does a municipality subject or cause to be subjected? Although the *Monell* Court purported to rely heavily on Section 1983’s literal language,¹⁵ this language affords little in the way of direction or limitation. As Justice Breyer argued most recently in his dissent in *Board of County Commissioners of Bryan County, Oklahoma v. Brown*,¹⁶ “as a purely linguistic matter,” the municipality could be said to subject someone to a deprivation, or cause someone to be so subjected, any time one of its employees acts within the scope of his or her employment.¹⁷ The

¹² William S. Laufer, *Integrity, Diligence, and the Limits of Good Corporate Citizenship*, 34 AM. BUS. L.J. 157, 158 (1996) (quoting Baron Thurlow).

¹³ See HANS, *supra* note 4, at 84-91 (noting that jurors in trials with corporate defendants tend to focus on specific individuals, or to search for analogies enabling them to reduce the corporation to an individual template).

¹⁴ 42 U.S.C. § 1983 (2002).

¹⁵ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691-92 (1978). See also *Bryan County*, 520 U.S. at 430 (Souter, J., dissenting).

¹⁶ *Bryan County*, 520 U.S. at 430 (Breyer, J., dissenting).

¹⁷ *Id.* at 431.

language itself would not preclude liability even under the purest respondeat superior scenario, the scenario that *Oklahoma v. Tuttle*,¹⁸ for example, found most objectionable: in which the municipality had no prior notice that the officer would engage in excessive force; the officer only did so on one occasion; and the municipality took all appropriate steps after the wrongful act occurred.

The irony of the Court's claim of reliance on statutory language is quickly made plain. To ward off the possibility of collapsing the distinction between entity and employee, the *Monell* Court created a requirement found nowhere in the language of the statute: the requirement that liability attach only to acts taken pursuant to official policy.¹⁹ In support of this requirement, the Court relied on a legislative history whose tenuous nature is well documented.²⁰ As the *Monell* Court readily conceded, the legislative history of the Civil Rights Acts contains "virtually no discussion of" Section 1983.²¹ Section 1983's engagement with legislative history generally consists of attempts to divine why the House of Representatives rejected the Sherman Amendment to the 1871 Civil Rights Act, which would have imposed liability on a municipality for acts of private parties occurring within its borders.²² These attempts at divination have caused much mischief. They led to the Court's holding of municipal immunity in *Monroe*,²⁴ and, once that was corrected, to the Court's ill-advised policy requirement in *Monell*,²⁵ which has spawned over the past twenty years

¹⁸ 471 U.S. 808 (1985).

¹⁹ *Monell*, 436 U.S. at 694. See also *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-81 (1986) (describing the policy requirement as intending to distinguish the municipality's acts from those of its employees); Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 787 (1992) (discussing the reasons for adoption of the policy requirement, and noting that its derivation is a "source of wonder").

²⁰ See, e.g., Kramer & Sykes, *supra* note 11, at 257-61.

²¹ *Monell*, 436 U.S. at 692 n.57.

²² Sec. 1, which later became 42 U.S.C. § 1983.

²³ *Monell*, 436 U.S. at 683-90. See also Kramer & Sykes, *supra* note 11, at 257-61 (discussing rejection of the Sherman Amendment). The Court also seeks to determine legislative intent by looking at the state of non-civil rights law in 1871, and assuming that absent a specific provision to the contrary, the 1871 Congress intended to incorporate current law into the statute. For critiques of this methodology see, e.g., Kramer & Sykes, *supra* note 11, at 264-66; Richard Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741 (1987).

²⁴ *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

²⁵ 436 U.S. at 694.

what Justice Breyer called, with some understatement, "a highly complex body of interpretive law."²⁶

In short, the twin pillars of the Court's municipal liability jurisprudence, the language of the statute and its legislative history, provide little support for the rejection of respondeat superior, and for the resulting policy requirement by which the Court seeks to ensure that the municipality and its employees do not collapse into one entity for liability purposes. Nevertheless, the Court increasingly finds a state of mind requirement for municipalities in the same questionable language and history.²⁷

The policy requirement in *Monell* focuses inquiry on the "nature of the [governmental] decision and the process by which it is made,"²⁸ deflecting attention from the harm caused by the actions of government. The focus on delineating "policy" lays the groundwork for an unfortunate fixation on identifying causal links to formal decision making by identifiable persons (and that harms identifiable persons). This fixation carries with it the potential to deflect from the complex ways in which government subjects people to deprivations. In *Owen v. City of Independence*,²⁹ decided two years after *Monell*, the Court came as close as it ever would to recognizing the municipality as a thing apart from its agents, understandable on its own terms, without analogy to malevolent individual actors. In *Owen* the Court recognized that systemic governmental injuries often "result . . . from the interactive behavior of several governmental officials, each of whom may be acting in good faith,"³⁰ and refused to impose a state of mind requirement for municipal liability. When, however, the Court began to deal with governmental inaction—failure to train, discipline or supervise—the specter of respondeat superior, or "too much

²⁶ *Bryan County v. Brown*, 520 U.S. 397, 430 (1997) (Breyer, J., dissenting).

²⁷ Given the paucity of legislative history and the spare text, the Court, despite its protestations to the contrary, (see, e.g., *Wood v. Strickland*, 420 U.S. 308, 316 (1975)) has filled in the interpretive gaps by creating a complex body of common law to interpret the statute. Modern Section 1983 jurisprudence therefore, when articulating the policies animating the statute, considers factors like fairness to the affected parties, cost allocation, federalism and the proper balance between official discretion and official constraint. However, these factors tend to be presented as merely additional gloss on text and legislative intent, and not surprisingly, they too seem to increasingly demand proof of municipal state of mind. See, e.g., the discussion of federalism in *Bryan County*, 520 U.S. at 414.

²⁸ *Kramer & Sykes*, *supra* note 11, at 252.

²⁹ 445 U.S. 622 (1980).

³⁰ *Id.* at 652.

liability," once again propelled it to define wrongdoing in terms of deliberate choice of action by identifiable persons.³¹ The Court was determined that liability should lie "only where the municipality *itself* causes the constitutional violation at issue."³² The Court in *City of Canton v. Harris* limited liability in such cases to deprivations flowing from "a deliberate or conscious choice . . . by [city policymakers]."³³ In *Bryan County*, the Court then upped the ante with what was essentially a malice aforethought requirement: that the policymaking official "consciously disregarded an obvious risk that the officer would subsequently inflict a particular constitutional injury."³⁴

Returning to the Area Two torture ring, it becomes obvious that several layers of municipal government, including the Chicago Police Department itself, are exempt from liability under the *Canton*, *Bryan County* standard. As Judge Posner saw the problem, (even at a time when *Canton* controlled, before *Bryan County* tightened the standard), municipal liability would lie only if the police chief had actually condoned the activities, for example by telling "the office of investigations to pay no attention to them."³⁵ "Proof of dereliction of duty was not enough. But that was all there was."³⁶ In the Area Two situation, as is often the case,³⁷ every incentive was skewed in favor of not knowing—not investigating, not gathering information, not sharing information, not acknowledging the receipt of information—suppressing information.³⁸ Deliberate

³¹ See *City of Canton v. Harris*, 489 U.S. 378, 392; *Bryan County*, 520 U.S. at 410.

³² *City of Canton*, 489 U.S. at 385 (citations omitted).

³³ *Id.* at 389.

³⁴ 520 U.S. at 411.

³⁵ *Wilson v. City of Chicago*, 6 F.3d 1233, 1240 (7th Cir. 1993).

³⁶ *Id.* at 1241.

³⁷ See, e.g., PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 71-73 (1983) (describing skewed incentives toward inaction); JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 203-04 (1993) (describing the decision by some police departments not to adopt specific policies in order to avoid liability); Susan Bandes, Monell, Parratt, Daniels and Davidson: *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101, 120-27 (1986).

³⁸ To highlight a few examples, failure to collect and organize data enabled the defendants to deny the existence of or knowledge of a pattern of torture. It enabled the internal investigating agency to refuse to investigate, and then, when it finally did investigate, it enabled the police chief to call its report "statistically flawed." See Charles Nicodemus, *Brutality Rap Hits Merit Cop*, CHI. SUN TIMES, Mar. 18, 1995, at 3. Failing to collect and organize data then enabled the police department's general counsel, when confronted with long-suppressed evidence of the department's knowledge and acquiescence, to declare the case closed because it was "too old." See Bandes, *supra*

indifference to a known risk was hardly necessary—mere indifference, coupled with refusal to learn about the risks involved, was sufficient to insulate every actor but those who wielded a cattle prod. Certainly it was enough to insulate the police chief, the designated policymaker under *Monell* and *Praprotnick*,³⁹ from knowledge of the day-to-day actions of his low-level employees.⁴⁰ As Peter Schuck so well described, we rely on government officials to take affirmative action when appropriate, yet they face incentives heavily skewed toward inaction.⁴¹ Current municipal liability doctrine creates even stronger incentives toward not knowing, not deliberating and, ultimately, not acting.

III. BUT DID THE GOVERNMENT *REALLY* DO IT?

The Court's direction, in short, is toward requiring blameworthy behavior by municipalities, while simultaneously rejecting the idea that these entities are capable of engaging in such behavior, or at least creating formidable hurdles to proving its existence.⁴² My argument is not that this move is doctrinally indefensible, but rather that it bespeaks a shift from doctrine to attitude, or from formal notions of responsibility to emotive notions,⁴³ and that this shift goes unacknowledged. Two conceptions of liability are at war here, and only one is articulated. Wrongdoing, in the legal context, and more specifically in the municipal liability context, is a legal term that identifies behavior that ought to lead to liability. It marks deviation from an agreed upon, socially created standard of conduct.⁴⁴ The notion of wrongdoing that has increasingly misinformed municipal liability law is a highly personal expression of the wrongdoer's attitudes or

note 1, at 1292-1303.

³⁹ *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

⁴⁰ Barbara Kritchevsky, *A Return to Owen: Depersonalizing Section 1983 Municipal Liability Litigation*, 41 VILL. L. REV. 1381, 1410 (1996) (arguing that narrow standards for determining who is a policymaker are likely to identify only persons who are so insulated from the day-to-day actions of municipal employees that they are unlikely to know of specific misconduct (and therefore to possess the level of knowledge required for deliberate indifference)).

⁴¹ SCHUCK, *supra* note 37, at ch. 3.

⁴² See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (holding that ordinarily municipal entities cannot be subjectively malicious); see also Kritchevsky, *supra* note 40, at 1396 (discussing *City of Newport*).

⁴³ Thanks to Robert Schapiro for helping me articulate these ideas.

⁴⁴ See, e.g., Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1009 (1990).

emotions toward the victim. It locates wrongfulness in malevolent desire or disposition; thus, it is a judgment of private features of the self, rather than of professional violation of shared, externalized norms.⁴⁵

In his wonderful book, *Three Seductive Ideas*, psychologist Jerome Kagan warns against using “insufficiently constrained”⁴⁶ concepts that appear to describe psychological processes. He says the following:

Trouble arises . . . when psychologists, sociologists, economists, and others in the social and behavioral sciences use abstract words for hidden psychological processes. Often, these words fail to specify critical information such as the type of agent, the situation in which the agent is acting, and the source of evidence for the ascription.⁴⁷

The problem Kagan describes is not, of course, confined to description of psychological processes. Any abstract concept runs a high risk of being insufficiently constrained, of failing to specify critical information that would limit its uses across disparate contexts. As linguist Ray Jackendoff noted, some words for abstract objects present themselves as referring to things “in the world,” despite the fact that they represent not concrete entities but a bundle of inferential features.⁴⁸ Unless we “tune” our conceptualizations, as Jackendoff puts it,⁴⁹ constantly checking to see whether they converge, we are likely to be using identical signifiers for entirely disparate sets of inferences. The legal realm is rife with such abstract concepts. Fred Schauer explains that certain concepts are “*pervasively indeterminate*,” in the sense that they cannot be applied to specific cases without the addition of supplementary premises.⁵⁰

⁴⁵ See also Judith Shulevitz, *There's Something Wrong With Evil*, N.Y. TIMES, Oct. 6, 2002, at 39 (reviewing SUSAN NEIMAN, *EVIL IN MODERN THOUGHT: AN ALTERNATIVE HISTORY OF PHILOSOPHY* (2002)). Shulevitz argues against thinking of evil as based on intensity or content of beliefs, since such beliefs might be strongly held and sincere, yet still lead to terrible wrongs. She suggests defining evil by the acts performed and by whether they violate standards of behavior.

⁴⁶ JEROME KAGAN, *THREE SEDUCTIVE IDEAS* 77 (1998).

⁴⁷ *Id.* at 13.

⁴⁸ RAY JACKENDOFF, *FOUNDATIONS OF LANGUAGE* 323 (2002). Thanks to Larry Solan for introducing me to these materials.

⁴⁹ *Id.* at 332.

⁵⁰ Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 514 (1988). See also Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829, 866 (2001).

In the context of municipal liability, the abstract charge of “wrongdoing” is leveled against the abstract entity “government.” Determining when such wrongdoing had occurred was never easy, but the determination became increasingly unconstrained, even unmoored, as the Court shifted from viewing the government entity as a construct whose goals should be judged against norms of governmental behavior, to viewing it as a concrete object in the world. It began using the language of human behavior, not as a useful heuristic, but as a description of what really exists.⁵¹

The early post-*Monell* case of *City of Newport v. Fact Concerts, Inc.*⁵² is a good example of the curious mix these opinions contain. The Court, rejecting the imposition of punitive damages against municipalities, rested its analysis in part on its view of the purposes behind Section 1983 and on its view of the optimal allocation of the costs of government wrongdoing.⁵³ It also veered into descriptive assertions of “what really is:” statements about municipalities as if they are “in the world” and have identifiable attributes.⁵⁴ The Court opined that punishment, through the imposition of punitive damages, should be applied not to the entity, but only to the *actual wrongdoer*.⁵⁵ It found that a government official can act knowingly, willfully and maliciously, but a municipality cannot.⁵⁶ The Court concluded that it makes no sense, therefore, to assess punitive damages against the municipality and that, moreover, such an award would act as retribution against blameless and innocent taxpayers.⁵⁷

In more recent cases, continuing to use the language of descriptive accuracy, the Court created the double bind of requiring the very mental states of which it earlier pronounced the entity incapable. In *Canton* it imposed a deliberate indifference standard to ensure that liability is fixed only

⁵¹ See Edward Rubin, *Rational States?*, 83 VA. L. REV. 1433, 1434 (1997).

⁵² 453 U.S. 247 (1980).

⁵³ *Id.* at 266-71.

⁵⁴ See, e.g., *id.* at 267.

⁵⁵ *Id.*

⁵⁶ *Id.* Here the Court quoted what it calls the “rationale” of an 1882 state court case: “[T]he city is not a spoliator and should not be visited by vindictive or punitive damages.” *Id.* at 262 (citing *Wilson v. City of Wheeling*, 19 W. Va. 323, 350 (1882)).

⁵⁷ *City of Newport*, 453 U.S. at 266 (citing *McGary v. President & Council of the City of Lafayette*, 12 Rob. 668, 674 (La. 1846)). Here the Court cited language from a pre-1871 state court case explaining that such damages would be “borne by widows, orphans, aged men and women, and strangers.” *Id.*

"where the municipality *itself* causes the constitutional violation at issue."⁵⁸ In *Bryan County*, it spoke of limiting liability to action for which the municipality is actually responsible⁵⁹ and avoiding the risk of holding it responsible for an injury that it did not cause.⁶⁰

Notice that the language becomes not only emotive, but morally tinged. This shift marks the unannounced and undefended move from responsibility to blame, in the sense that "blame is a word we reserve for humans who are both responsible and morally responsible in an unpleasant way."⁶¹ It suggests that it would not be fair or right to blame the entity for something it did not do. It is not hard to understand the urge to thus moralize and personify. It is difficult to tell a compelling and coherent story about a complex entity, so the storyteller borrows metaphors, and often does so sloppily. In our stories, we tend to want people with whom we can identify and people we can judge. We want someone to blame and someone to root for. We want evil to have, as Andrew Delbanco put it, "a name, a face, and an explanation."⁶² If someone does wrong, we want it to be the result of a choice to act by someone capable of reasoning. We want a motive. We want simple causal links between actor and act, between wrongdoing and consequence.

The drive for coherent and affecting narrative can be understood through many lenses. We can look to narrative theory, beginning with Vladimir Propp's taxonomy of the common structures of all folktales.⁶³ We can look to cognitive theory's treatment of the powerful pull of metaphor, a field that Steven Winter has explicitly linked to this area of law.⁶⁴ And we can look to the development of the legal system, from primitive notions of retribution and revenge for the blameworthy person with evil design, toward a more

⁵⁸ *City of Canton, Ohio v. Harris*, 489 U.S. 378, 378 (1989).

⁵⁹ *Bryan County v. Brown*, 520 U.S. 397, 415 (1997).

⁶⁰ *Id.*

⁶¹ John Darley, *Incommensurability and Symbolism in Civil Sanctioning*, Remarks at Responsibility & Blame: Psychological & Legal Perspectives, Symposium at Brooklyn Law School (Oct. 18, 2002).

⁶² ANDREW DELBANCO, *THE DEATH OF SATAN: HOW AMERICANS HAVE LOST THE SENSE OF EVIL* 181 (1995). See also Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 903 (2000) (citing and discussing Delbanco's book).

⁶³ VLADIMIR PROPP, *MORPHOLOGY OF THE FOLKTALE* (Lawrence Scott trans., 2d ed. 1990) (1928).

⁶⁴ Winter, *supra* note 10.

enlightened and forward-looking⁶⁵ focus on protection of the public interest. Indeed, the *Owen* Court, more than twenty years ago, approvingly noted that the evolution of tort law from a focus on individual blameworthiness to a principle of equitable loss-spreading harmonized well with the goals of Section 1983.⁶⁶ Yet the drive toward humanizing and emotionalizing is deeply rooted.⁶⁷

The move toward the emotive is understandable, but in this context it is highly problematic. As Jerome Kagan notes, "all words for cognitive, emotional and behavioral processes are functional categories"⁶⁸ To employ abstract notions like malice, blame or conscious choice is to risk uncritically importing assumptions from one category to another. Or, to put it another way, it is to reach for a highly available prototype though it is poorly tailored to the situation at hand.⁶⁹ Social psychologists have found that individual judgments about responsibility tend to be closely linked to the defendant's intentions, knowledge and proximity. This linkage creates difficulties when neither the bureaucratic decision-making process nor the criteria for liability fit within the individual, fault-based template.⁷⁰

Recalling Area Two, we understand what it means to blame Commander John Burge for torturing helpless suspects; this resonates with most every pre-existing set of beliefs about evil human behavior. When the concept is imported to the category of bureaucratic failure to act, however, those resonances remain, though the functional category has changed dramatically. The question is now whether a public official, such as a police chief or even a mayor, has abused his authority in a way that led to the deprivation of constitutional rights. In this context, the resonances serve mainly to mislead. We will not hear stories about the police chief or the mayor that fit the script, or satisfy the basic urge to punish evildoers, who acted

⁶⁵ See Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 320 (1996) (discussing the difference between backward-looking norms of culpability and forward-looking norms of wrongdoing).

⁶⁶ *Owen v. City of Independence*, 445 U.S. 622, 657 (1980).

⁶⁷ See HANS, *supra* note 4, at 90-91 (noting jury tendencies to invoke individual templates and search for appropriate human analogies).

⁶⁸ KAGAN, *supra* note 46, at 80.

⁶⁹ See Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCH. 857, 859 (1991).

⁷⁰ HANS, *supra* note 4, at 93.

consciously and alone and caused easily traceable harm.⁷¹ As Justice White observed in the context of a challenge to inhumane prison conditions, they “often are the result of cumulative actions and inactions by numerous officials . . . sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined. Intent simply is not very meaningful when considering a challenge to an institution”⁷² Indeed, the intent standard is worse than “not very meaningful” in this context. Intent and deliberate indifference standards exacerbate the incentive structure that exists in most bureaucratic institutions: They put a premium on delegating, not knowing, not acting, not making a paper trail. They insulate acts, or failures to act, that flow from the conflicting and multiple motives, goals and agendas that most collectives, and most individuals, possess. They insulate acts that flow from unconscious racism,⁷³ from “external” problems like lack of funding⁷⁴ and even from bureaucrats doing the best they can, though it is inadequate to prevent serious constitutional harm.

The problem of misdescription is not a function solely of the seductive pull of blame. Municipal liability jurisprudence relies on other misleading models as well; it draws from tort models that erase the difference between private wrongs and constitutional harm,⁷⁵ from economic models that conflate corporate with governmental bureaucracies,⁷⁶ even from interest group theories that fail to distinguish top-level politicians from street-level bureaucrats.⁷⁷ There is far too little nuanced information on the ways in which governmental entities make decisions, and the sorts of incentives, legal or otherwise, that would best promote accountability.⁷⁸

Thus, the misuse of the concept of blame is not the sole culprit in skewing municipal liability doctrine. Conversely, I am not arguing that the concept of blame ought to be banished

⁷¹ Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2320-23 (1990); Bandes, *supra* note 1, at 1328-38.

⁷² *Wilson v. Seiter*, 501 U.S. 294, 310 (1991).

⁷³ See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

⁷⁴ Kritchevsky, *supra* note 40, at 1433.

⁷⁵ See, e.g., Bandes, *supra* note 71, at 2320-23; Nahmod, *supra* note 44.

⁷⁶ Rubin, *supra* note 51, at 1438.

⁷⁷ See, e.g., Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

⁷⁸ See, e.g., *id.* at 353-54.

from municipal liability jurisprudence. It should, however, be approached as a functional concept with a particular purpose.⁷⁹ Peter French, who writes about corporate intent and integrity, has argued that it does make sense to ascribe moral virtue to corporations.⁸⁰ He suggests, in an article written several years before the Enron scandal and related revelations, that we acknowledge that “there are distinctly corporate plans and policies that provide the reasons why corporations do the things they do,” and that these need not be reduced to statements about the plans “of humans who happen to be agents of the corporate actor.”⁸¹ Once we focus on their unique structure, we see that corporations can be structured to pursue integrity, or not.⁸² The fascinating recent obstruction of justice trial of Arthur Andersen suggests the contortions juries go through when attempting to force systemic misconduct into an individual model.⁸³ They tend to search for the wrongdoing actor, even the scapegoat.⁸⁴

Concerns about the moral integrity of bureaucracies take on particular urgency when the bureaucracies are governmental. Government in particular, the “omnipresent teacher,”⁸⁵ is a moral agent. Justice Brennan stated so eloquently in *Owen*:

How “uniquely amiss” it would be . . . if the government itself—“the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct”—were permitted to disavow liability for the injury it has begotten.⁸⁶

⁷⁹ See generally my introduction to *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999) for discussion of the problems with decontextualized treatment of the role of emotions in legal contexts.

⁸⁰ Peter A. French, *Integrity, Intentions, and Corporations*, 34 AM. BUS. L.J. 141 (1996).

⁸¹ *Id.* at 152.

⁸² *Id.* at 152-55.

⁸³ See, e.g., Dan Ackman, *Andersen Jury's Philosophical Pickle*, at <http://www.forbes.com/2002/06/14/0614topnews.html> (last visited Feb. 19, 2003).

⁸⁴ By the same token, a recent book on corporate crime points out that the FBI's Uniform Reporting Program, which determines the “nation's crime index,” does not report crime by corporations, even when the corporations are convicted of felonies. See THOM HARTMAN, *UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS* 184 (2002). See also Mark Fishman, *Crime Waves as Ideology*, in *JUSTICE AND THE MEDIA* 159, 172 (Ray Surette ed., 1984) (pointing out that police blotters do not report white collar crime).

⁸⁵ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

⁸⁶ *Owen v. City of Independence*, 445 U.S. 622, 651 (1980).

Municipalities are capable of wrongful and even reprehensible acts, and when they engage in such acts, it is important to place the responsibility, and indeed the stigma, where it belongs. To do so holds the entity responsible for the public meaning of its actions, affirms the importance of the rights at stake and puts the moral onus where it belongs⁸⁷—upon those who collectively failed to avoid abusing the public trust.

⁸⁷ See Levinson, *supra* note 77, at 408 (singling out the government official closest to the harm will be arbitrary from a moral point of view if that officer is merely responding to bureaucratic incentives or carrying through the inevitable results of lack of training or resources.) Of course, the individual official may be liable in his individual capacity, and this should be true whether or not municipal liability lies. See *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (finding by jury that police officer inflicted no constitutional injury on plaintiff removed any basis for liability against the city); but see Barbara Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 GEO. WASH. L. REV. 417, 454-59 (1992) (arguing that *Heller* should not mean that exoneration of individual defendants precludes municipal liability).

