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Henry C. Collins

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COMMENT

MUNICIPAL LIABILITY FOR TORTS COMMITTED BY VOLUNTEER ANTICRIME GROUPS

I. Introduction

Volunteer anticrime activity¹ has increased markedly over the last few years.² This increase reflects the fiscal problems plaguing many cities,³ where diminished financial resources have eroded police forces through a combination of layoffs, attrition and hiring freezes.⁴ One

1. Volunteer anticrime activity takes a variety of forms. Mobile patrols which employ citizens' band equipped cars, as well as other neighborhood patrols, limit their involvement to observing and reporting suspicious activity and therefore avoid direct entanglement with suspected criminals. Shaman, *Neighborhood Security Patrols Double*, N.Y. Times, Jan. 24, 1982, § 8 (Real Estate), at 1. See also N.Y. Times, Feb. 25, 1982, at B12, col. 1. Although participation in these programs has increased recently, this Comment focuses on street and subway patrols. Due to the patrol members' direct involvement with suspected criminals, the potential for tort liability is greater than that of the groups which avoid direct confrontation. See notes 13-16 *infra*. In addition, this Comment examines organized volunteer groups who emulate municipal police functions. It does not discuss liability in connection with individual "Good Samaritans." See, e.g., N.Y. EDUC. LAW § 6527(2) (McKinney 1972) (providing immunity for physician rendering emergency treatment outside hospital); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 56 (4th ed. 1971) (discussing liability for acts and omissions).

2. In New York City, such activity has doubled over the last four years. Shaman, *supra* note 1, at 1. "[A]bout 150,000 [New York] residents are now involved in some form of crime prevention program. . . ." *Id.* Another report estimates that hundreds of anticrime patrols operate nationally. Pick, *Do Good Watchdogs Make Good Neighbors?*, 10 *STUDENT LAW.* 22, 24 (Dec. 1981).

3. A publication by a New York citizen's group states: "[t]he city's fiscal crisis has heightened the potential for crime as the number of police officers has been reduced and many municipal services have been curtailed." Citizen's Committee for New York City, Inc., "Lend a Hand for a Safer New York" 3 (1980).

4. NEW YORK CITY POLICE DEPARTMENT WORK FORCE

<u>Year</u>	<u>No. of Uniformed Policemen</u>	<u>No. of Civilian Personnel</u>
1970	31,680	2,138
1972	30,464	2,330
1974	31,632	4,341
1976	26,632	4,307
1978	24,729	4,406
1980	22,902	4,449

Chart compiled from information furnished by Office of Management and Analysis, New York City Police Department (Feb. 26, 1982) (unpublished data). "Layoffs" of

volunteer anticrime group in particular, the Alliance of Guardian Angels, Inc. (Guardian Angels), has achieved considerable notoriety for its patrols of New York City subways. Its members, originally thirteen in number, began patrolling the subways in February, 1979.⁵ By October, 1980, the Guardian Angels boasted 550 members, and New York City had offered to make them auxiliaries of the New York City transit police.⁶ The director of the group rejected the offer, fearing undue governmental influence in its operations.⁷ Three months later, however, the New York City police department and the Guardian Angels formulated a plan under which the now 700 members could retain their independent status,⁸ yet benefit from a structured "ongoing relationship" with the city police.⁹ This plan culminated in a "Memorandum of Understanding" reached between the City of New York and the Guardian Angels in March, 1981.¹⁰

In contrast to the relatively passive stance adopted by some volunteer anticrime groups,¹¹ the Guardian Angels deter crime by exercising the statutory power to effect citizen's arrest.¹² In jurisdictions like New York, where the Guardian Angels are active, an individual in fact must have committed a crime for the citizen's arrest to be lawful. Where an arrest is found to be unlawful, the arrestor may be liable

uniformed police commenced in July 1975. At the same time, hiring of civilian personnel, defined in this chart to include clerical police department employees and to exclude school crossing guards and employees working under grants, increased to allow the maximum number of uniformed police to perform their patrol duties. As of December 1981, uniformed personnel numbered 22,006, and civilian personnel, 5,576. Information supplied by Office of Management and Analysis (Feb. 26, 1982).

5. N.Y. Times, Jan. 15, 1981, at B5, col. 1.

6. *Id.* Oct. 17, 1980, at B3, col. 5. See notes 246-65 *infra* and accompanying text for a discussion of the legal status of auxiliary police.

7. N.Y. Times, Oct. 17, 1980, at B3, col. 5. "We feel we can be more effective if we don't become involved with the Transit Authority." *Id.*, quoting Curtis Sliwa, head of the Guardian Angels.

8. *Id.*, Jan. 15, 1981, at B5, col. 2.

9. City of New York, MEMORANDUM OF UNDERSTANDING, March 25, 1981 [hereinafter cited as MEMORANDUM]; New York City Police Department, Operations Order No. 45, The Alliance of Guardian Angels, Inc., May 29, 1981. This Operations Order was issued pursuant to the Memorandum.

10. MEMORANDUM, *supra* note 9.

11. See note 1 *supra*.

12. MEMORANDUM, *supra* note 9, ¶10. The citizen's power to arrest, a right formerly enjoyed at common law, largely has been superseded by statute. See *The Law of Citizen's Arrest*, 65 COLUM. L. REV. 502, 503, 511 (1965); *Lurie v. District Attorney*, 56 Misc. 2d 68, 72, 288 N.Y.S.2d 256, 263 (Sup. Ct. Kings County 1968) ("[c]learly the new arrest statute pre-empted the field to the exclusion of all such common-law rights").

civily for damages.¹³ In view of the strict standards governing the propriety of citizen's arrests,¹⁴ suits for false arrest against anticrime volunteers such as the Guardian Angels may be brought.¹⁵ In addition, any physical injuries caused by anticrime volunteers could lead to suits to recover for excessive force.¹⁶

A party injured by an anticrime volunteer bears a strong incentive to hold a municipality liable¹⁷ for injuries inflicted by individuals whose functions of patrol and arrest closely resemble those of the police.¹⁸ Such a plaintiff may proceed under the following three

13. In New York, the right of citizen's arrest is codified in § 140.30 of the Criminal Procedure Law, which provides: any person may arrest another person (a) for a felony when the latter has in fact committed such felony, and (b) for any offense when the latter has in fact committed such offense in his presence. N.Y. CRIM. PROC. LAW § 140.30(1) (McKinney 1981). The statutes in other jurisdictions, too, generally are strict, retaining the common law standards. See *The Law of Citizen's Arrest*, *supra* note 12, at 511. See generally 6A C.J.S. *Arrest* §§ 10, 12-15 (1975); 5 Am. Jur. 2d *Arrest* § 23 (1962). Under New York's provision, "[i]f the offense was not in fact committed, a person may be liable civilly and answerable in damages, even if acting in good faith upon reasonable cause." N.Y. CRIM. PROC. LAW § 140.30 (McKinney 1981) (Practice Commentary).

14. See note 13 *supra*.

15. By December, 1981, the Guardian Angels arrested 150 persons under their statutory power to effect citizen's arrest. Pick, *supra* note 2, at 42.

16. The amount of force allowed to effect the arrest is similarly regulated by statute. New York's codification provides:

A private person acting on his own account may use physical force, other than deadly physical force, upon another person when and to the extent that he reasonably believes such to be necessary to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes to have committed an offense *and who in fact has committed such offense*.

N.Y. PENAL LAW § 35.30(4) (McKinney 1975) (emphasis added). "In brief, the 'private person' arrester, in order to be justified in using any physical force to make any arrest, must not only believe that the arrestee has committed the offense in question, *but he must be right*. . . ." *Id.* (emphasis added) (citation omitted) (Practice Commentary to subdivision 4).

17. Reasons frequently mentioned include: (1) ensuring a financially responsible defendant; (2) enhancing jury sympathy; and (3) obviating the need to identify the tortious actor out of a group. See *Bishop v. Tice*, 622 F.2d 349, 355 n.11 (8th Cir. 1980); *Dean v. Gladney*, 621 F.2d 1331, 1337 n.15 (5th Cir. 1980) *cert. denied sub nom. Dean v. County of Brazoria*, 450 U.S. 983 (1981); *Respondeat Superior Liability of Municipalities for Constitutional Torts after Monell: New Remedies to Pursue?*, 44 Mo. L. REV. 514, 536 (1979) [hereinafter cited as *Respondeat Superior Liability*]; Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 923, 926-27 (1976) [hereinafter cited as *Damage Remedies*]. The doctrine of governmental immunity has been eroded in recent years. See note 224 *infra* and accompanying text.

18. Although a municipality may be liable for the conduct of its police officers, it generally will not be liable for failure to provide police protection or "adequate protection" to members of the public. *Riss v. City of New York*, 22 N.Y.2d 579, 583,

causes of action: first, a tort claim for assault, battery or false arrest under state law;¹⁹ second, an action under 42 U.S.C. § 1983 (section 1983),²⁰ alleging an unconstitutional deprivation under color of state law, custom or usage; and third, a *Bivens*-type²¹ action implied directly under the fourteenth amendment.

This Comment examines the elements that a plaintiff proceeding under section 1983, *Bivens* or state law must prove in order to recover against a municipality for torts committed by anticrime volunteer groups.²² It reviews the agreement reached by the Guardian Angels and New York City and analyzes the extent to which this municipality has attempted to avoid tort liability. This Comment concludes that even if a plaintiff establishes a master-servant relationship, success in recovering against a municipal corporation may be limited to a state law tort claim. The Supreme Court's rejection of *respondeat superior*²³ as a basis for municipal liability in section 1983 claims²⁴ and judicial hesitation in implying causes of action directly under the Constitution²⁵ effectively prevent an injured party from succeeding under either of those theories. A plaintiff proceeding under state law

240 N.E.2d 860, 861, 293 N.Y.S.2d 897, 898 (1968); *Bass v. City of New York*, 38 A.D.2d 407, 413-14, 330 N.Y.S.2d 569, 576 (2d Dep't (1972)); 18 McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.79-.86 (rev. 3d ed. 1977). Failure to provide protection or "adequate" protection may be actionable, however, where a special duty of protection is owed to an individual. See *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958) (special duty to protect informer who furnished information to police leading to apprehension of a dangerous fugitive). A plaintiff recently sued New York City for injuries caused by Guardian Angels, alleging *inter alia*, that the city was negligent in failing to provide adequate police protection. The court rejected this argument on the basis of *Bass* and *Schuster*. *Adames v. City of New York*, N.Y.L.J., Apr. 26, 1982, at 5, col. 2 (Sup. Ct. N.Y. County Apr. 13, 1982).

19. See notes 221-65 *infra* and accompanying text.

20. 42 U.S.C. § 1983 provides:

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 proper proceeding for redress.

42 U.S.C. § 1983 (1976).

21. *Bivens v. Six Unknown Fed. Agents*, 403 U.S. 388 (1971). See text accompanying notes 163-220 *infra*.

22. This Comment focuses on *municipal* liability for the torts of volunteer anticrime patrols. The liability of individual members will be examined only incidentally. See text accompanying notes 88-129 *infra*.

23. See notes 34, 228-45 *infra* and accompanying text.

24. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978).

25. See text accompanying notes 163-220 *infra*.

may employ *respondeat superior*, but might enjoy greater success by pointing to the similarity in functions between the Guardian Angels and the New York City auxiliary police to find municipal liability in connection with the activities of both groups.

II. Theories of Recovery

A. 42 U.S.C. § 1983.

Since the Supreme Court's decision in *Monell v. Department of Social Services*,²⁶ municipalities have been subject to suit under section 1983, a statute intended to enforce the fourteenth amendment.²⁷ The plaintiff proceeding against a municipality under section 1983²⁸ must establish two elements: first, that the deprivation was caused by an official policy, custom or usage of the municipality,²⁹ and second, that the conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States.³⁰ Establish-

26. 436 U.S. 658 (1978). "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." *Id.* at 690. *Monell* expressly overruled a prior Supreme Court decision, *Monroe v. Pape*, 365 U.S. 167 (1961), which had held that municipalities were not "persons" under § 1983. The impact of *Monell* in this regard has been discussed extensively. *E.g.*, Peters, *Municipal Liability After Owen v. City of Independence and Maine v. Thiboutet*, 13 URB. L. 407 (1981); Seng, *Municipal Liability for Police Misconduct*, 51 MISS. L.J. 1 (1980); Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213 (1979).

27. As *Monell* noted, Congress intended § 1983 to provide a "broad remedy for violations of federally protected civil rights." *Monell*, 436 U.S. at 685 (emphasis added). "It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment." *Monroe v. Pape*, 365 U.S. 167, 171 (1961) (citations omitted). See also Singleton v. City of New York, 632 F.2d 185, 204 (2d Cir. 1980) (Weinstein, J., dissenting), *cert. denied*, 450 U.S. 920 (1981) citing Note, *Actionability of Negligence Under Section 1983 and The Eighth Amendment*, 127 U. PA. L. REV. 533, 537-38 (1978); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1357 (1952); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1153-55 (1977).

28. See note 20 *supra* for text of § 1983.

29. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694. See also *Powe v. City of Chicago*, 664 F.2d 639, 643 (7th Cir. 1981).

30. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). Without considering whether the acts complained of deprived the plaintiffs of a right, privilege or immunity secured by the Constitution or laws of the United States, the Court in *Monell* passed directly to the question of whether municipalities were

ing the first element, however, has proved problematic for many plaintiffs because of the narrow definition courts often give to "official policy, custom or usage."³¹ Unlike *Monell*, where the municipality's unconstitutional policies were embodied in regulations and bylaws,³² municipalities often do not express unconstitutional policies in as overt a manner.³³ In addition, *Monell* stated that a municipality could not be held liable under section 1983 on any theory of vicarious liability including *respondeat superior*.³⁴ The Supreme Court's holding becomes significant in the context of volunteer anticrime patrols because volunteer status does not necessarily preclude the application of *respondeat superior*.³⁵

1. Official Policy

Monell expressly recognized that governmental policy, custom or usage, cognizable under section 1983, could be found even though not expressly set forth in a statute or law.³⁶ Subsequent decisions have inferred such policy from inaction,³⁷ thereby raising the question

amenable to actions brought pursuant to § 1983. *Monell*, 436 U.S. at 662-64. The second element derives directly from the language of § 1983. See note 20 *supra*.

31. See *Powe v. City of Chicago*, 664 F.2d 639 (7th Cir. 1981); *Avery v. County of Burke*, 660 F.2d 111 (4th Cir. 1981); *Harbulak v. County of Suffolk*, 654 F.2d 194 (2d Cir. 1981); *Landrigan v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980); *Turpin v. Mailet*, 619 F.2d 196 (2d Cir.), *cert denied sub nom. City of West Haven v. Turpin*, 449 U.S. 1016 (1980).

32. *Monell v. Department of Social Servs.*, 394 F. Supp. 853, 854-55 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 254 (1976), *rev'd*, 436 U.S. 658 (1978). In *Monell*, the Board of Education and Department of Social Services compelled pregnant employees to take medically unnecessary leaves of absence without pay in violation of the due process clause.

33. *E.g.*, *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981).

34. *Monell*, 436 U.S. at 691. *Respondeat superior* holds a master liable for the torts of his servant committed in the course of his employment. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 69, at 458 (4th ed. 1971). See notes 228-45 *infra* and accompanying text. See also *RESTATEMENT (SECOND) OF AGENCY* § 219 (1958); F. MECHEM, *OUTLINE OF AGENCY* § 349 (4th ed. 1952); W. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* § 83 (1964). *Monell's* rejection of *respondeat superior* as a basis for municipal liability has been criticized. See Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213 (1979); *Respondeat Superior Liability*, *supra* note 17, at 514 (1979).

35. See notes 231-35 *infra* and accompanying text.

36. *Monell*, 436 U.S. at 691.

37. See, *e.g.*, *Avery v. County of Burke*, 660 F.2d 111, 114 (4th Cir. 1981) (official policy may be established by omissions); *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981) ("municipality's continuing failure to remedy known unconstitutional conduct of its police officers is the type of informal policy or custom that is amenable to suit under § 1983"); *Doe v. New York City Dep't of Social Servs.*,

whether a municipality's acquiescence in the acts of volunteer anti-crime groups performing police functions may constitute "official policy." A finding of official policy, however, would be doubtful because a plaintiff most likely would attempt to predicate municipal liability on a single tortious incident.

In *Turpin v. Mailet*,³⁸ a plaintiff who earlier had succeeded in a section 1983 suit against a police officer for excessive force in connection with an arrest,³⁹ alleged that a second policeman maliciously arrested him on a charge of disorderly conduct, having been motivated solely by the outcome of the first lawsuit.⁴⁰ The plaintiff sought to hold the city liable, claiming that the failure of the police department to discipline the first policeman encouraged other officers "to believe . . . that they could violate [his] rights with impunity."⁴¹ The court examined whether the municipality's inaction in the face of unconstitutional police behavior could evidence an "official policy" within the meaning of *Monell*.⁴² Noting that the allegations concerned not one, but two unlawful arrests, the court nevertheless concluded that the plaintiff failed to prove any official policy.⁴³

Turpin stated that official policy could be inferred from both the acts and omissions of a municipality's supervisory officials.⁴⁴ The

649 F.2d 134, 141 (2d Cir. 1981) (officials may be liable under § 1983 for failure to do what is required as well as for overt activity); *Shinman v. Frank*, 633 F.2d 468, 469 (6th Cir. 1980) (inaction can lead to civil rights liability); *Turpin v. Mailet*, 619 F.2d 196, 201 (2d Cir. 1980) (official policy may be inferred from supervisory officials' omissions). Many of these decisions relied on *Estelle v. Gamble*, 429 U.S. 97 (1976), where the Court recognized that "deliberate indifference to serious medical needs" of a prisoner could violate the eighth amendment. *Id.* at 104. The Court ruled, however, that the facts indicated that most medical malpractice which was not cognizable under § 1983. *Id.* at 107.

38. 579 F.2d 152 (2d Cir.) (en banc), *vacated sub nom.* *City of West Haven v. Turpin*, 439 U.S. 974 (1978), *modified on remand*, 591 F.2d 426 (2d Cir. 1979) (en banc).

39. The plaintiff alleged that a policeman severely wounded him when he attempted to intervene in the arrest of another person. Although the police arrested and prosecuted the plaintiff, the juvenile court declined to convict him. *Id.* at 154 (citing unreported lower court decision).

40. *Turpin v. Mailet*, 619 F.2d 196, 198 (2d Cir. 1980), *cert. denied sub nom.* *City of West Haven v. Turpin*, 449 U.S. 1016 (1981).

41. *Turpin*, 619 F.2d at 198.

42. *Id.* at 197.

43. *Id.* at 202. While the failure to discipline the first officer "might suggest a slight disregard for [the plaintiff's] rights," *id.* at 203, it did not amount to "official policy" sufficient to find municipal liability under § 1983. *Id.* at 203-04.

44. *Id.* at 201.

court observed, however, that "absent more evidence of supervisory indifference, such as acquiescence in a prior pattern of conduct, a policy could not ordinarily be inferred from a single incident of illegality such as a first arrest without probable cause or with excessive use of force."⁴⁵ Other courts have reached similar results.⁴⁶ Indeed, as one court explained, imposition of liability in such an instance would amount to an invocation of *respondeat superior* contrary to *Monell*.⁴⁷

Despite the trend of decisions rejecting municipal liability for inaction following an isolated incident, the court in *Herrera v. Valentine* found liability for inaction in the face of egregious police misconduct.⁴⁸ In *Herrera*, an officer kicked a visibly pregnant plaintiff in the abdomen and threw her to the ground. He refused her requests for medical attention and later threatened to shoot her.⁴⁹ Moreover, while she was in his custody, he denied her requests for legal counsel. The plaintiff complained that she suffered physical and emotional injuries and delivered her child stillborn as a result of the beating.⁵⁰ Alleging violations of her civil rights under section 1983, the plaintiff named the officer and the municipality as defendants, and theorized that the city's failure to "properly hire, train, retain, supervise, discipline and control [its police] *directly* caused her tortious injury."⁵¹ The court noted that "a municipality's continuing failure to remedy known unconstitutional conduct of its police officers is the type of informal policy or custom that is amenable to suit under section 1983,"⁵² and concluded that the evidence of prior official knowledge

45. *Id.* at 202.

46. *Powe v. City of Chicago*, 664 F.2d 639, 650 (7th Cir. 1981) (allegation of single act will not support finding of official policy, but pattern or series of incidents could lead to finding of official policy); *Avery v. County of Burke*, 660 F.2d 111, 114 (4th Cir. 1981) (single or isolated incidents normally insufficient to establish §1983 liability); *Singleton v. City of New York*, 632 F.2d 185, 195 (2d Cir. 1980) (citing *Turpin*, the court held that official policy was not to be inferred from single unlawful incident absent additional circumstances); *Landrigan v. City of Warwick*, 628 F.2d 736, 747 (1st Cir. 1980) (alleged treatment was an isolated incident; failure to investigate not sufficient to establish liability).

47. *Powe v. City of Chicago*, 664 F.2d 639, 650 (7th Cir. 1981), citing *Sterling v. Village of Maywood*, 579 F.2d 1350 (7th Cir. 1978), *cert. denied*, 440 U.S. 913 (1979).

48. 653 F.2d 1220 (8th Cir. 1981).

49. *Id.* at 1222.

50. *Id.*

51. *Id.* at 1224.

52. *Id.*

of police misconduct⁵³ amply supported the judgment against the city.⁵⁴

Herrera illustrates that inaction may lead to an inference of official policy where it follows a series of unlawful episodes. A plaintiff also may establish "policy" by pointing to an official "whose edicts or acts may fairly be said to represent official policy"⁵⁵ In *Black v. Stephens*,⁵⁶ a detective arrested a husband and wife following an altercation at a traffic light and charged the husband with aggravated assault.⁵⁷ Two days later the husband complained about the detective to the police chief but was informed that, due to an official regulation, the department would conduct no investigation until the charges pending against the husband were resolved.⁵⁸ Upon learning of the complaint, the detective filed three additional charges against the husband based on the original altercation.⁵⁹ The husband and wife, as plaintiffs, commenced an action against the individual detective, the chief of police, and the municipality under section 1983.⁶⁰ The court stated that to hold the police chief liable under section 1983, the plaintiff had to "establish a causal connection between the police chief's actions and the officer's unconstitutional activity"⁶¹ and found that the timing of the additional charges supplied the necessary connection.⁶² In addition, the court noted that three factors in the actions of the police chief pointed to an official policy: the chief had promulgated the regulation which postponed disciplinary hearings

53. The court found that numerous complaints of police misconduct had been made previously to the authorities, including charges of excessive force, sexual misconduct, racism and selective law enforcement. *Id.* at 1225. Hearings and investigations by county and independent agencies all concluded that a pervasive problem with the conduct of the city police force existed. The mayor, city council, and the Nebraska Indian Commission all previously had been aware of the numerous complaints. *Id.*

54. *Id.* A judgment against the individual officers also was upheld. *Id.*

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

56. 662 F.2d 181 (3d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3710 (U.S. Mar. 9, 1982) (No. 81-1239).

57. *Id.* at 186.

58. *Id.*

59. *Id.*

60. Finding that excessive force had been applied, that a regulation promulgated by the chief caused the filing of unwarranted charges, and that the chief had a policy of encouraging the use of excessive force by officers, a jury awarded compensatory damages against the detective and compensatory and punitive damages against the chief and the city. *Id.* at 187.

61. *Id.* at 189.

62. *Id.* at 190.

until the underlying arrest was resolved;⁶³ “a citizen’s complaint about excessive force never went into a police officer’s permanent personnel file;”⁶⁴ and “he never initiated a disciplinary action against an officer based solely on his evaluation of the officer’s use of force.”⁶⁵ Rejecting the municipality’s contention that, contrary to *Monell*, its liability was predicated on *respondeat superior*, the court held that *Monell* was satisfied because the police chief represented official policy for the city.⁶⁶

2. Constitutional Deprivation

The plaintiff who successfully establishes that an anticrime volunteer was acting pursuant to official policy also must establish that the conduct amounted to a constitutional deprivation—not a mere violation of state tort law.⁶⁷ In *Baker v. McCollan*,⁶⁸ a plaintiff sued under section 1983,⁶⁹ alleging that a state sheriff mistakenly arrested him and detained him for four days⁷⁰ without due process of law. The Supreme Court observed that “false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant

63. *Id.* at 189.

64. *Id.* at 190.

65. *Id.*

66. *Id.* at 191, quoting *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978).

67. “The . . . inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right ‘secured by the Constitution and laws’. . . . Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.” *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981), quoting *Baker v. McCollan*, 443 U.S. 137, 138, 146 (1979). Accord *Roberts v. Marino*, 656 F.2d 1112 (5th Cir. 1981); *Braden v. Texas A & M Univ. Sys.*, 636 F.2d 90 (5th Cir. 1981) (breach of contract action); *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973).

68. 443 U.S. 137 (1979).

69. Without stating its reasons, the district court directed a verdict in favor of the sheriff and his surety. *Baker*, 443 U.S. at 141. The court of appeals, characterizing respondent’s cause of action as a § 1983 false imprisonment claim, reversed the decision. *McCollan v. Tate*, 575 F.2d 509 (5th Cir. 1978). It held that the plaintiff was entitled to have his § 1983 claim presented to the jury, although the evidence supported no more than a finding of negligence on the sheriff’s part. *Id.* at 512.

70. In *Baker*, the plaintiff’s brother was arrested on narcotics charges and, because he carried a driver’s license with the plaintiff’s name, was booked mistakenly under that name. He was released on bond, and subsequently, an arrest warrant was issued for him in the plaintiff’s name. Pursuant to the warrant and over his protest, the plaintiff was taken into custody and held for four days before the error finally was discovered and he was released. *Baker*, 443 U.S. at 137.

is a state official."⁷¹ It distinguished rights protected by the constitution from those arising out of tort law, ruling that violations of the latter must be redressed in state courts under traditional tort law principles.⁷²

Baker establishes a threshold requirement: to proceed under section 1983, the plaintiff must have been deprived of a right "secured by the Constitution and laws."⁷³ While the distinction seems to be elementary, the decisions following *Baker* reveal that courts have had to make the determination on a case-by-case basis.⁷⁴ One Second Circuit opinion, *Johnson v. Glick*,⁷⁵ decided before *Baker*, has proved to be helpful in determining whether a given set of facts presents a common law tort or a constitutional violation. *Johnson* directs inquiry into "[1] the need for application of force, [2] the relation between the need and the amount of force that was used, [3] the extent of the injury inflicted, and [4] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."⁷⁶ In *Shillingford v. Holmes*,⁷⁷

71. *Id.* at 146.

72. *Id.* Justice Stevens' dissent in *Baker* (joined by Justices Brennan and Marshall) did not take issue with the majority's distinction between violations actionable only under state law and those actionable under the Constitution. The dissent, however, found that the totality of the circumstances surrounding the plaintiff's arrest and detention amounted to a violation of his fourteenth amendment rights. *Baker*, 443 U.S. at 149-56 (Stevens, J., dissenting).

73. *Id.* at 140, quoting 42 U.S.C. § 1983 (1976).

74. See, e.g. *Roberts v. Marino*, 656 F.2d 1112 (5th Cir. 1981); *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981); *Hall v. Tawney*, 621 F.2d 207 (4th Cir. 1980).

75. 481 F.2d 1028 (2d Cir.), cert. denied sub nom. *John v. Johnson*, 414 U.S. 1033 (1973).

76. *Id.* at 1029-30. In *Johnson*, a prisoner alleged that a guard made an unprovoked attack on him and placed him in a holding cell for two hours before permitting him medical attention. *Id.* Noting that "[n]ot every push or shove . . . violates a prisoner's constitutional rights," *id.* at 1033, the court cited the Supreme Court's language in *Rochin v. California*, 342 U.S. 165 (1952), which noted that pumping a suspect's stomach to determine whether he had swallowed illegal narcotics was "conduct that shocked the conscience" and violated due process. *Johnson*, 481 F.2d at 1033, quoting *Rochin*, 342 U.S. at 172. *Johnson's* factors, therefore, arose in an attempt to implement the Supreme Court's standards of due process in a meaningful fashion, and along with *Baker*, have been followed essentially without modification. E.g., *Roberts v. Marino*, 656 F.2d 1112 (5th Cir. 1981); *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981).

Johnson's "good faith" factor regarding the motivation for the application of force remains viable despite *Owen v. City of Independence*, 445 U.S. 622, (1980). *Owen* removed the good faith of officers as a defense to municipal liability under § 1983. *Johnson* employed the good faith test not as a defense to liability as in *Owen*, but merely as one element a court should consider in weighing the totality of the circumstances surrounding the application of force. Compare language in *Johnson*, see text accompanying this note, with *Shillingford v. Holmes*, 634 F.2d 263, 265-66 (5th Cir. 1981).

77. 634 F.2d 263 (5th Cir. 1981).

for example, a bystander tourist alleged that a policeman attacked him when he merely was photographing a group of policemen apprehending a boy.⁷⁸ Beginning with the proposition that section 1983 “[was] not a general tort statute,”⁷⁹ the court noted that *Baker* “permit[ted] no bright line to be drawn”⁸⁰ in determining whether an injury amounted to a constitutional deprivation. Applying the *Johnson* factors, however, the court found that the physical abuse inflicted “[on] a bystander on the public streets . . . [was] sufficiently severe, sufficiently disproportionate to the need presented and so deliberate and unjustified”⁸¹ as to amount to a deprivation of constitutional rights.⁸²

3. *Municipal Liability Through Concerted Action or Negligence.*

Monell establishes that municipalities will be liable under section 1983 only where official policy or custom subjects a plaintiff to a constitutional deprivation.⁸³ Where volunteer anticrime patrols are involved, it is likely that any episode giving rise to a cause of action will be a single, isolated incident. In addition, *Turpin*⁸⁴ and numerous decisions⁸⁵ indicate that official inaction following an isolated incident will not permit an inference of policy sufficient to support municipal liability under section 1983. Thus, if a plaintiff shows official inaction following an isolated incident of excessive force or unlawful imprisonment, effected by either a volunteer actor or a regular police officer, the weight of authority suggests he will be unsuccessful in establishing that official policy led to the violation. Where, however, he can demonstrate inaction in the face of a pattern of misconduct, as in *Herrera*,⁸⁶ or implementation of procedures leading to misconduct, as in *Black*,⁸⁷ the likelihood of establishing “official policy” is much greater.

78. *Id.* at 264.

79. *Id.*

80. *Id.* at 265.

81. *Id.* at 266. *See also* *Roberts v. Marino*, 656 F.2d 1112 (5th Cir. 1981), where the court employed a similar balancing approach.

82. *Shillingford*, 634 F.2d at 266.

83. 436 U.S. 658, 694 (1978). *See* notes 36-66 *supra* and accompanying text.

84. 619 F.2d 196 (2d Cir. 1980).

85. *See* note 46 *supra*.

86. 653 F.2d 1220 (8th Cir. 1981).

87. 662 F.2d 181 (3d Cir. 1981).

a. *Shopkeeper's and Citizen's Arrest Decisions*

The issue of individual liability is distinct from the issue of municipal liability under section 1983. The statute reflects a congressional attempt to enforce the provisions of the fourteenth amendment,⁸⁸ which regulates state action.⁸⁹ Thus, to find individual liability under section 1983, a plaintiff must establish that the conduct complained of was committed by a person acting under color of state law and that the conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States.⁹⁰ Courts occasionally have found liability for individuals acting in concert with police officers under a prearranged plan—especially in the face of a statute authorizing merchants' detention of suspected shoplifters.⁹¹ Although these decisions involve individual liability under section 1983, this concerted action potentially could amount to "official policy" sufficient to support municipal liability under *Monell*. These decisions⁹² suggest the extent to which a court may allow recovery against anticrime groups under section 1983 because these volunteers effect citizen's arrests authorized by state statutes.⁹³ The Supreme Court in *Flagg Bros., Inc. v. Brooks*⁹⁴ set forth two elements

88. *Monroe v. Pape*, 365 U.S. 167, 171 (1961). It firmly is established "that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

89. "[P]rivate conduct, however discriminatory or wrongful," will not be actionable under the Constitution. *Shelley*, 334 U.S. at 13.

90. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

91. *Duriso v. K-Mart No. 4195*, 559 F.2d 1274 (5th Cir. 1977); *Smith v. Brookshire Bros., Inc.*, 519 F.2d 93 (5th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 915 (1976). See also *El Fundi v. Deroche*, 625 F.2d 195, 196 (8th Cir. 1980) (per curiam).

92. *White v. Scrivner*, 594 F.2d 140 (5th Cir. 1979) (shopkeeper's arrest); *Smith v. Brookshire Bros., Inc.*, 519 F.2d 93 (5th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 915 (1976) (shopkeeper's arrest); *Warren v. Cummings*, 303 F. Supp. 803 (D. Colo. 1969) (citizen's arrest).

93. See note 13 *supra* and accompanying text.

94. 436 U.S. 149 (1978). In *Flagg Bros.*, a warehouseman proposed to sell plaintiffs' goods which were stored with him pursuant to a New York statute authorizing the sale to enforce a lien. The plaintiffs sued under § 1983 to enjoin the sale, alleging it violated the fourteenth amendment by depriving them of property without due process of law. To satisfy the "color of law" requirement, the plaintiffs advanced two arguments. First, they claimed that the statutory power to resolve private disputes was one exclusively reserved to the state, which had only been delegated to the warehouseman. *Id.* at 157. Second, they argued that the proposed sale was properly attributable to the state "because the State has authorized and encouraged it in enacting . . . [the statute]." *Id.* at 164. The Court rejected both contentions; only where the statute delegates an "exclusive prerogative of the sovereign," *id.* at 160, as

indicating when private action pursuant to a state statute amounts to state action: when the statute delegates an "exclusive prerogative of the sovereign,"⁹⁵ and when " 'the State, by its law, has compelled the act.' "⁹⁶

In *Smith v. Brookshire Bros., Inc.*,⁹⁷ the court distinguished instances cognizable under section 1983 from those actionable only under state tort law where defendants were individuals acting under a shopkeeper's statute.⁹⁸ The store officials in *Smith* "knew that they could have people detained merely by calling the police and designating the detainee."⁹⁹ The police, in turn, arrested suspects without independently establishing that there was probable cause that shoplifting had occurred.¹⁰⁰ The court held that the actions of the store employees and the police were concerted and, therefore, amounted to state action.¹⁰¹

By contrast, in *White v. Scrivner Corp.*,¹⁰² the court did not find state action pursuant to shopkeeper's statutes. In *White*, employees of a store detained and searched individuals suspected of shoplifting. Although the defendants found no store merchandise in the possession of the plaintiffs, only a handgun, they nevertheless summoned the police,¹⁰³ who arrested one of the plaintiffs for carrying a concealed

for example in elections of public officials, would the Court find state action. Noting that several remedies were available to debtors and creditors, *id.* at 162, the Court rejected the claim that the lien enforcement statute delegated an exclusive state function. *Id.* at 161. Turning to the plaintiffs' second argument, the Court ruled " 'that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act.' " *Id.* at 164, quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. at 170. "[A] State's mere acquiescence in a private action [would not] convert . . . that action into that of the State." *Flagg Bros.*, 436 U.S. at 164. New York State had permitted sales of property to enforce liens, but it did not compel such sales. *Id.* at 165.

95. *Id.* at 160.

96. *Id.* at 164, citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970).

97. 519 F.2d 93 (5th Cir. 1975) (per curiam), cert. denied, 424 U.S. 915 (1976).

98. *Id.* at 94.

99. *Id.*

100. *Id.*

101. *Id.* at 95. Similarly, in *Duriso v. K-Mart No. 4195*, 559 F.2d 1274 (5th Cir. 1977) (per curiam), the plaintiff was detained as a suspected shoplifter. The police were summoned, the plaintiff searched, and although no weapons or merchandise were found, he was arrested. Relying on *Smith v. Brookshire Bros., Inc.*, the court stated, "a detention by store employees is under color of state law if it is demonstrated that the store employees and the police were acting in concert and that the store and the police had a customary plan which resulted in the detention." *Id.* at 1277. The court held that the jury could have found a "customary plan." *Id.* at 1278.

102. 594 F.2d 140 (5th Cir. 1979).

103. *Id.* at 141.

weapon.¹⁰⁴ Alleging that the search and detention violated their rights under the fourteenth amendment, the plaintiffs brought an action under section 1983 against the store and the employees. They offered three arguments to satisfy the color of law requirement: first, that in detaining and searching them, the employees performed a function exclusively reserved to the state;¹⁰⁵ second, that defendants acted pursuant to a state statute permitting detention of suspected shoplifters;¹⁰⁶ and, finally, that the defendants acted in concert with the police.¹⁰⁷ The court rejected the first two arguments on the basis of *Flagg Bros.*¹⁰⁸ It reasoned that neither the storekeeper's detention of suspected shoplifters,¹⁰⁹ nor the detention following the discovery of a gun,¹¹⁰ were functions exclusively reserved to the state. Although police usually performed these acts,¹¹¹ private citizens also engaged in such activity. Moreover, the statutes permitted, but did not compel, the detention of shoplifters.¹¹² The third contention, that action in concert with the police amounted to state action, also failed.¹¹³ Distinguishing *Smith*, where police "routinely arrested suspected shoplifters solely upon the statement of the storekeeper" without either an independent investigation or sworn complaint,¹¹⁴ the *White* court found that the evidence did not reveal a plan between the police and the defendant employees.¹¹⁵

Finally, courts make distinctions between the types of arrest statutes involved in determining whether state action exists; a plaintiff's success, therefore, may hinge on whether a citizen's or a shopkeeper's arrest statute is involved. In *Warren v. Cummings*,¹¹⁶ the proprietor of a liquor store, his employee, and a third man who identified himself as being either a detective or a probation officer confined and detained a suspected shoplifter until he was removed by local policemen.¹¹⁷ Alleging a section 1983 deprivation of his right to be free from unlawful arrest, the plaintiff contended that the state statutes

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. See note 94 *supra*.

109. *White*, 594 F.2d at 142.

110. *Id.* at 143.

111. *Id.*

112. *Id.*

113. *Id.* at 143-44.

114. See notes 97-101 *supra* and accompanying text.

115. *White*, 594 F.2d at 143.

116. 303 F. Supp. 803 (D. Colo. 1969).

117. *Id.* at 804.

which permitted a private citizen to effect an arrest¹¹⁸ and a storekeeper to question suspected shoplifters¹¹⁹ “vested defendants with the authority to act as agents of the state . . . under color of state law.”¹²⁰ The court rejected this argument as to all three defendants, but made distinctions between the merchant and his employee, on the one hand, and the private citizen, on the other. First, it observed that the shopkeeper’s statutes licensed a merchant to detain and question suspected shoplifters, but it did not vest him with the authority of the state¹²¹ because “[t]he actions of [the proprietor and his employee] were in pursuit of their own personal interest even under [the statutes].”¹²² As for the third defendant, the court commented that the state arguably was sharing its sovereignty¹²³ by allowing a private citizen to arrest suspected criminals. The court nonetheless decided that the private arrest did not amount to state action. Distinguishing shopkeeper’s statutes as purely creatures of the legislature,¹²⁴ *Warren* reasoned that statutes permitting citizen’s arrests merely codified pre-existing common law rights; they neither added to the common law right nor encouraged the arrest. This common law right, therefore, did not amount to such significant state action as to make the defendant an agent of the state.¹²⁵

The shopkeeper’s and citizen’s arrest decisions suggest the type of situations where individual liability may be found under section 1983; they are not, however, in accord.¹²⁶ Given the types of volunteer activity likely to lead to a cause of action, namely, unlawful arrest or

118. COLO. REV. STAT. § 39-2-20 (1963), presently codified at COLO. REV. STAT. § 16-3-201 (1973).

119. COLO. REV. STAT. § 40-5-31 (1963), presently codified at COLO. REV. STAT. § 18-4-407 (1973).

120. *Warren*, 303 F. Supp. at 805. See also *Weyandt v. Mason’s Stores, Inc.*, 279 F. Supp. 283 (W.D. Pa. 1968); *Van Daele v. Vince*, 294 F. Supp. 71 (N.D. Ill. 1968).

121. *Warren*, 303 F. Supp. at 805.

122. *Id.*

123. *Id.* at 806.

124. *Id.*

125. *Id.*

126. *Mendoza v. K-Mart, Inc.*, 587 F.2d 1052 (10th Cir. 1978) (no plan found; shoplifting statute not sufficient for finding state action); *Warren v. Cummings*, 303 F. Supp. 803 (D. Colo. 1969) (no state action, no plan). But see *El Fundi v. Deroche*, 625 F.2d 195 (8th Cir. 1980) (per curiam) (reversing summary dismissal of § 1983 claim, court held “state action is present when private security guards act in concert with police officers or pursuant to customary procedures agreed to by police departments, particularly when a state statute authorizes merchants to detain suspected shoplifters,” *id.* at 196); *Duriso v. K-Mart No. 4195*, 559 F.2d 1274 (5th Cir. 1977) (affirming finding of state action through customary plan between store and police regarding suspected shoplifter); *Smith v. Brookshire Bros., Inc.*, 519 F.2d 93 (5th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 915 (1976) (state action found through concerted action of store managers and police pursuant to customary plan).

use of excessive force, it is questionable in light of these decisions whether the individual volunteers would be held liable under section 1983. By analogy to the shopkeeper's cases,¹²⁷ however, if concerted action were found between the police and the volunteer group acting pursuant to citizen's arrest statutes, it is possible that a court could find official policy, and hence municipal liability. Notably, the Memorandum of Understanding reached between the Guardian Angels and the City of New York¹²⁸ does not contemplate a prearranged course of action. The police officer is directed to cooperate with the volunteer but is instructed to follow ordinary procedures and to "comply with all departmental procedures established for an arrest by a civilian."¹²⁹

b. *Municipal Negligence*

A plaintiff injured by a volunteer anticrime group also may seek to hold the municipality liable on a negligence theory, alleging that the municipality's negligent failure to train, supervise or control the volunteers caused the constitutional deprivation.¹³⁰ Such a theory does not violate *Monell's* bar against vicarious liability because the plaintiff still must show that a municipality's official policy caused the injury.¹³¹ The negligence theory, frequently invoked in cases involving police misconduct,¹³² arises from the Supreme Court's decision in *Monroe v. Pape*,¹³³ where the court stated that the section "should be read against the background of tort liability that makes a man respon-

127. See notes 97-126 *supra* and accompanying text.

128. See text accompanying notes 8-10 *supra* and 236-45 *infra*.

129. MEMORANDUM, *supra* note 9, ¶ 10; New York City Police Department Operations Order No. 45, The Alliance of Guardian Angels, Inc., May 29, 1981, ¶ 5. See note 239 *infra* and accompanying text.

130. See, e.g., *Hays v. Jefferson County*, 668 F.2d 869, 871 (6th Cir 1982); *Carter v. Carlson*, 447 F.2d 358, 360 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* *District of Columbia v. Carter*, 409 U.S. 418 (1973); *Edmonds v. Dillin*, 485 F. Supp. 722, 725-26 (N.D. Ohio 1980); *Leite v. City of Providence*, 463 F. Supp. 585, 588 (D.R.I. 1978); *Schweiker v. Gordon*, 442 F. Supp. 1134, 1136 (E.D. Pa. 1977).

131. *Leite v. City of Providence*, 463 F. Supp. 585 (D.R.I. 1978).

Although [plaintiff's] complaint is largely phrased in terms of a respondeat superior claim, he does assert that "the City of Providence is liable . . . in that it was negligent in hiring, training, continuing to employ and/or failing to discipline and/or supervise its employees . . ." Such a claim asserts that official municipal policy was one of the direct causes of the alleged harm. Therefore, the City . . . is not being sued solely on the basis of a respondeat superior theory.

Id. at 588.

132. See cases cited at note 130 *supra*.

133. 365 U.S. 167 (1961). *Monroe* has been overruled in part, see note 26 *supra*, to the extent that it held local governments were completely immune from suit under § 1983. *Monell*, 436 U.S. at 663.

sible for the natural consequences of his actions."¹³⁴ Three factors, however, may prevent a negligence theory from succeeding. First, although the general similarity of patrol and arrest functions seems to suggest the applicability of the theory, it is questionable whether a municipality should be held liable for failing to control a group that, by its nature, remains essentially beyond the exercise of any real control.¹³⁵ Second, given the favorable record enjoyed by groups like the Guardian Angels,¹³⁶ it is unlikely that a plaintiff could establish the breach of a duty regarding their control or supervision. Finally, even if the negligence theory could be applied to a municipality in the context of a claim stemming from the actions of volunteers, a question remains whether mere negligence will support municipal liability under section 1983. The trend of case law indicates that it may not.¹³⁷

Despite the weight of authority rejecting this approach, plaintiffs still assert the negligence theory in an attempt to find municipalities liable for negligent training, control and supervision.¹³⁸ Earlier decisions had found that liability under section 1983 could be predicated on a theory of negligence;¹³⁹ it is significant, however, that they all

134. *Monroe*, 365 U.S. at 187. See also *Hays v. Jefferson County*, 668 F.2d 869, 873 (6th Cir. 1982).

135. See text accompanying notes 242-45 *infra*.

136. The Guardian Angels thus far largely have avoided suits stemming from their patrol activities. In February, 1981, 11 Guardian Angels were arrested on assault charges arising out of an incident on the subway. The charges were dropped later, however, and the group members were cleared of any wrongdoing. Pick, *supra* note 2, at 42. In addition, in March, 1981, a plaintiff brought suit against the Guardian Angels, the New York City Transit Authority and New York City, alleging physical injury. *Adames v. City of New York, N.Y.L.J.*, Apr. 26, 1982, at 5, col. 2 (Sup. Ct. N.Y. County Apr. 13, 1982).

137. *Jamison v. McCurrie*, 565 F.2d 483, 486 (7th Cir. 1977) (no constitutional cause of action for mere negligence; plaintiff must show misbehavior was either intentional or in reckless disregard of constitutional rights); *Bonner v. Coughlin*, 545 F.2d 565, 567 (7th Cir. 1976) (*en banc*) (alleged actions, neither intentional nor in reckless disregard of plaintiff's constitutional rights, insufficient to satisfy § 1983); *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 719-21 (7th Cir.), *cert. denied sub nom. Gutierrez v. Department of Pub. Safety*, 414 U.S. 1146 (1973) (eighth amendment not violated by prison guards' negligent supervision of an inmate; plaintiff cannot recover damages under § 1983 in the absence of intentional infliction of cruel punishment or callous indifference); *Schweiker v. Gordon*, 442 F. Supp. 1134, 1138 (E.D. Pa. 1977) (plaintiff beaten by police officer, claim against police commissioner cannot be based on mere negligence).

138. *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982).

139. *Parker v. McKeithen*, 488 F.2d 553, 556, & n. 6 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974). *Parker* implied that negligence could be actionable under § 1983. In *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom. District of Columbia v. Carter*, 409 U.S. 418 (1973), a plaintiff beaten by a police officer sought to hold supervisory officials and the District of Columbia liable for negligence in failing to train and supervise the officer. The District of Columbia

predated the Supreme Court's decision in *Rizzo v. Goode*,¹⁴⁰ which has been characterized as "[t]he major impediment to simple negligence as a basis for liability of supervisory officials and municipalities. . . ." ¹⁴¹

Rizzo, a section 1983 suit against the mayor of Philadelphia, the police commissioner, and the city managing director, involved an alleged pattern of illegal, unconstitutional police behavior directed at minority citizens.¹⁴² The Supreme Court reversed the previously granted injunctive relief,¹⁴³ finding "no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the city officials]—express or otherwise—showing their authorization or approval of such misconduct."¹⁴⁴ Courts have interpreted *Rizzo* to require "a showing of 'direct responsibility' for the actions of the individual officers [as] a prerequisite for liability. The mere 'failure to act [even] in the face of a statistical pattern' of incidents of misconduct [is an] insufficient" basis for liability.¹⁴⁵ Decisions since *Rizzo*, such as *Herrera* and *Turpin*, which hold that official inaction in the face of a pattern of misconduct could lead to municipal liability,¹⁴⁶ seemingly have eroded the *Rizzo* holding. Nevertheless, courts have been reluctant to confront the implications of *Herrera* and *Turpin* and adopt the negligence standard in the face of *Rizzo*.¹⁴⁷

In *Hays v. Jefferson County*,¹⁴⁸ the plaintiffs, who suffered injuries during a violent altercation between police and demonstrators, sued

escaped liability in this pre-*Monell* decision, *id.* at 369, although it was found that the District had "a duty to supervise, train and control its police officers." *Id.* at 368. Regarding the supervisory officials, *Carter* held "they are . . . subject to suit under § 1983 for any negligent breach of duty that may have caused appellant to be subjected to a deprivation of constitutional rights." *Id.* at 365. As noted in *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982), "it is significant that [*Carter*] predates the Supreme Court's decision in *Rizzo v. Goode*." *Id.* at 873 n.2 (citations omitted).

140. 423 U.S. 362 (1976).

141. *Hays*, 668 F.2d at 873.

142. *Rizzo*, 423 U.S. at 366-67.

143. The district court required the defendants to submit a comprehensive program for improving the handling of complaints alleging police misconduct. The court of appeals affirmed the choice of equitable relief. *Id.* at 365-66, citing 506 F.2d 542, 548 (1974).

144. *Rizzo*, 423 U.S. at 371.

145. See, e.g., *Hays*, 668 F.2d at 873-74, quoting *Rizzo*, 423 U.S. at 376.

146. See, e.g., *Turpin v. Mailet*, 619 F.2d 196 (2d Cir. 1980).

147. See, e.g., *Hays v. Jefferson County*, 668 F.2d 869, 873-74 (6th Cir. 1982); *Bonner v. Coughlin*, 545 F.2d 565, 567 (7th Cir. 1976) (en banc); *Edmonds v. Dillin*, 485 F. Supp. 722, 725 (N.D. Ohio 1980); *Rheuark v. Shaw*, 477 F. Supp. 879, 911 (N.D. Tex. 1979); *Leite v. City of Providence*, 463 F. Supp. 585, 590 (D.R.I. 1978).

148. 668 F.2d 869 (6th Cir. 1982).

the county, the police chief, and deputy chief, alleging that the defendants were negligent in the training, supervision and control of the unidentified officers.¹⁴⁹ Ruling that "simple negligence [was] insufficient to support liability of high police officials and municipalities for inadequate training, supervision and control of individual officers,"¹⁵⁰ the court vacated the jury verdict rendered for the plaintiff.¹⁵¹ *Hays* recognized the Supreme Court's requirement in *Monroe* that section 1983 claims be viewed in light of traditional tort law principles¹⁵² but noted the trend of case law rejecting section 1983 liability in isolated instances involving a negligent failure to supervise, train or control.¹⁵³

Several lower federal courts expressly have rejected negligence as a sufficient predicate for section 1983 municipal liability under *Rizzo*¹⁵⁴ and, instead, have required a higher level of culpability to support liability. Where the constitutional violation was not part of a pattern of past misconduct, *Hays* would require a "complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable . . . or would properly be characterized as substantially certain to result."¹⁵⁵ Other decisions similarly require behavior that is intentional, in reckless disregard of the plaintiff's rights,¹⁵⁶ or that evidences callous indifference.¹⁵⁷ In

149. *Id.* at 871.

150. *Id.* at 872.

151. *Id.*

152. *Hays*, 668 F.2d at 873, quoting *Monroe*, 365 U.S. at 187.

153. *Hays*, 668 F.2d at 873. In *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976) (en banc), the plaintiff brought an action against the director of a state department of corrections and two prison guards, alleging that the guards' negligence in leaving his cell door ajar following a search resulted in the theft of his trial transcript, thereby violating his due process rights. *Id.* at 566. The court ruled that the guards' negligence did not support an action under § 1983. Interpreting the "tort liability" language in *Monroe*, see text accompanying note 134 *supra*, *Bonner* explained that [a]ll that . . . *Monroe* really establishes is that a specific intent to violate constitutional rights of the plaintiff is not required for a Section 1983 violation. But the introduction of a general intent yardstick into the determination of whether conduct is State action . . . does not mean that mere negligence is actionable under section 1983.

Bonner, 545 F.2d at 567.

154. 423 U.S. 362 (1976). See cases cited in note 137 *supra*. For example, *Hays* noted that the Supreme Court's decision in *Rizzo v. Goode* stands as "[t]he major impediment to simple negligence as a basis for liability of supervisory officials and municipalities." *Hays*, 668 F.2d at 873.

155. *Hays*, 668 F.2d at 874, citing *Rheuark v. Shaw*, 477 F. Supp. 897, 911 (N.D. Tex. 1979); *Leite v. City of Providence*, 463 F. Supp. 585, 590 (D.R.I. 1978).

156. See, e.g., *Jamison v. McCurrie*, 565 F.2d 483, 486 (7th Cir. 1977); *Bonner v. Coughlin*, 545 F.2d 565, 567 (7th Cir. 1976).

157. *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 719-21 (7th Cir.), cert. denied *sub. nom.* *Gutierrez v. Department of Pub. Safety*, 414 U.S. 1146 (1973).

Edmonds v. Dillin,¹⁵⁸ the plaintiffs proceeded against two cities, their police departments, and several individual officers, alleging that the defendant municipalities' failure to establish and enforce adequate rules and regulations governing training and conduct "resulted in the arbitrary and capricious enforcement of the law by defendant police officers."¹⁵⁹ Seeking to avoid the difficulty in defining gross negligence or recklessness, *Edmonds* adopted a different standard for use in a " 'police training' case under Monell":

If a municipality completely fails to train its police force, or trains its officers in a manner that is in reckless disregard of the need to inform and instruct police officers to perform their duties in conformity with the constitution, and if the municipality might reasonably foresee that unconstitutional actions of its police officers might be committed by reason of the municipality's failure or reckless disregard, then the municipality would have implicitly authorized or acquiesced in such future unconstitutional acts.¹⁶⁰

Regardless of the standard adopted, it is doubtful whether a plaintiff could hold the municipality liable on a negligence theory for an incident involving a group like the Guardian Angels. First, only two unrelated reports of physical confrontations involving the Guardian Angels exist and proof of a *pattern* of misconduct is unlikely.¹⁶¹ Second, the Memorandum of Understanding adopted by the Guardian Angels and the police department contemplates training of the group.¹⁶² A plaintiff, therefore, would experience difficulty in showing a complete failure to train, a reckless disregard of the need for training, or the inevitability of the group's misconduct.

B. Direct Action under the Fourteenth Amendment

A party injured or falsely imprisoned by a volunteer anticrime patrol seeking to hold a municipality liable¹⁶³ may sue for damages in

158. 485 F. Supp. 722 (N.D. Ohio 1980).

159. *Id.* at 725.

160. *Id.* at 727. Measuring the allegations against this standard, *Edmonds* found the complaint insufficient to impose municipal liability under § 1983. The court noted that there was no allegation that the city exhibited "a wilful or reckless disregard of the need to instruct its police to perform their duties constitutionally and without discriminatory intent. . . ." *Id.*

161. See note 136 *supra*.

162. N.Y. Times, Jan. 15, 1981, § B, at 5, col. 1; MEMORANDUM, *supra* note 9, ¶ 1.

163. See note 17 *supra* regarding the incentives for holding a municipality liable for the torts of volunteers.

a *Bivens*-type action directly under the fourteenth amendment.¹⁶⁴ In *Bivens v. Six Unknown Federal Narcotics Agents*,¹⁶⁵ the plaintiff alleged that federal narcotics agents, acting under claim of federal authority, conducted a search of his apartment without a warrant.¹⁶⁶ The agents then took the plaintiff to a federal courthouse and subjected him to a visual strip search.¹⁶⁷ The plaintiff brought suit against the agents involved, alleging great humiliation, embarrassment and mental suffering as a result of the unlawful conduct. The Supreme Court held that the plaintiff had a cause of action for damages against the federal officers who conducted the unconstitutional search and seizure¹⁶⁸ directly under the fourth amendment.¹⁶⁹ Two considerations prompted the Supreme Court to imply the cause of action: first, “[there were] no special factors counselling hesitation,”¹⁷⁰ and, second, there was no “equally effective” remedy.¹⁷¹ Under the *Bivens* rationale, the Supreme Court has extended the direct constitutional action to the fifth¹⁷² and eighth amendments.¹⁷³

164. See notes 178-79 & 185-89 *infra* and accompanying text for cases allowing *Bivens* suits against non-federal defendants.

165. 403 U.S. 388 (1971).

166. *Id.* at 389. The agents allegedly manacled the plaintiff in front of his family, threatening to arrest them all. *Id.*

167. *Id.*

168. *Id.* at 397.

169. *Id.*

170. *Id.* at 396.

171. *Id.* at 397.

172. *Davis v. Passman*, 442 U.S. 228 (1979). In *Davis*, a former Congressional staff member alleged that her Congressman employer had discriminated against her on the basis of her sex by terminating her employment. Finding that the fifth amendment included a right to be free from illegal discrimination, *id.* at 236, *Davis* extended *Bivens* beyond its previous application to the fourth amendment and held that the plaintiff had a cause of action for damages under the fifth amendment. *Id.* at 248-49. *Davis* noted the two constraints of *Bivens*, see text accompanying notes 170-71 *supra*, but found “no special factors counselling hesitation.” *Id.* at 245, quoting *Bivens*, 403 U.S. at 396. Factors reviewed included (1) propriety of a damages remedy; (2) effect of a suit against a Congressman; (3) absence of an explicit Congressional prohibition against money damages; and (4) a fear of increased federal litigation. *Davis*, 442 U.S. at 245-48. In addition, as in *Bivens*, there were “no other alternative forms of judicial relief” available for the plaintiff. *Id.* at 245. Specifically, § 717 of Title VII of the Civil Rights Act of 1964, 86 Stat. 111, (codified at 42 U.S.C. 2000e-16(a) (1976)), which prohibits discrimination on the basis of “race, color, religion, sex, or national origin,” *id.*, does not protect congressional employees such as the plaintiff. Additionally, the relevant rule of the House of Representatives, H.R. Rule XLIII, cl.9, reprinted in 121 CONG. REC. 22 (1975), which prohibits sex discrimination “as part of the Code of Official Conduct of the House,” was not adopted until approximately six months after the plaintiff’s discharge. *Id.*

173. *Carlson v. Green*, 446 U.S. 14 (1980). *Carlson* has been viewed as enunciating “clearer and less restrictive criteria for a private constitutional right of action

The Court's reticence in enunciating what factors might "counsel hesitation,"¹⁷⁴ however, has led to confusion in the lower courts regarding the applicability of *Bivens* to non-federal defendants.¹⁷⁵ By contrast, less confusion surrounds the instances where "equally effective" remedies preclude the direct constitutional action.¹⁷⁶

1. *The Non-Federal Defendant*

Only a few courts have applied *Bivens* to defendants other than federal officials.¹⁷⁷ In these decisions, courts have found either that

even when alternative remedies are available." *Shewmaker v. Minchew*, 666 F.2d 616, 617 (D.C.Cir. 1981) (per curiam). In *Carlson*, a prisoner was admitted to a federal prison hospital following a severe asthma attack. *Green v. Carlson*, 581 F.2d 669, 671 (7th Cir. 1978). He was in the hospital for over eight hours but was never examined by a physician. Eventually, an unlicensed nurse placed him on a respirator known to be inoperative, although the prisoner protested that the apparatus made breathing more difficult; in addition, he was given a drug contraindicated for asthmatics. Thirty minutes later, the prisoner suffered a respiratory arrest and died. *Id.* The deceased's mother commenced suit on behalf of her son's estate, alleging that prison officials' violations of his due process, equal protection, and eighth amendment rights caused personal injuries leading to his death. *Id.* Despite the availability of an action under the Federal Tort Claims Act (FTCA), the Court nevertheless held that a *Bivens* action under the eighth amendment was appropriate. *Carlson*, 446 U.S. at 19-23. A major factor in the decision, which contrasted the action under FTCA with the direct constitutional action, was the inadequacy of the FTCA in redressing this wrong. *Id.* at 18-23.

Carlson expressly affirmed the holding in *Bivens*: "victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Id.* at 18. Such a cause of action may be defeated, however, in two situations: first, "when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress,'" *id.*, citing *Bivens*, 403 U.S. at 396, and *Davis*, 442 U.S. at 245, and, second, "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson*, 446 U.S. at 18-19, citing *Bivens*, 403 U.S. at 397 and *Davis*, 442 U.S. at 245-47. Finding neither situation present, the court allowed the direct action under the eighth amendment. *Carlson*, 446 U.S. at 18-23.

174. *Carlson* failed to define what special factors might counsel hesitation, merely noting that none were present. *Carlson*, 446 U.S. at 19. See also *Bush v. Lucas*, 647 F.2d 573, 576 (5th Cir. 1981) ("[t]here is little guidance in the Supreme Court opinions as to what 'special factors' will justify withholding a *Bivens* remedy"). See generally Note, *Constitutional Law: Bivens Again*, 10 STETSON L. REV. 329, 332 (1981).

175. See cases cited at note 177 *infra*.

176. See cases cited at note 196 *infra*.

177. *Zerilli v. Evening News Ass'n*, 628 F.2d 217 (D.C. Cir. 1980); *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69 (8th Cir.), cert. denied, 429 U.S. 855 (1976); *Yiamouyiannis v. Chemical Abstracts Serv., Inc.*, 521 F.2d 1392 (6th Cir. 1975) (per curiam), cert. denied, 439 U.S. 983 (1978); *Writers Guild of America, West, Inc. v. American Broadcasting Co.*, 423 F. Supp. 1064, 1088-89 (C.D. Cal. 1976), vacated

the "private party" acted in concert with a federal official¹⁷⁸ or that significant federal funding of the activity existed.¹⁷⁹ Given the non-federal status of anticrime volunteers and municipalities, the scope of *Bivens* becomes a threshold question—if the private status of a defendant should "counsel hesitation," then volunteer actors such as the Guardian Angels and local municipal officials should escape *Bivens* liability under the fourteenth amendment.

*Zerilli v. Evening News Association*¹⁸⁰ examined whether the private status of a defendant "counselled hesitation" in implying a *Bivens* action. In *Zerilli*, the Department of Justice allegedly conducted a "bugging" operation and later disclosed the communications to a defendant newspaper which published the material in a series of articles on organized crime.¹⁸¹ The plaintiffs commenced suit against the United States Attorney General, unknown agents of the Justice Department, and the publisher of the newspaper. In addition to statutory claims,¹⁸² the plaintiffs sued the federal defendants and the

and remanded, 609 F.2d 355, 360 (9th Cir. 1979); *Gardels v. Murphy*, 377 F. Supp. 1389 (N.D. Ill. 1974). See generally Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed By Government Officials*, 4 HASTINGS CONST. L.Q., 531 (1977). This commentator analyzed four decisions imposing *Bivens* liability on non-federal officials and concluded that the decisions were "arguably not legitimate extensions of *Bivens*." *Id.* at 578. Where private parties are concerned, federalism suggests that state tort law should govern their disputes. *Id.* In addition, where a state official or private party acts unconstitutionally, adequate remedies are provided through various sections of the Civil Rights Act, specifically, §§ 1981, 1982, 1983 and 1985(3). *Id.* at 578-79. Another commentator concluded that in *Carlson*, the Court "emphasized the *Bivens* remedy as a federal response to federal wrongdoing. In so doing, the Court restricted any analogy to wrongdoing by state officials." Note, *Constitutional Law: Bivens Again*, 10 STETSON L. REV. 329, 342 (1981).

178. *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976) (Assistant United States Attorney allegedly provided private newspaper with the plaintiff's psychiatric reports which it published, thereby violating right of privacy); *Gardels v. Murphy*, 377 F. Supp. 1389 (N.D. Ill. 1974). See notes 185-89 *infra* and accompanying text.

179. *Yiamouyiannis v. Chemical Abstracts Serv., Inc.*, 521 F.2d 1392 (6th Cir. 1975) (*per curiam*), *cert. denied*, 439 U.S. 983 (1978) (the plaintiff alleged that discharge by an employer who received federal funding violated his first amendment rights). *But see* *Greenya v. George Washington Univ.*, 512 F.2d 556, 562 n.13 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975). In *Greenya*, the court ruled that the "Constitution, unlike section 1983, does not automatically create an action for money damages for all deprivations of constitutional rights," *id.* at 562 n.13, even when "significant government funding" exists. *Id.* at 560.

180. 628 F.2d 217 (D.C. Cir. 1980).

181. *Id.* at 218.

182. The plaintiffs also sued under 18 U.S.C. §§ 2510-20 (1976 & Supp. II 1978), which concerns issues such as "wiretapping and other interceptions of wire and oral communications." *Zerilli*, 628 F.2d at 219.

newspaper directly under the fourth amendment. Faced with the issue of whether the newspaper, as a private party, was susceptible to a *Bivens* suit, the court reasoned that "a defendant's private status [was one factor that] should at least 'counsel hesitation' in the creation of *Bivens* liability, for the primary purpose of the *Bivens* doctrine is to remedy abuses by those who act as agents for the sovereign."¹⁸³ *Zerilli*, therefore, declined to extend *Bivens* to hold the newspaper liable.¹⁸⁴

According to at least one decision, a volunteer's ostensibly private status does not necessarily absolve a defendant from *Bivens* liability. In *Gardels v. Murphy*, Vietnam protestors alleged that employees and agents of the presidential public relations office harrassed them during a demonstration and prevented them from expressing their views.¹⁸⁵ One defendant sought to escape *Bivens* liability by arguing that he was a "sparetime voluntary advanceman."¹⁸⁶ The court rejected his argument¹⁸⁷ because it "[saw] no reason why the [White House] Advance Office could not delegate part of its authority and duty to aid in the logistics and preparation of a presidential trip to a political party, which party and its agents would then be acting under color of federal authority."¹⁸⁸ Other indicia included his performance of work as-

183. *Zerilli*, 628 F.2d at 224. The court noted two additional "special factors" that, taken together with the defendant newspaper's private status, prevented it from imposing *Bivens* liability. First, the central thrust of the fourth amendment—searches and seizures—did not govern the challenged disclosure and publication *Id.* at 223. "The fourth amendment is addressed only to 'searches and seizures,' and the basic constitutional wrong has been fully accomplished when the unlawful search or seizure has been completed." *Id.* Second, it reasoned that concerns for a free press counselled against imposing liability on a newspaper "for uncovering and publishing information that it deems newsworthy." *Id.* at 224. The *Bivens* claim against the federal defendants was dismissed on the grounds that a separate action on the same subject matter was already pending before the court. *Id.* at 222.

184. *Id.* at 223-24. Compare *Zerilli with Writers Guild of America, West, Inc. v. American Broadcast Co.*, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated and remanded*, 609 F.2d 355 (9th Cir. 1979), where a district court implied a *Bivens* remedy for first amendment rights against non-federal defendants. In *Writers Guild*, an association of writers and directors sued the television networks and the Federal Communications Commission, challenging the "family viewing policy" which restricted certain kinds of programs during hours when children were likely to be viewers. 423 F. Supp. at 1072. The court said there was "no doubt" that the first amendment created personal federal rights. *Id.* at 1088. In addition, because damages are the "ordinary remedy for [an] invasion of personal interests," a direct Constitutional action was appropriate. *Id.* at 1089.

185. 377 F. Supp. 1389, 1392 (N.D. Ill. 1974).

186. *Id.* at 1398.

187. *Id.* at 1399. The court analogized to decisions finding "state action" by political parties under § 1983.

188. *Id.*

signed by the public relations office and his access to areas where the general public was not permitted.¹⁸⁹

Although it remains unclear whether courts will apply *Bivens* to non-federal defendants,¹⁹⁰ the private status of the defendant remains at least a factor counselling hesitation in applying the *Bivens* remedy.¹⁹¹ *Zerilli's* refusal to extend *Bivens* to private defendants on the ground that the direct constitutional action is intended to redress wrongs committed by the agents of a sovereign does not necessarily preclude application of the doctrine to anticrime volunteers. Under *Bivens*, however, courts also must consider whether remedies exist which adequately redress the injury. Unlike the uncertainty surrounding "special factors," courts have had noticeably less difficulty in determining whether alternative remedies prevent a direct constitutional action.

2. Section 1983: An Equally Effective Remedy

The complex procedural history of *Turpin v. Mailet*¹⁹² illustrates the judicial treatment of *Bivens* actions in the face of section 1983 claims. In *Turpin*, handed down one day before the Supreme Court's decision in *Monell*, the Second Circuit noted that municipal immunity from suit left the plaintiff without a section 1983 remedy. As a result, the court allowed the plaintiff to proceed against a municipality directly

189. *Id.*

190. *Zerilli*, 628 F.2d at 223. As noted in *Zerilli*, "[t]he Supreme Court has never discussed the possibility that *Bivens* liability might extend beyond federal officials and reach private actors who in some way have participated in a governmental violation of constitutional rights." *Id.*

191. *See id.* at 223-24.

192. 579 F.2d 152 (2d Cir.) (en banc), *vacated sub nom.* *City of West Haven v. Turpin*, 439 U.S. 974 (1978), *modified on remand*, 591 F.2d 426 (2d Cir. 1979) (en banc). In "*Turpin I*," the court ruled that the city could be held liable for unconstitutional actions directly under the fourteenth amendment. 579 F.2d at 152 (2d Cir. 1978). One day later, the Supreme Court held that municipalities could be sued under § 1983 for causing the violation of constitutional rights. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). The Supreme Court then vacated the decision in "*Turpin I*," 439 U.S. at 974, and instructed the Second Circuit to reconsider its prior ruling in light of *Monell*. Based on the plaintiff's allegations, the prior decision was modified with instructions to the trial court to permit the plaintiff to proceed against the city under § 1983. "*Turpin II*," 591 F.2d at 426. At trial, the jury found the city and the officer jointly liable. On appeal, the court held that the plaintiff's evidence was insufficient to prove any "official policy" on the part of the municipality, as required by *Monell*. 619 F.2d 196, 203 (2d Cir.), *cert. denied sub nom.* *City of West Haven v. Turpin*, 446 U.S. 1016 (1980) ("*Turpin III*"). *See* text accompanying notes 38-45 *supra* for a discussion of *Turpin* in connection with "official policy" under § 1983.

under the fourteenth amendment.¹⁹³ Reconsidering the propriety of the action in light of *Monell* as mandated by the Supreme Court, the Second Circuit reversed and held: "there is no place for a cause of action against a municipality directly under the 14th Amendment, because the plaintiff may proceed against the city . . . under § 1983."¹⁹⁴ Therefore, the pre-*Monell* unavailability of the section 1983 action against a municipality initially led the court to imply the remedy against the municipality under the fourteenth amendment.¹⁹⁵ The reversal in *Turpin* demonstrates that the section 1983 action may be a bar to the direct action.¹⁹⁶

To overcome an unfavorable result as in *Turpin*, plaintiffs have argued that *Monell's* rejection of *respondeat superior* under section 1983 denies them an "equally effective" statutory remedy, thereby permitting a *Bivens* direct constitutional action under the fourteenth

193. "*Turpin I*," 579 F.2d at 156-58, 168. The court cautioned, however, that municipal liability could be predicated on a theory of *respondeat superior* under the fourteenth amendment. *Id.* at 168. To impose liability on the municipality under a theory of *respondeat superior* would be "fundamentally inconsistent with the import of *Bivens*. To the extent that one allows recovery under a theory of *respondeat superior*, an additional remedy is being created for a single constitutional infraction." *Id.* at 166. In addition, "[w]e cannot . . . ignore the fact that Congress has provided a primary remedy under § 1983 against the employees themselves, and has chosen not to impose vicarious liability upon the municipality." *Id.*

194. "*Turpin II*," 591 F.2d 426, 427.

195. *Id.* at 427.

196. See *Pauk v. Board of Trustees of City Univ. of New York*, 654 F.2d 856, 865 (2d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3716 (U.S. Mar. 8, 1982) (No. 81-1091) ("when § 1983 provides a remedy, an implied cause of action grounded on the constitution is not available."); *Bishop v. Tice*, 622 F.2d 349, 357 (8th Cir. 1980); (existence of Congressionally created civil service remedies obviates a *Bivens* remedy inferred from the constitution); *Cullen v. Margiotta*, 618 F.2d 226, 227 (2d Cir. 1980) (*per curiam*) (impliedly affirming district court's holding that relief under § 1983 precluded a direct cause of action under the constitution); *Dominguez v. Beame*, 603 F.2d 337, 340 n.2 (2d Cir. 1979), *cert. denied*, 446 U.S. 917 (1980) ("[i]n light of *Turpin v. Mailet* . . . we need not consider appellant's complaint insofar as it attempts to state a cause of action directly under the Fourteenth Amendment"); *Owen v. City of Independence*, 589 F.2d 335 (8th Cir. 1978), *rev'd on other grounds*, 445 U.S. 622 (1980) ("[a] post-*Monell* interpretation of section 1983 permits the [plaintiff] to sue the [defendant] [C]ity . . . directly and, therefore, we find it unnecessary to rely on the *Bivens* doctrine as we did in our previous opinion"); *Cale v. City of Covington*, 586 F.2d 311 (4th Cir. 1978) (no *Bivens* action, given the availability of a suit under § 1983 against municipal officers); *Mahone v. Waddle*, 564 F.2d 1018, 1024-25 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978) ("*Bivens* teaches that the existence of an effective substantial federal statutory remedy . . . obviates the need to imply a constitutional remedy."); *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977) (existence of statutory remedy may render a *Bivens* analysis inappropriate).

amendment.¹⁹⁷ However, just as courts have rejected *respondeat superior* under section 1983,¹⁹⁸ they similarly have declined to predicate municipal liability on this theory in *Bivens* actions.¹⁹⁹

In *Dean v. Gladney*, confrontations between police and beachgoers led to a *Bivens* claim.²⁰⁰ Spectators gathered to view the arrest of two men and police began to make indiscriminate arrests.²⁰¹ The police arrested three bystanders²⁰² and placed them in an unventilated patrol car for about one and one-half hours; in addition, they denied the women whom they arrested the use of restroom facilities at the jail.²⁰³ The women brought suit against the officers involved, the sheriff,²⁰⁴ the county, and the two cities. The court ruled that "*Bivens* does not sanction the imposition of, and should not be read to impose" *respondeat superior* liability on a municipality for its employees' acts.²⁰⁵

197. In *Dean v. Gladney*, 621 F.2d 1331 (5th Cir. 1980), *cert. denied sub nom. Dean v. County of Brazoria*, 450 U.S. 983 (1981), the court considered a claim alleging police brutality under § 1983 and *Bivens*. See notes 200-10 *infra* and accompanying text. The court cited *Hearth Inc. v. Department of Pub. Welfare*, 617 F.2d 381 (5th Cir. 1980) (*per curiam*), where a possibility of a § 1983 claim precluded a *Bivens*-type action. *Dean*, 621 F.2d at 1336 n.14. The *Dean* court noted that the plaintiffs in the instant action, unlike *Hearth*, grounded their § 1983 claim on a *respondeat superior* theory—a theory rejected by *Monell*. Without passing on the argument, *Dean* stated that "it is at least arguable that a *Bivens*-type action is appropriate here even though it was not in *Hearth*." *Id.*

198. See note 34 *supra* and accompanying text.

199. *Dean v. Gladney*, 621 F.2d 1331 (5th Cir.), *cert. denied sub nom. Dean v. County of Brazoria*, 450 U.S. 983 (1980); *Jones v. City of Memphis*, 586 F.2d 622 (6th Cir. 1978), *cert. denied*, 440 U.S. 914 (1979); *Cale v. City of Covington*, 586 F.2d 311 (4th Cir. 1978); *Molina v. Richardson*, 578 F.2d 846 (9th Cir.), *cert. denied*, 439 U.S. 1048 (1978); *Nix v. Sweeney*, 573 F.2d 998 (8th Cir. 1978), *cert. denied*, 444 U.S. 929 (1979).

200. 621 F.2d 1331 (5th Cir. 1980), *cert. denied sub nom. Dean v. County of Brazoria*, 450 U.S. 983 (1981). Plaintiffs alleged violations of the first, fourth, eighth, and fourteenth amendments, and §§ 1981, 1983, and 1988. *Id.* at 1332, 1334. They raised only the *Bivens* claim on appeal. *Id.* at 1335 n.11.

201. *Id.* at 1332.

202. *Id.* at 1333. An officer warned two of the bystanders that if they did not cease taking photographs, he would "smash the camera into their heads." *Id.* The third had been waiting for her friends to return. *Id.*

203. *Id.* at 1332-33.

204. The sheriff allegedly had instructed the men that "'unlawful force would be met with lawful force.'" *Id.* at 1332.

205. *Id.* at 1335. The court found support for its conclusion in decisions in six separate circuits passing on the question. *Id.*, citing *Jones v. City of Memphis*, 586 F.2d 622 (6th Cir. 1978), *cert. denied*, 440 U.S. 914 (1979); *Cale v. City of Covington*, 586 F.2d 311 (4th Cir. 1978); *Turpin v. Mailet*, 579 F.2d 152 (2d Cir.) (*en banc*), *vacated sub nom. City of West Haven v. Turpin*, 439 U.S. 974, *modified on remand*, 591 F.2d 426 (2d Cir. 1979) (*en banc*); *Nix v. Sweeney*, 573 F.2d 998 (8th Cir. 1978), *cert. denied*, 444 U.S. 929 (1979); *Jamison v. McCurrie*, 565 F.2d 483 (7th Cir. 1977); *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977).

Rather, several arguments militated against *respondeat superior*: the requirement of culpability in *Bivens*,²⁰⁶ fiscal considerations of increased litigation;²⁰⁷ and, importantly, the need for congruence²⁰⁸ with the result in *Monell*²⁰⁹ to avoid circumvention of the prohibition against *respondeat superior*.²¹⁰ The court in *Molina v. Richardson*²¹¹ also prevented a plaintiff proceeding in a *Bivens* action from holding a municipality liable on the basis of *respondeat superior*, albeit under an analysis differing from *Dean*. Police in *Molina* removed the plaintiff driver from his car by force when he refused to hand over his driver's license.²¹² After a struggle, they booked him for resisting

206. *Jones*, 586 F.2d at 625 (imposing liability under theory of *respondeat superior* considered fundamentally inconsistent with the import of *Bivens*); *Kostka*, 560 F.2d at 42 ("the Court's methodology [in *Bivens*] belies any claim that *Bivens* should be understood as recognizing sweeping federal judicial power to create damage remedies to vindicate constitutional rights").

207. *Cale*, 586 F.2d at 317; *Nix*, 573 F.2d at 1003. *Dean* stated that, unlike the situation presented in *Bivens*, state and local fiscal policies are implicated when a suit is brought against a municipality on a *respondeat superior* theory. *Dean*, 621 F.2d at 1336.

208. "It would be incongruous to hold that the doctrine of *respondeat superior* can be invoked against a municipal corporation in an action under 28 U.S.C. § 1331 (a *Bivens*-type action) when the doctrine has no application in an action under 42 U.S.C. § 1983." *Dean*, 621 F.2d at 1336, quoting *Jones v. City of Memphis*, 586 F.2d at 625.

209. *Dean*, 621 F.2d at 1336-37. "Although the standards of liability under section 1983 are not necessarily applicable to constitutional claims in a *Bivens*-type action, we are reluctant to extend the scope of municipal liability in the face of the Supreme Court's clear pronouncement in *Monell* and in the absence of affirmative action by Congress to impose respondeat superior liability on municipalities in either context." *Id.* (footnote omitted). The standards are "not necessarily applicable" because, although the two actions are analogous, they are not identical. *Id.* at 1336-37. In addition, the court noted commentary support for *respondeat superior* liability in *Bivens* actions. The court also recognized that a rejection of *respondeat superior* effectively could foreclose some victims' only opportunity to secure compensation for their damages. *Id.* at 1337 n.15, citing *Hundt, Suing Municipalities Directly under the Fourteenth Amendment*, 70 Nw. U. L. Rev. 770, 780-82 (1975); Note, *A Federal Cause of Action Against a Municipality for Fourth Amendment Violations by its Agents*, 42 GEO. WASH. L. REV. 850, 853, 861 (1974); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922 (1976); Comment, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 952 n.79 (1979). See also Note, "Damages or Nothing"—*The Efficacy of the Bivens-Type Remedy*, 64 CORNELL L. REV. 667, 672 n.2 (1979).

210. *Dean*, 621 F.2d at 1336. "To impose liability on the basis of *respondeat superior* in a *Bivens*-type action against a local governmental entity would . . . permit plaintiffs to circumvent the restrictions imposed in *Monell* on a section 1983 claim." *Id.*

211. 578 F.2d 846 (9th Cir), cert. denied, 439 U.S. 1048 (1978).

212. *Id.* at 847.

arrest but filed no charges.²¹³ Claiming physical injuries stemming from the incident, the plaintiff commenced suit against the police officers under section 1983 and the fourth, fifth and eighth amendments, seeking to hold the city liable on a theory of *respondeat superior*.²¹⁴ Conceding that *Monell* barred a section 1983 action against the city, the plaintiff sought the direct *Bivens* action as a substitute remedy.²¹⁵ The court rejected the claim but chose not to rely on the "alternative remedy" theory as had the court in *Dean*.²¹⁶ Instead, *Molina* articulated two additional reasons for not allowing the direct action against municipalities on a theory of *respondeat superior*: respect for the role of Congress and concern for the principles of federalism. First, *Molina* recognized that the implementation of constitutional guarantees is "primarily a legislative task"²¹⁷ and that Congress chose to exclude municipalities from vicarious liability under section 1983.²¹⁸ Second, extensive federal involvement in disputes between local governments and individual citizens would only deter the states and political subdivisions from developing their own solutions.²¹⁹

No one of the factors mentioned in *Dean*, *Molina* or *Turpin* necessarily would preclude every action asserted directly under the Constitution. In the case of a person injured by a volunteer patrol member, however, the considerations mentioned by the courts, especially the judicial rejection of *respondeat superior*, probably would render unsuccessful an attempt to hold the municipal corporation liable in an action directly under the Constitution.

C. State Tort Claims

Although *Monell's* rejection of *respondeat superior* may prevent a plaintiff from recovering against a municipality under section 1983 and *Bivens*, additional avenues still may exist under state tort law in jurisdictions where such claims are not barred by governmental immunity.²²⁰ Most likely, a party injured by a volunteer group member

213. *Id.*

214. *Id.*

215. *Id.* at 847-48.

216. *See* note 209 *supra*.

217. *Molina*, 578 F.2d at 851.

218. *Id.* "[S]urely it is appropriate for the federal judiciary to respect that considered legislative reticence." *Id.* In addition, the fourteenth amendment "counsels an especially heightened sensitivity to the traditional role of Congress in implementing constitutional principles through the legislative process." *Id.* at 852.

219. *Id.*

220. *See* notes 224-25 *infra*.

will proceed under one of two theories:²²¹ (1) that the municipal corporation "master" is liable for the torts of his volunteer "servant" under the doctrine of *respondeat superior*,²²² or (2) that an analogy exists between the volunteer group and the uniformed or auxiliary police whose activities are authorized by state law.²²³ A plaintiff may encounter governmental²²⁴ or municipal²²⁵ immunity from suits in some jurisdictions, however, which would preclude recovery. In New

221. Additional theories that suggest themselves would be unavailing. Any theory of agency is irrelevant because the injured party is not seeking to enforce a contract against the municipality. See RESTATEMENT (SECOND) OF AGENCY § 1 (1958); see also F. MECHEM, OUTLINES OF THE LAW OF AGENCY § 12 (4th ed. 1952); W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 3(F) (1964). Under a second theory, ratification of a tort by the master, the injured party would have to establish that the tortious actor was intending to act for the purported master, a difficult showing. See RESTATEMENT (SECOND) OF AGENCY § 85; MECHEM § 212. A third theory, apparent authority, has been unsuccessful in this context. *Adames v. City of New York*, N.Y.L.J., Apr. 26, 1982, at 5, col. 2 (Sup. Ct. N.Y. County Apr. 13, 1982). The *Adames* court ruled that the actions of the principal must reasonably cause a third party to believe that another is the principal's agent and that the third party must reasonably rely on the apparent authority to his detriment. The plaintiff had not pleaded reliance adequately.

222. See note 34 *supra* and notes 228-35 *infra* and accompanying text.

223. See notes 246-65 *infra* and accompanying text.

224. Generally, states and municipal corporations enjoyed an immunity from tort liability until the early 1900's. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131 (4th ed. 1971). This immunity has been judicially and statutorily eroded and, at present, exists only in a minority of jurisdictions. For a general discussion of the abrogation of governmental immunity, see 18 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 53.01-.02 (rev. 3d ed. & Supp. 1981); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 29.1 n.2 commentary (Supp. 1968). For an early decision rejecting immunity, see *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 133 (Fla. Sup. Ct. 1957) (en banc) (holding that a municipal corporation may be held liable for the torts of police officers under *respondeat superior*). For an example of statutory abrogation, see N.Y. CT. CL. ACT § 8 (McKinney 1963), note 226 *infra*. Depending on the jurisdiction, the government's liability ranges from full immunity to liability coextensive with the private individual's or corporation's. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131 (4th ed. 1971); 18 MCQUILLIN, *supra*, § 53.02.

225. Generally, a municipal corporation is not liable for the acts of its officers in enforcing police regulations. 18 MCQUILLIN, *supra* note 224, § 53.22(c). This is due to the distinction that developed in relation to municipal corporation's dual character, which is both corporate and governmental. Traditionally, the law has distinguished between certain governmental functions, for which the government is immune from tort liability, and proprietary functions, which are not cloaked with this immunity. W. PROSSER, *supra* note 224, § 131. In addition, it is "firmly established that the operation of a police department is a governmental function, and that acts or omissions in connection therewith ordinarily do not give rise to liability on the part of the municipality." 18 MCQUILLIN, *supra* note 224, § 53.51. In jurisdictions where such liability has been imposed by statute—as in 13 states—the municipality would be liable for such actions; this liability is not limited to police officers but includes all officers and agents of the municipality engaged in executing police powers and regulations. *Id.* § 53.22(c) nn.2-3.

York, where the legislature has abrogated governmental immunity,²²⁶ municipalities have been held liable for injuries resulting from assaults committed by police officers during the performance of their governmental functions.²²⁷

1. *Respondeat Superior*

Unlike the claims grounded on federal law, an injured party may raise the doctrine of *respondeat superior*²²⁸ under state common law and hold the municipality liable for the torts of volunteers. In New York,²²⁹ municipal liability is identical to that of individuals or corporations.²³⁰ While *respondeat superior* applies to municipal officers and employees,²³¹ a plaintiff nevertheless must demonstrate that the servant is one employed to perform services for another where, "with respect to the physical conduct in the performance of the services [that person] is subject to the other's control or *right to control*"²³² in order to hold the master liable. A volunteer donating services without an employment contract or compensation may function as a servant of one accepting those services.²³³ The mere right to control, however, does not automatically result in a finding of a master-servant relationship because, in addition, "[t]here must be consent or manifestation of consent to the existence of the relation by the person for whom the service is performed. . . ."²³⁴ Therefore, a court may not find the volunteer to be a servant where the master neither exercises control nor consents to the relationship. The Memorandum of Understanding reached between New York City and the Guardian Angels illustrates a

226. See N.Y. CT. CL. ACT § 8 (McKinney 1963). The statute provides that "[t]he state hereby waives its immunity from liability and . . . assumes liability . . . in accordance with the same rules of law as applied to actions . . . against individuals or corporations"

227. *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945); *McCarthy v. City of Saratoga Springs*, 269 A.D. 469, 56 N.Y.S.2d 600 (3d Dep't 1945); *Egan v. State*, 255 A.D. 825, 7 N.Y.S.2d 64 (4th Dep't 1938).

228. See note 34 *supra*.

229. *McCarthy v. City of Saratoga Springs*, 269 A.D. 469, 56 N.Y.S.2d 600 (3d Dep't 1945).

230. N.Y. CT. CL. ACT § 8 (McKinney 1963).

231. *Collins v. City of New York*, 11 Misc. 2d 76, 171 N.Y.S.2d 710 (Sup. Ct. 1958), *aff'd mem.*, 8 A.D.2d 613, 185 N.Y.S. 740 (1st Dep't), *aff'd*, 7 N.Y.2d 822, 164 N.E.2d 719, 196 N.Y.S.2d 700 (1959).

232. RESTATEMENT (SECOND) OF AGENCY, *supra* note 221, § 220(1) (emphasis added). Comments to the second Restatement indicate that the relationship of master-servant is not capable of exact definition. *Id.* § 220, comment (c).

233. *Id.* § 225.

234. *Id.* § 225, comment (e).

municipality's desire to avoid liability while it strives to cooperate with the group's patrol activities and accommodate the need of the organization to maintain independence in its operations.²³⁵

2. *The Memorandum of Understanding*

The language of the Memorandum attempts to negate implications of control and consent for the purpose of master-servant liability, expressly recognizing the Guardian Angels as "an independent, autonomous citizens group"²³⁶ and stipulating that they are not New York City employees within the meaning of a state statute which provides for indemnification of city employees from liability for acts performed in the scope of their employment.²³⁷ In addition, the Memorandum equates the group's power to arrest with the right "provided to all citizens under the law"²³⁸ and provides that, when an Angel effects an arrest, the city police officer should cooperate with him.²³⁹ The Memorandum notes that the Angels wear a uniform but recognizes it solely for the purposes of identifying group members.²⁴⁰ Moreover—and perhaps crucial to the subject of consent and control—the Memorandum does not impose specific criteria on the group for selection of its members,²⁴¹ although it allows for name checks for the purpose of revealing the criminal history of any present or prospective member²⁴² and anticipates the development of criteria to exclude potential members with serious criminal records.²⁴³ Also relevant to the "control" element is the Angels' agreement to furnish the police department with information regarding their activities—specifically, notice of

235. MEMORANDUM, *supra* note 9.

236. *Id.* ¶ 1.

237. *Id.* ¶ 13, *citing* N.Y. GEN. MUN. LAW § 50-k(3) (McKinney Supp. 1981-82).

238. MEMORANDUM, *supra* note 9, ¶ 10.

239. *Id.* The Operations Order issued by the New York City Police Department adds, "The officer will also assist the Guardian Angel in preparing a report . . . concerning an arrest in which he is involved." New York City Police Department, Operations Order No. 45, The Alliance of Guardian Angels, Inc., May 29, 1981, ¶ 5.

240. MEMORANDUM, *supra* note 9, ¶ 3. The memorandum provides that "[w]hile on duty, members . . . will be identifiable . . . by their distinctive uniform consisting of: a red beret and a white T-shirt with red lettering reading 'Guardian Angel Safety Patrol,' featuring an emblem of wings around an eye above clouds." *Id.*

241. *Id.* ¶ 12.

242. *Id.* "If a name check discloses that any individual has been convicted of a felony, a fingerprint check will be conducted of that person and the information obtained will be provided to the leadership of the Guardian Angels for *its* determination of the individuals's [sic] fitness for participation in the organization." *Id.* (emphasis added).

243. *Id.*

proposed areas, dates and duration of patrol tours; advance notice of patrols planned for special public events; and submission of the details of fixed and definite patrols of the transit system to the transit authority police department.²⁴⁴ Arguably, the elements of control and consent become more pronounced in view of the agreement to furnish the information; it seems, however, that the city falls short of exercising the control or consent necessary to cause liability. The city has the right to check members but imposes no criteria for their selection. In addition, although the city has knowledge of patrols, its role is passive because it does not participate in their scheduling.²⁴⁵

3. *The Propriety of Municipal Immunity*

A plaintiff might seek to impose municipal liability for torts committed by volunteer anticrime groups by pointing to New York City's use of auxiliary police. Although municipalities currently enjoy immunity for certain torts committed by auxiliaries,²⁴⁶ a plaintiff may argue that the city has exceeded the intent of the statute authorizing the use of auxiliary police²⁴⁷ and has exploited the auxiliaries and Guardian Angels "to fill a gap in security created by the limited number of uniformed police officers assigned to subway security."²⁴⁸ In so doing, the city has derived the benefit of these groups' activities but has sought to escape liability for torts committed within the scope of the volunteer anticrime work.

Pursuant to the New York State Defense Emergency Act,²⁴⁹ the City of New York is authorized to "[r]ecruit, equip, and train auxiliary police . . . to perform such other police functions as may be required. . . ."²⁵⁰ New York City currently uses volunteer auxiliary police officers who serve "without pay as civic minded citizens."²⁵¹ They are "trained by the regular police forces and are similarly uniformed and equipped except that they do not carry guns."²⁵²

244. *Id.* ¶ 8.

245. See text accompanying note 244 *supra*.

246. N.Y. UNCONSOL. LAWS § 9193(1) (McKinney 1974).

247. *Id.* § 9185 (McKinney Supp. 1981-82).

248. *In re* Patrolmen's Benevolent Ass'n, N.Y.L.J., Mar. 24, 1982, at 6, col. 3 (Sup. Ct. N.Y. County Mar. 19, 1982) (patrolmen's group challenged New York City's use of auxiliaries to patrol the subway).

249. 1951 N.Y. Laws ch. 784 (codified at N.Y. UNCONSOL. LAWS §§ 9101-9202 (McKinney 1974)).

250. New York State Defense Emergency Act, 1951 N.Y. Laws ch. 784 § 23(5) (codified at N.Y. UNCONSOL. LAWS § 9123(22) (McKinney 1974)).

251. N.Y. ADMIN. CODE tit. U, § U51-11.0(a) (1975). For a fuller description of auxiliary police activities, see N.Y. Times, Apr. 20, 1982, at B1, col. 1.

252. *Id.* They are authorized, however, to carry handcuffs. N.Y. ADMIN. CODE tit. A, § 436.14.0(b)(5) (1981-82 Cum. Supp.).

A recent decision construed the Defense Emergency Act to uphold New York City's use of auxiliary police on weekly subway patrols. In *In re Patrolmen's Benevolent Association*,²⁵³ the plaintiff association challenged the auxiliary patrols, claiming that, in addition to exceeding the statutory authority, such patrols posed an immediate threat to the public and the patrolling officer.²⁵⁴ The court found that "it is within the . . . clear statutory responsibility and authority to utilize civilians for this function."²⁵⁵ A closer reading of the decisions cited by the court indicates that the weekly patrols do not automatically violate the statutory provisions. To the extent the auxiliaries operate on a more frequent, regular basis, however, such activity is without statutory authority. In addition, an informal opinion issued by the New York State Attorney General makes it clear that the auxiliaries "may be used in a drill to . . . patrol . . . neighborhoods for the purpose of maintaining security."²⁵⁶ Similarly, the use of auxiliaries "has been . . . found to be proper for such activities as patrolling the streets [and] unprotected public parks in . . . cities of this state during the late hours. . . ."²⁵⁷ While performing such activities, both the individual member and the municipality are immune from liability for torts committed during the performance of authorized drills.²⁵⁸ It is important to note in this regard, however, that despite the apparent scope of permissible auxiliary activities, certain restrictions exist. While courts have upheld the use of auxiliaries in conducting patrols,²⁵⁹ "[t]hese drill periods must be set up to effectuate their proper purpose—to train only and *not as a subterfuge* for the establishment

253. N.Y.L.J., Mar. 24, 1982, at 6, col. 3 (Sup. Ct. N.Y. County Mar. 19, 1982).

254. *Id.*

255. *Id.*

256. INF. OP. N.Y. ATTY. GEN., Mar. 21, 1980 at 3.

257. *In re Patrolmen's Benevolent Ass'n*, N.Y.L.J. Mar. 24, 1982, at 6, col. 3, citing *Portanova v. Scher*, 75 Misc. 2d 570, 348 N.Y.S.2d 500 (Sup. Ct. Westchester County 1973); *Patrolmen's Benevolent Ass'n v. Hitt*, 75 Misc. 2d 565, 348 N.Y.S.2d 456 (Sup. Ct. Westchester County 1972).

258. INF. OP. N.Y. ATTY. GEN., Mar. 21, 1980 at 3, construing N.Y. UNCONSOL. LAWS § 9193. See also *Bundy v. Peugeot*, 222 N.Y.S.2d 576 (Buffalo City Ct. 1961).

259. See note 257 *supra* and accompanying text. A "drill" is defined as

[a]ny duly authorized activity of the state civil defense commission or a local office of civil defense, or subdivision, service or unit thereof, with or without the participation of the general public, held in training or preparation for enemy attack or for rehabilitation and recovery procedures following an attack. Drill is synonymous with authorized test, training, or training [sic] or practice exercise. Drill includes assistance by civil defense forces in combating natural or peacetime disasters upon the direction of a public officer authorized by law to call upon a civil defense director for assistance in protecting human life or property.

N.Y. UNCONSOL. LAWS § 9103(14) (McKinney 1974).

of the only police department in town.”²⁶⁰ In *In re Portanova v. Scher*,²⁶¹ a policemen’s union challenged a city’s use of twenty-three auxiliary policemen for patrolling parks during the night as an attempt to avoid the appointment of regular police officers. The court rejected the challenge, finding that the use was “not a broad substitution of one police force for another.” At most it was the “*minor and temporary* supplementation of the existing regular force to meet the expanding problem of law enforcement” limited to specified times and areas.²⁶²

The Defense Emergency Act was passed in the early 1950’s during the Cold War.²⁶³ Legislative history indicates that the act was intended to provide for civilian defense in the event of foreign attack and to authorize activity in preparation for such an emergency. By contrast, nothing in the Act indicates the propriety of using auxiliary police to conduct drills for routine purposes such as patrolling subways.²⁶⁴ The regular use of auxiliaries, therefore, exceeds the statutory authorization and permits cities, under a cloak of immunity, to accomplish necessary police-type functions through volunteers. In view of this, the statutory grant of immunity should not attach to the municipality; instead, municipal immunity should be limited to those activities falling within the meaning of the Defense Emergency Act.

Immunity for the auxiliaries themselves is on a different footing. As is the case with volunteer firemen, immunity should be extended to the individual members to encourage participation in such volunteer activity.²⁶⁵ Where the patrols are directed at filling the pressing need for additional law enforcement, volunteer anticrime groups, as a matter of policy, should be granted immunity for torts committed in connection with their activities. Where, however, the municipality

260. *Patrolmen’s Benevolent Ass’n v. Hitt*, 75 Misc. 2d 565, 568, 348 N.Y.S.2d 456, 460 (Sup. Ct. 1972) (emphasis added).

261. 75 Misc. 2d 570 348 N.Y.S.2d 500 (Sup. Ct. 1973).

262. *Id.* at 571, 348 N.Y.S.2d at 502 (emphasis added).

263. “We are living in times of the gravest national tension, when aggressive Soviet Communist imperialism may launch an attack on the free world at any point at any time.” Governor’s Memorandum, *reprinted in* 1951 New York State Legislative Annual 323, 324.

264. See generally N.Y. UNCONSOL. LAWS § 9102 (McKinney 1974).

265. *Sikora v. Keilor*, 17 A.D.2d 6 (2d Dep’t 1962). In *Sikora*, a plaintiff sued for personal injuries resulting from an accident allegedly caused by a volunteer fireman during the performance of his duties. *Id.* at 7. Under the New York statute, the volunteer fireman enjoyed immunity except for wilful negligence or malfeasance. *Id.*, citing N.Y. GEN. MUN. LAW § 205-b (McKinney 1974). Moreover, the statute expressly left municipal liability intact. *Id.* The court described “the underlying purpose of the statutory exemption . . . [as] encourag[ing] and facilitat[ing] volunteer firemen’s service. *Id.*”

employs the groups on a regular basis to perform police functions outside the legislative intent behind the Defense Emergency Act, it should not be granted such an immunity.

III. Conclusion

A plaintiff injured by an anticrime volunteer effectively has no remedy under federal law—whether under section 1983 or the Constitution. Scant basis exists for municipal liability under section 1983 because of *Monell's* rejection of *respondeat superior* and the requirement that an official policy caused the constitutional deprivation. While the required showings could be made by proof of official inaction in the face of a pattern of unlawful conduct or by concerted action between police and private individuals, merely negligent inaction would not suffice. The rejection of *respondeat superior* and the questionable applicability of *Bivens* to non-federal defendants also may foreclose the remedy afforded directly under the Constitution. Most importantly, courts view section 1983 as an “equally effective” remedy, thereby barring constitutional actions.

Under state law in jurisdictions permitting suits against municipalities, a plaintiff may succeed under a theory of *respondeat superior* only if he can prove a master-servant relationship between the city and the volunteers. The elements of control and consent, essential to the doctrine, however, are absent in the relationships between most anticrime volunteer groups and municipalities. Although an injured plaintiff thus may be left without a remedy against a municipality which has derived significant benefit from the police and patrol functions assumed by volunteers, relegating the entire burden of liability to a party performing valuable work eventually may discourage such anticrime activity to the detriment of the public. Therefore, anticrime volunteer groups should be granted immunity in order to foster and encourage this activity in view of rising crime and diminishing police forces, and municipalities should shoulder the financial responsibility for providing sufficient police-type protection.

Henry C. Collins

