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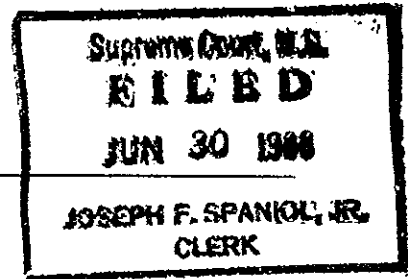

In the
Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF CANTON, OHIO,
PETITIONER,

v.

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

Amicus Curiae Brief of the American Civil Liberties Union and ACLU of Ohio in Support of Respondents

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CITY OF CANTON, OHIO

Petitioner,

v.

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,

Respondents

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF OHIO IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. ACLU of Ohio is one of its state affiliates.

The ACLU has long worked to defend basic constitutional rights and, in so doing, has filed numerous briefs with this Court, as counsel for a party or as amicus curiae in many cases requiring construction of 42 U.S.C. §1983, the statute at issue in this case. The ACLU has been particularly concerned about the use of §1983 to remedy unconstitutional police practices.

Because this case raises important issues regarding the standards for imposing municipal liability under §1983 for unconstitutional police conduct, the ACLU

submits this brief as amicus curiae to present its experience and views for the Court's consideration.[1/]

1/ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 36.2.

STATEMENT OF THE CASE

Amicus adopts the statement of the case presented by respondent.

SUMMARY OF ARGUMENT

Amici join in the argument of respondent that certiorari should be dismissed as improvidently granted.

Amici argue that the term "policy" for purposes of municipal liability under Monell v. Department of Social Services, 436 U.S. 658 (1978) includes a policy established by the failure of a policymaker to take action when that failure rises to the level of gross negligence. The "bright line" rule, limiting "policy" to a deliberate choice from alternatives, proposed by the petitioner would unduly restrict Monell liability by virtually eliminating claims based on policy. It is certain that a policymaker will rarely deliberately and explicitly choose to adopt an affirmatively unconstitutional policy.

A decade of municipal liability for inadequate training of police officers has resulted in

improved police work and training. Maintaining liability for failure to train police officers is important because it has the effect of deterring constitutional violations.

Finally, the experience of the lower courts indicates that that there is no danger that liability for failure to train will result in respondeat superior liability.

ARGUMENT

I. CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Amici join in the argument of the respondent that certiorari should be dismissed as improvidently granted because the principal issue raised in this appeal was conceded by the City in the lower courts. The important issues raised in this case should be decided by this Court in a case where they have been properly presented and considered below. See City of Springfield v. Kibbe, __ U.S. __, 107 S.Ct. 1114 (1987)

II. A MUNICIPALITY MAY BE LIABLE UNDER MONELL FOR ITS FAILURE TO TRAIN POLICE OFFICERS.

Amici join in respondent's argument that a municipality may be liable under Monell v. Department of Social Services, 436 U.S. 658 (1978) when a policy of failing to train police officers causes a constitutional deprivation. We also agree that the appropriate standard of culpability to hold a municipality liable is

one of gross negligence. The purpose of our participation in this case is to present policy issues not discussed by the parties.

A. Municipal Policy May be Set by Inaction

When a policymaker is grossly negligent in failing to establish policies in an area where he or she is responsible for setting policy, a policy has been set by inaction. It follows from previous decisions of this Court that such policy may be set by those officials with final policymaking authority. Pembauer v. City of Cincinnati, ___U.S.___ 106 S.Ct. 1292 (1986); City of St. Louis v. Praprotnik, ___U.S.___ 108 S.Ct. 915 (1988).

Petitioner contends that municipal "policy" only exists for §1983 purposes when responsible officials make a deliberate choice among competing options and then articulate that choice in an explicit fashion. Petitioner's Brief at 20. As a management model we have no quarrel with this proposition, but it does not reflect the way governments operate in the real

world and should not determine the scope of liability under §1983.

Unfortunately, municipal policy is not always developed in an ideal setting. See D. Yates, The Ungovernable City: The Politics of Urban Problems and Policy Making, (1977). Policymakers may find it expedient to ignore their obligation to establish policy in an area. H. Simon, Administrative Behavior 2nd Ed., 58 (1957) This failure to address issues which a good policymaker would address and to consciously develop policy sets policy; a policy of ignoring serious risks that constitutional violations will result. Whether or not motivated by a conscious desire to avoid accountability such flagrant inattention to government's basic responsibilities should not be rewarded under a remedial statute designed to provide relief for constitutional wrongs.

Nothing in the history or theory of §1983 supports such a result. This is especially true in the area of police practices. Imagine two scenarios in

which an innocent victim is shot by an errant police bullet. In the first scenario the officer is following policy by shooting into a crowd; in the second scenario, the officer has been handed a gun and never trained when deadly force may be used. In both cases, it is eminently reasonable to say that the city is responsible for the resulting death and should be held liable.[1/]

If only those policies which are deliberately adopted from alternatives may subject a municipality to liability, municipalities will rarely be liable for a policy claim under Monell. It is hard to imagine that a policymaker would, after considering various alternatives, deliberately and explicitly adopt an

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1/ The distinction between acts of omission and commission is rarely a useful analytic tool in §1983 cases. See Deshaney v. Winnebago County Dept. of Social Services, No. 87-154, Amicus Curiae Brief of ACLU, et al, at 46-52.

affirmative policy which violates clearly established constitutional law. See Pembauer v. City of Cincinnati, 106 S.Ct. at 1301 (White, J. concurring). If this definition were adopted Monell claims based on policy would apply only in those rare instances when a deliberately adopted policy did not violate constitutional law when adopted but violated later articulated constitutional principles, as in Pembauer.

It would be anomalous for this Court to hold municipalities liable for deliberate acts of policymakers who in good faith felt the policies they established were constitutional, while immunizing from liability policymakers who cavalierly ignored the need for written policy and training in order to comply with the Constitution. The message to policymakers would be simple: ignorance is a defense to municipal liability under §1983.

If petitioner's view were adopted a whole new series of elements would be added to a Monell claim. Plaintiff would be required to introduce

evidence regarding the manner in which a municipal policy was developed. Even a written policy developed in haste without consideration of any alternatives would not subject a city to liability. A trial would focus on the deliberations which took place before a policy was implemented. This is not in step with this Court's decisions. See Owen v. City of Independence, 445 U.S. 622 (1980); Newport v. Fact Concerts, 453 U.S. 247 (1981).

B. The Bright Line Rule Proposed by the Petitioners Would Virtually Eliminate Municipal Liability Based on Policy.

Petitioner proposes that this Court adopt a "bright line" rule limiting policy claims under Monell to officially adopted unconstitutional municipal policies. Petitioner's Brief at 17. What petitioner describes as an effort to clarify §1983 would, in fact, virtually eliminate municipal liability policy claims in police abuse cases brought under §1983.

In police misconduct litigation,

> "policies unconstitutional in themselves" - are understandably rare, or at least rarely surface in litigation in this realm. "Official" statements of law enforcement policy almost inevitably will specifically condemn rather than condone uses of excessive force or other unconstitional conduct by police.

Spell v. McDaniel, 824 F.2d 1380, 1388 (4th Cir. 1987) cert. denied, sub nom. City of Fayetteville v. Spell, __ U.S.__ 108 S.Ct. 752 (1988).

However, the mere existence of an official policy statement which parrots constitutional standards does not prevent a municipality from directly causing constitutional deprivations by its police force. Formal policy must be implemented and police training is essential to implementation. When training is deficient or non-existent a policy statement can easily become a meaningless piece of paper ignored by police officers who are supposed to comply with it. The mere existence of "policy" of this type should not function to

protect a municipality from liability for foreseeable constitutional violations.

A municipality which establishes proper official policies and takes proper steps to implement its policies need not fear imposition of liability under Monell. As recognized by the amicus brief filed by five local government agencies in City of Springfield v. Kibbe, supra "(a)dopting (a) standard of gross negligence amounting to deliberate indifference will preserve important policy concerns." Brief of Amicus Curiae U.S. Conference of Mayors, et al in City of Springfield v. Kibbe, supra at 18. Indeed, imposition of municipal liability for failing to train police officers has resulted in an emphasis on police training throughout the United States which has reduced police misconduct generally as described below.

C. Municipal Liability for Inadequate Training Serves the Purposes Intended by this Court in Monell.

In Owen v. City of Independence, supra, this Court held that a municipality is not entitled to a

qualified immunity defense under §1983, emphasizing the importance of compensatory damages in vindicating constitutional rights. This Court noted that an important purpose of §1983 is "to serve as a deterrent against future constitutional deprivations..." 445 U.S. at 651, and added:

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policy making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.

Id. at 651-52 (footnote omitted) (emphasis added).

After ten years, litigation under Monell has begun to have the effect sought in Owen of improving police training and procedures, thereby minimizing

constitutional violations.[2/] Before Monell a study of the effect of police misconduct litigation under §1983 concluded that few changes in police practices occurred due to these suits against individual officers. Note, Suing the Police in Federal Court, 88 Yale L.J. 781, 812-814 (1979). A more recent article, by contrast, notes the impact of civil rights litigation on police procedures, supervision and internal review, which it attributes to the imposition of municipal liability. McCoy, Enforcement Workshop: Lawsuits Against Police - What Impact Do they Really Have?, 20 Crim.L. Bulletin 49, 50-51 n.7 (1984).[3/]

2/ As explained in respondent's brief the lower federal courts have all permitted municipal liability for failure to train.

3/ Newspaper articles confirm this phenomenon. See, e.g. Miller "New Questions Arise on Policing Police," N.Y. Times, April 3, 1983 (The Justice Department's Community Relations Service
(Continued On Next Page)

McCoy notes one "obvious result of Section 1983 litigation" is that police departments now act to "carefully maintain a good training program to teach and remind officers of constitutional standards." Id. at 55. Other experts in criminal justice also have observed improved police training due to Monell liability. "People v. Police," 71 A.B.A.J. 36 Feb. 1985. Even police administrators who feel beleaguered by police misconduct litigation concede that §1983 litigation against police agencies has resulted in heightened training and standards. Schnabel, Fighting Back, The Police Chief, Apr. 1988 at 61, 62.

3/ (Continued From Previous Page) "has recently been inundated with requests for assistance from local governments, seeking municipal liability training and protection. Several police departments have re-examined and altered their firearms policies."); "Police Agencies Seek Ways to Avoid Citizen's Lawsuits." N.Y. Times November 3, 1985; "Report Says Tighter Policies Reduce Killings by the Police." N.Y. Times, October 20, 1985 at A20, col. 1.

An article by the Executive Director of Americans for Effective Law Enforcement, an organization that publishes a manual on police misconduct litigation and provides training to police agencies throughout the country, concludes that police officials agree that increased liability under §1983 has had positive effects including improved pre-employment screening of police officers, better supervision, more attention to discipline and:

> Cities and counties are noting that under Monell v. Department of Social Services, (1978) a city can be sued in federal court for inadequate training of its officers, and that under Owen v. City of Independence (1980) the defense of good faith is no longer available to the government entity.

Schmidt, Section 1983 and the Changing Face of Police Management, in Police Leadership in America 235 (W. Geller ed. 1985) (hereinafter "Schmidt").

The need to improve training in order to limit municipal liability under §1983 is a constant theme in professional journals read by police policymakers. See

Shofield, Law Enforcement and Government Liability, An Analysis of Recent §1983 Litigation, FBI Law Enforcement Bulletin, Jan., 1981; Scuro, Recent Developments in Government Liability under 42 U.S.C. 1983, Police Chief, Apr., 1982, at 20; Fazo, Use of Deadly Force, Police Chief, Aug., 1985, at 54; Geller, 15 Shooting Reduction Techniques: Controlling the Use of Deadly Force By and Against Police Officers, Police Chief, Aug., 1985, at 56; Meadows, Perceptions on Police Training, 15 J. Police Sci. & Ad. 1 (1987). Cox, Faughn & Nixon, Police Use of Metal Flashlights, as Weapons: An Analysis of Relevant Problems, 13 J. Police Sci. & Ad. 244 (1985).

Likewise criminal justice agencies now provide training in changing constitutional standards in an effort to prevent constitutional violations. For example, this Court's decision in Tennessee v. Garner, 471 U.S. 1 (1985) required changes in police policies, on the use of deadly force. As a result the United States

Department of Justice, in cooperation with the International Association of Chiefs of Police, developed a national deadly force training project for police agencies. The brochure for this course states: "Garner v. Tennessee has revolutionized Deadly Force Case Law and Liability. This...workshop may save lives and millions in litigation." In short, the potential of municipal liability in the deadly force area for inadequate training and for improper policies has resulted in a prompt and sophisticated response which improves police work and reduces constitutional violations.

The consequences of this adjustment by police departments around the country is both predictable and desirable: there has been a "dramatic decline" in the number of citizens shot by police. Sherman and Cohn, Citizens Killed by Big City Police, 1970-84, 2 Crime Control Reports 2 (October, 1986). One reason for that decline is that the rise of civil litigation has motivated

city governments "to provide state-of-the art standards and practices with respect to deadly force." Id. at 15. The result has been a change in police culture towards professionalism and respect for citizen's constitutional rights.

The professionalization of policing has brought an increased emphasis on training. Police recruit training "has moved from the basement...into its own facilities with its own separate status and identity" during the period from 1952 to 1982. Frost and Seng, The Administration of Police Training: A Thirty Year Perspective 12 J. Police Sci. & Ad. 66 (1984).

Training seminars for police administrators on issues involving use of force and police supervision now take place regularly, sponsored by groups like Americans for Effective Law Enforcement, the International Association of Chiefs of Police, and the Southwestern Law Enforcement Institute. See 37 Crim.Law.Rptr. 2460, 2408, 2356, and 2060 (1985). In

recent years more than 3,000 senior police officials have attended three day programs on police liability and many more have attended shorter programs.[4/] Schmidt, supra, at 229. Twenty years ago police executives had little interest in this subject. Id.

Police departments increasingly employ risk managers and legal advisors "to minimize liability by the improvement of training, the re-examination of department policies, and the reassignment of officers who generate an abnormal number of complaints." Schmidt, supra, at 232. A recent article regarding municipal liability under §1983 concluded:

> over the past decade, Monell has encouraged careful policy review and professionalism within police departments, and the result has been significant deterrence of unconstitutional behavior.

4/ Police training is available from many private agencies as well as free training by state and federal agencies. The argument by amici that small towns cannot undertake elaborate training ignores this. Amicus Brief, International City Management Assn., et al at 17.

McCoy, Civil Rights Suits Not Abusive; Police Have No Cause for Alarm, Legal Times, Oct. 5, 1987 at 14.

Other reports confirm that improved police training reduces complaints about police misbehavior. A recent study by the National Institute of Justice found a 30 percent reduction of civil complaints against police who had formal field training in a survey of almost 300 law enforcement agencies. "Recruit Field Training Said to Reduce Liability Complaints," 10 Crim. Just. Newsletter, at 5 (1987). This suggests that recognizing liability against municipalities for failing to adequately train police officers may in the long run reduce civil rights violations and therefore reduce the volume of litigation in this area.

In sum, the professional commentary on this subject supports the intuitive observation that municipal liability for inadequate police

training is effective in fulfilling §1983's goal of deterring constitutional violations.

D. Municipal Liability for Failure to Train Will Not Result in Respondeat Superior Liability.

Liability for gross negligence in training police officers is direct liability for the failure of policymaking officials to act. A decade of experience has shown that lower courts recognize that municipalities are not vicariously liable under §1983. The lower courts have been, if anything, unduly strict in reviewing these claims.[5/] Thus there is no basis for the claim that liability for failure to train results in "the erosion of municipal immunity from respondeat superior liability." Amicus Brief, International City Management Association, et al at 14.

5/ This Court has recently rejected the notion that §1983 should be narrowly construed to weed out even frivolous claims. See eg Felder v. Casey, No. 87-52C, Slip op. at 16-17 (June 22, 1988).

Amici have reviewed the reported federal decisions during the past three years involving claims of inadequate training under §1983, municipal defendants have prevailed on motions to dismiss or motions for summary judgment in the majority of these cases. See e.g. Thomas v. City of Zion, 665 F.Supp. 642, 648 (N.D.Ill. 1987) (a training program is not inadequate because a police officer did not follow the training one time); Tompkins v. Frost, 655 F.Supp. 468, 470 (E.D.Mich. 1987) (legal training on §1983 is not required); Alberto v. DePinto, 638 F.Supp. 1307 (D.Ct. 1986) (police officers who were trained regarding excessive force not required to have a refresher course); Boren v. City of Colorado Springs, 624 F.Supp. 474 (D.Colo. 1985) (general allegations of failure to train); Bibbo v. Mulhern, 621 F.Supp. 1018 (D.Mass. 1985) (no evidence of inadequate training presented to defeat a summary judgment motion). The contours of municipal liability for a policy of inadequate training

have been established by application of this Court's rulings in the lower courts.

Rymer v. Davis, 754 F.2d 198 (6th Cir. 1985), vacated and remanded, 473 U.S. 901 (1985), reinstated on remand, 775 F.2d 756 (1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1369 (1987) cited by amici in support of the petitioner as an example of improper application of municipal liability is one of the most extreme examples of a policy of inadequate police training and serves as an example of the importance of Monell liability. The City of Shepardsville, Kentucky had no rules or regulations governing its police force, no pre-employment training, and only "on-the-job" training initially. The arresting officer had never been instructed on arrest procedure or treatment of injured persons. The plaintiff was beaten by a city police officer who then rejected the recommendation of an emergency medical technician that plaintiff be taken to

a hospital for medical treatment. Under petitioner's theory a city would not be liable for constitutional violations even under these extreme facts. See also Rock v. McCoy, 763 F.2d 394 (10th Cir. 1985) (failure to provide basic police training as required by state law); Wierstak v. Heffernan, 789 F.2d 968 (1st Cir. 1986) (failure to train police in policies regarding use of firearms, high-speed chase, roadblocks and failure to instruct regarding use of force in arrests and inspection of prisoners for injuries as required by state law).

The argument made by the City and amici in their support that the lower courts have found liability based on speculative theories of municipal policy is not supported in the case law. Petitioner's Brief at 13, Amicus Brief at 14.

Cases upholding municipal liability for failure to train police officers have been supported by the evidence. While amici do not necessarily agree with every result reached in the lower courts, certainly the

flood of cases predicted by the petitioner leading to vicarious liability of municipalities has not occurred. Imposing municipal liability for police misconduct only where a previous "custom" of misconduct can be proved would permit foreseeable police misconduct to occur, injuring citizens, before the municipality need take action. It would also remove the incentive to improve police procedures which Monell has provided. Ample resources exist so that with proper training municipalities can prevent constitutional violations before a pattern of abuse occurs. Where a city is grossly negligent in providing such training, with the result that it causes a foreseeable violation of constitutional rights, liability must attach to fulfill the promise of §1983.

CONCLUSION

Should this Court reach the issues raised in petitioner's brief it should hold that a municipal policy of gross negligence in police training is sufficient to

establish municipal liability under Monell. The judgment of the Sixth Circuit should be affirmed and this case should be remanded for a new trial.

RESPECTFULLY SUBMITTED,

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