No. 86-1088

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CITY OF CANTON, OHIO,
Petitioner,

v.

GERALDINE HARRIS, *et al.*,
Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, AND NATIONAL GOVERNORS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RICHARD K. WILLARD
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
BEATE BLOCH
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1088

CITY OF CANTON, OHIO,
Petitioner,

v.

GERALDINE HARRIS, *et al.*,
Respondents.

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

---

MOTION FOR LEAVE TO FILE BRIEF OF THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, AND NATIONAL GOVERNORS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 36.3 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of the brief. This motion is made necessary by the failure of respondents' counsel to respond to *amici's* requests by mail and telephone for consent.

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case again presents the question under what circumstances a City may be held liable under 42 U.S.C. § 1983 for unconstitutional conduct allegedly attributable to inadequate police training. *See City of Springfield v. Kibbe*, 107 S.Ct. 1114 (1987); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). This issue is of particular interest to *amici* because of the large number of lawsuits brought under § 1983 alleging inadequate training or similar theories as the basis for holding municipalities liable for employee misconduct.

There are strong incentives for plaintiffs to sue municipalities because, unlike individual defendants in § 1983 cases, municipalities enjoy no qualified immunity for actions taken in good faith. *Owen v. City of Independence*, 445 U.S. 622 (1980). Thus, as in this case, a jury may find the municipality liable and the individual defendants not liable for the same conduct. Moreover, municipalities have deeper pockets and are less likely than individual defendants to appeal to the jury's sympathy.[1]

In *Monell v. Department of Social Services*, 436 U.S. 658 (1977), this Court ruled that municipal liability under 42 U.S.C. § 1983 cannot be predicated on the doctrine of respondeat superior, but only on an official policy or custom of the municipality itself. In response to *Monell*, plaintiffs often seek to impose municipal lia-

---

[1] A recent study, covering Cook County civil cases over the period 1959-1979, indicates that jury awards against government entities are substantially larger than against individual defendants for the same kind of injuries. For moderate injuries, government defendants were assessed 50% more than individual defendants. For very serious injuries, awards against government defendants were 2.5 times as much as for individual defendants. A. Chinn & M. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* 43-44 (Rand Corp. 1985).

bility by alleging that the misconduct of individual employees results from a municipal policy or custom of inadequate training, supervision, or recruitment. The attraction of such a theory is its universal applicability: with the benefit of 20/20 hindsight, almost any example of employee misconduct can be characterized as preventable by better training or improved supervision.

The result is to compel municipalities to appear and defend numerous lawsuits that involve, at most, misconduct by individual employees. In this area of litigation, *amici* urge the Court to halt the creeping erosion of municipal immunity from respondeat superior liability under § 1983.

Amici submit that the rationale of *Monell* and subsequent decisions requires a holding in this case that a municipal policy or custom can form the basis of liability under § 1983 only if the policy itself violates the Constitution. The Court should clearly reject the notion that a "policy" of inadequate training alone can violate the Due Process Clause.

Amici submit that the decision below is wrong. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.

Respectfully submitted,

RICHARD K. WILLARD
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
BEATE BLOCH
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

May 5, 1988

QUESTIONS PRESENTED

1. Whether municipal liability under 42 U.S.C. § 1983 can be predicated on a municipal policy or custom that does not violate the Constitution.

2. Whether inadequate training of police officers can give rise to municipal liability under § 1983 as violative of the Due Process Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1088

CITY OF CANTON, OHIO,
Petitioner,

v.

GERALDINE HARRIS, *et al.*,
Respondents.

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

---

BRIEF OF THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, AND NATIONAL GOVERNORS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT OF THE CASE

Respondent Geraldine Harris, and her husband and daughter, filed this action under 42 U.S.C. § 1983 against

the City of Canton, the Mayor, the Police Chief, and several individual police officers, seeking damages for injury suffered by Mrs. Harris as a result of her arrest and detention by the police.

Mrs. Harris was lawfully arrested and brought to the police station. Upon her arrival at the station, she was found sitting on the floor of the patrol wagon, and while being booked she slumped to the floor. Regulation 334.7 of the Canton Police Department provides that the jailer "shall, when a prisoner is found unconscious or semi-conscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to the City Jail." Pet. App. 5a. The jail supervisor, Captain Maxson, asked Mrs. Harris whether she needed medical attention, but she failed to respond, and, instead asked to see her son, Ronnie. The supervisor concluded that Mrs. Harris was neither ill nor injured, but was experiencing an emotional reaction to her arrest, and did not require medical treatment. She was released on bail less than an hour after her arrest, and taken to a hospital, where she was diagnosed as suffering from gross stress reaction, anxiety, and depression.

The district court granted the motions of the Mayor and Police Chief for a directed verdict The supervisor was not named as a defendant in the lawsuit. J.A. 18-19. The jury found in favor of all the named individual police officers, but awarded Mrs. Harris a verdict of $200,000 against the City on the ground that she was unreasonably denied medical attention while at the jail.

The court of appeals concluded that the district judge had properly instructed the jury that municipal liability could be predicated on the policy, set forth in the regulation, that authorized police station supervisors to decide

whether a prisoner required medical attention, although the City provided no training or guidelines for making that decision. The judgment of the district court was reversed and the case remanded for a new trial because of another portion of the judge's charge that would have permitted the jury to impose liability on the City if "its police department and/or its supervisory personnel . . . in some way participated in the actual misconduct, if any . . . ." Pet. App. 8a. Judge Merritt dissented in part, disagreeing with the majority's conclusion "that a delegation of unregulated or undirected authority to the jailor to make decisions on the need for medical care raises a colorable substantive due process claim suitable for submission to the jury on remand." Pet. App. 11a.

SUMMARY OF ARGUMENT

1. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court held that a municipality is liable under 42 U.S.C. § 1983 for an employee's unconstitutional conduct only if the municipality inflicted the violation through an official policy or custom. The Court should now resolve a question left open in cases since *Monell* by holding that the policy or custom must itself be unconstitutional in order to form the basis of municipal liability. This rule is a logical application of the reasoning by which the Court has rejected respondeat superior liability under § 1983. It is consistent with the Court's frequent observation that § 1983 created no substantive liability apart from the underlying constitutional violations for which it provided a remedy. Liability should not be premised upon a municipal policy unless that policy is unconstitutional and directly authorizes violations committed by municipal employees.

2. The Court has clearly rejected the notion that the Due Process Clause makes negligent conduct unconstitutional. *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986). The reasoning

of these opinions applies equally to the concept of "gross" negligence.

3. Liability under § 1983 cannot be based upon theories that hold the municipality responsible for violations by employees that are attributed to policies of inadequate training, supervision, or recruitment. Such theories are invalid because they impose vicarious liability upon municipalities that have not themselves violated the Constitution in the policies or customs they have adopted. Such policies, even if grossly negligent, do not violate the Due Process Clause and thus cannot form the basis of § 1983 liability. Any other approach would seriously complicate litigation against municipalities by requiring in each case a potentially wide-ranging inquiry into the reasonableness of administrative practices and policies.

ARGUMENT

I. A MUNICIPALITY IS LIABLE UNDER § 1983 ONLY IF ITS POLICY OR CUSTOM VIOLATES THE CONSTITUTION.

A. A Municipality Can Be Held Liable Under § 1983 Only For Its Own Acts.

Beginning with *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which first established that a City is a "person" subject to suit under § 1983, the Court has firmly and repeatedly rejected efforts to impose liability on municipalities based on the doctrine of respondeat superior. These decisions characterize § 1983 as imposing liability on a municipality only for its own violations of the Constitution. In *Monell* itself, the Court, after a thorough review of the background and legislative history of § 1983,[1] concluded (436 U.S. at 694):

---

[1] The precursor of § 1983 was intended to remedy a specific weakness in the law, that the Fourteenth Amendment conferred certain rights but gave the citizen no remedy to enforce them. *See Monell*, 436 U.S. at 685 n.45, where the Court quoted, among other excerpts from the legislative history, the statement of Senator

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it 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.

Similarly, in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), both the plurality and concurring opinions emphasized that the logic of *Monell* restricted § 1983 liability to the municipality's own violations. 471 U.S. at 818 (plurality opinion); *id.* at 828, 830-31 (Brennan, J., concurring). Both opinions agreed that municipal liability could not be based on a policy inferred from a single incident of police misconduct.

This approach is also consistent with subsequent decisions confirming that § 1983 does not impose respondeat superior liability on municipalities. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988).[2] Both cases focused

---

Thurman, an opponent of the bill, that it "authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action *against the wrong-doer* in the Federal courts . . . ." (quoting Cong. Globe, 42d Cong., 1st Sess., App. 216-17 (1871) (emphasis added)).

[2] In *Pembaur*, the Court stated that, in *Monell*, "we concluded that § 1983 could not be interpreted to incorporate doctrines of vicarious liability" because Congress felt it could impose civil liability on municipalities only for "their *own* illegal acts." 475 U.S. at 479 (emphasis in original). "*Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially sanctioned or ordered." *Id.* In *Praprotnik*, the plurality opinion said that *Monell* had "rejected the use of the doctrine of respondeat superior and concluded that municipalities could be held liable only when an injury was inflicted by a government's 'lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'" 108 S.Ct. at 923.

on whether a given violation was in fact committed by the municipality as such, or was attributable only to a subordinate officer's personal exercise of discretion; the municipality could not be held to have violated the Constitution unless an act of the municipality, as such, could be identified.[3]

B. A Municipality Can Be Held Liable Under § 1983 Only When An Unconstitutional Policy Causes A Deprivation Of Rights.

The Court has not decided whether a municipality may be held liable for an official policy that is not in itself unconstitutional but may give rise to violations by employees. In *Tuttle*, the plurality opinion suggested that "some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter." 471 U.S. at 823. The concurring opinion criticized as "metaphysical" the distinction between policies that are themselves unconstitutional and those that cause constitutional violations. *Id.* at 833 n.8. *Pembaur* suggested that the limitation was, at the least, that the plaintiff must "establish that the unconstitutional act was taken *pursuant to* a municipal policy rather than simply resulting from such a policy in a 'but for' sense." 475 U.S. at 482 n.11 (plurality opinion; emphasis in original).

Finally, in *Praprotnik*, the plurality went even further, holding that "the existence of an unconstitutional munic-

---

[3] The discussion of "policy" in these cases addressed the question whether the action or decision was properly to be regarded as that of the municipality. For example, the Court in *Pembaur* stated: "The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality . . . ." 475 U.S. at 479 (emphasis in original). It was clear in each case that the relevant action or decision, if it *was* that of the municipality, would in itself constitute a violation by the municipality of the Constitution.

ipal policy" was a requisite to a city's liability under § 1983 (108 S.Ct. at 926). The concurring opinion observed that the Court had previously left open "the question whether a city can be subjected to liability for a policy that, while not unconstitutional in and of itself, may give rise to constitutional deprivations." *Id.* at 936.

Amici would urge the Court to resolve this issue by limiting municipal liability under § 1983 to those deprivations of constitutional rights by employees that are inflicted by an official policy or custom that is itself unconstitutional.[4] This conclusion follows logically from the Court's previous decisions—*Monell*, *Tuttle*, *Pembaur*, *Praprotnik*—which have repeatedly emphasized that under § 1983 a municipality is to be held liable only for its own constitutional violations, and not vicariously for the tortious acts of its subordinate employees. A municipality should not be held to have violated the Constitution unless it has an unconstitutional policy or custom that expressly or impliedly authorizes a deprivation of rights by its employees.[5]

Moreover, to hold otherwise would be to create a separate standard of fault for municipalities under § 1983, apart from that imposed by the Constitution. The Court has often emphasized that § 1983 is purely remedial and provides no basis for the development of a quasi-constitutional tort law. *See, e.g., Baker v. McCollan*, 443 U.S. 137, 146 (1979). As we discuss more fully in Part

---

[4] A leading authority on § 1983 litigation has recommended this approach. See Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 Iowa L. Rev. 1, 17-33 (1982).

[5] *Monell* and *Pembaur* were examples of express authorization. *Praprotnik* indicated that implied authorization could take the form of acquiescence in "a series of decisions by a subordinate official [that] manifested a 'custom or usage' of which the supervisor must have been aware." 108 S.Ct. at 927.

II below, the § 1983 remedy is not available simply for negligence, but only for conduct that constitutes a violation of the Constitution. As the Court ruled in *Daniels v. Williams*, 474 U.S. 327, 330 (1986):

> [I]n any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim. See *e.g.*, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (invidious discriminatory purpose required for claim of racial discrimination under the Equal Protection Clause); *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) ("deliberate indifference" to prisoner's serious illness or injury sufficient to constitute cruel and unusual punishment under the Eighth Amendment).

Therefore, a municipal policy or custom that is alleged to give rise to liability under § 1983 should be judged by the appropriate constitutional standard, and not by standards of fault derived from tort law. Liability cannot be founded merely on the existence of a causal nexus between a municipal policy and a constitutional violation committed by an employee.[6] There must also be proof that the policy itself was unconstitutional, in that the

---

[6] The dissenting opinion in *City of Springfield, Mass. v. Kibbe*, 107 S.Ct. 1114, 1120 (1987), emphasized that liability exists only for actual violations by the defendant of the Constitution, and this precludes the use of the concept of causation to expand municipal liability:

> In some sense, of course, almost any injury inflicted by a municipal agent or employee ultimately can be traced to some municipal policy. Finding § 1983's causation requirement satisfied by such a remote connection, however, would eviscerate *Monell's* distinction, based on the language and history of § 1983, between vicarious liability and liability predicated on the municipality's *own* violations.

107 S.Ct. at 1120 (emphasis in original).

municipality deliberately directed or authorized the misconduct.[7]

II. A VIOLATION OF THE DUE PROCESS CLAUSE CANNOT BE ESTABLISHED BY A FINDING OF NEGLIGENCE, EVEN IF CHARACTERIZED AS "GROSS NEGLIGENCE."

The Court has firmly rejected the notion that the Due Process Clause should serve as a vehicle for the imposition of a body of general federal tort law. In *Paul v. Davis*, 424 U.S. 693, 701 (1976), the Court warned against a theory of liability based upon tortious conduct that did not violate a specific constitutional guarantee:

> But such a reading would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the 'constitutional shoals' that confront any attempt to derive from

---

[7] The wording "subjects, or causes to be subjected" in § 1983 does not mandate or justify the introduction of the "proximate cause" concept of tort law to create liability for a policy which is not itself unconstitutional but which is alleged to cause constitutional violations by employees. The dictionary assigns two distinct meanings to the verb "cause": first, "to serve as cause or occasion of: bring into existence (careless driving causes accidents) (trying to find what caused the fire) (cause the water to flow into the new channel)"; and, second, "to effect by command, authority, or force (the president caused the ambassador to protest)." Webster's New International Dictionary (3d unabridged ed. 1981). The phrase "causes to be subjected" in § 1983 appears to use the word "cause" as in the second part of the definition. That sense is more consistent with the principle that § 1983 is remedial only, and does not extend liability to persons not directly implicated in constitutional violations.

In light of its context, and the subsequent opinions of this Court referred to above, the statutory language does not support a reading that incorporates the more attenuated notions of causation derived from tort law. Thus, in *Martinez v. California*, 444 U.S. 277, 285 (1980), the Court rejected a theory of § 1983 liability predicated on the "proximate cause" doctrine of state tort law.

> congressional civil rights statutes a body of general federal tort law, *Griffin v. Breckenridge*, 403 U.S. 88, 101-102 (1971); *a fortiori*, the procedural guarantees of the Due Process Clause cannot be the source of such law.

As set out below, the Court specifically rejected the proposition that negligence, the mere failure to exercise due care, violates the Due Process Clause. In our view, the same rationale precludes liability based upon a finding of "gross" negligence, even if it can be distinguished meaningfully from simple negligence.

In *Daniels v. Williams*, 474 U.S. 327 (1986), the Court noted that § 1983 had historically been applied to "*deliberate* decisions of government officials to deprive a person of life, liberty, or property" (*id.* at 331) (emphasis in original), reflecting the provision's origins and intent. *Daniels* held that negligence did not rise to the level of a constitutional tort.[8]

In *Davidson v. Cannon*, 474 U.S. 344 (1986), the Court applied the holding of *Daniels* in a context involving allegations of both procedural and substantive due process. A prisoner sued prison officials who had negligently failed to protect him from injury by another inmate, although they had been alerted to the possibility of the attack. The Court held unequivocally (*id.* at 347-48):

> [T]hat lack of care simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent. . . . Far

[8] In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Court characterized the negligent loss of a prisoner's hobby kit by prison employees as a deprivation of property for which procedural due process was required by Fourteenth Amendment. Justice Powell's concurring opinion disagreed: "I would not hold that such a negligent act, causing unintended loss of or injury to property, works a deprivation in the *constitutional* sense." *Id.* at 548 (emphasis in original). *Daniels v. Williams* overruled this portion of *Parratt v. Taylor*.

> from abusing governmental power, or employing it as an instrument of oppression, respondent Cannon mistakenly believed that the situation was not particularly serious . . . . The guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials.

The Court has not had occasion to determine whether a level of culpability beyond simple negligence, but falling short of intentional wrongdoing, is sufficient to impose liability under the Due Process Clause. This issue was not decided in either *Davidson* or *Daniels* (see 474 U.S. at 334 n.3), although the dissenting Justices in *Davidson* believed that injury caused by official recklessness or deliberate indifference would constitute a deprivation of liberty under the Due Process Clause. See 474 U.S. at 349, 353-55.

It seems doubtful that the somewhat imprecise tort law distinction between simple negligence and "gross" negligence has much relevance under the Due Process Clause. As the Court observed in *Daniels*:

> That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectible legal interests. The enactment of tort claim statutes, for example, reflects the view that injuries caused by such negligence should generally be redressed. It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns.

474 U.S. at 333 (footnote omitted). These observations would appear to apply with equal force to gross negligence as to simple negligence. Even in the field of traditional tort law, the distinction between simple negligence

and gross negligence has proved difficult of application and has been widely criticized.[9]

In any event, it is clear from *Daniels* and *Davidson* that a violation of the Due Process Clause requires an abuse of governmental power, the essence of which is *deliberate* action or, at least, *deliberate* inaction. It may well be that deliberate indifference to a known and immediate risk of serious injury could violate the Constitution under this test, because such conduct might be the equivalent of intentional conduct for purposes of the Due Process Clause. But differentiating between conduct that is negligent and conduct that is grossly negligent under standards of tort law would not appear relevant to the constitutional analysis. Even gross negligence lacks the cognitive element inherent in the concept of municipal "policy."

III. A MUNICIPALITY CANNOT BE HELD LIABLE UNDER § 1983 FOR A POLICY OF INADEQUATE TRAINING, SUPERVISION, OR RECRUITMENT.

As the motion accompanying this brief describes, plaintiffs often seek to hold municipalities liable in § 1983 litigation for "policies" of inadequate training, super-

---

[9] In the words of one leading text:

> Although the idea of "degrees of negligence" has not been without its advocates, it has been condemned by most writers, and, except in bailment cases, rejected at common law by most courts, as a distinction "vague and impracticable in [its] nature, so unfounded in principle," that it adds only difficulty and confusion to the already nebulous and uncertain standards which must be given to the jury. The prevailing rule in most situations is that there are no "degrees" of care or negligence, as a matter of law; there are only different amounts of care, as a matter of fact. From this perspective, "gross" negligence is merely the same thing as ordinary negligence, "with the addition," as Baron Rolfe once put it, "of a vituperative epithet."

W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on the Law of Torts* 210-11 (5th ed. 1984) (footnotes omitted).

vision, or recruitment procedures, *i.e.*, for failing to take reasonable care to prevent constitutional violations by their employees. The court of appeals held in this case that such liability could be imposed if the policy in question was grossly negligent. A number of other courts have reached a similar conclusion, although the precise formulation varies from circuit to circuit.[10]

It is unclear whether the rationale of these decisions is that a grossly negligent policy is itself unconstitutional, or that such gross negligence suffices to impose vicarious liability under § 1983 even if the policy itself is not unconstitutional. Neither rationale is consistent with the legal principles established by the Court set forth in Parts I and II, *supra*. Even a grossly negligent policy does not incorporate the element of deliberate abuse that characterizes a violation of the Due Process Clause.[11] And gross negligence in the implementation of a policy that is not unconstitutional is simply not sufficient to establish a constitutional violation by the municipality itself.

In fact, the Court has previously rejected attempts to impose this sort of liability. In *Rizzo v. Goode*, 423 U.S. 362 (1976), the Court held that equitable relief was not

---

[10] *See, e.g., Bergquist v. County of Cochise*, 806 F.2d 1364, 1370 (9th Cir. 1986) ("a policy of gross negligence in training or supervision gives rise to § 1983 liability"); *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981) (liability "[i]f a municipality fails to train its police force, or if it does so in a grossly negligent manner so that it inevitably results in police misconduct"); *Owens v. Haas*, 601 F.2d 1242, 1247 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979) (failure to train or supervise law enforcement officers must be so grossly negligent as to constitute "deliberate indifference"). The Sixth Circuit cases are discussed below.

[11] It is, of course, possible that deliberate inaction by a municipality after a widespread pattern of injurious conduct would demonstrate such deliberate indifference as to constitute the equivalent of intent; but no such pattern was demonstrated on the record in this case.

available under § 1983 to require municipal officials to adopt policies that would "reduce the incidence of unconstitutional police misconduct." *Id.* at 378. Although the Court's decision was based in part upon the scope of federal equitable power, it was also based upon a determination that the defendant policymaking officials had played "no affirmative part" in depriving plaintiffs of their constitutional rights. *Id.* at 377.

Then, in *Polk County v. Dodson*, 454 U.S. 312 (1981), the Court rejected claims that a county's official policies regarding public defenders could form the basis of liability under § 1983. The Court found that none of the policies themselves violated the Constitution, citing *Rizzo v. Goode* for the proposition that a "general allegation of administrative negligence fails to state a constitutional claim cognizable under § 1983." 454 U.S. at 326.

The erosion of municipal immunity from respondeat superior liability under § 1983 is exemplified by the theory of liability for inadequate training applied by the court of appeals in the present case. That theory had its genesis in *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982), *cert. denied*, 459 U.S. 833 (1983). In *Hays*, the court, relying upon *Rizzo v. Goode*, refused to impose liability on the County for negligent failure to supervise, train, or control. 668 F.2d at 872-74. The court went on to state, however, that, in the absence of a pattern of past misconduct, "a supervisory official or a municipality may be held liable only where there is essentially 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." *Id.* at 874 (citations omitted). *But see id.* at 875 (Merritt, J., dissenting); *id.* at 877 (dissent from denial of rehearing en banc). The Sixth Circuit subsequently characterized *Hays* as holding that:

> [A] municipal custom that authorizes or condones police misconduct can be inferred when the municipality has failed to train or has been grossly negligent in training its police force.

Rymer v. Davis, 754 F. 2d 198, 200-01 (6th Cir. 1985), *vacated and remanded* (in light of *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985)), 473 U.S. 901 (1985), *reinstated on remand*, 775 F.2d 756 (1986), *cert. denied*, 107 S.Ct. 1369 (1987).

In the present case, the court of appeals held that the rule of *Hays* and *Rymer* supported the submission of the inadequate training theory to the jury. The court described the basis for the theory as follows (Pet. App. 6a):

> Harris's theory of grossly inadequate training was based on the fact that the police had an established policy of allowing shift commanders unfettered discretion under rule 334.7 to make the decision to refer a prisoner to the hospital based on their personal judgment and perceptions, coupled with the fact that these commanders were given no training or guidelines for making this decision.

In this case, as in many others based upon such theories, the alleged "policy" of the City has a certain air of unreality. The City's police regulation, rather than giving the officer "unfettered discretion," specifies with particularity several circumstances in which he should refer an arrested person for medical treatment. Far from aiming at the deprivation of prisoners' constitutional rights, the regulation is designed for the benefit of the person detained.

There is, however, a more fundamental error than the strained and unrealistic effort of the court to define the municipality's policy. In all of these cases, the court omits an important step in the analysis by assuming that liability can be imposed on a municipality whenever a

court can discern a "policy" that is grossly negligent. As we explained in Part I of this argument, a municipality should not be liable under § 1983 for a policy that is not itself unconstitutional. And, as we explained in Part II, a grossly negligent policy does not violate the Due Process Clause.[12]

In addition to the legal deficiencies in the court's theory of liability, it gives rise to serious practical problems. Litigation concerning municipal policies on training, supervision, or recruitment is likely to extend the scope of a lawsuit well beyond the facts of a particular violation. These issues of institutional competence may be time-consuming to try and difficult to resolve.[13]

---

[12] The error in the Sixth Circuit's analysis is not cured by its insistence that the inadequate training must be "causally connected to the deprivation, which means proving that the lack of training was so reckless or grossly negligent that deprivations of persons' constitutional rights were substantially certain to result." (Pet. App. 5a.) This discussion relates to whether there is a causal link between the City's policy and the ensuing violation, not to whether the policy itself was unconstitutional. As we have shown above (Part I.B.), causation is not sufficient to impose municipal liability under § 1983.

[13] It is not enough to say that only unreasonable or negligent or even grossly negligent policies can form the basis for liability. Such a standard will never permit the municipality to avoid burdensome discovery and rarely prevent the issue from being submitted to a jury. In *Rymer v. Davis*, a case relied upon by the court of appeals in the present case, the court pointedly observed: "The type or amount of training necessary to avoid the inference of a custom that authorizes or condones police misconduct is properly a jury question." 754 F.2d 198, 201 n.1 (6th Cir. 1985). Similarly, courts often refer to the importance of allowing liberal discovery. *See, e.g., Eiland v. Hardesty*, 564 F. Supp. 930, 936 (N.D. Ill. 1982) ("[p]rior to discovery it is unrealistic to expect plaintiff to know much more about the city's policies, and a complaint should be dismissed at the pleading stage only if it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief."); *Escalera v. New York City Housing Auth.*, 425 F.2d 853, 957 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

Resolution of these issues, moreover, would often require the federal court to second-guess many aspects of the municipality's administrative structure and procedures.[14] It could even require the court to substitute its own judgment for a municipality's decisions concerning the allocation of funds among different programs, because a plaintiff could always argue that a policy of inadequate funding in a particular area had caused a constitutional violation.[15]

---

[14] In *Rymer v. Davis, supra,* the Sixth Circuit listed no fewer than eight texts as among the resources "available to municipalities to guide them in supervising police officers and in preventing instances of police brutality." 754 F.2d at 201 n.1. As with many cases in this area, the court seemed oblivious to the practical difficulty, especially for small municipalities, of undertaking elaborate training and administrative programs, as well as to the differences among cities that make standardized training impossible. As Judge Merritt pointed out in his partial dissent in this case, the Constitution does not require a court to "erect a due process requirement that cities must have paramedical officers or other trained medical specialists who exercise some type of professional judgment at the jail."

[15] For example, in *Anderson v. City of Atlanta,* 778 F.2d 678 (11th Cir. 1985), a case of death from a drug overdose in a pretrial detention center, it was held that because testimony had been given that "understaffing was a persistent problem and that complaints had been lodged with [the] supervisors, including [the Director of the City's Bureau of Corrections, who was the relevant policymaker]" (*id.* at 685), the jury had evidence on which to conclude that the City knew that

> the [Center] was inadequately staffed and that it was difficult for the officers to perform their jobs properly. Thus, it was possible for the jury to decide that there was a conscious decision on the part of [the Director] and therefore, the City of Atlanta, not to increase the staff at the Detention Center in the face of complaints of inadequate staffing. The result of this decision was that officers were unable to perform their jobs properly. Furthermore, the jury could have found that [the Director] and the City of Atlanta knew or should have known that the natural consequence of this failure to adequately staff the jail would impair proper medical care and attention necessary to protect the health of pre-trial detainees. *Id.* at 686.

Furthermore, there is no principled basis on which the standard of "adequacy" can be fixed. Precisely what is required by a standard of "adequate" training could in practice become known only after the event, and after a federal court had spoken, and might well vary from court to court and from case to case, because, as previously noted, it would always be arguable that some additional training (or other precaution) would have averted the violation in question.[10] This uncertainty would make rational decisionmaking impossible, and expose municipalities to unlimited potential claims.

Section 1983 raises one of the most important financial issues confronting municipal governments, as this Court has appreciated. In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the Court indicated sensitivity to the importance to municipalities of expanded liability under § 1983, and held that the statute did not permit an award of punitive damages against municipalities. Referring to the application of § 1983 to violations of federal statutory as well as constitutional law, the Court stated:

> Under this expanded liability, municipalities and other units of state and local government face the possibility of having to assure compensation for per-

[10] *Compare, e.g., Wellington v. Daniels*, 717 F.2d 932 (4th Cir. 1983) (policeman hit plaintiff with flashlight during chase; plaintiff relied on police chief's testimony that he knew such use of flashlights was dangerous, and that his own officers sometimes used them in self-defense; plaintiff claimed chief should have prohibited use of flashlights as a weapon, or issued cautionary instructions; jury award of $1,500,000 set aside by j.n.o.v., which was affirmed on appeal); *with Bergquist v. County of Cochise*, 806 F.2d 1364, 1370 (9th Cir. 1986) (search warrant issued on basis of uncorroborated informant statement and executed at wrong address; district court dismissed complaint alleging municipality was liable "because of a policy of failing to train the officers in the need to verify informant data before seeking a warrant and in proper methods of executing a warrant"; reversed and remanded to determine if facts alleged a training policy that was grossly negligent).

> sons harmed by abuses of governmental authority covering a large range of activity in everyday life. To add the burden of exposure for the malicious conduct of individual government employees may create a serious risk to the financial integrity of these governmental entities.

Id. at 270.

These comments apply with equal force to an extension of liability, beyond the area of "abuses of governmental authority," to liability for failure to meet undefined, federally imposed standards of "adequacy" in reducing the risk of potential violations by municipal employees.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the Sixth Circuit insofar as it held that a jury issue existed and remand for the entry of judgment in favor of the petitioner.

Respectfully submitted,

RICHARD K. WILLARD
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
BEATE BLOCH
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

May 5, 1988