No. 86-1088

(5)

Supreme Court, U.S.
FILED
MAY 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

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

---

BRIEF OF PETITIONER

CARTER G. PHILLIPS *
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

W. SCOTT GWIN
WILLIAM J. HAMANN
JOHN S. COURY
CANTON LAW DEPARTMENT
City Hall
Canton, Ohio 44702
(216) 489-3251

Counsel for Petitioner

* Counsel of Record

May 5, 1988

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

QUESTIONS PRESENTED

1. Whether the City of Canton can be held liable under 42 U.S.C. § 1983 on the ground that a City employee was delegated authority to act in a manner not in violation of the Constitution if the City failed to prove that the employee had been given adequate training to exercise that authority.

2. Whether the City of Canton can be held liable under 42 U.S.C. § 1983 for the alleged failure of an employee of the City to provide medical treatment to a single jailed detainee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1088

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

---

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not reported. The opinion of the United States District Court for the Northern District of Ohio, denying Defendant's Motion for Judgment Notwithstanding the Verdict or for a New Trial (Pet. App. 12a-18a) is not reported.

JURISDICTION

The opinion of the court of appeals was entered on July 2, 1986, and a petition for rehearing was denied on August 22, 1986. On November 4, 1986, Justice Scalia extended the time for filing a petition to and including

January 4, 1987. The petition for a writ of certiorari was filed on January 2, 1987. The petition was granted on March 7, 1988. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution (U.S. Const. amend XIV, § 1) provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Section 1983 (42 U.S.C. § 1983) provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 . . . .

STATEMENT

1. Respondent Geraldine Harris was lawfully arrested on April 26, 1978, by officers of the Canton Police Department who transported her to the City's Police Station in a patrol wagon. Pet. App. 2a. When she arrived at the station, Mrs. Harris was found sitting on the floor of the wagon. *Id.* A police captain, who was present when the patrol wagon arrived, asked Mrs. Harris if she was in need of medical attention. *Id.*; see Tr. 2-82, 4-327—4-329 (testimony of shift supervisor, Captain Maxson). Mrs. Harris did not indicate that she needed any assistance; instead she repeatedly asked to see "Ronnie," her son. Pet. App. 2a. Police officers immediately contacted Mrs. Harris' son and asked him to come and arrange for his mother's release into his custody.

After being brought into the police station, Mrs. Harris, who was leaning against the wall, slumped to a seated position on the floor. Pet. App. 2a.[1] Officers twice assisted Mrs. Harris to her feet and placed her in a chair, but she slumped back to the floor. *Id.* Mrs. Harris was fully conscious and aware of her actions during the time that she was in custody. See *e.g.*, Tr. 4-333 (testimony of Captain Maxson); Tr. 3-232 (testimony of Officer Norcia). Police officers who were present testified that they did not believe that Mrs. Harris was sick or injured; rather, they believed her actions to have been an emotional response to her arrest. Tr. 4-318—4-320; Tr. 3-237—3-238; see also Pet. App. 2a. Such reactions are not at all uncommon among arrestees. Pet. App. 2a; see Tr. 3-237—3-238 (testimony of Officer Norcia).

During the course of booking procedures, Mrs. Harris again was asked if she required medical attention or medication and she repeatedly responded that all she wanted was to see "Ronnie." Tr. 4-329, Tr. 2-80—2-82. After bond procedures were completed, Mrs. Harris was placed in a holding cell for a short period of time until she was released into the custody of her family. Pet. App. 2a-3a. Mrs. Harris had been held in police custody at the City Police Station for no more than 30 to 40 minutes. Pet. App. 3a.

2. Mrs. Harris, together with her husband and daughter ("Respondents"), subsequently brought this lawsuit under 42 U.S.C. § 1983 against various individual police officers involved in her arrest, city officials—including the mayor and police chief—and the City of Canton itself. Respondents alleged, *inter alia*, that the City had violated Mrs. Harris' due process rights by depriving

---

[1] See also Tr. 3-247, 4-256 (testimony of Officer Kuehner); Tr. 4-315 (testimony of Captain Maxson).

her of medical treatment during the course of her post-arrest detention.[2]

With respect to the claim that Mrs. Harris had been denied reasonable access to medical treatment because of a City custom or policy, the evidence at trial established that the patrol officer assigned as "jailer," in consultation with a supervising officer, is responsible for determining whether persons in police custody require immediate medical attention. The regulations of the Canton Police Department specifically provide that:

> [the officer assigned as 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. 4a; see City of Canton Police Regulation 334.7 (J.A. 34). The evidence at trial established that the regulation was applied as written and that the normal procedure was for the jailer to determine, in consultation with a supervising officer, whether a prisoner was in need of medical attention. See Tr. 4-347—4-349 (testimony of Police Chief Maser); Tr. 2-159—2-160 (testimony of Officer Wyatt). The jailers and supervising officers did not receive specialized medical training beyond basic first aid. The regulation plainly assumes that

---

[2] Respondents' complaint included a number of claims that were rejected by the district court or the jury, including constitutional claims under the Fourth, Fifth, Eighth, Thirteenth and Fourteenth Amendments, as well as common law claims for false imprisonment, assault and battery.

The court granted the motions for directed verdict by Mayor Stanley A. Cmich and Police Chief David Maser. J.A. 6. The jury found in favor of all of the remaining individual defendants, police officers Schnabel, Norcia, Kuehner, Daianu and Samolia, on all of the counts against them. J.A. 11-13. Respondents did not cross-appeal from these adverse judgments.

the officers would make any decision concerning whether a prisoner required hospitalization on the basis of common sense and experience. In this case, common sense and experience indicated to the police officers that Mrs. Harris did not require immediate hospitalization. Pet. App. 2a-3a; see Tr. 4-319—4-320; Tr. 3-237—3-238.

The case was tried to a jury, which rejected all of respondents' claims except the claim that the City unconstitutionally denied Mrs. Harris medical treatment during her post-arrest detention. On that claim, the jury awarded Mrs. Harris $200,000 *against the City*. The City's motions for remittitur, new trial or judgment notwithstanding the verdict were denied. Pet. App. 4a.

3. The court of appeals unanimously reversed the judgment of the district court, holding that one of the two alternative theories of municipal liability that had been presented to the jury was erroneous. The first instruction predicated the City's liability on the mere participation of "supervisory personnel" in the alleged constitutional violation. The court unanimously held that such an instruction was erroneous because supervisors are not policymakers for purposes of holding the City liable under Section 1983.[3] The inclusion of this theory as an alternative basis for imposing liability required that the jury's verdict be reversed on that ground. Pet. App. 9a.

The majority of the court of appeals voted to remand the case for a new trial on an alternative theory of municipal liability based on the premise that the City had a policy of inadequately training police officers. The court held that the City could be found liable on the theory that it had "an established policy of allowing shift commanders unfettered discretion . . . to make the decision

---

[3] Any doubt about the validity of that legal conclusion was swept aside earlier this Term in *City of St. Louis* v. *Praprotnik*, 108 S.Ct. 915, 927 (1988), in which the Court held that supervisors were not policymakers for purposes of municipal liability under Section 1983.

to refer a prisoner to the hospital . . . coupled with the fact that these commanders were given no training or guidelines for making this decision." Pet. App. 6a.[4] The court of appeals reasoned that inadequate training of police officers constitutes a municipal policy which, if it can be linked causally to a constitutional deprivation, is a sufficient basis for imposing liability on a city. As applied, the court held that the grant of discretion to the jailer to evaluate Mrs. Harris' medical condition coupled with the City's failure to "show any evidence of adequate training . . . raised a valid . . . issue of municipal liability . . . ." Pet. App. 6a. Accordingly, the court remanded the case to the district court for a second trial on that theory.

Judge Merritt dissented from the remand order. Pet. App. 10a-11a. First, he noted that the City's policy regarding medical treatment of arrestees clearly was not unconstitutional. Second, he argued there was no evidentiary basis for finding that it was the custom or policy of the City to apply its regulation in a manner that deprived arrestees of their constitutional rights. Pet. App. 10a. In the absence of a showing of custom or policy, he rejected the majority's contention 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 . . . ." Pet. App. 10a. He noted that the majority's inadequate training theory, as applied in this case, would "erect a due process requirement that cities must have paramedical officers or other trained medical spe-

---

[4] The Court's reference to "shift commanders" is unexplained, but the police regulations delegate the decision at issue to the jailer, in consultation with "his supervisor." The jailer's "supervisor" could be any one of the police captains on duty, but a captain is not a shift commander and there is no suggestion in the record that this routine decision to seek medical treatment for an arrestee was *ever* made by any high ranking officer of the police department.

cialists who exercise some type of professional judgment at the jail." Pet. App. 10a.

SUMMARY OF ARGUMENT

Muncipal liability may only be imposed under Section 1983 upon proof that municipal actions "subjected" a person to injury under the Constitution or other federal law. *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). The inquiry under *Monell* is whether the government—and not merely a government agent or employee—is responsible for the harm. Thus, a Section 1983 plaintiff must prove that a deliberate municipal act—either a government policy or custom is the moving force of the plaintiff's injury.

I.

In this case, the only relevant municipal policy was the City of Canton's police regulation that required the police to provide all arrestees with necessary medical care. Nevertheless, the court of appeals engaged in a purely speculative search for something that could be characterized, in a talismanic fashion, as a municipal "policy." The court of appeals concluded that the City's delegation of authority to the jailer, to decide whether to provide a person in police custody with medical attention, coupled with the absence of any evidence of adequate "medical" training, established a muncipal policy for which the City could be held liable. Such a theory of liability is irreconcilable with the limits of Section 1983 liability, as enunciated by this Court in *Monell* and its progeny.

A. This Court should reaffirm the bright line standard embodied in *Monell* that restricts municipal liability under Section 1983 to injuries that directly result from the adoption of a policy that is itself unconstitutional. By adopting such a standard, the Court would ensure that municipal governments only are held responsible when their own acts—as opposed to the acts of their employ-

ees violate the Constitution. Such a rule also would avoid the recurring problem, illustrated by this case, in which a Section 1983 claim against a municipality is allowed to go to the jury in the absence of any evidence that any municipal decision caused the injury in question.

Because of the nature of municipal policies, there should rarely, if ever, be a serious question whether a policy exists or what it provides. *City of St. Louis* v. *Praprotnik*, 108 S.Ct. 915, 923-924 (1988). By requiring a showing that the policy in question is unconstitutional, and not merely that its misapplication led to constitutional injury, this Court would establish a fixed guidepost that would clarify the scope of the "policy" requirement for lower courts and litigants.

Adoption of such a standard would eliminate claims, such as those in this case, that blur the line between custom and policy. It also would allow municipal governments a fair opportunity to define, with some certainty, their actual policy in important areas of governmental conduct without concern that the policy choice might be misinterpreted by a jury exercising the hindsight available after an injury has occurred.

Imposing the requirement that the challenged policy itself be unconstitutional would not be a departure from precedent. See, *e.g.*, *Monell*, 436 U.S. at 661; *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 470 (1986). Nor would it leave potential plaintiffs without remedies. In addition to existing tort and administrative remedies, plaintiffs would, of course, remain free to maintain their Section 1983 claims against those individuals who acted under color of state law to cause their injuries.

There is no allegation of any unconstitutional municipal policy in this case. Nor in light of the protective nature of the City's policy toward providing medical care to detainees could such a claim have been made. Accordingly, the complaint against the City must be dismissed.

B. Even if the policy in question does not need to be unconstitutional itself, a Section 1983 claim against a city must nevertheless establish at least that (1) the city has taken a discrete and identifiable action in adopting the putative policy; (2) the policy was "deliberately" adopted from among alternatives; and (3) the policy was the "moving force" behind the constitutional injury. The court of appeals' theory of inadequate training is wholly inconsistent with all three of these basic requirements of a policy that subjects a city to potential liability under Section 1983.

First, the theory of inadequate training fails to require that the plaintiff identify or produce evidence of any municipal "action." Instead, the inadequate training theory simply invites the jury to "infer" from an injury caused by a municipal employee that the City had a policy of inadequate training. Thus, the theory suffers from the same defect identified in *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808 (1985); it permits the jury to infer the existence of a policy in the absence of any evidence, thereby "permitting precisely the theory of strict respondeat superior liability rejected in *Monell*." *Id.* at 831 (Brennan, J., concurring).

Second, the theory of inadequate training also fails to meet the requirement of intentional or deliberate conduct. The term "policy" implies "a course of action consciously chosen from among various alternatives . . . ." *Tuttle*, 471 U.S. at 823. In the absence of such a "state of mind" requirement, it is virtually impossible for a city to rebut the unsupported assertion that it had a "passive" policy of failing to train or supervise. Indeed, that is precisely what occurred in this case because there was no evidence that the City deliberately chose to limit training for any reason, much less with the knowledge or expectation that such "inadequate" training might restrict the access of detainees to medical care.

Finally, a theory of inadequate training fails to ensure that the municipal policy is the "moving force" of the constitutional violation. A Section 1983 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." *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 482 (1986) (emphasis in original). In the instant case, there has been no showing that training was a "but for" cause of respondents' alleged injuries. There clearly is no basis in the record for finding that any City policy regarding training was the "moving force" in the alleged violation.

II.

Although the court below apparently analyzed the case solely in terms of municipal policy, the jury instructions could be construed to permit the City to be held liable for "implicitly authorizing" a custom of providing inadequate medical care. There is, however, no evidence in the record to support a "custom" of inadequate medical care for detainees in the City of Canton. All of the evidence related solely to the care provided to Mrs. Harris, and that clearly cannot prove that any well settled practice existed, particularly one that is directly contrary to the express policy of the City to provide medical care to injured detainees.

ARGUMENT

Section 1983 imposes liability on any "person . . . who subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. In *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), this Court overruled its previous decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), and held that municipal governments are "persons" subject to liability under Section 1983. *Monell*, 436 U.S. at 690. Based upon a thorough review of the legislative history of the Civil Rights Act of 1871, the Court held, however, that Congress did not intend to subject municipal governments to liability on the basis of respondeat superior or vicarious liability. Instead, Section 1983 granted relief directly against a city only where municipal actions directly "subjected" a person to constitutional injury. 436 U.S. at 690-694.[5] The Court made it plain that 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.

436 U.S. at 694.

---

[5] The Court's analysis in *Monell* rejecting respondeat superior is supported by the legislative history of Section 1983 which recognizes that Congress intended that the Act provide only a "remedy" and not create any new form of liability. See Cong. Globe, 42nd Cong., 1st Sess. 568 (1871) (Sen. Edmunds). A theory of municipal liability based on respondeat superior, rather than a city's own acts, would have established vicarious constitutional liability, which was not recognized as a basis for recovery against cities in 1871. See *Monell*, 436 U.S. at 690-92; see also Cong. Globe, *supra* at 216 (Sen. Thurman) (Section 1983 authorizes plaintiff "to bring an action *against the wrong-doer* in the Federal courts . . . .") (emphasis added); see also *Monell*, 436 U.S. at 692 n.57 (describing Congress' rejection of respondeat superior liability in Sherman Amendment).

Thus, *Monell* teaches that municipal liability for constitutional injury under Section 1983 may be imposed only on the basis of (1) a municipal policy or (2) a municipal custom or practice. *Id.* In general, liability exists under the "policy" prong of *Monell* where the city's policymakers consciously adopt a final rule of general application which gives rise directly to constitutional injury. See *Pembaur*, 475 U.S. 480-81. Municipal liability under the "custom or practice" prong of *Monell* arises under less formal circumstances where a pattern or practice of unconstitutional acts by city representatives or employees places the city on notice of those acts and gives rise directly to the reasonable inference that the city has implicitly authorized the "custom" in question. See *Monell*, 436 U.S. at 690-91. The inadequate training theory employed by the court of appeals fails to establish a basis for liability under either prong of *Monell*.

I. The City Of Canton Cannot Be Held Liable Under Section 1983 For Adopting An Alleged "Policy" Of Providing Police Officers With Inadequate Medical Training.

The holding of the court of appeals in this case illustrates a disturbing trend in Section 1983 litigation in which courts and litigants, convinced that the term "policy" is a talismanic basis for municipal liability, search for anything that can be characterized as a "policy" in order to hold a city liable for a given injury. Thus, although respondents' only claim relates to a delay in the provision of medical care, the City's actual policy relating to the provision of medical care is rendered irrelevant. The fact that the City had an express, written policy to protect Mrs. Harris and to ensure that she received medical care (upon request or upon any reasonable indication of need) is treated by the respondents and the court of appeals as beside the point. But, to ignore the City's real policy and invite the jury to hold the City liable for

an amorphous failure to train, under a standard which effectively requires the policy to be implemented perfectly, exposes the City to liability for constitutional injuries in circumstances in which the City cannot fairly be held to account. This Court in *Monell* made clear that Congress expressly did not intend to impose liability in such circumstances where the City itself was not responsible for the injury.

Given that the lower courts have applied the "policy" standard for municipal liability in ways that cannot be reconciled with the limits of Section 1983, this Court should reaffirm the bright line standard embodied in *Monell* which restricts municipal liability under Section 1983 to injuries resulting from a "policy" *which is itself unconstitutional.*[6] By following this path first laid down in *Monell*, the Court would ensure that local governments are only held responsible when their own "acts" violate the Constitution. But, even if the Court declines ex-

---

[6] As currently applied, the *Monell* standard has allowed the lower courts to affirm municipal liability in circumstances where it is virtually impossible to discern any "policy or custom," as those terms are usually understood. See, *e.g.*, *Rascon* v. *Hardiman*, 803 F.2d 269, 275 (7th Cir. 1986) (proof that county correctional facility lacked formal written disciplinary procedures, allowing individual officers to "conclude" that physical beatings are permissible, may result in county liability for actions pursuant to county policy); *Avery* v. *County of Burke*, 660 F.2d 111, 115 (4th Cir. 1981), (county may be liable for policy of failing to adopt policies, rules or regulations for counseling persons in county health facilities); *Anderson* v. *City of Atlanta*, 778 F.2d 678 (11th Cir. 1985) (where inmate injury traceable to inadequate staffing of facility, city may be liable for its policy of understaffing). Even a cursory review of Section 1983 cases suggests that the lower courts are struggling to fit cases within the "policy" mold when most typical misconduct claims either involve no real city policy or a policy that prohibits misconduct. See Brief of International City Management Association, *et al.*, as *Aimi Curiae*, pp. 16-18 nn. 15-16, describing cases in which lower courts have affirmed finding of municipal liability based on fairly speculative theories of what constitutes municipal policy.

pressly to limit Section 1983 liability to unconstitutional policies, it still must hold that the Sixth Circuit's theory of liability for inadequate training is a grossly overbroad basis for holding cities liable, which conflicts with several decisions of this Court and which therefore must be rejected.

A. The City Cannot Be Held Liable Under Section 1983 On The Basis Of A Municipal Policy Unless The Policy Itself Is Unconstitutional.

Although this Court has withheld decision on the issue whether "a policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here, can *ever* meet the 'policy' requirement of *Monell*," *Tuttle*, 471 U.S. at 824 n. 7 (emphasis added), it has expressed some doubt about the viability of such a theory. The Court's misgivings on that score are well founded. Given the principles limiting municipal liability under Section 1983, a requirement that the "policy" causing injury must be unconstitutional is an appropriate condition for imposing liability directly upon a city. Under such a requirement, the theory of the court of appeals must be rejected.

1. *Monell* and its progeny are, at bottom, about responsibility (*Pembaur*, 475 U.S. at 478), and they indicate that municipal responsibility for a constitutional violation can only be demonstrated when the city's actions are themselves unconstitutional. The term "policy" is not talismanic; rather, it is simply a "shorthand" expression used to determine whether a municipality—as opposed to a municipal employee or agent—"has caused [a person] to be subjected" to a violation of constitutional rights. The purpose of examining relevant municipal policy is to determine whether the constitutional injury in question results from city action or merely from individual action. Another way of framing the question is to ask whether the relevant city action is unconstitutional

or whether the unconstitutional act is more properly attributed to some other actor. It is only where the city's policy is unconstitutional that it can fairly be said that the city's own act has "caused [a person] to be subjected" to constitutional injury. See *Tuttle*, 471 U.S. at 828 (Brennan, J., concurring). Thus, the primary reason for requiring a finding that the policy in question was itself unconstitutional is that such a requirement serves the plain meaning of the statute and accurately reflects the element of municipal responsibility inherent in *Monell's* interpretation of Congress' intent in the Civil Rights Act of 1871.

In addition, imposing a requirement that the challenged policy itself must be unconstitutional is fully consistent with this Court's precedents. Indeed, in every case in which this Court has affirmed liability on the basis of a municipal policy, the policy in question was unconstitutional. In *Monell*, for example, the policy that compelled pregnant employees to take unpaid leaves of absence was found to be unconstitutional. 436 U.S. at 661-62. See *Tennessee* v. *Garner*, 471 U.S. 1 (1985) (statute which permitted the use of deadly force to effect the arrest of a fleeing suspect was unconstitutional insofar as it authorized the killing of an unarmed, nondangerous suspect); *City of Newport* v. *Fact Concerts*, 453 U.S. 247 (1981) (city council decision to cancel license found to violate First Amendment); *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 470 (1986) (policy decision of county prosecutor regarding service of arrest warrants found to violate Fourth Amendment); *Owen* v. *City of Independence*, 445 U.S. 622, 663 (1980) (due process injury attributable to unconstitutional acts of city policymakers). Thus, a holding that the "policy" in quesiton must itself be unconstitutional would merely confirm what has been implicit in this Court's decisions to date.

Requiring a showing that the challenged policy is unconstitutional will protect important municipal preroga-

tives without impairing significantly the rights of plaintiffs. Because of the nature of municipal policies, liability under the "policy" prong of *Monell* (and the permissible range of appropriate municipal action) may be readily established under a rule that fixes liability for policy choices only in those situations where the policy is found to be unconstitutional. Such a rule would avoid the recurring problem, illustrated by this case, in which the Section 1983 plaintiff is permitted to argue in favor of City liability on the basis of a municipal "policy" in the absence of any evidence that any such policy actually exists.

Unlike questions of "custom," there should rarely, if ever, be a question whether a policy exists or what the policy provides. Municipal policies are often written and generally have fairly well-defined terms. This is so because municipal policy exists where there is a rule of general application that "establish[es] fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur*, 475 U.S. at 480-81. Thus, by imposing liability under the "policy" prong of *Monell* only where it can be fairly said that the policy is unconstitutional, this Court could establish fixed guideposts that would clarify Section 1983 for lower courts and litigants. See *Praprotnik*, 108 S.Ct. 915, 924 (1988) (in Section 1983 municipal liability cases, court should attempt to clarify issue and avoid standard which leads to "uncertainty").

A bright line standard would eliminate claims, such as those in the instant case, that blur the lines between policy and custom and leave municipal governments unable to present an effective defense. Where the term "policy" is used loosely to include such matters as adequacy of training, the city is faced with the most difficult elements of both "custom" and "policy" claims. On the one hand, the city is held liable for a single incident —as is appropriate only in the case of claims based on municipal policy. See *Pembaur*, 475 U.S. at 482 n.11.

On the other hand, plaintiffs are allowed to rely on an amorphous, unwritten practice which the City is unable to prove does *not* exist—which is appropriate only in claims relying upon custom. See, *infra*, 31-35.

A bright line rule that limited Section 1983 liability to municipal policies that were in fact unconstitutional also would allow municipal governments a fair opportunity to confine municipal "conduct" to constitutional norms (and thereby avoid potentially crippling damage actions). Unlike other potential Section 1983 defendants, municipal governments lack a qualified immunity defense for actions taken in good faith. *Owen* v. *City of Independence*, 445 U.S. 622 (1980). Thus, cities, unlike other potential defendants, must make the *correct* choice in conforming each of their "actions" to the requirements of the Constitution. Although there will always be close questions, *cf. Pembaur*, 106 S.Ct. at 1295, a bright line test that requires the policy itself to be unconstitutional would provide city policymakers with some certainty that they could examine (and review) city policies to ensure that they are consistent with constitutional norms. At least, such a requirement would eliminate the current state of affairs in which every city policy is subject to constitutional "second-guessing" by a jury with the benefit of hindsight. In effect, a requirement that the challenged policy must be unconstitutional would allow city governments to operate in good faith (assuming appropriate knowledge of constitutional standards), while providing a remedy for those occasions when unconstitutional municipal conduct results in injury.

In addition, limiting the scope of municipal liability under the "policy" prong of *Monell* would not deprive Section 1983 plaintiffs of reasonable recoveries for injuries. Where there is no unconstitutional municipal policy, such plaintiffs would still be able to argue, in an appropriate case, that their injuries resulted from an action that "implements or executes" a municipal cus-

tom. Moreover, plaintiffs would retain their existing right to sue any individuals directly for constitutional injury caused by their actions under color of law. Injured plaintiffs also would have available state tort and administrative remedies. Thus, even if Section 1983 were intended, under an "insurance theory," to provide compensation in the absence of fault—and it clearly was not (*Monell*, 436 U.S. at 694-95)—a holding that municipal governments are only liable under Section 1983 for their unconstitutional policies would not leave potential plaintiffs without reasonable means to seek compensation. In sum, there is no basis in the language of Section 1983, its legislative history, this Court's decisions or sound public policy to open the door to expanded municipal liability by holding that municipal policies that are otherwise constitutional can nevertheless serve as the basis for holding a city liable for the acts of its employees in misapplying that policy.

2. If this Court determines that there is no municipal liability unless the policy in question is unconstitutional, then there is no basis for a new trial in this case. This is because there is no City policy at issue in this case which is even arguably unconstitutional.

City of Canton policy requires that when a prisoner requests or is in need of medical attention, the shift commander "*shall* . . . have such person taken to a hospital for medical treatment." J.A. 33 (emphasis added); see, *supra*, p. 4. Respondents ignore this clear statement of City policy, but the policy exists and it clearly is protective of the detainees' right to medical treatment. The policy is not unconstitutional. Neither is it unconstitutional to delegate authority to *implement* the policy. See *Praprotnik*, 108 S.Ct. at 927. In fact, the City has no other choice; either the policy of medical treatment is delegated to the employees who are physically present to implement the policy within the limits of the delegated discretion or it would not be implemented at all. To hold

otherwise would require every city to draft a medical treatment policy for its jails that defines every conceivable circumstance in which treatment might be necessary. But, as this Court has recognized, individual discretion cannot, as a practical matter, be legislated away. See *Praprotnik*, 108 S.Ct. at 925-26. More important, the Constitution does not require that every municipal government "codify" every policy in a way that eliminates employee discretion. Thus, neither the policy, nor the delegation of discretion to implement the policy, is unconstitutional in itself.

The only other arguable "policy" that the respondents (and the court below) can point to is the policy of providing only minimal formal medical training to the officers that make the decision whether a detainee is in need of medical treatment. Assuming arguendo that the level of training is indeed a policy—and it is not, see, *infra*, pp. 21-26—such a policy nevertheless is not unconstitutional. This is clear when the medical training issue is considered in context. First, under the police regulations, the jailer need only make the decision regarding necessity of treatment when the detainee cannot (or will not) request treatment. In such circumstances, the need for hospitalization is largely self-evident, especially to an experienced police officer. See, *supra*, pp. 4-5. Second, the jailer's decision to obtain medical treatment does not involve formal "medical" decision-making, but instead requires a common sense evaluation. That evaluation is not made in a vacuum. It is made by the jailer (an experienced officer), in consultation with a supervising officer, based on their collective experience and observation. In short, the level of training is appropriate to perform the task delegated to the jailer and his supervisor.[7] No one has suggested that the Constitution re-

[7] This is not to say that the jailer could never make a mistake and deny medical treatment in a situation in which a reasonable person could find that treatment was appropriate. But hiring of paramedi-

quires that every decision of every individual employee always be "correct," and imposing liability simply because the decision was incorrect involves adoption of respondeat superior liability. Unless the Constitution requires every prison and jail in the land to have "paramedical officers or medical specialists" (see Pet. App. 10a (Merritt, J., dissenting)) on the premises 24 hours per day, the level of "medical" training of police officers in the City of Canton is not, in itself, unconstitutional. Accordingly, the City cannot be held liable for the constitutional injuries cited by respondents which at most reflect an incorrect implementation of the City's constitutionally valid policies.

B. The City Cannot Be Held Liable Under Section 1983 Based On A Theory Of Inadequate Training In The Absence Of Proof Of A Municipal Policy.

The test for determining whether a particular action or decision represents municipal "policy" may focus on the nature of the decision (*i.e.*, whether the decision is one of *general application*) or it may focus on the identity or status of the decisionmaker (*i.e.*, whether the person is a *policymaker* and therefore acts on behalf of the municipality). See *Pembaur*, 475 U.S. at 481-84; *id.* at 499-501 (Powell, J., dissenting); see also *Tuttle*, 471 U.S. at 822. In either case, to prevail on a Section 1983 claim under the theory that a municipal policy caused the injury, a plaintiff must prove that: (1) the City has "acted" by adopting a policy; (2) the City "deliberately" adopted the policy from among various alternatives (*i.e.*, the City breached the appropriate standard of care), and (3) the policy was the "moving force" behind, rather

---

cal personnel would not ensure that the decision was made perfectly. At best, respondents can only argue that the jury could find that a higher level of training would have made it more likely that Mrs. Harris would have received earlier treatment. But that argument amounts to nothing more than a claim that the individual decision was incorrect, not that the policy was unconstitutional.

than the "but for" cause of, the constitutional injury.[8] The court of appeals' theory of inadequate training is wholly inconsistent with these basic requirements of a policy that subjects a city to potential liability under Section 1983.

1. At the outset, the theory of inadequate training fails to meet the most fundamental requirement of municipal liability under Section 1983 because it fails to *identify any municipal "act"* which would support a finding of municipal liability.[9] In effect, the inadequate training theory invites the jury to "infer" from an "inadequate" performance of one or more City employees

---

[8] It may be helpful, in defining the limits of liability for municipal "policies," to analogize to the familiar elements of tort liability. See, *e.g.*, *City of Springfield* v. *Kibbe*, 107 S.Ct. 1114, 1121 (1987) (O'Connor, J., dissenting). Generally, liability in tort requires a plaintiff to establish: (1) an act by the defendant; (2) the requisite standard of care (intent, negligence or strict liability); and (3) causation of the injury. See, *e.g.*, W. Prosser, The Law of Torts, 143 (4th ed. 1971). A Section 1983 claim that a municipal policy caused a constitutional tort similarly requires proof of all the same elements. See *Monell*, 436 U.S. at 690-91 (liability requires municipal act and causation of injury); *Tuttle*, 471 U.S. at 822-23 (plurality opinion) (noting that it is "open to question" whether negligence alone would support liability); see also *Kibbe*, 107 S.Ct. at 1121 (O'Connor, J., dissenting).

[9] The jury instruction, which the court of appeals approved, provided that the City would be liable if the City

> failed to supervise its police force and that such supervision was so reckless, grossly negligent, inadequate, and the result of deliberate indifference that police misconduct and violations of citizen's rights were probably certain to result. . . . In other words, if you believe that the Canton Police Department adequately supervised, trained and controlled the police officers, then you shall return a verdict for the City of Canton . . . .

Tr. 4-389—4-390. Under these instructions there is *no requirement* that the City have *any policy* regarding training; rather, the jury need only find that the City failed to meet the undefined standard of "adequate" training and that the failure to meet such standard was based on the City's "gross negligence."

that the City, *sub silentio*, had a policy of inadequate training.[10]

In *Tuttle*, 471 U.S. at 808, this Court reversed a judgment against a municipality under Section 1983 where the instructions allowed the jury to " 'infer,' from a single, unusually excessive use of force . . . that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the [city]." The Court found that inference to be "unwarranted" because it allowed the Section 1983 plaintiff to "establish municipal liability without submitting proof of a single action taken by a municipal policymaker." *Tuttle*, 471 U.S. 821. Such an inference of wrongful city conduct "would amount to permitting precisely the theory of strict respondeat superior liability rejected in *Monell*." *Tuttle*, 471 U.S. at 831 (Brennan, J., concurring). The inadequate training theory adopted by the court below suffers from precisely the same defect that caused this Court to reject the theory in *Tuttle*[11]—the "inference" of City "policy"

---

[10] The court of appeals did not explain how the City's written policy of providing necessary medical attention to arrestees affected the inadequate training theory.

[11] With respect to the sufficiency of the evidence under this theory, the court of appeals pointed to "two facts." First, the court noted (and it is undisputed) that the jailer had "discretion" in making medical treatment decisions. Second, the court stated that "the city could not show any evidence of adequate training." See Pet. App. 6a.

With respect to the first "fact," it is settled that the existence of discretionary authority is no proof of municipal policy. *Praprotnik*, 108 S.Ct. 927. With respect to the second "fact," the court erred in placing the burden of demonstrating the "adequacy" of training on the defendant/petitioner. By so shifting the burden, the court has established a rule in which a plaintiff proves his prima facie case of municipal liability merely by demonstrating that the employee was acting within the range of delegated authority, and it is then the city's burden to prove that training is "adequate." But, if there is one firm guidepost in this

is based upon a complete lack of evidence.[12]

In this case, the *only* evidence of any City policy was the written policy requiring that arrestees be provided necessary medical attention. Thus, as in *Tuttle*, 471 U.S. at 820-21, the court of appeals has sanctioned a theory which turns the *Monell* requirement of a municipal policy into a play on words in which real City policy is ignored and the "policy" of inadequately training police officers is employed as a contrivance to avoid the plain meaning of Section 1983 as interpreted by this Court in *Monell*. Section 1983 requires proof that the "person" to be held liable—the City—took some action that "cause[d] [respondent] to be subjected" to the constitutional violation. 42 U.S.C. § 1983. The City of Canton (by its policies) "caused" its employees to provide Mrs. Harris with medical assistance if she requested it or if they believed that she needed it. The most that respondents can prove is that the City's employees erred in applying that policy in a single instance. In no way can that support a holding that *the City* "acted" to injure Mrs. Harris.

In fact, the inadequate training theory espoused by the court below and the respondents does not even pur-

---

area of the law, it is that there is no municipal liability under a respondeat superior theory, which imposes liability on an employer simply on a showing that injury was caused by an employee acting within the scope of his delegated authority. By imposing liability in reliance on the City's "error" in so delegating authority, the court below demonstrates that its theory is distinguishable only in name from a claim of respondeat superior and therefore is clearly incorrect. See *Monell*, 436 U.S. at 693-94. But, in any case, even if respondents proved that petitioners did not "adequately" train police officers, such evidence would tend only to show the City's negligence and would not constitute evidence of a municipal policy.

[12] There is no evidence that any City "policymaker" ever adopted any policy of inadequate training for the Canton police. Nor was there any evidence of any rule of "general application" regarding the medical training received by police officers on duty at the jail.

port to identify any action on the part of the City that caused respondents injury. Instead, liability is premised on the delegation of "unfettered *discretion*" to the jailer "coupled with" the allegation that the City "has wholly failed to train or has been grossly negligent in training its police force . . . ." Pet. App. 5a-6a. But, such a shift in focus from City *policy* to the discretionary authority of City employees is antithetical to the "policy" requirement of *Monell*.

In *City of St. Louis* v. *Praprotnik*, 108 S.Ct. 915 (1988), this Court considered the issue of municipal liability based upon the presence of delegated authority. In that case, the respondent had argued that the City was liable to him for an unconstitutional retaliatory discharge on the ground that the City had delegated "final" authority—that was not subject to de novo review—to the supervisory officials who had discharged him.

This Court reversed. The Court reiterated that municipalities may be held liable under *Monell* only for acts for which the municipality actually is responsible, "that is, acts which the municipality has officially sanctioned or ordered." *Id.* at 924 (quoting *Pembaur*, 475 U.S. at 480). Upon review of the record, the Court found no suggestion that the relevant city policymakers—the mayor, alderman and Civil Service Commission—had any *policy* authorizing retaliatory discharges. In fact, City policy, as reflected by the rules and decisions of the Civil Service Commission, was to the contrary. The Court then flatly rejected Praprotnik's argument that the delegation of final authority to apply the City's policy was in effect a delegation of policymaking authority. "Simply going along with discretionary decisions made by one's subordinates . . . is not a delegation to them of the authority to make policy." *Id.* at 927. In fact, the Court noted that the City's practice of delegating discretion and "going along" with the employee's decision was consistent with a presumption that the "subordinates are faithfully

attempting to comply with the policies that are supposed to guide them." *Id.* Thus, the Court concluded that "the purposes of Section 1983 would not be served by treating a subordinate employee's decision as if it were a reflection of municipal policy." *Id.*

As in *Praprotnik*, the mere fact that "discretionary" authority was delegated to the jailer does not make his conduct a reflection of City "policy." [13] A city only can "act" through its officials and employees. Because virtually all municipal authority must be delegated, the exercise of discretion by municipal employees is neither inappropriate nor unusual. As *Praprotnik* made clear, an exercise of discretionary authority cannot reflect city "policy" under Section 1983, unless another city policy causes that discretion to be exercised in a way that is unconstitutional. Thus, at bottom, the reliance on the City's grant of discretion (coupled with a vague deficiency in training) as the only evidence of a City "policy" demonstrates that respondents and the court below were unable to identify any action relating to the injury in this case that reasonably could be attributed to the City.

2. The inadequate training theory also fails to meet the "state of mind" requirement of intentional or deliberate conduct that is inherent in the term "policy." It is "difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training' unless evidence be adduced which proves that the inadequacies resulted from conscious choice—that is, proof that the

---

[13] The argument that the delegation was "coupled" with inadequate training is of no more help to respondents than was Proprotnik's allegation that the delegation was "coupled" with inadequate review. In both cases, the cities necessarily had delegated day-to-day decisionmaking authority to city employees. In both cases, there was no showing that the city policy of delegation was itself unconstitutional. In fact, in both cases, actual city policies (regarding civil service employees and the medical treatment of arrestees, respectively) clearly were constitutional.

policymakers deliberately chose a training program which would prove inadequate." *Tuttle*, 471 U.S. 823. This is so because "the word 'policy' generally implies a course of action consciously chosen from among various alternatives . . . ." *Id.*; see *Pembaur*, 475 U.S. at 480-81 & n.9; see also *id.* at 499-500 (Powell, J., dissenting).

This is not to say that a city may never be held liable for municipal actions that are undertaken recklessly or with deliberate indifference to their consequences. To the contrary, where there is more than a single incident of employee misconduct, it is possible that a city may be placed on sufficient notice that some state of mind other than a deliberate decision would suffice. See *Tuttle*, 471 U.S. at 821-22; *cf. Pembaur*, 475 U.S. at 480; see, *infra*, pp. 33-34. However, such a claim would arise under the "custom" prong of *Monell* and not under the "policy" prong at issue here. The distinction is an important one.

Unlike a claim for liability based on municipal custom, which requires proof of "persistent and widespread" practices. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 167 (1970), a Section 1983 claim based on municipal policy may arise from a single act. See *Tuttle*, 471 U.S. at 821; *Kibbe*, 107 S.Ct. at 1115; *Pembaur*, 475 U.S. at 480. If the *Monell* limitations on municipal liability inherent in the policy requirement are to have any force, this Court must reaffirm that municipal liability based on a single act only arises where there is "a *deliberate* choice . . . ." *Pembaur*, 475 U.S. at 483 (emphasis added). In the absence of such an intent requirement, it will be almost impossible for a city to rebut the common charge that it had a "passive" policy of failing to train or failing to supervise. Indeed, all that a Section 1983 plaintiff would need to do is *assert* that training was inadequate and the case could be submitted to the jury under the "policy" of inadequate training.

This problem is well illustrated by this case because there was no evidence at trial that the City deliberately chose to limit the training of jailers for any reason, much less with the expectation that such an approach might restrict the access of detainees to medical care. To the contrary, the only reasonable inference from the evidence is that the City chose to confer discretion upon experienced police officers who could competently decide whether medical care was warranted and have such care supplied under the relatively clear guidelines embodied in the City's regulation. See *supra*, pp. 4-5. Thus, to the extent that there was any evidence of a deliberate choice, it was not a choice to disregard the constitutional rights of any citizen.[14]

Because the evidence concerning the source of the "policy" was so inadequate, the court of appeals was required to employ a theory of liability which allowed the plaintiff to argue that an unspoken "policy" of inadequate training caused the constitutional injury—despite the existence of an undisputed written policy which was designed to prevent such injuries.

3. Finally, the theory of inadequate training adopted by the court of appeals fails to ensure that the "municipal policy must be 'the moving force of the constitutional violation.'" *Tuttle*, 471 U.S. at 820 (quoting *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981)). This Court has made it clear that this "causation" requirement of a municipal liability claim is a significant one. A Section 1983 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."

---

[14] In addition, there was no evidence that any decision about the level of training was made by a policymaker of the City. For all that appears in the record, city officials may have assumed that jailers were receiving paramedical training as part of their regular training program. Thus, the policymaker requirement for a finding of municipal policy has not been satisfied.

Pembaur, 475 U.S. at 482 n. 11 (emphasis in the original). See *Martinez* v. *California*, 444 U.S. 277, 284-285 (1980).

As the plurality in *Tuttle* explained, the stringent analysis of the causation element is inherent in the "policy" test for municipal liability under Section 1983. The purpose of the *Monell* policy requirement is to distinguish those injuries for which municipal governments are truly *responsible—i.e.*, injuries caused by their "own illegal acts," see *Pembaur*, 475 U.S. 478-79—from injuries caused by the acts of municipal employees. See *Tuttle*, 471 U.S. at 818; *Pembaur*, 475 U.S. at 479-80. But, simply identifying a municipal policy that has some connection to the constitutional violation alleged is insufficient. This is so because "almost any injury inflicted by a municipal agent or employee ultimately can be traced to some municipal policy." *Kibbe*, 107 S.Ct. at 1120 (O'Connor, J., dissenting). In *Tuttle*, the plurality explained that

> if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official; for example, [the police officer] would never have killed Tuttle if Oklahoma City did not have a "policy" of establishing a police force.

471 U.S. at 823. Thus, in order to assure that the assignment of liability under Section 1983 reflects a realistic appraisal of responsibility, a showing of "but for" causation will not be enough. Instead, "there must be an affirmative link between the policy and the particular constitutional violation alleged." *Id.* In other words, the Section 1983 plaintiff must show that a municipal policy was the "moving force" of the injury, not just one of many possible links in the chain of causation.

Assuming arguendo that constitutional injury was established by the officers' failure to send Mrs. Harris to

the hospital during the 30-40 minutes she was in custody, there is simply no basis on this record for concluding that the officers' medical training had any "causal" relationship to that injury. In order to make such a showing, through expert testimony or otherwise, the respondents would first have to demonstrate "but for" causation, *i.e.*, that a police officer with a different level of training necessarily would have made a different decision in the circumstances. Such a showing would demonstrate that the only factor for which the City could be considered responsible (*i.e.*, training) *may* be causally linked to the injury. But respondents also would have to demonstrate that it was more likely than not that the level of training—and not some other factor such as the indvidiual officer's mental state (see *Tuttle*, 471 U.S. at 830-31 (Brennan, J., concurring))—actually caused the injury in this case.[15] In the absence of any independent evidence to establish this causal link, "the city itself may well not bear any part of the fault for the incident; there may have been nothing that the city could have done to avoid it." *Id.* at 831.

The inadequate training theory enunciated by the Sixth Circuit clearly falls short of the required standard for proving that a municipal policy is the moving force

---

[15] Based on the record developed at trial, the City clearly cannot be held liable under a proper instruction on the "causation" requirement. The difficulty with respondents' argument (and with inadequate training theories generally) is that "any number of other factors," including "the disposition of the individual officers, the extent of their experience with similar incidents, [and] the actions of the other officers involved," were "equally likely to contribute or play a predominant part in bringing about the constitutional injury." See *Kibbe*, 107 S.Ct. at 1120 (O'Connor, J., dissenting). To allow the jury to determine that the officers' training was the "moving force" in the alleged injury, "notwithstanding the large number of intervening causes also at work, . . . appears to be largely a matter of speculation and conjecture"—at least in the absence of some (non-existent) evidence to support respondents' position. See *Id.* at 1120-21.

of a constitutional violation. The court below held that causation may be established by "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. Thus, under the theory of the court of appeals, a showing of "forseeability" is a substitute for causation. This is incorrect as a matter of law and clearly inconsistent with the holdings of this Court.

Even *if* a showing of forseeability without proof of deliberate choice could suffice to establish the appropriate *standard of care* for municipal liability under the "policy" prong of *Monell*, such a showing still would not be sufficient to hold the City liable. Proof of intent—*viz.*, that the City "policymakers deliberately chose a training program which would prove inadequate," see *Tuttle*, 471 U.S. at 823—is a necessary, but not a sufficient, element of liability. Respondents also must prove that there is an "affirmative link" between the deliberate policy choice and the constitutional violation alleged. *Id.* Because the theory of inadequate training established below fails to require *any* proof of causation, it cannot be a legitimate basis for imposing liability on the City under Section 1983.

II. THE CITY OF CANTON CANNOT BE HELD LIABLE UNDER SECTION 1983 FOR FOLLOWING AN ALLEGED "CUSTOM" OF PROVIDING DETAINEES WITH INADEQUATE MEDICAL CARE.

Although the court of appeals analyzed the case strictly in terms of the "policy" prong of *Monell*, it also generally approved the district court's instructions. Pet. App. 6a. Those instructions could be construed to include a "custom" analysis, by which the City would be liable for "implicitly authorizing" a long-standing custom or practice of inadequate medical care for detainees based on inadequate training and supervision. Although it is not

free from doubt whether this issue is actually in dispute, it is clear that on the record in this case, respondents cannot support liability under a theory of municipal "custom."

In relevant part, the jury instructions provided that:

> [F]or the City of Canton and its police department to be held liable under Section 1983, its police department [must be found to have] . . . failed to supervise its police force and that such supervision was so reckless, grossly negligent, inadequate, and the result of deliberate indifference that police misconduct and violations of citizen's rights were probably certain to result. Under such conditions, . . . the City of Canton may fairly be determined as acquiescing in and implicitly authorizing such violations. In light of the responsibility, authority and force that police normally wield, a city, such as Canton, is considered to have actual or imputed knowledge of the probable consequences that arise from inadequate supervision of the police department.

Tr. 4-388—4-389. This theory of municipal liability arguably based on custom, like the court of appeals' "policy" theory, is inconsistent with the decisions of this Court.

The fundamental defect in this theory of municipal "custom" is that it fails to require that the jury find that a "custom" of providing inadequate medical care actually existed. Based on the instruction provided, the jury is free to conclude from a *single incident* that the City had a "custom" of providing inadequate medical care to detainees and therefore may be held liable directly. Such an instruction was necessary to sustain liability because there is no evidence in the record of any denial of medical treatment to any person in police custody other than the arguable incident involving Mrs. Harris.

Although a single decision by a municipal policymaker can establish municipal policy, *Pembaur*, 475 U.S. at 470, a single incident cannot establish a municipal custom. It is simply impossible to conclude from the examination of a single incident whether the incident represents an aberrational occurence or a reflection of a longstanding custom or practice of the City. The reason that a single incident will not support liability is not that municipal governments are entitled to "one free bite" at constitutional rights. Rather, it is because only a repeated course of conduct or practice leading to constitutional injury will give rise to a reasonable inference that the city is on notice of the practice and has given the practice its tacit authorization. In other words, a single incident is insufficient to establish that the city has deliberately (or even recklessly) adopted the custom or practice at issue

By contrast the approved instruction allows the jury to draw an inference of municipal responsibility for inadequate medical care "even in the face of uncontradicted evidence that the municipality . . . met the highest . . . standards of providing such care imaginable." *Tuttle*, 471 U.S. at 821. Indeed, the instruction—by failing to provide any guidance to the jury in determining the "adequacy" of medical care—virtually invites the jury to hold the City liable. But, as this Court first made clear in *Monell*, a City may only be held liable for "practices" that are "so permanent and well settled" as to have "the force of law." *Monell*, 436 U.S. at 691. In the face of the City's expressly stated policy of providing medical care to detainees in need of medical attention, respondents did not and could not prove a permanent and well-settled practice to the contrary. Therefore, the record fails to establish municipal liability based on "custom."

CONCLUSION

The order of the court of appeals remanding for a new trial should be vacated and the cause remanded for dismissal of the complaint.

Respectfully submitted,

CARTER G. PHILLIPS *
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

W. SCOTT GWIN
WILLIAM J. HAMANN
JOHN S. COURY
CANTON LAW DEPARTMENT
City Hall
Canton, Ohio 44702
(216) 489-3251
Counsel for Petitioner

May 5, 1988

* Counsel of Record