No. 86-1088

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 FOR RESPONDENT

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STATEMENT OF THE CASE

On the morning of April 26, 1978 respondent, Geraldine Harris, was driving her daughter to school when she was stopped by an officer of the Canton Police Department for going 35 miles per hour in a 20 mph zone. While the officer questioned her about a traffic violation, Mrs. Harris collapsed on the ground, and was physically pushed onto the floor of a police wagon. Tr. 1-166; 3-56-57.[1]

Mrs. Harris testified that she had been fully cooperative, but that she was treated in a rough and discourteous fashion, and that when she protested this treatment the officer told her "she was going to jail." Tr. 1-163. The officer testified that she had produced her driver's license, but that she became belligerent and would not disclose other information necessary for writing a traffic citation. The officer decided to arrest respondent and called for the police wagon to transport her to the police station.

While Mrs. Harris was being taken to the station, the arresting officers contacted their supervisor to advise of the need for probable medical assistance at the station. Tr. 2-77; 2-91. The wagon was met by Captain Alan Maxson

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[1] Petitioner's Statement of the Case is written as if it was the verdict winner in the trial court. Evidence favorable to respondent is ignored and conflicting testimony is resolved in favor of the petitioner. At this stage in the case, since respondent prevailed in the district court on the claim of denial of medical treatment, all evidence relating to that claim must be viewed in the light most favorable to the respondent. See *Continental Ore Co. v. Union Carbide Co.*, 370 U.S. 690 (1962).

who determined that Mrs. Harris was "unable to get out [of the wagon by] herself." Tr. 2-80. When she was taken out of the wagon and into the station she immediately collapsed and fainted on the floor of the police booking room. Tr. 1-171. The police laughed at her condition. Tr. 170. Captain Maxson asked Mrs. Harris if she needed medical attention; she responded that she wanted "Ronnie." Tr. 2-81.

The police twice attempted to place Mrs. Harris in a chair, but on both occasions she again collapsed to the ground. Tr. 3-234-5. She continued to be in a disoriented and incoherent condition. Tr. 2-80. Captain Maxson responded to this situation by having her remain on the floor of the station for ten minutes, Tr. 2-83, after which she was placed in a jail cell. Mrs. Harris claims she was searched by male officers. Tr. 1-172-73. She fainted again while she was in the cell, Tr. 1-174, and was later found by her son Ronnie lying on the "filthy floor" of the cell. Tr. 2-16-17. Ronnie Harris arranged for an ambulance to transport respondent to the hospital. Medical treatment was delayed at this point when the police insisted that they fingerprint Mrs. Harris, even as she lay on a stretcher ready to leave for the hospital. Tr. 2-21.

The police had not been provided any training with regard to medical treatment of individuals suffering from emotional distress. Tr. 2-164. Further, a police officer testified that it was the practice of the police department to provide medical attention in such cases only where the individual was a clear danger to herself. Tr. 3-236-237.

Mrs. Harris was in police custody for close to two hours. Tr. 2-28. When she was finally taken to the hospital

she was suffering from hysteria, hyperventilation and severe anxiety and depression. Tr. 1-98-104. She was hospitalized for one week. This condition was caused by her confinement in the jail without necessary medical treatment. Tr. 2-38.

Mrs. Harris, a 52-year-old black woman, had never previously been arrested. She is the mother of eight children, all of whom have graduated from college and have gone on to professional careers. Her confinement caused deep feelings of disgrace and humiliation. She developed a strong fear of the police. Her husband testified that she had become a "different person" since the incident. Tr. 2-3. Mrs. Harris continued to suffer from these conditions for a lengthy period of time following the incident. Tr. 2-6; 1-104-108.

At trial, the case presented three claims under 42 U.S.C. § 1983. Mrs. Harris alleged that she was (1) the victim of excessive force at the scene of her arrest, (2) again physically abused at the police station, and (3) denied necessary medical treatment at the police station. The first two claims were made against individual officers and officials; the claim for denial of medical treatment was stated only against the petitioner, City of Canton. The district court directed a verdict as to the Mayor and Police Chief and the jury found for the remaining individual defendants on the first two claims.

The evidence with regard to the claim of denial of medical attention was established by the testimony of respondent, her medical doctors and various police officers. Tr. 1-163-180; 1-94-104; 2-16-28; 2-80-90. The jury's verdict was predicated on its determination that Mrs.

Harris was in fact denied her right to necessary medical treatment. This aspect of the verdict was not appealed by the petitioner and the issue is not before the Court.

On the issue of the City's liability, respondent introduced evidence that demonstrated that the regulation concerning medical treatment (City of Canton Police Regulation 334.7 (J.A.34)) was not applied as written. The failure to provide necessary medical care to Mrs. Harris resulted both from the City's failure to train its police officers with respect to the provision of medical attention and from the City's custom of distinguishing between physical and emotional ailments in assessing the need for medical treatment: where the individual is suffering from stress, hysteria or other mental disturbance, medical care is not provided unless the police determine that the individual is clearly dangerous to himself. Tr. 3-236-27.

The jury returned a verdict in favor of respondent on the denial of medical attention claim and awarded her $200,000 in compensatory damages. The trial court denied the City's motion for directed verdict and motion for judgment notwithstanding the verdict. The City's legal position on these motions (and in the Court of Appeals) was that inadequate training amounting to gross negligence *would be* sufficient to establish City liability. See Section I, *infra*.[2]

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[2] Even though the City itself stated that the proper standard for liability on a failure to train claim was gross negligence, the trial court instructed the jury that respondent had to prove that such failure to train or supervise was the "result of deliberate indifference." Tr. 4-388-89.

The Court of Appeals reversed the judgment against the City because the trial court had given an improper alternative theory for municipal liability (participation of supervisory officials). The case was remanded for a new trial. The Court of Appeals ruled that sufficient evidence was produced to support a jury verdict based on a theory that lack of training caused the constitutional violation in this case.

SUMMARY OF ARGUMENT

1. Certiorari should be dismissed as improvidently granted because petitioner failed to preserve for review the principal issues it now argues in this Court. For the first time in this litigation, petitioner asserts that a failure to train can never amount to a policy under *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978). Petitioner further claims that only policies unconstitutional in themselves can create municipal liability.

Petitioner took the exact opposite position in the lower courts. At trial, petitioner conceded that it could be held liable for "a failure to train its police force" or for "grossly negligent training . . . " Tr. 4-113. On appeal, the City, as late as its Petition for Rehearing, asserted that the Court of Appeals "correctly in our view, states that grossly inadequate training may be a basis for a City's liability under Section 42 U.S.C. § 1983." Furthermore, the Petition for Writ of Certiorari presented questions for review that were premised on the view that lack of training could be a basis for municipal liability where a city "should have known that training was inadequate" and

that "violation of constitutional rights might foreseeably result." 56 U.S.L.W. 3601 (March 7, 1988).

This Court should adhere to its long standing rule limiting review of issues to those that were raised and argued below. In *City of Springfield v. Kibbe*, 480 U.S. ___, 107 S.Ct. 1114 (1987), the Court dismissed certiorari as improvidently granted under circumstances virtually identical to those presented by this case. There, as here, petitioner's legal position at trial and on appeal was that grossly negligent training could be the basis for municipal liability.

The only issue properly preserved for review is whether there was sufficient evidence to support a jury verdict on any theory of municipal liability. This issue is not sufficiently important to warrant independent review and certiorari should be dismissed as improvidently granted.

2. Assuming the Court reaches the issue, it should find that the evidence was sufficient to establish municipal liability for the deprivation of respondent's right to medical treatment. Every court of appeals and each Justice of this Court that has considered the issue has agreed that a municipality's failure to train or supervise its police officers can under appropriate circumstances amount to a violation of § 1983. Section 1983 and *Monell* impose liability for city policies that require, authorize, or otherwise cause unconstitutional conduct. A city can cause a constitutional violation by its policy of failing to train its police with regard to the constitutional limitations on their powers as surely as it can cause violations by policies that require or authorize misconduct.

The City requests this Court to fashion a broad exception to the principle set forth in *Monell*, that municipalities are liable for constitutional violations which their actions cause, by holding that evidence about training is simply irrelevant to a Section 1983 action. Such a rule would ignore the reality that training and supervision are the primary ways in which municipalities announce and implement policy with regard to police and other employees.

Gross negligence is the appropriate standard for judging whether municipal liability is established by a failure to train. This level of culpability is sufficiently strict to ensure that a jury's finding of causation is not based on speculation and that fault, as opposed to vicarious liability, is the basis upon which municipal liability has been found.

3. The constitutional violation in this case was caused as well by a custom and practice of the City of Canton. Custom may be established where the city, through its employees, follows a repeated course of conduct from which a jury can infer that the city is at fault for failing to correct an improper practice, that it is foreseeable that the practice will cause constitutional violations, and that the violation at issue was caused by this custom. There is no requirement that the course of conduct had previously caused other constitutional violations. Further, the custom may be contrary to written city policy.

4. The evidence was sufficient to establish that the lack of training and the custom of denying medical treatment to persons in police custody who are suffering from emotional ailments caused respondent's injuries.

The evidence established that no training was provided to police with respect to the symptoms or treatment of persons suffering from mental distress or emotional illness. It was clearly foreseeable that the failure to train police would lead to the denial of necessary medical treatment to persons in respondent's condition. The evidence also established that the City had a custom and practice of denying medical treatment to persons suffering from emotional as opposed to physical ailments. The practice of the City was to refer such cases to the hospital only where the person was clearly dangerous to herself, thus creating the very high risk that certain persons in respondent's condition would be denied necessary treatment. The failure to seek treatment for respondent, a disoriented woman, who had fainted, collapsed and was hyperventilating on the floor of the police station, was part of the custom and practice of the City of refusing medical care in these situations.

ARGUMENT

I. Certiorari Should Be Dismissed As Improvidently Granted Since The Issue Of Whether A Failure To Train May Constitute A Policy For Purposes Of Municipal Liability Under *Monell* Is Not Properly Before The Court.

Petitioner's principal argument in this Court is that a city's failure adequately to train its employees cannot constitute a policy for purposes of municipal liability under 42 U.S.C. § 1983. Brief of Petitioner, 7-10, 11-30. This issue is not properly presented to this Court because petitioner explicitly conceded that it could be held liable

under a theory of inadequate training at every stage of the proceedings in the lower courts.

In its brief submitted prior to trial, the City argued:

> Plaintiffs must prove that whatever emotional distress or physical harm they may have suffered was proximately caused by a breach of a duty owed to them by the Defendants either by direct action or as a result of misfeasance and nonfeasance *by failing to adequately train, supervise, and discipline members of the police force.* Record, Document No. 10, at 3 (emphasis added).

This position was confirmed in the City's oral motion for a directed verdict after the close of respondent's case:

> City of Canton could be held liable . . . under improper training of its police officers . . . that is when a municipality fails to train its police force or recklessly trains its police force or is grossly negligent in training its police force.[3] Tr. 4-113.

Consistent with this position, following the presentation of the evidence and the charge to the jury, petitioner's sole objection to the jury instruction on city liability was that it was "simply a glorified version of a respondeat superior instruction."[4] Tr. 4-424. The City

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[3] Petitioner renewed its motion for directed verdict at the close of defendants' case, arguing that there was insufficient evidence to make out a policy or custom. Training was not mentioned. Tr. 4-356.

[4] The jury charge stated two alternative bases for city liability: that the City's "police department and/or its supervisory personnel . . . participated in the actual misconduct" or that the City "failed to supervise its police force and that such

(Continued on following page)

made no objection to the trial court's instruction on liability for a failure to supervise adequately or the standard of care required for finding such liability. The instruction authorized a verdict if the City's failure to supervise "was so reckless, grossly negligent, inadequate, and the result of deliberate indifference that police misconduct and violations of citizens' rights were probably certain to result."[5] Tr. 4-389. Petitioner's motion for judgment notwithstanding the verdict was similarly silent on this issue. Pet. App. 4a.

In the Court of Appeals, petitioner pressed the *respondeat superior* objection and its claim that the evidence was insufficient to prove a policy of denying medical treatment to prisoners, but again failed to object to (or

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(Continued from previous page)

supervision was so reckless, grossly negligent, inadequate and the result of deliberate indifference that police misconduct and violations of citizens' rights were probably certain to result." Tr. 4-389.

[5] The trial court's instructions on city liability emphasized that *respondeat superior* was not applicable:

> you may not return a verdict against the City of Canton if you believe, from a preponderance of the evidence, that Mrs. Harris was denied medical treatment by a Canton police officer merely because of the fact that said police officer was an employee of the City of Canton. Tr. 4-390.

Thus, it is clear that petitioner's objection was directed only to the instruction predicating liability on participation by supervisors.

even mention) the imposition of liability for a failure to train or supervise.[6]

Perhaps most telling, after the Court of Appeals issued its opinion in this case, the City *expressly agreed* with that court's conclusion that a failure to train stated a valid basis for imposing liability on a municipality. In its Petition for Rehearing – which, ironically, argued that the issue of training was not properly before the Court of Appeals – the City stated: "The majority opinion, quite correctly in our view, states that grossly inadequate training may be a basis for a City's liability under Section 42 U.S.C. 1983 . . . " Petition for Rehearing, Court of Appeals, at 1.

The Petition for Writ of Certiorari does not repudiate those express statements and clearly assumes that there are circumstances in which a failure to train will constitute an actionable municipal policy. Question No. 1 implies that inadequate training is actionable where the city "should have known that training was inadequate" and that "violation of constitutional rights might foreseeably result." 56 U.S.L.W. 3601 (March 7, 1988). Similarly, Question No. 2 relates to burden of proof and Question 3 to the type and degree of training required to insulate a municipality from liability.

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[6] Petitioner's sole reference in its brief in the Court of Appeals to the "failure to supervise" theory was made in the context of arguing – erroneously – that the trial court's jury instruction permitted the jury to infer a municipal policy of failing to give adequate medical attention from a single instance of such conduct. Brief for Appellant, Court of Appeals, at 27.

Petitioner's argument in support of certiorari assumed the validity of the failure to train theory. See, e.g., Petition at 8 ("the question is what showing of deliberate decision making on the part of municipal policymakers is required to support a finding that the City adopted a 'custom or policy' of inadequate training"); *id.* at 11 ("Particularly in cases such as this, where the custom or policy alleged is a city's failure to train . . . it is important that the lower courts and litigants have clear guidance with respect to the requirement that the violation must be proven to have occurred 'pursuant to' the City's custom or policy").

Furthermore, the record in this case does not squarely present the issue of the appropriate standard of culpability for claims that a municipality is liable for its failure to train its employees. The City expressly adopted the gross negligence standard in its motions for directed verdict, Tr. 4-113, and again endorsed the gross negligence standard in the Petition for Rehearing (p.1) before the Court of Appeals. The district court's instruction to the jury specified a higher standard of fault, requiring the City's failure to be "so reckless, grossly negligent, inadequate, *and* the result of deliberate indifference that police misconduct and violations of citizens' rights were probably certain to result." Tr. 4-389 (emphasis added).

In short, at the eleventh hour, petitioner seeks to challenge in this Court holdings of the Court of Appeals that petitioner has itself asserted throughout this case. As Justice Frankfurter observed when faced with a similar reversal of legal position in *Abel v. United States*, 362 U.S. 217, 232 (1960), "[a]ffirmative acceptance of what is now sought to be questioned could not be plainer."

This Court ordinarily limits its review to issues that were raised and argued below. *California v. Taylor,* 353 U.S. 553, 556, n. 2 (1957). Whether this limitation is jurisdictional or prudential, see *Bankers Life and Casualty Co. v. Crenshaw,* ___ U.S. ___, 56 U.S.L.W. 4418, 4420 (May 17, 1988), at a minimum it counsels against treating issues that were not only not raised below, but were explicitly incorporated by the party raising the issue in this Court as part of its own theory of the case. *City of Springfield v. Kibbe,* 480 U.S. ___, 107 S.Ct. 1114 (1987); *Abel v. United States,* 362 U.S. 217, 230-232 (1960).

This salutary rule guards against unscrupulous litigation strategies. A contrary rule would permit a party to present an erroneous legal theory as insurance for an appeal. Furthermore, adherence to the rule insures that the Court's "need for a properly developed record on appeal" is satisfied. *Crenshaw,* 56 U.S.L.W. at 4420; see also *Illinois v. Gates,* 462 U.S. 213, 224 (1983) ("fidelity to the rule guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances").[7]

Observing these "customary limitations on [the Court's] discretion" in this case will also "promote

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[7] The issue of failure to train is not necessarily dispositive of this case. As we demonstrate below, the constitutional violation was caused by a combination of the City's custom of denying medical care to persons suffering from emotional disturbance and the City's failure adequately to train its police force.

respect for the procedures by which [the Court's] decisions are rendered, as well as confidence in the stability of prior decisions." *Gates*, 462 U.S. at 224. Although it may be appropriate in some circumstances for the Court to overlook technical defects in the record (such as a failure to object to a jury instruction pursuant to Rule 51), where the issue has otherwise been raised and fully litigated below,[8] it would defy sound principles of judicial restraint – and invite unscrupulous litigation practices – to permit a litigant to reverse his explicit and consistent former position on appeal.

This case bears a striking resemblance to *City of Springfield v. Kibbe, supra*. As in *Kibbe*, petitioner explicitly adopted at trial and on appeal the very legal principle – the viability of the grossly negligent training theory of municipal liability – that it now challenges in this Court. 107 S.Ct. at 1115. In *Kibbe* the city had at least argued in its motions for directed verdict and motion for judgment notwithstanding the verdict that it should not be held liable even for its grossly negligent failure to train. 107 S.Ct. at 1118 (O'Connor, J., dissenting). Here, by contrast, petitioner expressly adopted the training and the gross negligence standards in its motions in the district court.

The record before the Court contains none of the factors that justify review of issues despite the failure to comply with procedural rules. In *Praprotnik*, the Court found that the issue had been preserved even though the

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[8] See e.g. *City of St. Louis v. Praprotnik*, ___U.S.___, 108 S.Ct. 915 (1988); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

petitioner failed to object to the relevant jury instruction because the petitioner's position in its various motions in the district court was consistent with its position on appeal. Similarly, the Court's decision to consider the "single occurrence" instruction in *Tuttle* was based on respondent's failure to raise its Rule 51 objection until its brief on the merits, even though the petitioner had clearly argued the "single incident" theory before the Court of Appeals and had presented it in the petition for writ of certiorari. 471 U.S. at 815-16. Here, petitioner conceded in the Court of Appeals the very point it now disputes.[9]

Having consistently maintained that municipal liability could be based on inadequate training, and having consistently embraced a gross negligence standard, petitioner now denounces the lower courts for applying those very principles. This sleight of hand response to the

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[9] Respondent has not waived her objection. Given petitioner's explicit avowals of the validity of the training theory, the Petition for Writ of Certiorari would have had to be extremely clear to put respondent on notice of the change in position. Even if some language in the Petition could be stretched to suggest this new position, it was improbable at best that the City would raise the sweeping argument that it now presses on the Court. As this Court ruled in *Kibbe*:

> It would be unreasonable to require a respondent on pain of waiver to object at the certiorari stage not only to the petitioner's failure to preserve the questions actually presented, but also to his failure to preserve any questions fairly included within the questions presented but uncontested earlier. Respondent strenuously objected to petitioner's raising this question at the first point that she was on notice that it was at issue in this case – in her response to petitioner's merits brief. *Id.* at 1116.

failure of the City's evidentiary arguments below should be rejected.

The only issue properly before the Court is whether the evidence was sufficient to support the jury verdict that a custom or policy caused the constitutional injury. This issue is not sufficiently important to warrant independent review and certiorari should be dismissed as improvidently granted. *Kibbe, supra,* 107 S.Ct. at 1116; *Belcher v. Stengel,* 429 U.S. 118 (1976) (per curiam).[10]

II. The Evidence Presented At Trial Was Sufficient To Establish Municipal Liability For The Deprivation Of Respondent's Constitutional Right To Medical Treatment Based Upon The City's Failure To Train Its Police Officers And The City's Custom And Practice Of Denying Necessary Medical Care To Persons Suffering From Emotional Distress.

It is our central submission that the evidence presented at trial was sufficient to support the verdict against the City of Canton under two theories of municipal liability. First, the City had a policy of recklessly failing to train or supervise its police officers with respect to their responsibility to provide necessary medical care to persons visibly suffering from emotional disturbances or distress. This failure to train created a substantial and foreseeable risk that constitutional rights would be denied. Second, and closely related to this failure to train,

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[10] Indeed, because petitioner has been granted a new trial, it will be able to fully litigate the municipal liability issue at trial and any evidentiary issues will be subject to review. In *Kibbe,* the dismissal of certiorari resulted in an affirmance of the judgment of the district court.

the City's custom and practice was to deny necessary medical treatment to persons in police custody suffering from various forms of emotional distress.[11] This custom has clearly superseded the written Police Regulation as the controlling practice in the City of Canton.

Since the Court of Appeals has granted petitioner a new trial, the sole issue presented is whether there was sufficient evidence presented that a jury could conclude that *any* policy, custom or practice of the City caused the constitutional deprivation. Because we rely on theories of liability that include a policy of failure to train and an unconstitutional practice or custom, we first set forth the legal principles which establish these theories of municipal liability under *Monell*. We then turn to an application of these legal principles to the proof at bar.

A. Liability Based On Training And Supervision Policies.

Petitioner argues that a municipality's failure to train or supervise its police officers and other employees can never amount to a violation of § 1983. This argument lacks both precedent and logic. Indeed, it has been explicitly rejected by the seven Justices of this Court who have discussed the issue, see *City of Oklahoma City v. Tuttle, supra* at 829 (Brennen, J. concurring); *Kibbe, supra* at

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[11] That respondent was in fact deprived of her constitutional right to medical care is not in dispute in this Court. A properly instructed jury found that such a deprivation was caused by the failure to provide medical care while respondent was in jail. Petitioner did not appeal from that aspect of the judgment.

1121 (O'Connor, J., dissenting), and by every court of appeals that has addressed the question. See, e.g., *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987); *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987); *Warren v. City of Lincoln*, 816 F.2d 1254 (8th Cir. 1987); *Wierstak v. Heffernan*, 789 F.2d 968 (lst Cir. 1986); *Fiacco v. City of Rensselaer*, 783 F.2d 319 (2d Cir. 1986); *Estate of Bailey v. County of York*, 768 F.2d 503 (3d Cir. 1985); *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985) (en banc); *Kymer v. Davis*, 775 F.2d 756 (6th Cir. 1985); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985); *Rock v. McCoy*, 763 F.2d 394 (10th Cir. 1985); *Bergquist v. County of Cochise*, 806 F.2d 1364 (9th Cir. 1986).[12]

In its eagerness to displace well-settled principles of statutory construction of § 1983, petitioner distorts this Court's municipal liability cases to construct a novel "bright-line" test for determining policy in *Monell* litigation. Brief for Petitioner at 13, 16, 17. Petitioner urges a re-writing of established principles in a manner that would exempt from municipal liability a broad range of policies and practices that manifestly cause deprivations of constitutional rights. A bright-line would be achieved by petitioner's test, but at the plainly unacceptable price of altering established doctrine and undermining the very teachings and purposes of § 1983.

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[12] There has been disagreement on the question of the level of culpability in the failure to train or supervise that will be required to impose municipality liability. That issue is discussed *infra* at Section II, B.

Monell held that a city could be held liable in a § 1983 action whenever a city policy had caused a constitutional violation to an aggrieved plaintiff. Petitioner urges this Court to fashion a broad exception to that rule, under which a deliberately adopted municipal policy regarding training or supervision can never be the basis of municipal liability, regardless of whether that training or supervision policy had the direct, entirely predictable or inescapable effect of causing serious constitutional violations. Petitioner insists that such evidence, no matter how substantial, is simply irrelevant to a § 1983 action.[13]

The policies for which *Monell* holds a municipality accountable are the official actions or practices that establish the operative rules of action which guide the conduct of subordinate employees. Training and supervision are at least as important a part of the process by which a city makes and announces policy (and affects the conduct of its employees) as the written memorandum in *Monell* or the telephone call in *Pembaur v. Cincinnati*, 475 U.S. 469 (1986). For some municipal employees, including police

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[13] Amici, International City Management Association, et al., urge that lack of training is not actionable unless it amounts to a policy that is unconstitutional itself. Interestingly, many of the same Amici expressly disavowed this view of *Monell* in their amicus Brief in *Kibbe, supra*, where they stated that a City "can be held liable under 42 U.S.C. § 1983 for providing inadequate police training if a deprivation of constitutional rights results from a municipal policy of inadequate training." Brief Amicus Curiae of U.S. Conference of Mayors, et al., p.5, *City of Springfield v. Kibbe, supra.*

officers, training and supervision are virtually the exclusive manner in which a city announces and implements its policies.

There is no valid or meaningful distinction under § 1983 between an unconstitutional city policy and an otherwise improper city policy which directly causes a constitutional violation. This point is readily appreciated by considering the issue of constitutional limitations on the use of deadly force. In *Tennessee v. Garner*, 471 U.S. 1 (1985), state and city policies permitted police offices to use lethal force against nonviolent fleeing felons, but did not obligate the police to do so. After *Garner*, a city's failure to train its officers that certain uses of deadly force are unconstitutional would reasonably be understood as similarly authorizing such action, even where the City Council or Mayor announced an intent to abide by the constraints of the Fourth Amendment. If police officers are not trained to comply with this limitation on their power, it is clearly foreseeable, indeed substantially certain, that an improperly trained police officer will shoot and kill a suspected car thief, pickpocket or some other non-dangerous fleeing suspect.

The same reasoning applies to the Fourth Amendment principles of *Payton v. New York*, 445 U.S. 573 (1980). Violations of constitutional rights are as likely to occur where a police department (1) expressly authorizes entries into homes to arrest suspects where the police have an arrest warrant, but not a search warrant or exigent circumstances; (2) has no written policy, but trains its officers to enter homes if an arrest warrant is in hand; or (3) has a written policy requiring compliance

with all Fourth Amendment doctrines, but does not train its officers as to the requirements of the Fourth Amendment under *Payton*. Apparently, petitioner would label (1) as a *Monell* violation, but not (2) or (3). Such a semantic distinction is illogical and thoroughly inconsistent with § 1983 and *Monell*.[14]

Petitioner's argument that only "unconstitutional" city policies can lead to municipal liability is also inconsistent with the language of § 1983 which imposes liability on "any person, who, under color of law . . . shall subject, *or cause to be subjected*, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." (emphasis added). The statute clearly contemplates that the defendant might become liable in either of two ways: by directly violating a plaintiff's constitutional rights, or by "causing" another party to do so. *Monell* itself recognized the existence of this second ground of recovery, noting that "Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort. . . ." 436 U.S. at 692. *Monell* concluded that § 1983 "clearly imposes liability on a government that, under color of some official policy 'causes' an employee to violate another's constitutional rights." 436 U.S. at 692.

This second type of liability applies to individuals and municipalities. If a city police chief, to whom

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[14] Given this Court's constant interpretation of the Constitution, including cases with direct impact on the powers and responsibilities of police officers, constitutional rights of individuals in a wide array of circumstances are dependent upon proper training and supervision of the police.

responsibility for making city law enforcement policy had been delegated, adopted a practice of hiring or retaining on the force individuals with a known proclivity for excessive and unprovoked violence, the police chief and the municipality should be liable when that practice led to inevitable abuses by the officers involved. Similarly, if the chief directed that new officers be taught to do all in their power to capture fleeing felons, and directed that the training curriculum contain no mention of the constitutional restrictions announced in *Tennessee v. Garner, supra,* the chief and the municipality should be held legally responsible if one of the officers so trained proceeded to kill a fleeing non-dangerous felon.

Imposition of municipal liability based on training or supervision is consistent with the normal rules of agency. When the rule of *respondeat superior* is inapplicable, a principal is still under a duty to exercise reasonable care in the selection, training, instruction and supervision of its agents.[15] That agency principle was well established when § 1983 was originally adopted in 1871, and application of that principle under *Monell* was expressly approved by the plurality opinion in *Tuttle,* 471 U.S. at 818-19, n.5. Where the violation of that duty is caused by the acts of a policymaker and thus may fairly be attributable to the city, liability is direct, not vicarious, and there

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[15] *Restatement (Second) of Agency,* § 213 (1958): "Principal Negligent or Reckless;" see also *Monell, supra* at 694 n.58; *Cutter v. Town of Farmington,* 498 A.2d 316 (N.H. 1985); Mead, 42 U.S.C. § 1983 Municipal Liability: The *Monell* Sketch Becomes a Distorted Picture, 65 N.C.L.Rev. 517, 558-559 (1987).

is no reason to think that the framers of § 1983 intended to establish any standard of care or definition of proximate causation different from those applicable to other principals.[16]

The City's reliance on *Praprotnick* is misplaced. At issue there was the question of whether a subordinate city employee's discretionary decisions, which were subject to review by the city's authorized policy makers could be deemed established city policy under *Monell.* The Court rejected the argument that a policymaker's single failure to investigate a subordinate's decision constituted a violation of § 1983. The court below anticipated

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[16] The legislative history of § 1983 makes clear that Congress was concerned not only with blatantly unconstitutional policies and customs, but also with more subtle constitutional violations resulting from failure to comply with facially constitutional statutes. "It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind [the statute]." *Monroe v. Pape,* 365 U.S. at 174-75. Representative Sheldon, in arguing for passage of the statute said:

> It must be apparent that these amendments enlarge the power of the Government in controlling the action of the States and I believe that it can extend its power, through its courts, in times of peace, directly to the individual who is deprived of his rights, . . . whether through the positive act *or the default of the State authorities.*

Cong. Globe, 42d Cong. 1st Sess. 367-68 (1871) (emphasis added).

Most modern police departments do not adopt explicitly unconstitutional policies and procedures. But constitutional violations by police officers may result just as surely due to the municipality's failure to train.

Praprotnick in reversing the judgment in this case because the trial court improperly instructed the jury that the mere participation of supervisory personnel could establish municipal liability. *Praprotnick* focussed on the question of which state officials have final policy making authority and did not address the issue on which the petitioner seeks review, whether a failure to train and supervise that is attributable to city policymakers can be a policy or practice under *Monell.*[17]

The decision not to train is unquestionably a course of action deliberately "chosen from among various alternatives." *Tuttle, supra,* at 823. Indeed, to the extent a city does not train or supervise officers because its policymakers did not even consider their responsibility to do so, the fault is more manifest. Liability should not be avoided by an abdication of governmental responsibility. The training, supervision and discipline of police officers are universally accepted norms, and the decision not to train or to train in a grossly negligent manner constitutes a policy no different than any other consciously chosen practice. In this case, liability based on failure to train is consistent with this Court's repeated assertion that municipal liability is to be based on notions of "fault." See *Monell, supra,* at 692, n.57; *Tuttle, supra* at 818 (plurality opinion) and 828 (Brennan, J., concurring).

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[17] Nor does *Tuttle* support petitioner's position. There, the plurality suggested that a claim can be made out "where the policy relied upon is not itself unconstitutional." *Id.* at 824. The three concurring justices rejected the bifurcation of the constitutional inquiry as a "metaphysical distinction." *Id.* at 833, n.8 (Brennan, J., concurring).

Diverse authorities recognize the vital role of police training.[18] Training with regard to the provision of medical care by jailers is a practice that is urged by many professional organizations concerned with proper standards for police activity and is the subject of widely disseminated standards and training curriculum. For example, the American Correctional Association has promulgated standards for police holding facilities that mandate training in the "recognition of signs and symptoms of mental illness, retardation, emotional disturbance and chemical dependency." ACA Standards For Adult Local Detention Facilities § 2-5271 (2d Ed. 1981). See also, Murphy, *Special Care: Improving the Police Response to the Mentally Disabled* 255-279. (Police Executive Research Forum, 1986) (listing and discussing training programs and materials); Levinson & Distefano, "Effects of Brief Training on Mental Health Knowledge and Attitudes of Law Enforcement Officers," 7 Journal of Police Sci. & Adm. 241 (1979); *International Association of Chiefs of Police, Training Key No.*

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[18] See, e.g., Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L.J. 447, 457 (1978); P. Schuck, *Suing Government* (1983); Chapman, *Police Policy on the Use of Firearms*, in *Readings on Police Use of Deadly Force*, 224, 234 (J. Fyfe ed. 1982); Rittenmeyer, *Vicarious Liability in Suits Pursuant to 42 U.S.C. 1983: Legal Myth and Reality*, 12 J. Police Sci. & Adm. 260, 265 (1984); Brown, *Use of Deadly Force by Patrol Officers: Training Implications*, 12 J. Police Sci. & Adm. 133 (1984) (improved training reduces likelihood of excessive shooting); Meagher, *Organizational Integrity: The Role of the Police Executive in the Management Process*, 13 J. Police Sci. & Adm. 236, 237 (1985) (strong administrative stand against misconduct alters behavior of officers); Reiss, *Controlling Police Use of Deadly Force*, 452 Annals Am. Acad. Pol. & Soc. Sci. 122, 131, 142-44 (1980).

377. Cf. Standards for Health Services in Jails, National Commission on Correctional Health Care (1986).

Finally, as developed in the Brief Amicus Curiae of the American Civil Liberties Union, *Monell* liability based on the requirement of training is now widely recognized as a major force in the professionalization and reform of police departments. City policymakers have given credence to this Court's admonition that "the threat of damages . . . may encourage . . . internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). Studies conducted in the wake of *Monell* and *Owen* establish these salutary results of municipal liability. See, e.g., Schmidt, "Section 1983 and the Changing Face of Police Management," in *Police Leadership in America*, 235 (W. Geller, ed. 1985).

B. The Proper Standard of Culpability

In discussing the training and supervision issues, the courts have not agreed on the level of culpability or fault that is required to render actionable a failure to train under § 1983. See, e.g., *Kibbe, supra*, at 1121 (O'Connor, J. dissenting); *Spell v. McDaniel, supra; Sherrod v. Berry*, 827 F.2d 195 (7th Cir. 1987); *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985) (en banc). In the event that the Court now chooses to address the issue, we urge that no requirement beyond gross negligence be imposed.[19]

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[19] We again note that petitioner's position in the trial court and in the court of appeals was that gross negligence was a sufficient basis for liability. The trial court's instructions to the jury required a showing of deliberate indifference. Tr. 4-388-89.

Initially, while petitioner intimates otherwise (Brief at 18), it should be stressed that § 1983 has no state of mind or fault components. See *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986). To be sure, certain constitutional rights incorporate standards of culpability. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) ("intentional" discrimination); *Estelle v. Gamble*, 429 U.S. 97 (1976); (Eighth Amendment requires showing of "deliberate indifference"); *Daniels v. Williams*, 474 U.S. 327 (1986) (simple negligence not sufficient to prove due process violation). But those culpability standards apply to the individual who directly commits the substantive violation.

Municipal liability involves dual causation: (1) proof of individual conduct and culpability sufficient to establish the underlying deprivation, and (2) proof that the City caused this conduct by a policy, custom, or usage. In this case, the unchallenged jury verdict that respondent was denied medical treatment in violation of the Constitution, was predicated on a finding that the individual officers were deliberately indifferent to her medical needs, thereby satisfying the culpability requirement of the due process clause.

By contrast, *Monell's* focus on fault and causation is a matter of statutory construction and the purposes of *Monell* are best achieved by a standard of gross negligence that imposes a sufficient degree of fault to ensure that municipal liability in cases of policies not unconstitutional themselves will not be based on *respondeat superior*. The legislative history of the 1871 Civil Rights Act makes

clear that Congress believed that liability should be imposed on a city for gross negligence which resulted in a constitutional violation. The rejection of the proposal for strict vicarious liability embodied in the Sherman Amendment formed the basis for this Court's rejection of *respondeat superior* in *Monell.* That amendment was replaced by an express Congressional approval of the use of a negligence-based standard for failure to prevent constitutional violations. Section 6 of the 1871 Act imposed liability on persons who, "having the power to prevent" the deprivation of federal rights by a third party, "shall neglect or refuse to do so" (emphasis added); damages were measured by the amount of injury which "reasonable diligence could have prevented." 17 Stat. 15 (1871).

If, as *Monell* held, the general nature of a city's exposure to liability under § 1983 is to be measured by the city's degree of exposure for failure to prevent abuses by Ku Klux Klan, 436 U.S. at 692, n.57, then the requirement of "reasonable diligence," and the imposition of liability for "neglect," are likewise appropriate where a city's own actions have caused a constitutional violation by its employees.[20]

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[20] The common law standard of negligence, the taking of an unreasonable risk of causing a foreseeable injury, was the traditional standard of "fault" by which civil liability in 1871, as today, was imposed. *The Nitroglycerine Case,* 82 U.S. 524, 538 (1872); *Railroad v. Jones,* 95 U.S. 439 (1877). We propose the gross negligence test to accommodate the concern that some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional. *City of Oklahoma City v. Tuttle, supra,* at 823 (plurality opinion).

The standard of deliberate indifference or reckless disregard adopted by the dissenting opinion in *Kibbe* – though met in this case – will unnecessarily immunize from liability training policies and practices that are clearly improper, and which inevitably cause constitutional violations. As a matter of logic, lack of training resulting from gross negligence can cause the same types of constitutional violations that are caused by policies that are reckless or deliberately indifferent. Some heightened measure of fault will help to ensure that liability is not imposed for remotely foreseeable effects, but gross negligence – a highly unreasonable risk of unconstitutional conduct – has sufficient bite to limit liability to situations where the violation is fairly attributable to the City. Cf. *Smith v. Wade*, 461 U.S. 30 (1983). Where a city unreasonably fails to train its police and that failure is substantially certain to result in a constitutional violation, it is fair to infer that its "actual policies are different from the ones that had been announced." *Praprotnick, supra*, at 928.[21]

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[21] Petitioner suggests that the lower courts have carelessly invoked the failure to train theory to impose liability. To the contrary, where the evidence is lacking, the lower courts have rejected this claim. See, e.g., *Vippolis v. Village of Haverstraw*, 768 F.2d 40 (2d Cir. 1985); *Tompkins v. Frost*, 655 F.Supp. 468 (E.D. Mich. 1987); *Bingham v. City of Pittsburgh*, 658 F.Supp. 655 (W.D. Pa. 1987); *Thompson v. Spikes*, 663 F.Supp. 627, 650 (S.D. Ga. 1987). Cases in which liability has been imposed have generally involved egregious violations of rights caused by a municipality's inexcusable failure to train or supervise. See, e.g., *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985) (shooting of innocent third party); *Spell v. McDaniel, supra*.

C. Custom and Practice As Predicates of Municipal Liability.

As petitioner acknowledges, *Monell* made clear that municipal liability could be established whether or not a formal city policy exists, where a custom or practice of the City causes the unconstitutional conduct. Congress included "customs" and "usages" in § 1983 because of the persistent and widespread discriminatory practices of state officials . . . . [that] could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Monell, supra* at 691. See also *Praprotnick, supra* at 925-26; 928; *Adickes v. S.H. Kress & Co., supra,* at 167-68. It is with the establishment of such rules of conduct, not with the writing of words in a ledger destined to gather dust on some obscure shelf, that *Monell* is concerned. As Justice Frankfurter stated in *Nashville, C. & St. L. R. Co. v. Browning,* 310 U.S. 362, 369 (1940):

> It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text.

Petitioner seeks to limit the custom or usage prong of *Monell* to cases where there have been repeated instances of actual deprivations of constitutional rights. Thus, the City argues that the trial court's instruction on "custom" was improper 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." Brief for Petitioner, 31.

We acknowledge that a "single incident cannot establish a municipal custom," Brief for Petitioner, 32, but we strongly disagree with petitioner's further submission that custom or practice can never be established, no matter how likely that custom is to cause a constitutional violation, until a series of deprivations have actually occurred. Petitioner disavows entitlement to "one free bite," Brief for Petitioner, 32, but that rule is exactly what petitioner urges upon this Court. Quite simply, there are numerous cases (including the instant one) where a practice or custom exists before an actual constitutional violation results. For example, if a City follows a custom of refusing to discipline or train its police officers with respect to their power to use deadly force and police thereby fire at non-dangerous fleeing felons, the city surely cannot defend the lawsuit of the first victim simply because of poor marksmanship in earlier incidents. Repeated violations may be compelling evidence of custom or practice, but such evidence is not a necessary or sole method of proof.[22]

This is not to suggest that where a plaintiff claims practice, custom or usage there is not a significant burden

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[22] Petitioner criticizes the trial court's jury instructions as authorizing a verdict based on a single incident. This is a plainly erroneous view of the instructions, see Tr. 388-89; moreover, given the fact that a new trial was granted by the Court of Appeals, the jury instructions are rendered moot.

of proof in the absence of repeated violations. The proper question is whether the evidence presented gives rise to a reasonable inference that the practice is widespread and well-settled. *Adickes, supra.* Depending upon the alleged practice or custom at issue, this proof may focus on repeated violations, the identity of the persons who have initiated or approved of a practice, or the scope and duration of the custom.

It is conceded that a "repeated course of conduct or practice" can give rise to municipal liability. Brief for Petitioner, 32. If this is so, it is because a jury can reasonably infer that the city has acted (by tolerating or failing to correct the practice), that the city is at fault (by disregarding acts and conduct that cause unconstitutional violations), and that the incident at issue was caused by this practice. Custom and practice as defined by a particular course of conduct, can exist regardless of the conduct's actual consequences. Proof that such a custom exists could be established by direct testimony of city officials, examples of its application and execution, or proof of consistent disregard of actual written policy.

D. The Evidence Is Sufficient to Support The Jury Verdict

The Seventh Amendment severely restricts the extent to which the verdict of a properly instructed jury may be reviewed by a federal court. In assessing the sufficiency of the evidence on which a jury based its verdict, neither a trial judge nor the appellate courts are free "to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other conclusions

are more reasonable." *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944). A case must be submitted to the jury "[i]f evidence might justify a finding either way . . . " *Wilkerson v. McCarthy*, 336 U.S. 53, 55 (1949), and "fair-minded men might reach different conclusions," *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 353 (1943). In assessing a request for a directed verdict or judgment notwithstanding the verdict, the courts are required "to view the evidence in the light most favorable to [the opposing party] and to give it the benefit of all inferences which the evidence supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide, Co.*, 370 U.S. 690, 696 (1962). Further, as this Court recently ruled in *Bourjaily v. United States*, 483 U.S. ___, ___, 107 S.Ct. 2775, 2781 (1987), "individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its consistent parts." See also, *Huddleston v. United States*, 56 U.S.L.W. 4363, 4366 (May 2, 1988).

The application of *Monell* frequently requires, as it did here, that the finder of fact resolve conflicting evidence and draw inferences regarding policies, customs and causation. But nothing in *Monell* suggests that the factual issues made critical by that decision are to be resolved by judges rather than juries. There is "no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as all others." *Jones v. East Tennessee V. & G.R.Co.*, 128 U.S. 443, 446 (1888). See also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting).

We have previously set forth the related doctrines that authorize a finding of municipal liability in this case: the lack of training and the custom and practice of denying medical treatment to persons in police custody who are suffering from emotional ailments. The evidence was more than sufficient to prove both theories and therefore dismissal of the case is unwarranted.

First, with regard to the lack of training, the jury was entitled to find that police of the City of Canton received no training with regard to the appropriate medical care for persons suffering from emotional disturbances and, indeed some, physical ailments. The police chief, Thomas W. Wyatt, testified that the jailer and his superiors received *no* training with respect to symptoms of mental instability or disturbance, heart attacks or respiratory problems. Tr. 2-164-65.[23] According to Chief Wyatt, medical treatment – and the denial of such treatment – was left to the "good judgment of the officers." Tr. 2-207. Thus, it was clearly the policy of the City, as implemented by a city policymaker (the chief of police, Tr. 3-135), to leave the provision of necessary medical services to the unguided, untrained, and necessarily uninformed discretion of police officers. The jury properly found this policy to be deliberately indifferent to the constitutional rights of those persons needing medical treatment.

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[23] Clearly, this evidence is sufficient to support a jury verdict that no training occurred. Petitioner's argument (Brief, at 22, n.11), that the trial court placed the burden of proving the adequacy of training is neither accurate, Tr. 4-388-89, nor relevant, since a new trial has already been granted.

The fact that the City had a regulation which purportedly required medical care in this case is just the beginning of the appropriate inquiry. By failing to train its jailer and supervisors with regard to the necessary steps that should be taken under the regulation, the city has undermined the very policy it has adopted. A precatory policy, whether it be to provide medical care in appropriate circumstances, not to arrest or search without probable cause, not to infringe one's right to free speech or assembly, or to refrain from excessive force, which is ignored in the training and supervision that is provided to those persons who must implement the policy is no real policy at all. The total failure to train speaks far louder and has far greater impact than a written rule. As Justice O'Connor noted in *Praprotnick, supra,* at 928, "[r]efusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced." See also, *Haynesworth v. Miller,* 820 F.2d 1245, 1274, n.239 (D.C. Cir. 1987).

No one suggests that a doctor, nurse or paramedic be assigned to the police station. What is required is a modicum of training, the materials for which are available from a number of correctional, police and medical associations,[24] to provide officers with the rudimentary information necessary not to treat, but to recognize ailments and to refer for appropriate medical treatment.

The consequences for respondent were serious enough, but they could have been far more grave if her

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[24] See, pp. 25-26, *supra.*

underlying condition was that of a stroke victim, or if the hyperventilation was more acute. What caused the jailer and his supervisors to deny medical treatment for Mrs. Harris was not the actions of "one bad apple," *Tuttle, supra,* at 821, whose behavior could not be foreseen or controlled by the City, but rather was a lack of training that precluded the exercise of "good judgment" and made it both foreseeable and highly likely that medical care would be denied to respondent.

Second, the evidence also established that the City of Canton's custom and usage of providing medical care to persons in police custody differed markedly from the "policy" articulated in Police Regulation 334.7. While the regulation purports to require referral to a hospital in several specific circumstances, the actual practice of the police and the jailer is not to provide medical care to persons suffering from emotional disturbances or disorders unless the person is clearly dangerous to herself.

There is a significant range of disorders – including that suffered by respondent – that would require treatment under the regulation, which by custom are not referred for medical evaluation or treatment. Officer Norcia testified that different standards were applicable in determining whether medical care was necessary, depending on whether the person was physically injured or emotionally disturbed. For physical injuries, police followed the regulation: "if the person was observed to be physically injured, we would take them to the hospital . . . " Tr. 3-236. By contrast, where a person was emotionally disturbed he or she would not be taken to the hospital except in extremely serious situations. Thus, where a person is in an hysterical condition, the police

first "try to calm them" and "try to prevent them from hurting themselves." Tr. 3-236. If that is not successful they would be put "in a position where they wouldn't hurt themselves or wouldn't hurt anybody else." Tr. 3-237. Only if it "got to the point . . . where we felt they were a danger to themselves" would the police seek medical attention. *Id.*

Moreover, it was the consistent theme of the police witnesses that respondent was not provided medical care because she appeared to be suffering only from stress related to the arrest and that many arrestees present the same condition. Tr. 3-237-38; 4-318-20. Thus, it is apparent that as a matter of custom and practice, emotional disorders are routinely ignored. A double standard is operative. Physical injuries are treated under the regulation. Tr. 3-337-38; 4-318-20; 2-82. Emotional disorders are not given medical treatment except in extreme (and undefined) circumstances, and the procedures provided by the regulation are not followed for this latter class of cases.

It does not take much imagination to see that this custom can cause extremely serious injury. Rather than allowing trained medical personnel the opportunity to evaluate and treat emotional disorders, the police, pursuant to a well established custom, have carved out a substantial exception to the written regulation. It is inevitable that the practice of denying medical attention in all cases until the person exhibits conduct that is truly dangerous to himself will in some situations cause a denial of necessary medical treatment. This will be true in either of two contexts. First, without any training, the police are likely to make an erroneous evaluation of the medical condition. Symptoms of physical ailments requiring

immediate treatment will be misunderstood as emotional reactions. Second, even if the evaluation that an emotional condition is present is correct, because the police do not seek medical attention for these conditions except in the case where they determine that the individual is clearly dangerous, certain individuals will be denied necessary medical care.

This case proves that point. Respondent could have been suffering from a variety of serious physical and/or emotional disorders, but the police were determined to fit her case into a non-treatment mode. How else can one explain the refusal to seek treatment for an hysterical woman who has fainted on the floor of the police station, who does not have the strength to sit in a chair, and who cannot even reply to a question as to whether she wants medical treatment? And even though her condition turned out to be primarily emotional, the general risk of harm engendered by the custom remains. Further, the custom and practice of not referring such cases unless the person was a danger to herself caused the police not to provide medical care where such care was plainly required. The unrebutted testimony at trial established that the serious emotional injuries were suffered by reason of respondent "being in jail" without medical treatment. Tr. 2-38 (testimony of Dr. Caruso).

Petitioner claims that a custom of denial of medical treatment cannot be established without proof of a course of unconstitutional conduct. But the custom of denying medical care is established by the kind of settled practice proven here regardless of the consequences in individual

cases. A city cannot blithely engage in a course of impermissible conduct awaiting the inevitable the first violation, and claim that it was not engaged in a custom or usage.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed and the case remanded to the district court for a new trial.

Respectfully submitted

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