9th dissent in this case

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER v. CITY OF CINCINNATI ET AL.

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

[January —, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

Monell v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), held that municipal liability under 42 U. S. C. § 1983 is limited to deprivations of federally protected rights caused by action taken "pursuant to official municipal policy of some nature . . . ." *Id.*, at 691. The question presented is whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement.

I

Bertold Pembaur is a licensed Ohio physician and the sole proprietor of the Rockdale Medical Center, located in the city of Cincinnati in Hamilton County. Most of Pembaur's patients are welfare recipients who rely on government assistance to pay for medical care. During the spring of 1977, Simon Leis, the Hamilton County Prosecutor, began investigating charges that Pembaur fraudulently had accepted payments from state welfare agencies for services not actually provided to patients. A grand jury was convened, and the case was assigned to Assistant Prosecutor William Whalen. In April, the grand jury charged Pembaur in a six-count indictment.

During the investigation, the grand jury issued subpoenas for the appearance of two of Pembaur's employees. When

these employees failed to appear as directed, the prosecutor obtained capiases for their arrest and detention from the Court of Common Pleas of Hamilton County.[1]

On May 19, 1977, two Hamilton County Deputy Sheriffs attempted to serve the capiases at Pembaur's clinic. Although the reception area is open to the public, the rest of the clinic may be entered only through a door next to the receptionist's window. Upon arriving, the Deputy Sheriffs identified themselves to the receptionist and sought to pass through this door, which was apparently open. The receptionist blocked their way and asked them to wait for the doctor. When Pembaur appeared a moment later, he and the receptionist closed the door, which automatically locked from the inside, and wedged a piece of wood between it and the wall. Returning to the receptionist's window, the Deputy Sheriffs identified themselves to Pembaur, showed him the capiases and explained why they were there. Pembaur refused to let them enter, claiming that the police had no legal authority to be there and requesting that they leave. He told them that he had called the Cincinnati police, the local media, and his lawyer. The Deputy Sheriffs decided not to take further action until the Cincinnati police arrived.

Shortly thereafter, several Cincinnati police officers appeared. The Deputy Sheriffs explained the situation to them and asked that they to speak to Pembaur. The Cincinnati police told Pembaur that the papers were lawful and that he should allow the Deputy Sheriffs to enter. When Pembaur refused, the Cincinnati police called for a superior officer. When he too failed to persuade Pembaur to open the door, the Deputy Sheriffs decided to call their supervisor for further instructions. Their supervisor told them to call Assistant Prosecutor Whalen and to follow his instructions. The Deputy Sheriffs then telephoned Whalen and informed

[1] A capias is a writ of attachment commanding a county official to bring a subpoenaed witness who has failed to appear before the court to testify and to answer for civil contempt. See Ohio Rev. Code Ann. § 2317.21 (1981).

him of the situation. Whalen conferred with County Prosecutor Leis, who told Whalen to instruct the Deputy Sheriffs to "go in and get [the witnesses]." Whalen in turn passed these instructions along to the Deputy Sheriffs.

After a final attempt to persuade Pembaur voluntarily to allow them to enter, the Deputy Sheriffs tried unsuccessfully to force the door. City police officers, who had been advised of the County Prosecutor's instructions to "go in and get" the witnesses, obtained an axe and chopped down the door. The Deputy Sheriffs then entered and searched the clinic. Two individuals who fit descriptions of the witnesses sought were detained, but turned out not to be the right persons.

After this incident, the prosecutor obtained an additional indictment against Pembaur for obstructing police in the performance of an authorized act. Although acquitted of all other charges, Pembaur was convicted for this offense. The Ohio Court of Appeals reversed, reasoning that Pembaur was privileged under state law to exclude the deputies because the search of his office violated the Fourth Amendment. *State* v. *Pembaur*, No. C–790380 (Hamilton County Court of Appeals Nov. 3, 1982). The Ohio Supreme Court reversed and reinstated the conviction. *State* v. *Pembaur*, 9 Ohio St.3d 136, 459 N. E. 2d 217 (1984), cert. denied, 467 U. S. 1219 (1984). The supreme court held that the state law privilege applied only to bad-faith conduct by law enforcement officials, and that, under the circumstances of this case, Pembaur was obliged to acquiesce to the search and seek redress later, in a civil action for damages. 9 Ohio St. 3d, at 138, 459 N. E. 2d, at 219.

On April 20, 1981, Pembaur filed the present action in the United States District Court for the Southern District of Ohio against the city of Cincinnati, the county of Hamilton, the Cincinnati Police Chief, the Hamilton County Sheriff, the members of the Hamilton Board of County Commissioners (in their official capacities only), Assistant Prosecutor Whalen,

and nine city and county police officers.[2] Pembaur sought damages under 42 U. S. C. § 1983, alleging that the county and city police had violated his rights under the Fourth and Fourteenth Amendments. His theory was that, absent exigent circumstances, the Fourth Amendment prohibits police from searching an individual's home or business without a search warrant even to execute an arrest warrant for a third person. We agreed with that proposition in *Steagald* v. *United States*, 451 U. S. 204 (1981), decided the day after Pembaur filed this lawsuit. Pembaur sought $10 million in actual and $10 million in punitive damages, plus costs and attorney's fees.

Much of the testimony at the 4-day trial concerned the practices of the Hamilton County police in serving capiases. Frank Webb, one of the Deputy Sheriffs present at the clinic on May 19, testified that he had previously served capiases on the property of third persons without a search warrant, but had never been required to use force to gain access. Assistant Prosecutor Whalen was also unaware of a prior instance in which police had been denied access to a third person's property in serving a capias and had used force to gain entry. Lincoln Stokes, the County Sheriff, testified that the Department had no written policy respecting the serving of capiases on the property of third persons and that the proper response in any given situation would depend upon the circumstances. He too could not recall a specific instance in which entrance had been denied and forcibly gained. Sheriff Stokes did testify, however, that it was the practice in his Department to refer questions to the County Prosecutor for

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[2] Hamilton County Prosecutor Leis was not made a defendant because counsel for petitioner believed that Leis was absolutely immune. Tr. Mar. 14–Mar. 17., p. 267. We express no view as to the correctness of this evaluation. *Cf. Imbler* v. *Pachtman*, 424 U. S. 409, 430–31 (1976) (leaving open the question of a prosecutor's immunity when he acts "in the role of an administrator or investigative officer rather than that of an advocate").

instructions under appropriate circumstances and that "it was the proper thing to do" in this case.

The District Court awarded judgment to the defendants and dismissed the complaint in its entirety. The court agreed that the entry and search of Pembaur's clinic violated the Fourth Amendment under *Steagald*, *supra*, but held *Steagald* inapplicable since it was decided nearly four years after the incident occurred. Because the law in the Sixth Circuit in 1977 permitted law enforcement officials to enter the premises of a third person to serve a capias, the District Court held that the individual municipal officials were all immune under *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982).

The claims against the county and the city were dismissed on the ground that the individual officers were not acting pursuant to the kind of "official policy" that is the predicate for municipal liability under *Monell*. With respect to Hamilton County, the court explained that, even assuming that the entry and search were pursuant to a governmental policy, "it was not a policy of Hamilton County *per se*" because "[t]he Hamilton County Board of County Commissioners, acting on behalf of the county, simply does not establish or control the policies of the Hamilton County Sheriff." With respect to the city of Cincinnati, the court found that "the only policy or custom followed . . . was that of aiding County Sheriff's Deputies in the performance of their duties." The court found that any participation by city police in the entry and search of the clinic resulted from decisions by individual officers as to the permissible scope of assistance they could provide, and not from a city policy to provide this particular kind of assistance.

On appeal, Pembaur challenged only the dismissal of his claims against Whalen, Hamilton County, and the city of Cincinnati. The Court of Appeals for the Sixth Circuit upheld the dismissal of Pembaur's claims against Whalen and Hamilton County, but reversed the dismissal of his claim against the city of Cincinnati on the ground that the District Court's

findings concerning the policies followed by the Cincinnati police were clearly erroneous. 746 F. 2d 337 (1984).[5]

The Court of Appeals affirmed the District Court's dismissal of Pembaur's claim against Hamilton County, but on different grounds. The court held that the County Board's lack of control over the Sheriff would not preclude county liability if "the nature and duties of the Sheriff are such that his acts may fairly be said to represent the county's official policy with respect to the specific subject matter." *Id.*, at 340–341. Based upon its examination of Ohio law, the Court of Appeals found it "clea[r]" that the Sheriff and the Prosecutor were both county officials authorized to establish "the official policy of Hamilton County" with respect to matters of law enforcement. *Id.*, at 341. Notwithstanding these conclusions, however, the court found that Pembaur's claim against the county had been properly dismissed:

> "We believe that Pembaur failed to prove the existence of a county policy in this case. Pembaur claims that the deputy sheriffs acted pursuant to the policies of the Sheriff and Prosecutor by forcing entry into the medical center. Pembaur has failed to establish, however, anything more than that, on this *one occasion*, the Prosecutor and the Sheriff decided to force entry into his office. . . . That single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy." *Ibid.* (footnote omitted) (emphasis in original).

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[5] The court found that there was a city policy respecting the use of force in serving capiases as well as a policy of aiding county police. It based this conclusion on the testimony of Cincinnati Chief of Police Myron Leistler, who stated that it was the policy of his Department to take whatever steps were necessary, including the forcing of doors, to serve an arrest document. 746 F. 2d, at 341–342; see also, Tr. Mar. 14–Mar. 17, pp. 43–45, 46–47. The court remanded the case for a determination whether Pembaur's injury was incurred as a result of the execution of this policy. 746 F. 2d, at 342.

Pembaur petitioned for certiorari to review only the dismissal of his claim against Hamilton County. The decision of the Court of Appeals conflicts with holdings in several other Courts of Appeals,[4] and we granted the petition to resolve the conflict. 472 U. S. —— (1985). We reverse.

II

A

Our analysis must begin with the holding in *Monell* v. *New York City Dept. of Social Services* that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." 436 U. S., at 691.[5] As we read its opinion, the Court of Appeals held that a single decision to take particular action, although made by municipal policymakers, cannot establish the kind of "official policy" required by *Monell* as a

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[4] See, *e. g.*, *McKinley* v. *City of Eloy*, 705 F. 2d 1110, 1116–1117 (CA9 1983); *Berdin* v. *Duggan*, 701 F. 2d 909, 913–914 (CA11), cert. denied, 464 U. S. 893 (1983); *Van Ooteghem* v. *Gray*, 628 F. 2d 488, 494–496 (CA5 1980), cert. denied, 455 U. S. 909 (1982); *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F. 2d 438, 448 (CA2 1980). See also, *Sanders* v. *St. Louis County*, 724 F. 2d 665, 668 (CA8 1983) (*per curiam*) ("It may be that one act of a senior county official is enough to establish the liability of the county, if that official was in a position to establish policy and if that official himself directly violated another's constitutional rights"). But see *Losch* v. *Borough of Parkesburg, Pa.*, 736 F. 2d 903, 910–911 (CA3 1984) ("even if [the police chief] were the final authority with regard to police activities, . . . there is no regulation or evidence of any repeated action by [the chief] . . . that can transmute his actions in the Losch incident into a general Borough policy").

[5] There is no question in this case that petitioner suffered a constitutional deprivation. The Court of Appeals found, and respondent concedes, that the entry and search of petitioner's clinic violated the Fourth Amendment under *Steagald*, *supra*. See 746 F. 2d, at 340 n. 1; Brief for Respondent 11. Respondent never challenged and has in fact also conceded that *Steagald* applies retroactively to this case. See Tr. of Oral Arg. 26–27. We decide this case in light of respondent's concessions.

predicate to municipal liability under § 1983.[4] The Court of Appeals reached this conclusion without referring to *Monell*—indeed, without any explanation at all. However, examination of the opinion in *Monell* clearly demonstrates that the Court of Appeals misinterpreted its holding.

Monell is a case about responsibility. In the first part of the opinion, we overruled a contrary holding in *Monroe* v. *Pape*, 365 U. S. 167 (1961), and held that local government units could be made liable under § 1983 for deprivations of federal rights. In the second part of the opinion, we recognized a limitation on this liability and held that a municipality cannot be made liable by application of the doctrine of *respondeat superior*. See *Monell*, *supra*, at 691. In part, this conclusion rested upon the language of § 1983, which imposes liability only on a person who "subjects, or causes to be subjected" any individual to a deprivation of federal rights; we noted that this language "cannot easily be read to impose liability vicariously on government bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.*, at 692. Primarily, however, our holding rested upon the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in

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[4]The opinion below also can be read as holding that municipal liability cannot be imposed for a single incident of unconstitutional *conduct* by municipal employees whether or not that conduct is pursuant to municipal *policy*. Such a conclusion is unsupported by either the language or reasoning of *Monell*, or by any of our subsequent decisions. As we explained last Term in *Oklahoma City* v. *Tuttle*, 471 U. S. —— (1985), once a municipal policy is established, "it requires only one application . . . to satisfy fully *Monell*'s requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy." *Id.*, at —— (plurality opinion); see also, *id.*, at —— (BRENNAN, J., concurring). The only issue before us, then, is whether petitioner satisfied *Monell*'s requirement that the tortious conduct be pursuant to "official municipal policy."

order to oblige municipalities to control the conduct of *others*. *Id.*, at 665–683.[1] We found that, because of these doubts, Congress chose not to create such obligations in § 1983. Recognizing that this would be the effect of a federal law of *respondeat superior*, we concluded that § 1983 could not be interpreted to incorporate doctrines of vicarious liability. *Id.*, at 692–694, and n. 57.

The holding that tortious conduct, to be the basis for municipal liability under § 1983, must be pursuant to a municipality's "official policy" is contained in this discussion. The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.[2] *Monell* held that recovery from a municipality is

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[1]This legislative history is discussed at length in *Monell* and need only be summarized here. The distinction between imposing liability on municipalities for their own violations and imposing liability to force municipalities to prevent violations by others was made by members of the House of Representatives who successfully opposed the "Sherman amendment" to the Civil Rights Act of 1871, 17 Stat. 13, the precursor of § 1983. The Sherman amendment sought to impose civil liability on municipalities for damage done to the person or property of its inhabitants by private persons "riotously and tumultuously assembled." Cong. Globe 42d Cong., 1st Sess., 749 (1871) (quoted in *Monell*, 436 U. S., at 664). Opponents of the amendment argued that, in effect, it imposed an obligation on local governments to keep the peace, and that the Federal Government could not constitutionally require local governments to keep the peace if state law did not. This argument succeeded in blocking passage of the amendment. However, even the opponents of the Sherman amendment recognized Congress' power to impose civil liability on a local government already obligated to keep the peace by state law if that government failed to do so and thereby violated the Fourteenth Amendment. See 436 U. S., at 665–683.

[2]Thus, our statement of the holding juxtaposes the policy requirement with imposing liability on the basis of *respondeat superior*:

"We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy . . . whether made by its lawmakers or by those whose acts or edicts may fairly be said to represent

limited to acts that are, properly speaking, acts "of the municipality"—that is, acts which the municipality has officially sanctioned or ordered.

With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy. See, *e. g.*, *Owen* v. *City of Independence*, 445 U. S. 622 (1980) (city council passed resolution firing plaintiff without a pretermination hearing); *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981) (city council cancelled license permitting concert because of dispute over content of performance). But the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Monell*'s language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," *Monell*, *supra*, at 694, and whose decisions therefore may give rise to municipal liability under § 1983.

Indeed, any other conclusion would be inconsistent with the principles underlying § 1983. To be sure, "official policy" often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. That was the case in *Monell* itself, which involved a written rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary. However, as in *Owen* and *Newport*, a government frequently chooses a course of action tailored to a particular situation and not intended to control

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official policy, inflicts the injury that the government as an entity is responsible under § 1983." 436 U. S., at 694.

decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood.[9] More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

Having said this much, we hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Discretionary acts by nonpolicymaking officials do not establish or constitute "official policy," and therefore such acts provide no basis for a finding of municipal liability without evidence of a conscious decision by policymakers that such action shall be taken.[10]

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[9] While the dictionary is not the source definitively to resolve legal questions, we note that this description of "policy" is consistent with the word's ordinary definition. For example, Webster's defines the word as "a specific decision or set of decisions designed to carry out such a chosen course of action." Webster's Third New International Dictionary 1754 (1981). Similarly, the Oxford English Dictionary defines "policy" as "[a] course of action adopted and pursued by a government, party, ruler, statesman, etc.; any course of action adopted as advantageous or expedient." VII Oxford English Dictionary 1071 (1933). See also, Webster's New Twentieth Century Dictionary 1392 (2d ed. 1979) ("any governing principle, plan, or course of action"); Random House Dictionary 1113 (1966) ("a course of action adopted and pursued by a government, ruler, political party, etc.").

[10] Section 1983 also refers to deprivations under color of a state "custom or usage," and the Court in *Monell* noted accordingly that "local governments, like every other § 1983 'person,' . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." 436 U. S., at 690–691. A § 1983 plaintiff thus may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers if able to prove that the challenged action was pursuant to a state "custom or usage." Because there is no alle-

See, *e. g.*, *Oklahoma City* v. *Tuttle*, 471 U. S., at ——.[11] Similarly, if challenged action was ordered or authorized by a municipal official who lacked actual authority to establish municipal policy with respect to such action, there can be no recovery from the municipality. Municipal liability under § 1983 attaches only where a deliberate choice to follow a course of action is made from among available alternatives by the official or officials responsible for making decisions with respect to the subject matter in question. See *Tuttle*, *supra*, at —— ("'policy' generally implies a course of action consciously chosen from among various alternatives"). Au-

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gation that the action challenged here was pursuant to a local "custom," this aspect of *Monell* is not at issue in this case.

[11] Respondent argues that the holding in *Tuttle* is far broader than this. It relies on the statement near the end of JUSTICE REHNQUIST's plurality opinion that "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell* unless proof of the incident includes proof that it was caused by an *existing*, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Id.*, at —— (emphasis added). Respondent contends that a policy cannot be said to be "existing" unless similar action has been taken in the past.

This reading of the *Tuttle* plurality is strained, and places far too much weight on a single word. The plaintiff in *Tuttle* alleged that a police officer's use of excessive force deprived her decedent of life without due process of law. The plaintiff proved only a single instance of unconstitutional action by a nonpolicymaking employee of the city. She argued that the city had "caused" the constitutional deprivation by adopting a "policy" of inadequate training. The trial judge instructed the jury that a single, unusually excessive use of force may warrant an inference that it was attributable to grossly inadequate training, and that the municipality could be held liable on this basis. We reversed the judgment against the city. Although there was no opinion for the Court on this question, both the plurality and concurring opinions found plaintiff's submission inadequate because she failed to 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. 471 U. S., at —— (plurality opinion), —— (BRENNAN, J., concurring in the judgment). That conclusion is entirely consistent with our holding today that the policy which ordered or authorized an unconstitutional act can be established by a single decision by proper municipal policymakers.

thority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and, of course, whether an official had policymaking authority is a question of state law. However, where a duly authorized municipal official chooses a course of action, and his decision is executed and results in the deprivation of a federal right, the municipality may be held liable under § 1983.

B

Applying this standard to the case before us, we have little difficulty concluding that the Court of Appeals erred in dismissing petitioner's claim against the county. The Deputy Sheriffs who attempted to serve the capiases at petitioner's clinic found themselves in a difficult situation. Unsure of the proper course of action to follow, they sought instructions from their supervisors. The instructions they received were to follow the orders of the County Prosecutor. The Prosecutor made a considered decision based on his understanding of the law and commanded the officers forcibly to enter petitioner's clinic. That decision directly caused the violation of petitioner's Fourth Amendment rights.

Respondent argues that the County Prosecutor lacked authority to establish municipal policy respecting law enforcement practices because only the County Sheriff may establish policy respecting such practices. Respondent suggests that the County Prosecutor was merely rendering "legal advice" when he ordered the Deputy Sheriffs to "go in and get" the witnesses. Consequently, the argument concludes, the action of the individual Deputy Sheriffs in following this advice and forcibly entering petitioner's clinic was not pursuant to a properly established municipal policy.

We might be inclined to agree with respondent if we thought that the Prosecutor had only rendered "legal advice." However, the Court of Appeals concluded, based upon its examination of Ohio law, that both the County Sheriff and the County Prosecutor could establish county policy

under appropriate circumstances, a conclusion that we do not question here.[9] Ohio Rev. Code Ann. § 309.09 (1979) provides that county officers may "require . . . instructions from [the County Prosecutor] in matters connected with their official duties." Pursuant to standard office procedure, the Sheriff's office referred this matter to the Prosecutor and then followed his instructions. The Sheriff testified that his Department followed this practice under appropriate circumstances and that it was "the proper thing to do" in this case. We decline to accept respondent's invitation to overlook this delegation of authority by disingenuously labeling the Prosecutor's clear command mere "legal advice." In ordering the Deputy Sheriffs to enter petitioner's clinic the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983.

The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[9] We generally accord great deference to the interpretation and application of state law by the courts of appeals. *United States* v. *S. A. Empresa de Viacao Aerea Rio Grandense*, 467 U. S. 797, 815, n. 12 (1984); *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. ——, —— (1985) (citing cases); see also, *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976).