No. 86-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF ST. LOUIS,
Petitioner,

vs.

JAMES H. PRAPROTNIK
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

BRIEF FOR THE PETITIONER

JAMES J. WILSON
City Counselor
*JULIAN L. BUSH
Assistant City Counselor
Room 314 City Hall
St. Louis, Missouri 63103
(314) 622-3361
Attorneys for Petitioner

*Counsel of Record

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Whether the failure of a local government to establish an appellate procedure for the review of officials' decisions which does not defer in substantial part to the original decisionmaker's decision constitutes a delegation of authority to establish final government policy such that liability may be imposed on the local government on the basis of the decisionmaker's act alone, when the act is neither taken pursuant to a rule of general applicability nor is a decision of specific application adopted as the result of a formal process?

2. Whether principles of causation applicable to actions brought against officials and local governments pursuant to 42 U.S.C. §1983 differ such that a judgment may be rendered against a local government despite the return of a verdict exonerating the local official who was alleged to have promulgated the unconstitutional policy and to have acted pursuant to that policy?

PARTIES BELOW

The parties in the Court of Appeals were the City of St. Louis, defendant and appellant, and James H. Praprotnik, plaintiff and appellee.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was filed August 19, 1986 and is reported as *Praprotnik v. City of St. Louis,* 798 F.2d 1168 (8th Cir. 1986).

JURISDICTION

The judgment of the Court of Appeals was filed August 19, 1986. The petition for rehearing was denied September 19, 1986. Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amend. I provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Civil Rights Act of 1871 (the "Ku Klux Klan Act"), 17 Stat 13, 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF CASE

As defendants' counsel admitted at the outset of the trial (R. 1-15), there is little dispute about the evidentiary facts of this case. Plaintiff James Praprotnik is an architect who was employed by the City of St. Louis beginning in 1968. Since 1980 he served as a "city planner IV" with the City's Community Development Agency (CDA), a department of City government primarily occupied with disbursing federal funds for urban redevelopment projects (R. 1-25, 30). Plaintiff enjoyed good to excellent job evaluations through 1980 when he became embroiled in a controversy that was the seed from which this lawsuit blossomed.

Donald Spaid, the director of CDA, promulgated a "secondary employment" policy that sought to control outside

employment by CDA architects out of his concern that real or apparent conflicts of interest might arise from such relationships (R. 3-216-218). Plaintiff resented the policy, believing that the requirement that he identify his private clients constituted ". . . an invasion of my personal and family privacy and carry overtones of discrimination and personal vendettas" (R. 2-34). The controversy culminated on April 29, 1980 when Kindleberger suspended plaintiff for fifteen days (R. 1-46) (R. 3-16, 219) (Def. Ex. I-4; R. 2-20)[1].

Plaintiff appealed his suspension to the City's Civil Service Commission, a body which was required to consider employee appeals of employment decisions, which decisions were required by the City Charter to be made on the sole basis of "merit and fitness" (J.A. 49, 63). Plaintiff had mixed success with his appeal: the Commission found that his conduct regarding outside employment was such that he might be properly subject to sanctions, but that the discipline imposed was excessively harsh under the circumstances (R. 1-47) (R. 3-221). The Commission reversed plaintiff's suspension, awarded him backpay, and directed his supervisors to give him a letter of reprimand (R. 1-47) (R. 3-221) (Def. Ex. I-8; R. 2-20).

The Civil Service Commission's decision rendered October 31, 1980 (R. 1-47) (Def. Ex. I-8; R. 2-20) was to be, in plaintiff's view, a turning point in his City career. On October 30, he received his annual evaluation from Kindleberger (R. 1-54) (R. 3-226). Plaintiff's evaluation was made in the midst of a major re-evaluation of the City salary structure, which had been occasioned by an amendment to the City Charter removing the anachronistic $25,000 limit on salaries for all employees (R. 3-98-100). Mayor James Conway had ordered the evaluation to prevent windfalls for employees who had progressed up the

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[1] Almost all of the exhibits were admitted on the same page of the transcript where they were offered.

steps of their pay grades over the years without displaying any special merit (R. 3-102-103). Many employees, whose performances were deemed satisfactory, were reduced to a lower step within their grade (without a pay decrease) because the higher step upon which they had been placed required exceptional, not merely good, performance (R. 3-34-38).[2] Kindleberger gave plaintiff a rating of "good", but recommended that plaintiff's place on the salary schedule be reduced by two grades (R. 3-226, 228). This apparently contradictory recommendation is explained as a result of the reevaluation process (R. 1-54). Plaintiff viewed the action as a reprisal for his success before the Civil Service Commission, and sought review before the service ratings appeal board (Pl. Ex. 24, R. 1-54) (Def. Ex. J-3, R. 2-20). That board, with the approval of the Director of Personnel, upgraded some of plaintiff's ratings and ordered that plaintiff be reduced in grade only one pay step (Def. Ex. J-8, R. 2-20).

In April, 1981 the City faced a shortfall of $54 million in revenues (R. 3-140). Mayor Schoemehl, who had succeeded Mayor Conway that April, joined with other officials in slashing the City's budget, resulting in some 5,000 city employee layoffs (R. 3-248). Frank Hamsher, an appointee of the new mayor, succeeded Spaid at CDA, that April (R. 1-59). Hamsher's first few weeks in office were occupied almost entirely with deciding how to eliminate employees and reduce costs (R. 1-58-59) (R. 3-141). Eventually, CDA was halved in size, and some eighty people were laid off or transferred to other positions in the City (R. 3-105-106). Plaintiff's planning section was reduced from nine to three persons (R. 1-58-59) (R. 3-141).

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[2] The reevaluation that lead to the reduction in grade of many competent city management employees who had not displayed a job performance "clearly commendable and distinguished " is described in *Bosse v. Civil Service Commission of City of St. Louis*, 658 S.W.2d 66 (Mo.App. 1983).

Plaintiff took the reduction in staff, the reassignments of work, and the alteration in budgets personally, seeing them as additional reprisals. He complained in a memorandum to Hamsher (Def. Ex. M-1; R. 2-20), who did not respond. In October, 1981, plaintiff was again rated by his superiors, one Karetski and Kindleberger (R. 2-58) (R. 3-227-228) (Pl. Ex. 56; R. 1-64). Once more, plaintiff felt he suffered a reprisal: he was rated "adequate" in some categories, but "inadequate" in his "relationships" (R. 2-58, 61) (R. 3-228). He appealed, again with some success (R. 2-60) (R. 3-103). The service rating appeals board, upheld by the Civil Service Commission, ruled that an inadequate rating be raised to adequate (R. 1-66) (R. 2-58-61) (Def. Ex. 0-3; R. 2-20) (Def. Ex. N-1, R. 2-20) (Def. Ex. 0-6, R. 2-20) (Def. Ex. AA-1; R. 2-20).

In April, 1982, coincident with preparations for the City's next fiscal year, CDA's budget was targeted for additional reductions (R. 3-166). Many of plaintiff's colleagues were transferred or laid off (R. 2-109) (R. 3-41). Indeed, 40% of the staff would ultimately be laid off in this second round (R. 3-173). At that time, plaintiff was the senior employee in his job classification ("city planning manager") at CDA (R. 1-61). Kindleberger considered a number of possible layoff and transfer combinations to achieve necessary staff cuts in his division, which included plaintiff's section (R. 3-242). In addition, the City's Heritage and Urban Design Division, which derived its operating funds from federal block grants administered by CDA, was seeking approval to hire someone with urban planning and architectural qualifications to perform design review work in connection with redevelopment in the City's historic districts (Pl. Ex. 53; R. 71-72) (Pl. Ex. 119, 121; R. 1-72-73) (Pl. Ex. 124, 125; R. 2-3).

In what plaintiff believed was yet another reprisal, Hamsher transferred additional design review functions to Heritage from CDA. The director of Heritage and Urban Design was then able to accept a transfer of a city planning manager from CDA,

in lieu of hiring a lower-level planner (R. 1-68-73) (R. 3-169-71) (R. 3-115). It is important to note that Donald Spaid, the supervisor who was "down on" plaintiff, was no longer with CDA at the time of the transfer. The director of Heritage, Henry Jackson, agreed to the transfer, but was unhappy that his division was getting more work but only one additional high-level employee (R. 3-171-76) (R. 3-203-204). Jackson's own superior, Thomas Nash, director of the City's Department of Public Safety, also approved.[3]

On March 23, 1982, Hamsher transferred plaintiff to Heritage, with no reduction in pay (R. 3-116), laid off one of the other city planning managers junior to plaintiff, and kept the third at CDA (R. 1-66-67). No one contemplated that plaintiff would be laid off by Heritage (R.3-202).

Predictably, plaintiff objected to his transfer. He retained counsel, and appealed to the civil service commission (R. 3-92, 117). The commission declined to hear the appeal, on the ground that plaintiff had lost nothing (R. 3-117-19). In response, plaintiff filed suit in United States District Court against the City, Kindleberger, Hamsher, Jackson and Deborah Patterson (Hamsher's successor at CDA), alleging that the transfer was unconstitutional.

Plaintiff's new assignment turned out badly. Many of the architectural duties were performed by Jackson and plaintiff was left with unchallenging clerical functions (R. 2-67). In addition, plaintiff, now embittered, engaged in a series of disputes with Jackson and with Robert-Killen, who replaced Jackson in the Fall of 1982 ((R. 2-165). Both Jackson and Killen made person-

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[3] Under the rules of the civil service commission, transfers could be accomplished with the consent of "appointing authorities." Consent of the employee was not required, but approval from the Department of Personnel was (R. 3-114). Several of plaintiff's witnesses were transferred in 1981 or 1982, even though they had seniority in their classifications at CDA (R. 2-109) (R. 2-146-147).

nel decisions adverse to plaintiff, and plaintiff was accorded some relief in this regard through successful appeals to the Civil Service Commission (R. 1-80-81) (Def. Ex. Ee-4; R. 2-19) (R. 2-72) (Pl. Ex. 141; R. 1-6) (Def. Ex. EE-15; R. 19) (Def. Ex. JJJ-1; R. 2-64) (R. 2-73).

In the Fall of 1983 Nash determined that two jobs could be created with the funds necessary to carry plaintiff's position (R. 2-188-89). Nash viewed the layoff as a "minor reorganization," necessitated by lack of funds, to provide sufficient personnel to handle the workload (R. 2-194-95) (R. 2-180-82).

Plaintiff's layoff complied with the procedures laid down by the Civil Service Commission, insofar as advanced notice of layoff was given, with a notation that the reason for the layoff was lack of funds, and that the layoff did not reflect discredit on plaintiff (Def. Ex. BBBB-6; R. 3-77). At the time of plaintiff's layoff, defendant Hamsher was a member of the Mayor's staff, with responsibilities unrelated to supervision of plaintiff or any other employee. He was not consulted regarding the layoff (R. 3-181).

Plaintiff amended the lawsuit to include a challenge to his layoff claiming that both the transfer and layoff violated his First Amendment and Due Process rights (J.A. 12-19). Plaintiff also appealed to the Civil Service Commission from the layoff (R. 2-73). Evidently the lawsuit pretermitted further proceedings on his civil service appeal, which is still pending. *Id.*

The case went to trial before a jury in November of 1984. Plaintiff's opening argument is particularly interesting, for the basis of the liability sought to be imposed upon the City was finally disclosed:[4] "If [the acts] were done by high-ranking City

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[4] Plaintiff's amended complaint did not allege that either plaintiff's transfer or his layoff was effectuated pursuant to a City policy, nor did it identify what that policy was, evidently contemplating that liability might be imposed upon the City on a respondeat superior theory (J.A. 12-19). Indeed, the trial court dismissed plaintiff's complaint against the City (J.A. 5), only to later reinstate it (J.A. 7).

officials, then the responsibility lies with the City because we contend that this then constituted a custom or practice on the part of the City over a period of years to eliminate people for the exercise of their rights of appeal and for whatever other reasons that existed" (R. 1-14).

Contrary to plaintiff's prediction, there was no evidence at all that any City employee, other than plaintiff, had suffered as a result of having filed appeals with the Civil Service Commission. The evidence at trial disclosed very little about defendants Kindleberger, Hamsher and Patterson. Kindleberger, of course, was one of plaintiff's superiors during his tenure at CDA. Hamsher was director of that agency, and later an advisor to the Mayor but without operational responsibilities. None of the named defendants was shown to have any particular responsibility to formulate City policy in the matter of personnel management, except to the extent that each of them played a role as "appointing authority" in the City's civil service structure, and as such had the duty to supervise employees under his direction. Hamsher and Patterson, as directors of CDA respectively, also had supervision of the agency's budget decisions and grant agreements (e.g., the grant agreement providing funds for Heritage). Except for the opinion evidence of plaintiff and several of his witnesses (R. 2-81), and except for routine approval of budgets by the City Board of Estimate and Apportionment (on which the Mayor sat), there was no evidence that the Mayor or his chief of staff instigated or was involved in any decision affecting plaintiff (see, e.g., R. 3-186). Plaintiff presented specific evidence of animosity only on the part of former director Spaid, whom plaintiff blamed for many of the evils befalling him (e.g., R. 2-75).

Counsel for the City made motions for directed verdict at the close of plaintiff's evidence and at the close of all the evidence arguing that there was no evidence of a city policy that directly caused plaintiff's injury (R. 3-15; R. 4-21-22). The City's motion were denied (*Id.*)

Perhaps realizing the paucity of evidence on city policy, plaintiff changed gears during closing argument. The city policy upon which liability was to be imposed was now identified thusly:

> Well, what they were doing, they were laying off people, that's the usage; that's the custom. They were laying them off for lack of funds. That's the usage and that's the custom (R. 4-62).

The jury returned verdicts exonerating all of the individual defendants, (Kindleberger, Hamsher and Patterson), but finding against the City of St. Louis on both the Due Process and First Amendment claims and awarding plaintiff $15,000 for each (J.A. 128-129). The City of St. Louis appealed, following the denial of its motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

A panel of the United States Court of Appeals for the Eighth Circuit affirmed the District Court in part, and reversed in part. *Praprotnik v. City of St. Louis,* 798 F.2d 1168 (8th Cir. 1986). The due process claim was vacated because the court believed that the award was either an improper duplication of the First Amendment claim, or an award for a Due Process claim where no substantive claim was cognizable. *id.* 798 F.2d at 1177-1178. The award of $15,000 on the First Amendment claim against the City was sustained. Judge Lay's analysis centered on Hamsher's decision to transfer Praprotnik, the circumstances surrounding which he believed were sufficient to justify the inference that the transfer was improperly motivated and which transfer he believed constituted a constructive discharge. *Id.* 798 F.2d at 1176. Because neither the transfer nor the layoff was subject to a review process that did not defer in substantial part to the decisionmaker, Hamsher's decision was deemed city policy. *Id.* 798 F.2d 1174-1175.

The City filed its Petition for a Writ of Certiorari in this Court to review that opinion.

SUMMARY OF THE ARGUMENT

1.a. In *Monell v. Dept. of Social Service,* 436 U.S. 658 (1978) the Court held that cities may be held liable pursuant to 42 U.S.C. §1983 for constitutional injuries inflicted pursuant to city policies. In the Court's post-*Monell* decisions there has been some progress toward providing greater clarity to the concept of liability engendering city policy, but a majority of the Court has not yet unambiguously endorsed a particular definition. One view, exemplified by Justice Brennan's concurring opinion in *City of Oklahoma City v. Tuttle,* 471 U.S. 808 (1985), and Part II-B of his opinion announcing the judgment of the Court in *Pembaur v. Cincinnati,* 475 U.S. ____, 89 L.Ed.2d 452 (1986), finds that a policy has been made where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur,* 89 L.Ed.2d at 465. A competing view, exemplified by Chief Justice Rehnquist's opinion in *Tuttle,* 471 U.S. 808, and by Justice Powell's dissenting opinion in *Pembaur,* finds city policy only in: a) rules of general applicability established by official action; and (b) decisions of specific application adopted as the result of a formal process. *Pembaur,* 89 L.Ed.2d at 475-476 (Powell, J., dissenting). Both views, however, demand that policies be made by policymakers.

b. The *ratio decidendi* of the opinion below is that the decision of Frank Hamsher, plaintiff's supervisor, to transfer plaintiff was a city policy because Hamsher's transfer decision was not subject to a review by other officials that did not defer in substantial part to Hamsher's original decision. Consistent application of this principle means that almost all decisions of city employees are policy because cities do not and cannot establish review processes, let alone appeals procedures of a particular kind, to review all decisions of their employees. Adoption of the view below would thus be inconsistent with the intention of Congress that innocent taxpayers should not be punished. *City of Newport v. Facts Concerts, Inc.,* 453 U.S. 247, 266 (1981).

c. A city policy is not made when an employee makes a decision that is contrary to orders or rules that are binding upon him. More than this, a city policy is only made when a decision is made by one in whom the ultimate authority to make such decisions is placed by the city's fundamental law, for it is only then that the city's taxpayers and voters may be said to be at fault: for it is only then that those in whom they have entrusted with the authority to make such decisions are at fault.

d. If indeed Frank Hamsher transferred plaintiff in retaliation for the filing of the appeal with the Civil Service Commission, then he violated a policy that was implicit in the City Charter provisions that established the civil service appeals process. There was no evidence that there was a widespread practice tolerated by City officials contrary to the policy expressed in the Charter. Moreover, Frank Hamsher did not have the authority to make City employment policy. That policy, in the first instance, was set by the Charter. Employment policy was made, within the confines of the Charter, by the Civil Service Commission. There was no evidence that the Commission promulgated or tolerated a practice of retaliatory firing. Thus, Hamsher's decision to transfer plaintiff was not City policy.

2. The City policy upon which liability was imputed to the City was Hamsher's decision to transfer plaintiff; the act for which plaintiff sought to impose liability on Hamsher as an individual defendant was Hamsher's act transferring plaintiff. Since Hamsher's decision and his act are distinct only analytically, the verdict exonerating Hamsher can be reconciled with the verdict against the City only if the principles of causation are applicable to individuals are different from those applicable to cities. They are not.

In *Mt. Healthy City School Dist. Board of Educ. v. Doyle,* 429 U.S. 274 (1977), the Court made it clear that factual causation is a predicate for constitutional tort liability. *Mt. Healthy* involved a local government, but it can hardly be doubted that

an individual cannot be held liable for the commission of a constitutional tort where his acts or omissions are not the factual cause of an injury. The Court has held that proximate causation is applicable to §1983 cases brought against individuals. *Martinez v. California,* 444 U.S. 277 (1980). The Court should hold that principles of proximate causation are equally applicable to cities for there is nothing in the plain language of §1983 or its legislative history that suggests that different principles should apply, and the opinions of both Chief Justice Rehnquist and Justice Brennan in *Tuttle* suggest that proximate cause principles are applicable to cities. *Tuttle,* 85 L.Ed.2d at 804 and 810 n.9.

Hamsher's decision to transfer plaintiff was no more or less the cause, factual and proximate, of plaintiff's injury than was Hamsher's act transferring plaintiff. The verdicts were incompatible.

ARGUMENT

Introduction

In 1951 Justice Frankfurter, observing the disparate results in the Court's cases applying 42 U.S.C. §1983 and the Civil Rights Act of 1871, of which §1983 was a part, explained that "[s]uch differences inhere in the attempt to construe the remaining fragments of a comprehensive enactment, dismembered by partial repeal and invalidity, loosely and blindly drafted in the first instance, and drawing on the whole Constitution itself for its scope and meaning." *Stefanelli v. Minard,* 342 U.S. 117, 121 (1951). In 1985 Justice Blackmun, speaking from the pages of a learned journal, stated that "[t]oday, §1983 properly stands for something different - for the commitment of our society to be governed by law and to protect the rights of those without power against oppression at the hands of the powerful". Blackmun, *Section 1983 and Federal Protection of Individual Rights - Will The Statute Remain Alive or Fade Away,* 60 N.Y.U.L.REV. 1, 29 (1985). There is no inconsistency between Justice Frankfurter's complaint that §1983 was loosely and blindly drafted, and Justice Blackmun's paean. Congress created, in the two imprecise sentences that constitute §1983, a new tort, setting forth virtually nothing of its components or procedure. By contrast, a recent treatise explaining the fundamentals of tort law runs to six volumes. See Harper, James and Coray, The Law of Torts, 2nd Ed. (1986). Nevertheless, the broad scope of §1983 - a means by which all constitutional rights may be vindicated - enables it to perform the noble function Justice Blackmun so eloquently described. The courts generally, and this Court in particular, however, have been left with the difficult task of giving content to the new tort, with only the most meager assistance from the plain language of the statute, and from the legislative history. In no respect has this task been more difficult than with respect to the task of determining and defining the circumstances upon which liability may be imposed upon cities.

In 1961 the Court held that municipal corporations could not, under any circumstance, be subjected to liability pursuant to §1983. *Monroe v. Pape,* 365 U.S. 167 (1961). Seventeen years later a divided Court reversed itself, ruling that cities may be held liable pursuant to §1983, but only for constitutional injuries caused by the cities' policies. *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978). The Court's most important decisions applying *Monell* have been divided, culminating in *Pembaur v. City of Cincinnati,* 475 U.S. ____, 89 L.Ed.2d 452 (1986), which contained three concurring opinions, and a dissent in which three justices joined. This well illustrates the difficulty with which applying §1983 to this issue is fraught.

We believe that the opinion below represents such an extreme view of *Monell* that this is not a difficult case. This is not to say, however, that it is not an important case. One commentator, anticipating *Monell,* warned that "[i]n the absence of precise definition, the proposed concept of policy may seem so loose as to be capable of engulfing all municipal protection against vicarious liability." Levin, *The Section 1983 Municipal Immunity Doctrine,* 65 Georgetown L.J. 1483, 1540 (1977).[5] This prophecy has been realized: in the absence of a precise definition of policy, the trend has been "toward the imposition of liability in an ever-widening circle." Leuchtman, *Joint Liability in Police Misconduct Cases,* 60 Mich. B.J. 93, 96 (1981). This case, then, affords the Court the opportunity of giving the term "policy" greater clarity, at least by negative definition, and this is very important.

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[5] To its credit, the court below recognized the importance of precision in the definition of policy in *Westborough Mall, Inc. v. City of Cape Girardeau,* 794 F.2d 330, 338-339 (8th Cir. 1986), where it directed the trial court to give an instruction defining "official policy" on remand.

The lower court's opinion is held together by two slender threads. The first is the court's conclusion that Frank Hamsher, the city employee who transferred plaintiff, was a city policymaker because his decision to transfer plaintiff was not subject to a review by other city employees who did not defer in substantial part to his initial decision to make the transfer. The second is the lower court's belief that a rational jury did believe, based solely upon the basis of a post hoc ergo propter hoc inference, that Hamsher's decision to transfer plaintiff was motivated by plaintiff's appeal of his suspension under the regime of Hamsher's predecessor. The first holding is the subject matter of Part I below, where we argue that the opinion of the court below is inconsistent with what this Court has done in its municipal policy cases, inconsistent with what this Court has said in its municipal policy cases, and inconsistent with the intent of Congress. Indeed, it is at odds with common sense. In Part II we consider the perversity of the lower court's belief that the jury made a permissible inference that Hamsher was unconstitutionally motivated in light of the jury's verdict exonerating Hamsher. We conclude that in this respect also the lower court's opinion is inconsistent with this Court's cases and with common sense. The threads of logic thus broken, the result reached unravels and it remains only to reverse the decision.

I.

Hamsher's Decision To Transfer Plaintiff Was Not A Policy Of The City Of St. Louis: A) If Made In Retaliation For Plaintiff's Civil Service Appeal, It Was Contrary To City Policy; and B) Hamsher Did Not Have The Authority To Make Personnel Policy For The City, Even Though The City May Not Have Had An Appeals Process For Reviewing His Transfer Decisions Without Showing Deference To His Decisions.

Who speaks for the city? And when does he who may speak for the city speak for the city, and how does he do so? Finding

answers to these difficult questions has been the task of the lower federal courts and of this Court since this Court's landmark decision in *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658 (1978), in which the Court held that municipal corporations and other local governments are liable under 42 U.S.C. §1983 for constitutional injuries inflicted pursuant to their policies, but leaving for another day the development of the full contours of the §1983 cause of action against a local government. Controversy has raged in the courts of appeals whether so-called "final" acts of city employees may, without more, be considered liability engendering municipal policies. Some courts, *see, e.g., Rookard v. Health & Hospitals Corp.*, 710 F.2d 41 (2d Cir. 1983), hold cities liable for such acts because the acts are thought to represent official policy; the Fifth Circuit, however, has rejected that view, believing that "policymaking authority is more than discretion, and *it is far more than the final say-so,* as a matter of practice, on what water main will be replaced today and whether a building meets city construction standards." *Bennett v. City of Slidell,* 728 F.2d 762, 769 (5th Cir. 1984), *cert. denied,* 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985) (emphasis added).

The Eighth Circuit decision now being reviewed by writ of certiorari is a particularly extreme version of the former view, holding that "final authority" is placed in a city employee such that his decision may be deemed municipal policy, even though his decision is subject to review and reversal by other city officials, because the reviewing officials defer in substantial part to the original decisionmaker. This Court has not directly addressed the issue. However, we believe that the various views developed regarding the contours of municipal liability compel the conclusion that the vesting of authority in a city employee to make decisions, even when not reviewable, does not by itself transmute all of the employee's decisions into municipal policy.

A.

The Lower Court's Opinion Is Inconsistent With The Results In *Polk County v. Dodson* and *City of Oklahoma City v. Tuttle* Where Employees Who Had Been Delegated The Authority To Make Decisions And Who Made Decisions Which Ended The Matters Decided Were Not Deemed Policymakers.

The lower court's opinion is inconsistent with the result in *Polk County v. Dodson,* 454 U.S. 312 (1981) and inconsistent with the result in *City of Oklahoma City v. Tuttle,* 471 U.S. 806 (1985).

The theory of the case below was succinctly stated as follows:

> "(1) if, according to a policy or custom established by a governing body, an official is delegated the authority, either directly or indirectly, to act on behalf of a governing body; and (2) if a decision made within the scope of the official's authority ends the matter, then the acts of the official may fairly be said to be those of the local governing body." *Praprotnik,* 798 F.2d at 1174.

The last condition is deemed met when a review process "defers in substantial part to the judgment of the original decisionmaker;" *id.,* 798 F.2d at 1175.

In *Polk County*, the basis of the plaintiff's claim against the local government was that the public defender, a county employee who had represented plaintiff, had withdrawn from representing him, causing him to be subjected to various constitutional deprivations. The Court held that plaintiff failed to state a claim because plaintiff's complaint failed to identify an unconstitutional policy pursuant to which an act causing injury occurred. However, if we employ the analysis of the court below, this result is error. The decision whether to withdraw from representing plaintiff was delegated to the assistant public defender; and the assistant public defender's decision ended the matter. There was no internal procedure of any kind, let alone

one which did not defer in substantial part to the assistant public defender's judgment, by which plaintiff could have obtained review of the assistant public defender's decision.

In *Tuttle* the city, by policy or custom, delegated to individual police officers the authority to act in the city's behalf in apprehending suspects. Officer Rotramel made a decision within the scope of his authority — he decided that he would use deadly force to apprehend the suspect — and that decision ended the matter of whether such force should be ~~brought~~ to bear in that case. Indeed, under the circumstances, Officer Rotramel's decision was the most final decision made by any employee in any of the Court's cases. There neither was nor could have been an appeal of his decision. Yet the Court held that liability could not be imposed upon the City on the basis of Rotramel's decision alone. Both of these cases are plainly irreconcilable with the opinion below.

B.

The Opinion Below Is Inconsistent With The Court's Pronouncements On Municipal Policy Because Hamsher Was Not Delegated The Authority To Make City Employment Policy, And He Did Not Make A Rule Of General Applicability.

The opinion below is inconsistent with the results reached in *Polk County* and in *Tuttle* because it is inconsistent with the principles that this Court has developed and applied to deciding issues of §1983 municipal liability.

Justice Brennan has developed the view that a policy is made where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 89 L.Ed.2d at 465. Justice Brennan's view recognizes that unconstitutional acts of even policymakers are not *ipso facto* municipal policy, for it is necessary "that the unconstitutional act was taken *pursuant* to a

municipal policy rather than simply resulting from such a policy in a 'but for' sense." *Pembaur,* 89 L.Ed.2d at 464-465 n.11 (emphasis in original).[6]

What is critical to this analysis is identification of the "subject matter in question" or "activity". *Pembaur,* 89 L.Ed.2d at 465. This is well illustrated in footnote 12 of Justice Brennan's opinion which, as Judge Ross' dissent in the case below correctly points out, is directly applicable to the case at bar. According to footnote 12, the identification of the particular subject matter in question takes place at a level of abstraction considerably beyond that of an individual hiring or firing decision; rather, the subject matter in question is defined broadly as "county employment policy". An individual hiring or firing decision does not become local government policy merely because the local government gives a particular employee discretion to make that decision; rather, an individual employment decision is transmuted into government policy only where the government has "delegated its power to establish final employment policy" to the particular decisionmaker. *Pembaur,* 89 L.Ed.2d at 465 n.12.

In the case at bar, the court below deemed an individual transfer decision local government policy because the City of St. Louis gave Frank Hamsher discretion to transfer plaintiff. There is no evidence, however, that the City gave Hamsher the power to establish final employment policy for the City. Indeed, the Civil Service Commission reviewed plaintiff's many complaints regarding plaintiff's several supervisors and sustained plaintiff's appeals. Because the City did not delegate the authority to set final City employment policy to Hamsher, the

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[6] But see Justice Brennan's opinion in *Tuttle* where it is said that "[s]ome officials, of course, may occupy sufficiently high policy-making roles that any action they take under color of state law will be deemed official policy." *Tuttle,* 85 L.Ed.2d at 808 n.5 (Brennan, J., concurring).

court's opinion is inconsistent with the views set forth in Justice Brennan's opinions in *Tuttle* and *Pembaur.*

A competing view of municipal liability is expressed in Part II of Chief Justice Rehnquist's opinion in *Tuttle,* and further developed in Justice Powell's dissent in *Pembaur.* Justice Powell's dissent in *Pembaur* identifies policy as limited to: (a) rules of general applicability established by official action; or (b) decisions of specific application adopted as the result of a formal process. *Pembaur,* 89 L.Ed.2d at 475-476 (Powell, J., dissenting).[7]

With respect to subpart (a) of Justice Powell's test, it is necessary to identify whose rules of general applicability are liability engendering, and although the answer may differ from government to government, and from rule to rule, the answer to that question is not difficult: the rules of those whom the applicable law vests with the authority to make rules of general applicability for the city. In the case at bar, it is clear that Frank Hamsher did not have the authority to make a personnel rule of general applicability for the City of St. Louis. It is a little more difficult to ascertain, pursuant to subpart (b) of the test, whose decisions adopted by a formal process are liability engendering. However, Justice Powell's discussion in *Pembaur* looks to *Owen v. City of Independence* and *City of Newport v. Facts Concerts, Inc.,* where the decisions were made by city councils, as examples, and his suggestion that had the elected prosecutor rendered his opinion in a formal and deliberate way (perhaps by an "opinion" letter), liability might have been imposed, provides a notion of what Justice Powell contemplated. It also gives an idea of what is not contemplated, and it seems clear that an individual transfer decision by a supervisor is beyond the

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[7] Justices Brennan, Blackmun and Marshall agree that policy is made under those circumstances. See *Pembaur,* op. cit., 89 L.Ed.2d 463-464.

pale. Thus, the opinion below is inconsistent with Chief Justice Rehnquist's opinion in *Tuttle* and with Justice Powell's opinion in *Pembaur*.

C.

Liability Cannot Be Imposed On Cities On The Sole Basis That A Decision Has Been Made That Is Not Subject To Review Because Such Liability Is Inconsistent With Congress' Rejection Of Respondeat Superior.

Not only is the opinion below inconsistent with what the Court has decided and what the Court has said, it is at odds with the policy of Congress, and with common sense.

This Court carefully scrutinized the legislative history of §1983 in *Monell,* and concluded that Congress did not intend that municipal liability be based on a respondeat superior theory. That conclusion was derived from two considerations. First, the plain language of the statute: "[T]he fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend §1983 liability to attach where such causation was absent." *Monell,* 436 U.S. at 692. Second, the Court believed that Congress would have considered §1983 respondeat superior liability to be constitutionally repugnant, just as it thought the Sherman Amendment constitutionally repugnant, for it was believed that Congress could not impose a duty upon municipalities to keep the peace by the coercive mechanism of imposing liability for the failure to do so. *Monell,* 436 U.S. 693.

Both of these considerations suggest that the theory of the case below is incompatible with the intent of Congress. Hamsher's (A's) tort can become the City (B's) liability only if the City caused Hamsher to subject plaintiff to a tort. But there is nothing that the City (or any of its agents) did that caused Hamsher to inflict retribution upon plaintiff, any more than would a garbage collector who, entirely of his volition, and in response

to his bigoted impulses, provided a higher level of services to the green people of the north side of a street than he provided to blue people on the south side of a street, be caused to do so by the city that employed him. Thus, the language of §1983 referring to "[e]very person who...cause to be subjected" would be wholly inapplicable. Liability must be based upon the language: "[e]very person who...shall subject." But while Hamsher, or our hypothetical garbage collector, would be any person, that language cannot be "easily read" such that either is the city, where nothing is involved but an individual decision by an individual supervisor or garbage collector.

Second, the insistence of the court below that a local government respond in damages for each of the constitutional torts committed by its employees where the local government does not provide a review mechanism comporting with a court's notion of what such a process should consist, runs afoul of the constitutional doctrine of the 1871 Congress. In *Monell,* the Court concluded that "creation of a federal law of respondeat superior would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional." *Monell,* 436 U.S. at 693. Congress thought the imposition of such an obligation beyond the power of Congress for it believed that Congress could not impose duties on state officers and agents as the imposition of such duties might impede them in the performance of their legitimate activities, *Monell,* 436 U.S. at 678. Congress further believed the imposition of damages for failure to perform a function was a coercive mechanism tantamount to the imposition of a duty. *Monell,* 436 U.S. at 679. Here, too, the lower court is attempting to impose a duty upon state instrumentalities: if you do not establish procedures for the review of your employees' decisions of the kind we deem appropriate, we shall make you pay for your delinquency. The court below will be unsuccessful in its effort, because it is simply impossible to establish the procedures the court below requires without crip-

pling the conduct of government, because governments cannot subject all of their employees' decisions to appellate review processes that operate without according deference to their employees' decisions. But in the long run, as the verdicts are returned, it is not unlikely that the court's view would successfully "destroy the government of the States." *Monell,* 436 U.S. at 679.

A third consideration militating against adopting the lower court's theory is that the consequence of doing so would render Congress' act in rejecting respondeat superior close to meaningless. To be sure, the lower court's opinion does not by its terms adopt respondeat superior. Respondeat superior makes a corporation liable for all of the acts of its employees, i.e., it makes the corporation liable for those whose physical conduct in the performance of services to the corporation are subject to the control of the corporation. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts, §70 (5th Ed. 1984).

The court below makes liable a municipal corporation only for those acts of its employees that are not reviewable by a process that does not defer in substantial part to the decision of the original actor. But almost all acts of municipal employees will fall into that category. On any given day, employees of a large city make literally tens of thousands of deliberate choices of whether to follow a course of action among alternatives. An assistant city counselor decides whether he will make argument A rather than B in the brief that he is preparing; another city attorney decides to strike juror A rather than juror B from the panel; a sanitation worker chooses to collect garbage on the north side of the street rather than the south side of the street; the counter clerk decides that he will wait on citizen A rather than citizen B, when both arrive at his city office at the same time; the school teacher decides that he will teach spelling in the morning rather than the afternoon; the police officer determines how much force is necessary to effectuate a particular ar-

rest; and on and on. In none of the cases is there an appeals process; in each of these cases the individual employee makes a choice among alternatives that is not subject to review. As an academic advocate of the view embodied in the decision below candidly admits, the "only way a city shall be allowed to limit its liability is to withdraw completely the police officers' [or other city employees'] power to arrest or search [or otherwise perform their functions]." Seng, *Municipal Liability For Police Misconduct,* 51 Miss. L. J. 1, 11 (1980). However, cities will not withdraw completely their employees' powers to act for they cannot. It is implausible that an 1871 Congress which repudiated respondeat superior would have countenanced such a result.

D.

A Policy Is Never Made By One Who Acts Contrary To Orders; A Policymaker Is One In Whom The Ultimate Authority To Make Decisions Is Placed By the Local Government's Fundamental Law.

A first approach to identifying whether a particular decisionmaker has made a policy is identification of the "activity" or "subject matter in question" by scrutinizing the facts to find all decisions that bear on the unconstitutional act. One would look to the most general statement of policy that had been made, which would normally be the one promulgated by the highest placed municipal decisionmaker who had made a decision pertaining to the matter. Something like this is suggested by Justice White in his concurring opinion in *Pembaur,* where he observes that "[w]here the controlling law places limits on their authority, they cannot be said to have the authority to make contrary policy", for if acts of employees contrary to local law were to expose the local government to liability, in such a circumstance, "it must be on the basis of *respondeat superior* and not because the officers' acts represents local policy." *Pembaur,* 89 L.Ed.2d at 467 (White, J., concurring). In other words, a decision con-

trary to orders is not policy. Thus, in a *Pembaur*-like situation, if the county prosecutor promulgated a policy that such search and seizures as the police conducted were proper, and an assistant prosecutor so advised, that would be county policy. If the prosecutor established a rule that such seizures were improper, and an assistant prosecutor nonetheless directed that such a search take place, there would not be county liability even though the assistant prosecutor's decision was final and not reviewed by the prosecutor. The harder case, however, is where the prosecutor does not establish any policy at all regarding the propriety of a particular search, and leaves the assistant to his own devices.

A suggestion as to the proper resolution is contained in Justice Brennan's opinion in *Pembaur* where he says that "if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board." *Pembaur,* 89 L.Ed.2d at 465 n.12. This suggests that the case we posed in which the prosecutor has not established any policy should be resolved by employment of a second approach: a person should not be deemed an "official responsible for establishing final policy with respect to the subject matter in question" unless he is the "ultimate authority" with respect to the subject matter in question. That is, if the decision causing constitutional injury is made by one who is not subject to the direction and control of any other city official, then the local government would be liable because the decision was made by a person with the ultimate authority to make such decisions on behalf of the local government. One must scrutinize the fundamental law of the local government, normally either a charter or state statutes, to ascertain where ultimate authority to make a particular decision is placed. Thus, the result in *Pembaur* is sus-

tained, even if it is believed that the county officials did not follow standard operating procedure, for the county official whose decision caused the injury was not subject to the direction or control of the county's governing body. *Pembaur,* 89 L.Ed.2d at 460. At the same time, the results in *Polk County* and *Tuttle* are reaffirmed, because the public employees in both cases were subject to the control of higher officials (even though the decisions they made were final), and thus the employers were not possessed of the ultimate authority.

This ultimate authority elaboration has several virtues, in addition to its capacity to reconcile the cases. It is flexible, and flexibility is a very important consideration in view of the vast differences in the configurations of local government in the United States. In one city, the mayor may have the ultimate authority to decide a particular matter; in another city, the ultimate authority to decide that matter may be placed in the city council. In one county, all the affairs of the county and all of its employees are subject to the direction and control of the county governing body; in another county, authority is divided among several independently elected officials (for example, the prosecutor, recorder of deeds, collector of revenue) none of whom is subject to the direction and control of the county council or of the other officials. This approach would permit local structures of government to be accomodated by an inquiry as to where ultimate authority was placed in a particular local government.

This approach would also be fair. The burden of a judgment against a local government will, of course, be borne by the residents of the particular subdivision in the form of taxes. It is fair to require the taxpayers of Hamilton County to pay for the unconstitutional acts of a prosecutor whom they elected;[8] it is

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[8] It is likely that most officials who are entrusted with ultimate authority are elected officials, but certainly there are many such officials who are appointed. Nevertheless, it is fair to require the taxpayer to pay for injuries inflicted by even appointed officials in whom they have placed the ultimate authority to make decisions on their behalf.

unfair to require them to pay for the illegal acts of persons in whom they have not vested the ultimate authority to decide on a course of action, despite the fact that it is necessary to place "final" decision-making authority in low-level employees. In such cases, the "ultimate authority" analysis protects the taxpayer from the acts of those in whom they did not entrust authority. Indeed, *Monell* itself appears to recognize the correctness of such a result: "By our decision in *Rizzo v. Goode,* 423 U.S. 362, 46 L.Ed.2d 561, 96 S.Ct. 598 (1976), we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support §1983 liability. See *id.,* at 370-371, 46 L.Ed.2d 561, 96 S.Ct. 598." *Monell,* 436 U.S. at 694 n.58. The harder case we posed above is thus resolved: where the prosecutor in the *Pembaur*-like situation has not made a policy, and his underling makes an unconstitutional decision, the county is not liable because the prosecutor, in whom the ultimate authority to make such a policy had been placed, did not make a policy. Lest there be a misunderstanding, let us hasten to add that the county would not avoid liability under this theory simply because there was no evidence of a written policy; if there was a persistent practice of the assistant prosecutors to make unconstitutional decisions, and this practice was known to the prosecutor, his tolerance of the custom is his policy, and his policy is the county's policy for which it might properly be held liable.

The view that we have urged — that at a minimum a decision cannot be a policy where the decision is contrary to an established policy made by one in a position superior to that of a decisionmaker — is consistent with both the language of §1983 and the constitutional theory of Congress. For a city does not cause its employees to subject others to torts when the employees violate rules, orders and decisions which they are bound to observe. Nor does such a construction require cities to establish a particular procedure for conducting their affairs. Moreover, the more comprehensive theory for assessing liability offered

above for resolution of the "harder case" — that a decision is not city policy unless it is made by those in whom the ultimate authority is vested to make such a decision — is consistent with these considerations. For a city does not cause its employees to subject others to torts when the natural persons in whom ultimate decision-making authority to make its decisions is entrusted do not require the City's employees to commit torts, and the rights of states and their instrumentalities to order their internal policies as they see fit is properly respected.

E.

Hamsher's Decision Was Not A City Policy: If It Was Illicitly Motivated, It Was Contrary To The Charter; And Hamsher Did Not Have The Authority To Make Employment Policy.

Application of the principles developed above requires that the judgment below be reversed. There is not one whit of evidence that the City of St. Louis had a rule, written or otherwise, that employees making appeals to the City's Civil Service System should be punished. The case is based solely on the meager circumstantial evidence which the court of appeals thought sufficient to allow a rational jury to infer that Frank Hamsher transferred plaintiff because of plaintiff's appeal. Nor is there evidence that Hamsher engaged in the kind of formal process Justice Powell had in mind. Liability must be imposed, if at all, on the basis that Hamsher made a deliberate choice from among alternatives, and that Hamsher was the official responsible for establishing final policy with respect to the subject matter in question. Without a doubt, Hamsher made a deliberate choice among alternatives — he transferred plaintiff and he did not have to do so. But the important issue remains: was the decision as to whether or not plaintiff would be transferred final policy with respect to the subject matter in question?

If the analysis above is correct, investigation of this matter begins with a search for a policy adopted at a level "higher"

than Hamsher that would determine whether Hamsher or others in his position had the discretion to transfer plaintiff because plaintiff made appeals to the Civil Service Commission. The City's Charter, adopted by vote of the residents of the City, and recognized as the City's "organic law", see *State ex rel. St. Louis Fire Fighters Association Local No. 73 v. Stemmler,* 479 S.W.2d 456, 457 (Mo. banc 1972), includes just such a policy.

Article XVIII of that Charter establishes a civil service system for the City. Under that system, all personnel decisions, including separation from employment, are to be made "on the sole basis of merit and fitness.' (J.A. 49). Employees may not be removed, demoted, or decreased in pay until they receive written notice, with the right to appeal, and after the completion of an investigation to insure that the decision was indeed made on the sole ground of merit and fitness (J.A. 55). Employees cannot be transferred, except where the transfer is for the benefit of the service (J.A. 54). A Civil Service Commission is created which has the authority and the duty to "consider and determine any matter involved in the administration of [the civil service] article and the rules and ordinances adopted in accordance therewith that may be referred to it for decision by the director or on appeal by any appointing authority, employee, or taxpayer of the city, or from any act of the director or of any appointing authority." (J.A. 63). Although there is nothing in the Charter that says, in so many words, that an appointing authority (such as Hamsher) is forbidden from punishing employees for filing appeals with the Civil Service Commission, it is impossible that such a decision could be thought to be made on the basis of merit and fitness. Moreover, it is surely implicit in any scheme that establishes such a liberal appeal process that employees cannot be punished for taking advantage of the process, for that would destroy the system it creates.[9] The City's Director of Personnel testified that he had

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[9] An analogy is found in cases that have held that a claim may be made under 42 U.S.C. §1981 for acts in retaliation for filing an EEOC

the authority to prevent retaliatory transfers (R. 3-117). Thus, the policy of the City, as expressed in its Charter, forbids the kind of act Hamsher is supposed to have committed.

Though plaintiff's counsel claimed otherwise in his opening argument (R. 1-14), there was no evidence that the policy expressed in the Charter is a mere formality, belied by an actual practice to the contrary. In fact, the Civil Service Commission, which has the power and duty to adopt rules and recommend ordinances for the administration of the system (J.A. 50, 62), promulgated an elaborate set of rules for implementing the system (J.A. 85-103). Indeed, plaintiff himself used the system successfully several times. Thus, if Hamsher actually did transfer plaintiff because of the civil service appeals, he did so in violation of City policy as expressed in the Charter, and he did not have discretion to do so. Because the issue can be disposed of at this level, there is no need to consider the additional analysis offered above that limits the liability of the city to the acts of those vested with the ultimate authority to make decisions on behalf of the city. Suffice it to say, plaintiff would have no claim under that theory, for the ultimate authority to make such decisions is placed in the Civil Service Commission, insofar as the Commission is authorized to adopt rules to administer the system (J.A. 50-57, 62-64); and in the Commission, the Board of Aldermen, and the Mayor, insofar as the recommendation, the adoption, and the approval of ordinances is required (J.A. 62-63).

Policymakers speak for the city, and they speak for the city when they make policy. The answer to the first question presented by our petition is that the failure of a local government, such as the City of St. Loius, to establish an appeals procedure for the review of employees' decisions which does not

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claim, for Section 1981 would become meaningless if an employer could punish an employee for attempting to enforce his rights under the statute. *Goff v. Continental Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1982).

defer in substantial part to the original decisionmaker's decision does not alone make the local government liable for the official's decisions, because employees are not policymakers merely because of the absence of such procedures. The trial court erred in denying the City's motions for directed verdict.

II.

The Verdict Exonerating Hamsher Is Inconsistent With The Verdict Returned Against The City.

A.

The City "Policy" Upon Which Liability Was Imposed Was Hamsher's Transfer Of Plaintiff.

Plaintiff's action was brought against Frank Hamsher, Charles Kindleberger and Deborah Patterson, in addition to the City of St. Louis. All of the individual defendants were exonerated by the jury's verdict; yet a verdict was returned against the City. Since the policy upon which City liability was predicated — Hamsher's decision to transfer plaintiff — and the act upon which plaintiff sought to impose individual liability upon Hamsher — his act transferring plaintiff — are distinct only analytically, it would seem to follow directly from the Court's holding in *City of Los Angeles v. Heller,* 89 L.Ed.2d 806, 475 U.S. ____ (1986), that the verdicts are incompatible and cannot stand. In *Heller* the Court upheld the trial court's dismissal of a §1983 action against the City of Los Angeles after the jury returned a verdict in favor of the individual officer who was alleged to have inflicted a constitutional injury on the plaintiff.[10]

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[10] *Heller* would not be applicable where the individual defendant might be thought to have been exonerated because he had established his immunity to the action. For example, in *Tuttle,* the jury exonerated Officer Rotramel, having been given a qualified immunity instruction, *Tuttle,* op.cit., 85 L.Ed.2d 791-792; and in *Pembaur,* the

The court below distinguished *Heller* on the basis that other city employees (Nash and Killen), who had not been named as defendants, were the persons who "effected city policy in laying Praprotnik off and thereby brought to fruition Praprotnik's ultimate injury." *Praprotnik*, 798 F.2d at 1173 n.3.[11] The jury's verdict exonerating Hamsher and the other individual defendants was attributed by the lower court to an erroneous instruction that liability might be imposed upon them only if they were "personally involved" in the layoff. *Id.* There was, in fact, an Instruction (No. 16) that informed the jury that an individual not be held liable under §1983 unless "he was personally involved in causing the deprivation of a constitutional right or he either has or is charged with actual knowledge that his subordinates are causing deprivations of constitutional rights." (J.A. 114). If the court below was referring to instruction 16, it was mistaken in its belief that the instruction made a plaintiff's verdict against the individual defendants contingent upon a finding that Hamsher and the others had to be personally involved in the layoff. There was another instruction (No. 29) that required a finding that Hamsher was personally involved in the layoff, but that instruction was the verdict director on the due process claim, and had nothing to do with the First Amendment claim (J.A. 120). Beyond this, Instruction No. 22, plaintiff's verdict director on the First Amendment claim, instructed the jury that it might find for plaintiff and against the individual defendants,

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prosecutor was not made a party because plaintiff believed he was absolutely immune. *Pembaur*, op.cit., 89 L.Ed.2d at 459 n.2. In the case now before this Court, a kind of qualified immunity instruction was given to the jury, but it involved only the Due Process claim and did not purport to be applicable to the First Amendment claim, which is the subject of the petition for certiorari. (J.A. 123)

[11] There was no evidence that either Nash or Killen effectuated plaintiff's layoff for an improper reason, and the opinion below does not pretend that there was.

if the defendants "were personally involved in causing plaintiff's transfer and/or layoff" (J.A. 118).[12]

Although we agree with the court's criticism that the "and/or" device contained in Instruction No. 22 is inelegant, *Praprotnik,* op cit., 798 F.2d at 1173 n.3, the phrase is comprehensible and it clearly allows liability to be imposed if the jury found that the individuals had been involved in the transfer. Indeed, by phrasing the instruction in and/or terms and referring to both the transfer and the layoff, the instruction allowed the jury to return a verdict against Hamsher under any of three theories, a device that optimized the opportunity for a

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[12] Instruction 22 (J.A. 118-119), the verdict director on the First Amendment claim, was badly bungled. The confusion that pervades the entire instruction begins with the misjudgment that one verdict director could embrace all four defendants, without distinguishing the findings necessary to sustain verdicts against each, and that the verdict director could embrace two discrete injuries — the transfer and the layoff — which were temporally remote, and which involved different actors. The error made in the concept of the instruction continued in its execution. The first part of the instruction requires a plaintiff's verdict if the jury finds that all of the six elements set forth are established ("Your verdict must be for the plaintiff...if..."). However, the second part of the instruction permits the jury, if it believes plaintiff to have established the six elements above, to ignore its announced duty to return a verdict for the plaintiff, and to consider three additional "defenses." If the jury believes that those three elements are true, it is commanded to return a verdict for the defendants. Beyond this, certain of the second three elements are simply incompatible with certain of the first six elements: a rational mind could not simultaneously accept the truth of both propositions. Moreover, at least one of the elements (that which was aimed at the City), was a misstatement of the law. The court below was manifestly dissatisfied with the instructions and believed that there was error committed. *Praprotnik,* 798 F.2d at 1173 n.3. It would have been more appropriate for the court to have deemed the instruction plain error (there was no objection), and reversed, rather than to reach as far as it did to impose a semblance of logic on the case. This is particularly so since Instruction No. 27 (J.A. 125) was also erroneous. See *Memphis Community School District v. Strachura,* 477 U.S. ____, 91 L.Ed.2d 249 (1986).

verdict against Hamsher. In any case, the theory upon which the court of appeals settled was that the unconstitutionally motivated act was the transfer. It was never disputed that Hamsher was not only personally involved in the transfer, but instigated that action. Therefore, it is not plausible that the verdict exonerating Hamsher was a consequence of the jury's belief that he could not be held liable because he was not personally involved in the layoff itself; rather, the most plausible interpretation of the verdict is that the jury did not believe: a) that Hamsher was improperly motivated; or b) his improper motivation was not the factual ("but-for") cause of either the transfer or layoff. Those propositions formed the second element that the verdict director required the jury to find (J.A. 118).

Thus, the judgment below can be saved only if the reliance of the court below upon the remoteness of the layoff from the transfer can sustain both the verdict against the City and the verdict in favor of Hamsher. That is, can an individual public employee escape liability because an injury is unforseeable, even though a local government is made to suffer the imposition of liability for an injury equally unforseeable?

Section 1983, it has often been said, "creates a species of tort liability...". *Imbler v. Pachtman,* 424 U.S. 409, 417 (1976). However, the Congress that created the tort did not see fit to adumbrate all of the elements of the new tort, nor to establish a procedure by which the new action might be litigated to judgment. Congress did, however, state that the new tort was "subject to the same rights of appeal, review upon error, and other remedies provided in like cases...", by reference to what is now codified as 42 U.S.C. §1988, adopted as part of the Civil Rights Act of 1866. This required the courts to exercise their newly established jurisdiction in civil rights cases in conformity with federal law to the extent that federal law was suitable, and with reference to the common law as modified by state law where federal law was deficient. *Moor v. County of Alameda,* 411 U.S. 693, 705-706 n.19 (1973). In conformity with this charge,

the Court has adopted common law tort principles where the interests protected by traditional tort law closely parallel the interests protected by the particular constitutional right; and the Court has adapted and modified common law rules where the interests protected by traditional law do not include the particular constitutional right. *Carey v. Piphus,* 435 U.S. 247, 258 (1978).

B.

§1983 Requires Factual Causation.

The Court's most significant causation case concerning a constitutional tort is *Mt. Healthy City School Dist. Board of Educ. v. Doyle,* 429 U.S. 274 (1977). *Mt. Healthy* is a particularly interesting case for it involved the liability of a local government for the commission of a constitutional tort, although jurisdiction was purported to be based upon 28 U.S.C. §1331, rather than upon §1983. This distinction is not an important one, however. The case was decided before *Monell,* and defendant school board did not raise the issue of municipal immunity until after the board had filed its reply brief in this Court, which declined to rule upon the tardy contention. There can be little doubt that the action would be brought pursuant to §1983, if it were brought today, and properly so. Therefore, it is fitting that we consider *Mt. Healthy,* for all intents and purposes, a §1983 action against a local government.

Mt. Healthy concerned plaintiff school teacher's claim that the local government, which had employed him, chose not to renew his contract in retaliation for the teacher's exercise of his First Amendment rights. The lower court found that plaintiff's rights had been violated because the exercise of the teacher's First Amendment rights had played a substantial part in the board's determination not to renew the contract. This Court reversed, holding that such a finding was insufficient to support the imposition of liability against the local government. It was

necessary, the Court believed, to "formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused." *Mt. Healthy*, 429 U.S. at 286. The Court found that the standard the trial court employed - a showing that the conduct was constitutionally protected and that the conduct was a substantial factor in the adverse employment decision - was an essential finding but not a sufficient one. It was necessary for the trial court to "have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.*, 429 U.S. at 287. This Court subsequently, in another case brought by an employee against a local government, referred to *Mt. Healthy* as employing a "but for" test. *Givhan v. Western Line Consolid. Sch. Dist.*, 439 U.S. 410, 417 (1979).[13] In declaring the "but for" test of causation, the Court applied traditional common law tort principles, which forbid the imposition of liability where the defendant does not, as a matter of fact, cause injury to plaintiff.

C.

§1983 Requires Proximate Causation With Respect To Both Cities And Individuals.

Tort law, however, requires more than factual causation as a condition of liability, for "the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond." Keeton, et al., Prosser and Keeton on Torts, *op. cit.*, §41. Because "any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the

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[13] "And while the District Court found that petitioner's 'criticism' was the 'primary' reason for the School District's failure to rehire her, it did not find that she would have been rehired *but for* her criticism." *Givhan, op. cit.*, 439 U.S. 417 (emphasis in the original).

court's with endless litigation' . . . legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." *Id.*

The most prominent such limitation is what is generally called "proximate causation" and proximate causation has frequently been expressed in terms of "foreseeable risks"; i.e., defendant's act is not deemed to be the proximate cause of plaintiff's injury where the defendants could not have reasonably foreseen that plaintiff would be injured as a consequence of defendant's act. *Id.* §§42 and 43. Indeed, this Court's decision in *Milwaukee and St. P. Ry Co. v. Kellogg,* 94 U.S. 469, 475 (1877), where the Court described proximate causation as requiring that it "appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances" has been recognized as the leading American case. Keeton, *et al.,* Prosser and Keeton on Torts, *op. cit.,* §43. More than this, the Court recognized that not "even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury". *Kellogg,* op. cit., 94 U.S. at 475.

The Court has made it plain that proximate causation, just as factual or but for causation, is required in a §1983 case brought against individuals. There is dictum to that effect in *Monroe v. Pape,* 365 U.S. 167, 187 (1961) ("Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.") That dictum came to life in the holding in *Martinez v. California,* 444 U.S. 277 (1980), an action brought against parole officers by the survivors of a girl murdered by a parolee. The Court held that plaintiff's pleading failed to state a claim for relief pursuant to §1983, for "appellants' decedent's death is too remote a conse-

quence of the parole officers' action to hold them responsible under the federal civil rights law." *Id.*, 444 U.S. at 285.

Do considerations of proximate causation and foreseeability similarly limit the liability of local governments for injuries caused by their policies? Certainly the plain language of §1983 fails to distinguish between the principles of causation that are applied to cities and those that are applied to individuals. Nor is there anything in *Monell* that suggests that traditional tort principles of forseeability should be abandoned where local governments are concerned. Moreover, Congress' rejection of respondeat superior liability for municipal corporations evinces a belief, at least to a limited extent, that cities should not be held liable on the basis of but-for causation, without inquiry as to the proximate cause issue, since but for the employment by the city of the tortfeasor, the victim will not be injured. Support, if any, for the view that cities are liable for the unforseeable consequences of their policies, must come from *Owen v. City of Independence,* 445 U.S. 622 (1980), where the Court held that local governments are not protected by the qualified immunity doctrine that protects individual defendants. There is a way of articulating *Owen* so that it seems analagous to the issue we are discussing here: If *Owen* holds that local governments are not immune from liability for acts that they cannot reasonably foresee to be unconstitutional, does it follow that they ought not be shielded from liability for the damages that their policies cause, merely because they could not reasonably foresee that an individual would be damaged as a consequence of those policies, unconstitutional or not? Indeed, the dissenting justices feared that the effect of the Court's opinion was to impose strict liability upon cities. *Owen,* op. cit. 445 U.S. at 658 (Powell, J., dissenting).

There are several reasons why such a conclusion does not follow. First, in *Owen* the Court was concerned with the issue of immunity, which presumes that the defendant caused plaintiff's injury, factually and proximately. Second, by withholding

qualified immunity from cities, the Court did nothing more than hold that cities would not be exonerated because they could not foresee changes in the law that would convert public policies that produced their intended results into constitutional torts. That is far different, and much more fair, than imposing liability upon cities for damages their policies cause, when not only is it unforseeable that the policies would be declared unconstitutional, but it is unforseeable that the policies would produce the results that injured plaintiff.[14]

Third, any ambiguity about the Court's views was clarified in the opinions in *Oklahoma City v. Tuttle, supra,* 471 U.S. 808. Chief Justice Rehnquist, in his opinion announcing the judgment of the court, made it plain that more than but-for causation is required, *Tuttle,* 471 U.S. at 822-823; and Justice Brennan, the author of the Court's opinion in *Owens,* likewise made plain that something more than but-for causation is required. *Tuttle,* 471 U.S. at 822-823 n.9. (Brennan, J., concurring). See also Justice O'Connor's dissenting opinion on behalf of four Justices in *City of Springfield v. Kibbe,* 55 U.S.L.W. 4239, 4242 (1987), where the Court's cases are summarized as follows:

> Given the importance, under §1983, of distinguishing between direct and vicarious liability, the Court repeatedly has stressed the need to find a direct causal connection between municipal conduct and the constitutional deprivation. See e.g., Oklahoma City v. Tuttle, 471 U.S., at 824-825 n.8 (requiring "affirmative link" between municipal policy and constitutional violation); Polk County v. Dodson, 454 U.S. 312 (1981) (municipal policy must be "moving force" behind constitutional deprivation). In

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[14] In other words, a city might have a policy that is later declared unconstitutional. Qualified immunity, under *Owen,* does not protect the City. However, if the policy had caused a result that was completely unpredictable and unintended, the City should not be held liable, not because it is immune, but because the policy is not the legal (proximate) cause of the unforseeable result.

> Monell itself, the policy at issue commanded the deprivation of constitutional rights.

The proximate cause limitation evidenced in those opinions is incompatible with any attempt to use *Owen* as authority for a theory of strict §1983 liability for municipal corporations. .

Finally, strict §1983 liability for municipal corporations must be rejected on the basis of the legislative history. In the course of the Court's careful examination of that history in *Monell*, the Court concluded that Congress had rejected the proposition that the Civil Rights Act of 1871, of which §1983 was a section, should embrace an insurance scheme. *Monell*, op. cit., 436 U.S. 694. Imposition of strict liability cannot be viewed as anything other than the creation of a mutual insurance scheme.

Thus, for all of these reasons, considerations of proximate cause and forseeability are as equally applicable to municipal corporations as they are to individuals.

D.

The Consequences Of Plaintiff's Transfer Were Equally Forseeable To Frank Hamsher, City Policymaker, As To Frank Hamsher, Individual Actor.

Acceptance of the proposition that cities, no less than individuals, cannot be held liable for the unforseeable consequences of their conduct, requires reversal of the judgment below. Demonstration that this is so requires, first of all, restoration of the level playing field that was upset by the court below. Realizing that there is an insurmountable bar to finding a reasonable connection between Hamsher's supposed illicitly motivated decision to transfer plaintiff, and the layoff of plaintiff 20 months later by other persons, the court below magically advanced plaintiff's date of discharge by the full span of 20 months, by deeming the transfer a constructive discharge because of the odius nature of plaintiff's new duties. *Praprotnik, op. cit.*, 798 F.2d at 1176.

There are several severe problems with the technique, most prominently the failure to explain why plaintiff has been fighting so vigorously to return to the assignment that is supposedly so detestable. Such considerations notwithstanding, if plaintiff's transfer is deemed a constructive discharge, so that Hamsher's supposed unconstitutional behavior was the more immediate cause of plaintiff's injury, the lower court's rationalization of the jury's verdict exonerating Hamsher on the theory that others directly caused plaintiff's layoff is both illogical and inconsistent. Beside the fact that the jury was specifically instructed that Hamsher was liable if he caused the layoff and the transfer, or liable if he caused the layoff or the transfer (J.A. 118), reason demands that if the conditions of the transfer were such as to constitute a constructive discharge, the issue of both factual and legal causation must be considered in terms, respectively, of: a) whether, but for Hamsher's improper motivation, plaintiff would have suffered the constructive discharge; and b) whether, looking at the matter from Hamsher's viewpoint, it was reasonably foreseeable that his decision to transfer plaintiff would place plaintiff in such a detestable position that plaintiff would suffer the damages attendant to a constructive discharge. Or, if we discount the constructive discharge theory and focus on the actual layoff, the issues become: a) whether, but for Hamsher's improper motivation, plaintiff would have suffered the layoff and the damages attendant to that act; and b) whether, looking at the matter from Hamsher's viewpoint, it was reasonably foreseeable that his decision to transfer plaintiff would place him in a position where he would be laid off and suffer the damages attendant to that act.

If the viewpoint urged above - that identical principles of both factual and proximate causation are used in considering the liability of both Hamsher, the natural person, and the City of St. Louis, the artificial person - then either analysis might be employed without violence to reason. What cannot be done logically, however, is what the court of appeals did: consider the

issue of factual causation in terms of the purported constructive discharge, and consider the issue of proximate causation in terms of the layoff. Imagine a baseball player, having attempted to advance from first base to third, and facing the umpire's call that he had failed to touch second base, and that he had also failed to beat the tag at third, defending himself by insisting that he had beaten the throw at second, and had touched third base. We would accuse him of playing a shell game. That is what the court below did.

If we consider the scenario that centers on the constructive discharge, factual causation requires that plaintiff would not have been transferred but for Hamsher's illicit motivation. Since there was no dispute but that the transfer was Hamsher's decision, a finding against plaintiff would be predicated on a finding that Hamsher was not illicitly motivated. If Hamsher was not so motivated, both Hamsher and the City must be exonerated. On the other hand, if there was factual causation, there is a proximate cause issue that may be posed as follows: was it forseeable that plaintiff's new assignment would be so odius to constitute a constructive discharge. There was no evidence that it was; more important, however, it was equally forseeable or unforseeable, to Frank Hamsher, individual defendant, as it was to Frank Hamsher, city policymaker.

It is no different if we follow the second scenario set forth above, which centers on the layoff. Once again, there is no dispute that plaintiff would not have been laid off but for his transfer; thus, any finding for Hamsher on the factual causation issue must be predicated on the jury's belief that he was not improperly motivated. And once again, if Frank Hamsher, individual defendant, was not improperly motivated, neither was Frank Hamsher, city policymaker. Turning to the proximate cause issue, not even the court below hinted that there was any evidence that Hamsher could have forseen the ultimate layoff. But, at the risk of redundancy, even if it was forseeable, it was equally forseeable to Hamsher in his guise of city policymaker, as it was to him as an individual actor.

Before leaving this question, we acknowledge a distinction between this case and *Heller*. The trial in *Heller* was a bifurcated one, and the finding exonerating the individuals defendants was held to preclude the possibility of a jury subsequently returning a verdict against the city that would be consistent with its earlier verdict exonerating the particular employees involved. Here, the trial was not bifurcated, and verdicts were returned against the City and in favor of the individual defendants. Plaintiff did not appeal the verdicts in favor of the individual defendants, and the judgments in their favor are now final. Hence, the logic that applied in *Heller* is equally applicable here, although the circumstance is somewhat different: the final judgment in favor of the defendants who were alleged to have inflicted a constitutional injury upon plaintiff, make it inconceivable that an award of damages could be properly imposed upon the city whose policy they were alleged to have made and effectuated. Thus, the second question presented by our petition is answered: the principles of causation applicable to official and local governments pursuant to §1983 do not differ such that a judgment may be rendered against a local government despite the return of the verdict exonerating the individual employee who was alleged to have promulgated the unconstitutional policy and acted pursuant to the policy. The jury's verdict against the City of St. Louis here was illogical.[15]

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[15] It is worth observing that even where respondeat superior is applied the rule is that the master cannot be held liable where a verdict has been returned or a judgment has been entered in favor of the employee who was alleged to have acted wrongfully. See, 53 AmJur 2d, Master and Servant, §406; Annot. 78 ALR 365; and the cases cited in both articles.

CONCLUSION

The policy of the Congress which adopted §1983 was one of "opposition to punishing innocent taxpayers and bankrupting local governments . . .". *City of Newport v. Facts Concerts, Inc., supra,* 453 U.S. at 266. Innocent taxpayers have been punished by the judgment of the district court, and local governments will be bankrupted by the theory that the court of appeals employed to sustain that judgment. The judgment should be vacated, and remanded for entry of judgment in favor of the City of St. Louis because there was no evidence that a city policy caused injury to plaintiff, and because any judgment against the City of St. Louis would be incompatible with the final judgment entered in favor of Frank Hamsher and the other individual defendants.

Respectfully submitted,

JAMES J. WILSON
City Counselor
*JULIAN L. BUSH
Assistant City Counselor
Room 314, City Hall
St. Louis, MO 63103

Attorneys for Petitioner

*Counsel of Record