

**MUNICIPAL LIABILITY FOR POLICE
MISCONDUCT UNDER 42 U.S.C. § 1983
AFTER CITY OF OKLAHOMA CITY
V. TUTTLE**

SOLOMON OLIVER, JR.*

I. INTRODUCTION

In *Monell v. Department of Social Services*,¹ the Supreme Court decided that municipalities could be sued under 42 U.S.C. § 1983² for violations caused by the execution of their official policies or customs. The Court, however, left the contours of such liability largely undefined.³ Though the Court has since clarified some aspects of municipal liability,⁴

* Associate Professor of Law, Cleveland State University, Cleveland-Marshall College of Law; B.A., 1969, College of Wooster; J.D., 1972, New York University School of Law; M.A., 1974, Case Western Reserve University. The author gratefully acknowledges the financial support of the Cleveland-Marshall Fund, the inspiration of his mother, Willie L. Oliver and the research assistance of Margaret McDevitt, Cleveland-Marshall class of 1985.

1. 436 U.S. 658, 690 (1978).
2. 42 U.S.C. § 1983 (1982), which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

3. Justice Brennan, writing for the majority in *Monell*, stated:

[W]e have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be. We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases, and we expressly leave further development of this action until another day.

436 U.S. at 695.

Justice Powell similarly stated in a concurring opinion: "Difficult questions . . . remain for another day. There are substantial line-drawing problems in determining 'when execution of a government's policy or custom' can be said to inflict constitutional injury such that 'government as an entity is responsible under § 1983.'" *Id.* at 713.

4. See *infra* notes 55-67 and accompanying text. Though this Article speaks of municipal liability, the discussion and the conclusions reached herein apply to "other local government units" as well. See *Monell*, 436 U.S. at 690. *Monell* provided that its holding applied to cities as well as

it has not yet addressed several significant issues.⁵

During its 1984 Term, *City of Oklahoma City v. Tuttle*⁶ presented the Supreme Court with two issues concerning what constitutes policy⁷ in

other "local government units which are not considered part of the State for Eleventh Amendment purposes." *Id.* at 690 n.54. The eleventh amendment bars suit against a state absent its consent.

The Supreme Court has held, apart from the issue of whether a state may be viewed as a "person" for purposes of § 1983, that the eleventh amendment bars such liability. *Edelman v. Jordan*, 415 U.S. 651, 676-77 (1974). Though Congress may abrogate a state's immunity that the eleventh amendment confers when legislating pursuant to § 5 of the fourteenth amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-56 (1976), the Supreme Court has held that Congress did not intend § 1983 to be such a waiver, *Quern v. Jordan*, 440 U.S. 332, 341 (1979).

The eleventh amendment, however, does not serve as a bar to suits against a municipal corporation or counties. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). In regard to other local entities receiving both state and local funds, however, the court must determine whether the particular entity "is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." *Mt. Healthy City School Dist.*, 429 U.S. at 280. In *Mt. Healthy*, the Court concluded that the defendant board of education, though receiving some guidance from the state board of education and receiving some state funds, also had the power to issue bonds and levy taxes, and thus was "more like a county or city than it is like an arm of the State." *Id.*

5. The Court, for example, has not fully addressed under what circumstances a person may be deemed a "policymaker" for purposes of subjecting the city to liability under § 1983. The lower courts addressing these issues have employed varying analyses with understandably differing results. Compare *Bennett v. City of Slidell*, 728 F.2d 762-70 (5th Cir. 1984) (city is not responsible for its attorney's and building inspector's delay in the issuance of a license because neither had policymaking authority; only the city council could in this instance be the policymaker for the municipality) with *Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983) (a police chief might be deemed a policymaker). For an excellent and thorough discussion of the factors that should be considered to determine under what circumstances city employees should be considered policymakers, see Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213, 216-27 (1979).

During its current term, the Supreme Court did address an aspect of this issue in *Pembauer v. City of Cincinnati*, 106 S. Ct. 1292 (1986). A majority of the Court concluded in an opinion written by Justice Brennan, that a single, first-time instruction by a county prosecutor to deputy sheriffs to force entry into a medical center without a search warrant to serve capias on employee of the center was sufficient under the circumstances to subject the county to liability under § 1983. In reversing the Sixth Circuit Court of Appeals, the Court made clear that municipal liability may be imposed for a single decision by a municipal policymaker. *Id.* at 1298. However, only Justices White, Marshall, and Blackmun joined that portion of Justice Brennan's opinion discussing what constitutes municipal policy:

We hold that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from various alternates by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Id. at 1300.

6. 105 S. Ct. 2427 (1985).

7. Courts and commentators sometimes use "policy" and "custom" interchangeably in their discussion of municipal liability. See Note, *Municipal Liability Under Section 1983: The Failure to Act as "Custom or Policy"*, 29 WAYNE L. REV. 1225, 1230 (1983). They are, however, analytically

the context of a police misconduct case: (1) whether proof of a single unusually excessive act of force by one officer, standing alone, could be sufficient to establish a policy of inadequate training by the city, and (2) whether a single act of police misconduct could be the basis of municipal liability if a policy of inadequate training were established through evidence independent of the act itself.⁸ Seven members of the Court decided the first issue negatively.⁹ Although the Court did not decide the second issue, Justice Rehnquist did, in the plurality opinion, make several comments in dicta that lower courts might view as bearing on its resolution. Justice Rehnquist sets forth generally the extent of proof he deems necessary to recover for an incident of misconduct. He distinguishes between proof of "unconstitutional policies" and policies that are not themselves unconstitutional.¹⁰ Furthermore, he raises the question, pregnant with implication, whether certain types of policies not unconstitutional in themselves, such as inadequate training, may ever be considered policy.¹¹

This Article analyzes the Court's recent decision in *Tuttle* and its potential impact on police misconduct litigation. It concludes that the Court's narrow holding that a single egregious act may not alone establish policy is sound in light of *Monell's* policy or custom requirement. It also concludes that this holding should not have a significant impact on lower court litigation because courts infrequently relied on the egregious incident theory.

The primary focus of this Article is on the issue the Court left undecided in *Tuttle*. Lower court treatment of inadequate training as a basis of recovery has been confused and unclear due to a failure to distinguish "policy" from "custom." This Article concludes that inadequate training should be viewed as "policy" and thus it is unnecessary to establish a pattern of violations as with "custom"; recovery may be had even upon proof of just one violation. This Article further concludes that none of the issues Justice Rehnquist raised should be resolved in a manner that denies or limits inadequate training as a theory of recovery. The clarification of the nature of inadequate training as a theory of recovery against

distinct. As may be clearly seen from the discussion, *see infra* notes 177-78 and accompanying text, the theory utilized may bear on whether or not recovery may be had from a municipality on a given set of facts.

8. *See infra* note 109 and accompanying text.

9. 105 S. Ct. at 2435-36.

10. *Id.* at 2436.

11. *Id.* at 2436 n.7.

a municipality for police misconduct will also serve to resolve the issue as to whether the failure to act may be viewed as policy in other contexts as well. Before discussing *Tuttle*, it is necessary to outline the historical background of section 1983 as well as the variation and conflict in lower court treatment of the inadequate training issue.

II. HISTORICAL BACKGROUND

In 1871, Congress created a cause of action for anyone whose federal statutory or constitutional rights had been violated under "color of state law." Now codified as section 1983,¹² this cause of action was enacted as section 1 of the Civil Rights Act of 1871,¹³ which was popularly known as the Ku Klux Klan Act.¹⁴ The Ku Klux Klan Act was passed in response to the widespread racial violence that blacks and white Republicans suffered throughout the South during this period.¹⁵ Sometimes law enforcement officers participated in the violence or acquiesced in it by failing to prosecute those who participated.¹⁶ Although the failure of state or state instrumentalities to control this racial violence¹⁷ prompted

12. 42 U.S.C. § 1983 (1982) (quoted *supra* note 2). The statute does not create substantive rights. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979). It provides a remedy for violation of rights that the U.S. Constitution or a federal statute other than § 1983 itself protects. *See Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

13. Ch. 22, 17 Stat. 13 (1871).

14. Though the Klan may have been the main source of violence in the South, the remedy that Congress created was not directed against the Klan or its members "but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Monroe v. Pape*, 365 U.S. 167, 176 (1961). *See infra* notes 17-28 and accompanying text.

The Klan Act was but one of several which Congress passed during the Reconstruction period after the Civil War in an effort to combat racism and provide equal rights to black citizens. The Acts included the Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (outlawed Southern Black Codes); Act of May 31, 1870, ch. 114, 16 Stat. 140 (protected voting rights); Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (same); and the Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (prohibited racial discrimination in public accommodations).

15. *Monroe v. Pape*, 365 U.S. 167, 174-78 (1961). *See also* Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 279-80 (1965); Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom"*, 79 COLUM. L. REV. 304, 308 (1979); Note, *supra* note 7, at 1226; *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1154 (1977).

16. *See supra* note 14.

17. *See, e.g., Monroe*, 365 U.S. at 174-76; CONG. GLOBE, 42d Cong., 1st Sess. 153-59, 195-96 (1871) (remarks of Sens. Sherman and Ames). The Court in *Monroe* stated:

It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies.

the passage of section 1983, the cause of action was not limited to black citizens or to conditions in the South and extended to all federal rights that were infringed “under color of law.”¹⁸ However, because of the courts’ restrictive interpretation of this phrase,¹⁹ section 1983 lay virtually unused as a tool to vindicate civil rights until 1961,²⁰ when the Supreme Court decided *Monroe v. Pape*.²¹

In *Monroe*, the plaintiffs, black parents and their children, sued the city of Chicago and several of its police officers alleging that they had violated their fourteenth amendment rights “‘under color of the statutes, ordinances, regulations, customs and usages’ of Illinois and of the City of Chicago.”²² Specifically, the plaintiffs claimed that the police officers, without a warrant, broke into their home in the early morning, made them stand naked while they ransacked the house, and then took the father to the police station where he was questioned and detained for an inordinate period of time without being allowed to communicate with his

365 U.S. at 180.

18. Representative Bingham who authored § 1 of the fourteenth amendment saw the purpose of the bill to be “the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guaranteed [sic] to him by the Constitution.” CONG. GLOBE, 42nd Cong., 1st Sess. app. 81 (1871).

Justice Douglas, writing for the Court in *Monroe*, stated: “Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and over again in the debates.” 365 U.S. at 183.

19. *Developments in the Law, supra* note 15, at 1156-67. Courts generally adopted the view that state officers’ conduct in violation of state law or authority was not “state action” and thus was not culpable conduct under § 1983. *Id.* at 1159-61.

The Supreme Court imposed further constraints on the use of § 1983 as a viable tool to vindicate civil rights by limiting the rights the fourteenth amendment protected to those with respect to the exercise of national citizenship. See *The Slaughterhouse Cases*, 83 U.S. 36, 78-80 (1873). Thus, the fourteenth amendment was not viewed as having any role in guaranteeing state enforcement of fundamental rights. See also Note, *Civil Rights: Municipal Liability Under 42 U.S.C. § 1983 for the Training, Supervision, and Control of Employees*, 22 WASHBURN L.J. 121, 122 (1982) (the Supreme Court’s interpretation of the scope of the fourteenth amendment accounted for the paucity of § 1983 suits).

20. From the enactment of the statute in 1871 until 1920, a total of only 21 lawsuits were filed under § 1983. See Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951). In 1960, the year before *Monroe* was decided, only 300 lawsuits were filed pursuant to all of the civil rights acts. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1960 ANNUAL REPORT OF THE DIRECTOR 232, table C2. By 1984, the number of non-prisoner civil rights cases had skyrocketed to over 20,000. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1984 ANNUAL REPORT OF THE DIRECTOR 145, table 25.

21. 365 U.S. 167 (1961).

22. *Id.* at 169.

family or a lawyer.²³ The district court dismissed their suit for failure to state a cause of action and the Court of Appeals for the Seventh Circuit affirmed.²⁴

The Supreme Court rejected the defendants' argument that because no law of the city of Chicago or the state of Illinois authorized the police officers to do what they did, they had not acted under color of state law. The Court adopted the interpretation it had previously given to "under color of law" in an analogous criminal provision.²⁵ It held: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."²⁶ The Court expressly rejected the defendants' argument that the section 1983 claim should be barred because state law itself prohibited such conduct and the state provided a judicial remedy.²⁷ Relying on the legislative history of section 1983, the Court found that one of the statute's primary purposes was to afford a practical remedy when "by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by . . . state agencies."²⁸ The Court thus found that the petitioners had stated a valid cause of action against the police officers and reversed the judgment of the court of appeals.²⁹

The Court, however, upheld the judgment, insofar as it applied to the city of Chicago, on the ground that the statute subjected only "persons" to liability for violation of federal rights and that a municipality was not a "person" within the meaning of the statute. In reaching this conclusion, the Court relied on Congress' rejection of the so-called Sherman Amendment, which was offered to supplement section 2 of the Civil Rights Act of 1871.³⁰ The author of the Sherman Amendment sought to

23. *Id.* at 169-70.

24. *Monroe v. Pape*, 272 F.2d 365, 366 (7th Cir. 1959), *rev'd*, 365 U.S. 167 (1961).

25. 18 U.S.C. § 242 (1982). This section provides for the criminal punishment of anyone who "under color of any law, statute, ordinance, regulation, or custom willfully subjects any inhabitant of [a state] to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." Section 242 was originally enacted as § 2 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

26. 365 U.S. at 184 (*quoting* *United States v. Classic*, 313 U.S. 299, 326 (1941)).

27. 365 U.S. at 183.

28. *Id.* at 180.

29. *Id.* at 187.

30. *Id.* at 187-91.

provide a vehicle for controlling Klan violence by making municipalities liable for damages caused to persons or property within their boundaries by private persons "riotously and tumultuously assembled."³¹ The Court found that Congress rejected this provision because Congress doubted its constitutional power to subject a municipality to any type of civil liability.³² Thus, Congress did not mean to include municipalities within the meaning of the word "person" in section 1 of the Act.³³

The *Monroe* Court, in defining "under color of law" to include official abuse of power, paved the way for section 1983 to become a major vehicle for the vindication of constitutional rights.³⁴ However, in concluding that a municipality was not a person within the meaning of section 1983, the Court withheld the most effective remedy for the systematic abuse of such state power, a damage action directly against the municipality involved.³⁵

In *Monell v. Department of Social Services*,³⁶ the Supreme Court considered anew its determination in *Monroe* that municipalities were not "persons" subject to liability under section 1983. In *Monell*, female employees of the Department of Social Services and the Board of Education of New York City filed a class action suit against the city claiming a violation of their constitutional rights.³⁷ The district court held that *Monroe* barred the recovery of back pay against the city and the court of appeals affirmed.³⁸

The Supreme Court reevaluated the legislative history that it had con-

31. See CONG. GLOBE, 42d Cong., 1st Sess. 663, 704, 820 (1871).

32. 365 U.S. at 190 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 804 (1871)).

33. 365 U.S. at 191. The Court noted that it did not "reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals." *Id.*

34. The Court's decision in *Monroe* considerably broadened the basis for federal lawsuits against state officials and was thus largely responsible for the proliferation of § 1983 lawsuits. See *supra* note 20. For example, in the police misconduct area, a variety of police abuses became actionable, including false arrest or false imprisonment, the use of excessive force, illegal searches and seizure, and coerced or illegal questioning.

35. See Littlejohn, *Civil Liability and the Police Officer: The Need for New Deterrents to Police Misconduct*, 58 U. DET. J. URB. L. 365, 412 (1981).

The *Monroe* decision which provided for municipal immunity under § 1983 was widely criticized. See, e.g., Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 132-36 (1972); Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1205-07 (1971).

36. 436 U.S. 658 (1978).

37. *Id.* at 660-61.

38. *Monell v. Department of Social Servs.*, 394 F. Supp. 853 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 259 (2d Cir. 1976), *rev'd*, 436 U.S. 658 (1978).

sidered in *Monroe* and concluded that indeed municipalities were "persons" within the meaning of the statute.³⁹ In reversing itself on this issue, the Court found unwarranted its conclusion in *Monroe* that Congress doubted its power to impose any type of civil liability on a municipality.⁴⁰ Sections 2 thru 4 of the Civil Rights Act, unlike section 1, dealt primarily with quelling Ku Klux Klan violence in southern states.⁴¹ The "wisdom and constitutionality of each of these sections" were the subject of considerable debate by Congress and each of these sections was ultimately amended.⁴² In contrast, section 1 was the subject of very little debate and was passed by Congress without amendment.⁴³ Furthermore, section 1 was not the subject to the same constitutional impediment to which the Sherman Amendment to section 2 was arguably subject.

The primary basis for Congress' conclusion that it could not constitutionally impose liability on municipalities for violence caused within their boundaries was that the federal government could not require "local governments to create police forces, whether this requirement was levied directly, or indirectly by imposing damages for breach of the peace on municipalities."⁴⁴ However, the opponents to the amendment distinguished between an unconstitutional imposition of the obligation to keep the peace and "merely imposing civil liability for damages on a municipality that was obligated by state law to keep the peace, but which had not in violation of the Fourteenth Amendment."⁴⁵ As a result, the Court concluded that Congress did not deem itself to be without constitutional power to impose civil liability on a municipality for its violation of the rights enumerated in section 1983.⁴⁶ In addition, the Court found that a reading of the legislative history and principles of statutory construction added further support to the conclusion that municipalities were intended to be included among the "persons" to which section 1983 applies.⁴⁷

39. 436 U.S. at 690.

40. *Id.* at 664-90.

41. *Id.* at 665.

42. *Id.*

43. *Id.* The lack of debate may in part be explained by the fact that the section only added civil remedies to the criminal penalties that § 2 of the Civil Rights Act of 1866, now codified as 18 U.S.C. § 242 (1982), already established. See CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (remarks of Rep. Shellabarger); see also *Developments in the Law, supra* note 15, at 1155.

44. 436 U.S. at 673.

45. *Id.* at 679.

46. *Id.* at 683.

47. *Id.* at 683-89.

Thus, the *Monell* Court stated that “[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body’s officers.”⁴⁸ Even if the lawmakers of the municipality do not formulate the policy, the city will be liable if the policy is made “by those whose edicts or acts may fairly be said to represent official policy.”⁴⁹ The Court also noted that a municipality could be sued for deprivation of constitutional rights pursuant to governmental custom even though the official decision makers had not formally approved the custom.⁵⁰ The Court, however, unequivocally indicated that municipalities could not be held vicariously liable for the torts of their employees: “In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tort-feasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.”⁵¹

Consequently, the key inquiry in regard to municipal liability under section 1983 is whether the municipality itself caused the violation. In *Monell*, the Court concluded that the requirement that pregnant female employees take unpaid leaves before the leaves were required for medical reasons was unquestionably (1) an official policy of the city and (2) the cause of the constitutional violation.⁵² The Court stated, however, that

48. *Id.* at 690 (footnote omitted).

49. *Id.* at 694.

50. In discussing custom as a basis for municipal liability, the Court quoted *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970), as follows: “Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a ‘custom or usage’ with the force of the law.” 436 U.S. at 691.

51. *Id.* at 691 (emphasis in original). As its basis for the rejection of *respondeat superior*, the Court found that the concept of vicarious liability was inconsistent with the language of the original § 1983 holding a person liable who under color of law either “subject[s] or cause[s] to be subjected, any person . . . to the deprivation of any rights . . . secured by the Constitution.” 436 U.S. at 691 (quoting 17 Stat. 13) (emphasis omitted). The Court stated: “Indeed, the 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.” 436 U.S. at 692. The Court found further support for the denial of vicarious liability in the legislative history surrounding rejection of the Sherman Amendment. *Id.* at 692-93.

An article concluding that at most the legislative history surrounding the rejection of the Sherman Amendment indicated that Congress was unwilling to hold local governments liable for the acts of others foreshadowed the *Monell* decision. See Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483, 1519-31 (1977).

52. 436 U.S. at 694-95.

"we have no occasion to address, and do not address, what the full contours of municipal liability . . . may be."⁵³ For example, it was not presented with, and thus did not decide, whether a municipality, like its employees, was entitled to qualified immunity under the statute.⁵⁴

After *Monell*, the Court has clarified some aspects of municipal liability. For example, in *Owen v. City of Independence*,⁵⁵ the Court held that municipalities were not entitled to qualified immunity under section 1983.⁵⁶ In *Owen*, the police chief brought a section 1983 action against the city of Independence, Missouri as well as the city manager and the members of city council in their official capacities. He charged that the city council's false and public accusations against him, coupled with his dismissal as police chief without notice and an opportunity to be heard, violated his fourteenth amendment right to due process.⁵⁷ After reciting the case's lengthy and involved procedural history, the Court of Appeals for the Eighth Circuit decided that the city had violated the police chief's rights under the due process clause of the fourteenth amendment.⁵⁸ However, the court held that all defendants, including the city, were entitled to a qualified immunity.⁵⁹

The Supreme Court reversed, finding that the language of the statute,⁶⁰ its legislative history,⁶¹ the common law,⁶² and public policy⁶³ did not support qualified immunity for the city. Specifically as to the issue of policy, the Court stated:

How "uniquely amiss" it would be, therefore, if the government itself—"the social organ to which all in our society look for the promotion of lib-

53. *Id.* at 695.

54. *Id.* at 701.

55. 445 U.S. 622 (1980).

56. *Id.* at 650.

57. *Id.* at 625-30.

58. *Owen v. City of Independence*, 589 F.2d 335, 337 (8th Cir. 1978), *rev'd*, 445 U.S. 622 (1980).

59. 589 F.2d at 338.

60. The Court stated that the language of § 1983 was "absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." 445 U.S. at 635.

61. *Id.* at 650.

62. Though the Court acknowledged that it has recognized immunity in the context of a § 1983 action, it has done so only when the immunity claimed by the defendant was well-established at common law and was compatible with the purpose of the statute. With municipalities, unlike with judges, *see, e.g.*, *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967), and prosecutors, *see, e.g.*, *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976), the Court found "no tradition of immunity for municipal corporations" at common law. 445 U.S. at 637-38.

63. 445 U.S. at 651-52.

erty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct"—were permitted to disavow liability for the injury it has begotten.⁶⁴

Furthermore, because of the existing qualified immunity that most government officials enjoyed, many victims of municipal misconduct would be left without a remedy.⁶⁵ In addition, the Court noted that the possibility of a damage remedy against the city might encourage policymakers to institute rules and programs to minimize violation of constitutional rights.⁶⁶ For the controlling standard of municipal liability, the Court reiterated *Monell's* holding that a city is liable under section 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflict the injury."⁶⁷

The Supreme Court has not yet addressed other significant aspects of the contours of municipal liability under section 1983. For example, prior to *Tuttle* the Court had not addressed whether proof of policymaking officials' failure to act may serve as a basis of establishing municipal policy under *Monell*. The lower courts, though addressing the failure to act issue in a variety of different contexts,⁶⁸ have most often addressed it in the context of police misconduct litigation in which plaintiffs seek recovery on a theory that the city has failed to train, or has inadequately trained, its officers.⁶⁹ The plaintiff in *Tuttle* relied upon this theory of liability. Before analyzing the Supreme Court opinion in *Tuttle* and discussing its implications, it is necessary to discuss the nature of inadequate training as a theory of recovery against a municipality prior to *Tuttle*.

III. MUNICIPAL LIABILITY FOR LACK OF ADEQUATE TRAINING

Lower federal court cases decided after *Monell* clearly established that a plaintiff could recover against a municipality for unconstitutional po-

64. *Id.* at 651 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 190 (1970)).

65. 445 U.S. at 651.

66. *Id.* at 651-52.

67. *Id.* at 633 (quoting *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978)).

In addressing another issue of municipal liability under § 1983, the Court in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) held that a city is not subject to punitive damages under the section. The Court concluded that municipalities were immune from punitive damages at common law and that the objectives of punitive damages, retribution and deterrence would not be significantly served. *Id.* at 259-71.

68. See Note, *supra* note 7, at 1233-34 (failure to act may give rise to § 1983 liability in prison administration, Indian reservation, and public agency contexts).

69. See *infra* notes 70-108 and accompanying text.

lice misconduct if he could prove a pattern and practice of abuse of which a city had actual or constructive knowledge.⁷⁰ The theory that a city had a pattern/practice or custom of police abuse was applied in a variety of different contexts, including, for example, excessive use of force and failure to discipline.⁷¹

In addition to allowing recovery from a municipality based on unconstitutional custom, some lower courts after *Monell* began to recognize a cause of action against municipalities for violations caused by inadequate training policies that were grossly negligent or recklessly indifferent to the civil rights of citizens.⁷² In sustaining such a theory of liability, courts rejected the argument that *Monell* and the Supreme Court's holding in *Rizzo v. Goode*⁷³ precluded recovery against a municipality for omissions of its policymakers.⁷⁴

In *Rizzo*, the plaintiff filed a class action suit seeking an injunction as well as other equitable relief against the Mayor of Philadelphia, the managing director, and supervisory police officials of Philadelphia. The plaintiffs alleged that a pervasive pattern of unconstitutional treatment of minorities and other citizens of Philadelphia existed throughout the city.⁷⁵ The trial court granted equitable relief, requiring the defendants to revise their program for handling citizens' complaints against the police.⁷⁶ Although the Court of Appeals for the Third Circuit affirmed this

70. See, e.g., *Reeves v. City of Jackson*, 608 F.2d 644, 652 (5th Cir. 1979) (city may be liable under § 1983 if it "tacitly or explicitly encouraged improper arrest" by its police officers); *Mayes v. Elrod*, 470 F. Supp. 1188, 1194-95 (N.D. Ill. 1979) (county department of corrections could be liable under § 1983 if its inaction amounted to acquiescence and implicit encouragement of a pattern of constitutional abuses); see also Seng, *Municipal Liability for Police Misconduct*, 51 Miss. L.J. 1, 6-7 (1980) (if city police officers routinely violate constitutional rights of citizens, the municipality may be liable under § 1983).

71. See, e.g., *Smith v. Ambrogio*, 456 F. Supp. 1130, 1137 (D. Conn. 1978) (municipal liability under § 1983 may be based "on the inaction of senior [police] officials that is tantamount to approval of unconstitutional acts by subordinates").

72. See, e.g., *Owens v. Haas*, 601 F.2d 1242, 1246 (2d Cir.) (county could be held liable for constitutional violations caused by inadequate training of its prison guard), *cert. denied*, 444 U.S. 980 (1979); *Leite v. City of Providence*, 463 F. Supp. 585, 590-91 (D.R.I. 1979) (failure to train or grossly negligent training may give rise to municipal liability).

73. 443 U.S. 362 (1976) (involving supervisory liability for police misconduct).

74. See, e.g., *Leite*, 463 F. Supp. at 590. In *Leite*, the court characterized the effect of *Rizzo* as follows: "*Rizzo* and its progeny do not find a negligent failure to supervise actionable under section 1983 unless the supervisory officials in some way directly participated in or encouraged the specific instance of misconduct . . ." *Id.* (emphasis added).

75. 423 U.S. at 366-67.

76. *Id.* at 369-70.

decision,⁷⁷ the Supreme Court reversed. The Court found the district court's exercise of authority to be an unwarranted intrusion into the internal affairs of the defendants and in violation of the principles of federalism.⁷⁸ Although the defendants had been "charged with conduct ranging from express authorization or encouragement of . . . mistreatment to failure to act in a manner so as to assure that it would not recur in the future,"⁷⁹ the Supreme Court noted the district court's findings of fact were "in sharp contrast to that which respondents sought to prove"⁸⁰ In fact, the Court found "no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy of petitioners—express or otherwise—showing their authorization or approval of such misconduct."⁸¹

Based upon this language, various municipal defendants have argued that a city's failure to act cannot serve as the basis of municipal liability.⁸² Most courts, however, have rejected this reading of *Rizzo*. Instead, they have concluded that the impediment to recovery in *Rizzo* was not inaction in and of itself, but was a lack of proof that the inaction caused the violation.⁸³ Indeed, the Supreme Court itself in *Monell* has not interpreted *Rizzo* so narrowly as to deny recovery for omissions that occur as a result of the policymaking process. The *Monell* Court read *Rizzo* to mean "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."⁸⁴ The clear import of this conclusion is that, if proof of an exercise of control *or* a failure to supervise had been established as the cause of the violation, the supervisors in *Rizzo* would have been liable.⁸⁵

77. *Id.* at 370.

78. *Id.* at 377-80.

79. *Id.* at 367.

80. *Id.* at 371.

81. *Id.*

82. See, e.g., *Turpin v. Mailet*, 610 F.2d 196, 201 (2d Cir.), *cert. denied*, 449 U.S. 1016 (1980); *Starstead v. City of Superior*, 533 F. Supp. 1365, 1370 (W.D. Wis. 1982).

83. See, e.g., *Turpin*, 619 F.2d at 200-01 (inaction in *Rizzo* did not amount to policy); *Hector v. Weglein*, 558 F. Supp. 194, 200 (D. Md. 1982) (*Rizzo* requires that inaction must be "causally linked" to a pattern of constitutional violations).

84. *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 n.58 (1978).

85. Many courts have considered cases involving supervisory liability under § 1983 to be relevant to the issue of municipal liability for inadequate training. As the district court stated in *Smith v. Ambrogio*, 456 F. Supp. 1130 (D. Conn. 1978):

The ascertainment of an unarticulated policy of a town is similar to the inquiry concerning the liability of supervisory officials accused of responsibility for unconstitutional conduct

One of the earliest cases recognizing a cause of action based directly on inadequate training was *Leite v. City of Providence*.⁸⁶ In *Leite*, the plaintiff sought recovery from the city of Providence under section 1983 after its police officers allegedly mistreated him. Discussing whether the city could be liable under *Monell* based upon the acts of its police force, the court stated:

If a municipality completely fails to train its police force, or trains its officers in a reckless or grossly negligent manner so that future police misconduct is almost inevitable, the municipality exhibits a "deliberate indifference" to the resulting violations of a citizen's constitutional rights. In such a case, the municipality may fairly be termed as acquiescing in and implicitly authorizing such violations.⁸⁷

taken by subordinates. *Respondeat superior* [is] unavailable to hold either the supervisory official or the town liable for the misconduct of the subordinate. Instead, the liability of the supervisor or the town depends on whether they have commanded the result or adopted a policy, a natural consequence of which is the denial of a constitutional right.

Id. at 1135.

86. 463 F. Supp. 585 (D.R.I. 1978).

87. *Id.* at 590. The standard of gross negligence or deliberate indifference seems to have been first articulated in *Leite* in the context of police misconduct litigation seeking recovery on an inadequate training theory. The *Leite* court concluded that supervisors traditionally had not been held liable for their negligent failure to supervise, control, and correct their subordinates and that *Rizzo v. Goode*, 423 U.S. 362 (1976), confirmed this result. The court stated:

Rizzo and its progeny do not find a negligent failure to supervise actionable under section 1983 unless the supervisory officials in some way directly participated in or encouraged the specific instance of misconduct; at a minimum, this standard requires a showing that the municipality, acting through its supervisory officials, implicitly authorized or approved or acquiesced in the misconduct.

463 F. Supp. at 590.

The court held that if a city acted in a manner that was deliberately indifferent to the violation of constitutional rights, the *Rizzo* requirement was satisfied. A city acts deliberately indifferent, the court concluded, when it trains its force in such a reckless or grossly negligent manner that future police misconduct is almost inevitable. *Id.*

The court adopted the reckless indifference "standard" from *Estelle v. Gamble*, 429 U.S. 97 (1976), in which the Supreme Court denied § 1983 recovery to a prisoner allegedly denied proper medical care in violation of the eighth amendment. The Court in *Estelle* held that a prisoner seeking recovery on such a basis must allege "deliberate indifference to [the] prisoner's serious illness or injury." *Id.* at 105.

The Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), however, makes it clear that it is the eighth amendment and not § 1983 which imposes the *Estelle* requirement of deliberate indifference. In *Parratt* the Court denied recovery on the ground that when the state provided an adequate remedy for the negligent loss by prison officials of plaintiff's hobby materials, such loss could not constitute a deprivation of property without due process of law under the fourteenth amendment. However, the Court concluded in *Parratt* that simple negligence may support an action under § 1983. *Id.* at 532-35. This term, in *Daniels v. Williams*, 106 S. Ct. 662, 664 (1986) and *Davidson v. Cannon*, 106 S. Ct. 668 (1986), the Court reaffirmed its conclusion that since no state of mind requirement is imposed by § 1983, one must look to the requirements with respect to the specific

The *Leite* court also stated that “citizens do not have to endure a ‘pattern’ of past police misconduct before they can sue the city” under these circumstances.⁸⁸

Most courts of appeals have subsequently acknowledged that recovery may be had against a municipality or other local governmental entity for constitutional violations caused by inadequate training policies resulting from gross negligence or reckless indifference of responsible supervisory officials.⁸⁹ Those courts that have recognized gross negligence or deliberate indifference as a basis of liability, however, have differed sharply in their treatment of key issues. Their decisions conflict regarding what constitutes official policy or custom for purposes of proving inadequate training for which a city may be liable, and whether or not one may recover on the basis of such training for a single incident of misconduct.

*Languirand v. Hayden*⁹⁰ established a very restrictive view of what one must demonstrate to prove an inadequate training policy. In *Languirand*, the plaintiff sued a municipality and one of its patrolmen for severe injuries that he sustained as a result of being shot by the patrolman. He claimed that the officer used excessive force in trying to apprehend him, and that the use of such force was the result of the city’s

constitutional violation alleged. The Court overruled the aspect of *Parratt* suggesting that negligent conduct by governmental officials is sufficient to establish a procedural due process violation under the fourteenth amendment in the absence of an adequate state remedy. *Davidson v. Cannon*, 106 S. Ct. 668 (1986).

88. 463 F. Supp. at 590.

89. See *Voutour v. Vitale*, 761 F.2d 812, 920 (1st Cir. 1985) (“supervisor must demonstrate at least gross negligence amounting to deliberate indifference and this conduct must be casually linked to the subordinate’s violation of the plaintiff’s civil rights”); *Rock v. McCoy*, 763 F.2d 394, 397 n.1 (10th Cir. 1985) (city is liable if it is grossly negligent in failing to train its police officers); *Lenard v. Argento*, 699 F.2d 874, 886 (7th Cir.) (municipal liability results if a supervisor’s inaction with regard to hiring, training, and supervision of subordinates constitutes “deliberate indifference” to a “pattern of constitutionally offensive acts”), *cert. denied*, 104 S. Ct. 69 (1983); *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir.) (a city may be liable for § 1983 if its training of the police is “so reckless or grossly negligent that future police misconduct is almost inevitable”), *cert. denied*, 459 U.S. 833 (1982); *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981) (same); *Turpin v. Maillet*, 619 F.2d 196, 201 (2d Cir.) (supervisory inaction can give rise to municipal liability if the supervisor is deliberately indifferent or tacitly authorizes police misconduct); *cert. denied*, 449 U.S. 1016 (1980); *cf. Hirst v. Gertzen*, 676 F.2d 1252, 1263 (9th Cir. 1982) (county could be liable under § 1983 if its negligent hiring and supervision of prison guards proximately caused the violation of the plaintiff’s constitutional rights); *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1388 (11th Cir. 1981) (“culpable nonfeasance” of a supervisory police official who failed to control subordinates is required before the individual superior or municipal corporation can be liable), *cert. denied*, 456 U.S. 979 (1982).

90. 717 F.2d 220 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2656 (1984).

inadequate training of its officers.⁹¹ At trial, undisputed testimony established that the patrolman had not received formal training in the use of his weapon, and expert testimony further established that he did not have the "minimum training that was necessary for him to do his job."⁹² However, the plaintiff did not seek to prove that the police force was inadequately trained *in general* or that there was a pattern of similar police misconduct.⁹³ The Fifth Circuit Court of Appeals, relying heavily on the fact that there was no such evidence presented, concluded that "[t]here is simply no evidence that the City had any policy or custom of placing armed officers on the streets who lacked adequate training, skill, and experience in the use of firearms."⁹⁴ Even assuming gross negligence on the part of the police chief, the court of appeals found that an isolated incident of allowing an inadequately trained officer to go on patrol, which resulted in personal injury and the violation of an individual's constitutional rights did not constitute a policy or custom under *Monell*.⁹⁵ Thus, the court in *Languirand* seemed to require demonstration of both systematic or widespread inadequate training within the police department and a pattern of abusive incidents before recovery might be had on a theory of an inadequate training policy.

At the opposite end of the spectrum, however, are cases in which courts have allowed plaintiffs to recover upon evidence of a single incident of misconduct if they have demonstrated that the municipality had an adequate training policy only in respect to the particular officer or officers involved.⁹⁶ *Rock v. McCoy*⁹⁷ is an example of such a case. In *Rock*, the plaintiff's theory of liability against the city was, in part, that the police officers had used excessive force in arresting him because the city had been grossly negligent in the training of the officers involved.⁹⁸

91. 717 F.2d at 221-22.

92. *Id.* at 228.

93. *Id.* at 229.

94. *Id.*

95. *Id.*

96. *See, e.g.,* *Voutour v. Vitale*, 761 F.2d 812, 820-23 (1st Cir. 1985) (failure to train officers involved in shooting of plaintiff may give rise to municipal liability under § 1983); *Rock v. McCoy*, 763 F.2d 394, 396-97 (10th Cir. 1985) (inadequate training of policemen who used excessive force during the plaintiff's arrest gave rise to municipal liability); *McQuarter v. City of Atlanta*, 572 F. Supp. 1401, 1420-21 (N.D. Ga. 1983) (recklessness or gross negligence in training and promoting supervisors involved in single incident of excessive force may be sufficient to state a claim of municipal liability under § 1983), *appeal dismissed*, 724 F.2d 881 (11th Cir. 1984); *Sirmans v. City of South Miami*, 86 F.R.D. 492, 494 (S.D. Fla. 1980) (same).

97. 763 F.2d 394 (10th Cir. 1985).

98. *Id.* at 397.

The jury returned a verdict against the city and the two officers. The city appealed, alleging that the plaintiff had not proved that the city had a *custom* of using excessive force of the kind the defendant officers employed.⁹⁹ The court of appeals noted that a custom of excessive force was not the theory upon which the plaintiff had relied. He had contended, instead, "that the City is liable because it was grossly negligent in failing to train the officers, with the foreseeable result that beatings like those inflicted on him would occur."¹⁰⁰ The court upheld the jury verdict reached on this theory of liability because ample evidence supported a finding that the two officers involved "had [not] received basic training at the Council of Law Enforcement Training (CLEET), the State of Oklahoma's school where all Oklahoma police officers are trained."¹⁰¹

Not all courts, however, have recognized recovery from a municipality that has inadequately trained police officers in such a way as to constitute gross negligence or deliberate indifference to the constitutional rights of others. For example, in *Gilmere v. City of Atlanta*,¹⁰² an Atlanta police officer had killed a man while attempting to arrest him. The administratrix of the decedent's estate sued the city of Atlanta claiming that the city had deprived the deceased of his liberty without due process. One theory of liability upon which the plaintiff relied was that the city had a custom or policy of deploying officers on the street without appropriate training. The trial court found that the city had trained the officer involved in a grossly negligent manner and held for the plaintiff.¹⁰³

On appeal, the Eleventh Circuit Court of Appeals found that *Monell* did not countenance a theory of liability based on inadequate training amounting to gross negligence or deliberate indifference.¹⁰⁴ The court found that there was no proof of an official policy of the city to select and train its officers in an improper manner. Furthermore, it found that no custom of the city sanctioned the use of excessive force. Because the plaintiff had presented "at best, an isolated incident in which the police officers used excessive force to restrain an arrestee,"¹⁰⁵ the holding from *Bennett v. City of Slidell*¹⁰⁶ was controlling. As a result, the *Gilmere*

99. *Id.*

100. *Id.*

101. *Id.* (footnote omitted).

102. 737 F.2d 894 (11th Cir. 1984).

103. *Id.* at 899-900.

104. *Id.* at 903-04.

105. *Id.* at 904.

106. 728 F.2d 762 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 3476 (1985).

court held: "Isolated violations are not the persistent, often repeated, constant violations that constitute custom and policy. . . . [O]ccasional acts of untrained policemen [standing alone] are not attribut[able] to city policy or custom."¹⁰⁷ Thus, although the plaintiff presented proof at trial from which the trial court might conclude that the training of the police officers who shot the deceased was so inadequate as to constitute gross negligence or reckless indifference, the court of appeals reversed the trial court's judgment in favor of the plaintiff.¹⁰⁸

Cases such as *Languirand*, *Rock*, and *Gilmere* illustrate the conflict that rages among the lower federal court decisions on the issue of inadequate training as a basis for municipal liability. Although the *Tuttle* Court was presented with one of the more vexing issues in this conflict, whether a city could be liable for a *single* instance of police misconduct if policy or custom is proved independently of the constitutional violation,¹⁰⁹ it did not directly address this issue. Instead, the Court reversed the jury verdict in favor of the plaintiff on the relatively narrow ground that proof of only a single act of police misconduct, no matter how egregious, cannot establish municipal policy.

107. 737 F.2d at 904 (quoting *Bennett*, 728 F.2d at 768 n.3 (citations omitted)).

108. 737 F.2d at 905.

109. The City of Oklahoma City's petition for certiorari and its brief in the Supreme Court reveal that the city did not merely seek reversal of the lower court's judgment on the basis of an error in jury instructions. It broadly argued that a city is not liable for a single instance of police misconduct caused by its policy or custom, even when independent evidence such as expert testimony as to inadequate training proves the policy or custom. See Petition for Writ of Certiorari at 5, *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427 (1985). As support for this position, the City of Oklahoma City cited cases in which plaintiffs sought to recover for a single act but relied upon independent evidence to establish a municipal policy or custom of inadequate training. *Id.* at 9-13 (citing, *inter alia*, *Languirand*, *Leite*, and *Hays v. Jefferson County*). The City did not cite cases that related to the single egregious incident theory, although the City contended in the "Question Presented" section of its petition that this theory was erroneously incorporated in the district court's instructions to the jury. See *id.* at i.

The City's brief also evidences that it perceived the issue before the Court as encompassing whether one may recover against a municipality for a single incident of misconduct. For instance, the City began its summary of the argument with the following statement: "[T]he City of Oklahoma City asserted throughout the case that it could not be held liable in damages under 42 U.S.C. § 1983 for a single isolated incident of the use of excessive force by a member of its police department." Brief of the Petitioner at 7-8, *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427 (1985). Furthermore, this perception of the primary issue seems also to have been shared by the respondent in the case, see Memorandum for the Respondent in Opposition at 5, as well as the authors of the amicus briefs on both sides. See, e.g., Brief of the State of Oklahoma Amicus Curie in Support of the Petitioner at 2-5; Brief of the American Civil Liberties Union and the American Civil Liberties Union of Oklahoma Foundation as Amicus Curie in Support of Respondent at 3, 7-12, 25-35, 49.

IV. TUTTLE AND ITS IMPLICATION

In *City of Oklahoma City v. Tuttle*,¹¹⁰ a police officer killed a man during the investigation of a reported robbery at a bar. His widow sued the police officer and the city of Oklahoma City under section 1983, claiming that their actions violated her husband's constitutional rights. Specifically, she claimed his right to due process was violated because the police officer had no reasonable basis to believe that a robbery had occurred or to employ deadly force in apprehending her husband.¹¹¹ The plaintiff sought to prove at trial that her husband's death was caused by the city's training of its officer in a manner so inadequate as to constitute gross negligence or reckless indifference.¹¹² She maintained that the officer's conduct was so egregious under the circumstances that, standing alone, it demonstrated that the city was grossly negligent or recklessly indifferent in its training. Alternatively, she presented direct evidence, through an expert witness, that the policeman's excessive and unconstitutional use of force was caused by inadequate training that amounted to gross negligence or deliberate indifference by the city.¹¹³

The district court charged the jury that it could hold the city liable under section 1983 if it found that the city's training of its officers was so deficient as to constitute gross negligence or deliberate indifference.¹¹⁴ It gave further instructions stating that while ordinarily a policy could not be inferred from a single incident of police misconduct, "a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge."¹¹⁵ Thereafter, the jury returned a verdict against the city and, the Court of Appeals for the Tenth Circuit affirmed the trial court's judgment.¹¹⁶

110. 105 S. Ct. 2427 (1985).

111. *Id.* at 2430, 2437.

112. *Id.* at 2430-31.

113. *Id.* at 2434-35.

114. *Id.* at 2430-31.

115. *Id.* at 2431 (quoting Joint Appendix at 44, *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427 (1985)).

116. *Tuttle v. City of Oklahoma City*, 728 F.2d 456, 457, 460-61 (10th Cir. 1984), *rev'd*, 105 S. Ct. 2427 (1985). On appeal, Oklahoma City maintained that the trial court committed error in several respects, including the giving of an instruction that would allow a jury to infer a policy of inadequate training from proof of a single incident involving the use of excessive force. 728 F.2d at 459. The City also maintained on appeal that one could not recover for a single incident of misconduct even if a policy of inadequate training was independently proven. *Id.* at 460-61. The Tenth

The Supreme Court reversed.¹¹⁷ In a plurality opinion in which the Chief Justice and Justices White and O'Connor joined, Justice Rehnquist found erroneous the district court's jury instruction that "a single, unusually excessive use of force" was sufficient to show inadequate training or supervision amounting to gross negligence or deliberate indifference.¹¹⁸ He also concluded that an inference of inadequate training derived from the degree of force an officer used and the "further assumption concerning the state of mind of the municipal policymakers" was unwarranted.¹¹⁹ Furthermore, such an instruction was contrary to *Monell's* policy or custom requirement, which "was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers."¹²⁰ Even though the plaintiff had introduced independent evidence of inadequate training, the judgment below had to be reversed; the jury instructions as to the single, unusually excessive use of force would allow the jury to impose liability on the city even if it did not believe the plaintiff's independent evidence of inadequate training.¹²¹ Thus, a single incident involving the excessive use of force, even though exceptionally brutal, was not sufficient by itself to constitute policy.¹²²

Justice Brennan's concurring opinion agreed with Justice Rehnquist's rejection of the principle that a "single egregious incident" can establish municipal policy and liability.¹²³ He concluded that allowing recovery

Circuit found that the judge's instructions were not erroneous. It held "that this action, [the use of force by the officer] coupled with the clearly inadequate training, demonstrate[d] the City's gross negligence and deliberate indifference to the rights of decedent" and gave rise to municipal liability. *Id.* at 461.

117. Justice Rehnquist wrote the plurality opinion, in which the Chief Justice, and Justices White and O'Connor joined. Justice Brennan wrote an opinion concurring in the judgment in which Justices Marshall and Blackmun joined. Justice Stevens dissented and Justice Powell took no part in the decision in the case.

118. 105 S. Ct. at 2435-37.

Aside from his discussion of the merits of the case, Justice Rehnquist's opinion for the Court also rejected the plaintiff's argument that the City had failed to object at trial to the "single incident" instruction with sufficient clarity as to comport with the requirements of Rule 51 of the Federal Rules of Civil Procedure. The Court found that the plaintiff had not raised this issue in the court of appeals, that its brief in opposition to the petition for certiorari did not raise the issue, and that judicial economy could not be served by allowing this argument to be raised at this late stage. *Id.* at 2431-32.

119. *Id.* at 2435.

120. *Id.*

121. *Id.*

122. *Id.* at 2436.

123. *Id.* 2437-40 (Brennan, J., concurring in part).

under this theory would amount to allowing recovery on a *respondeat superior* basis, a basis that the Court had explicitly rejected in *Monell*.¹²⁴ Justice Stevens in dissent maintained, on the other hand, that because the Court in *Monell* was not presented with the issue of *respondeat superior* liability, it should not have decided that issue.¹²⁵ He further concluded that *Monell* had wrongly construed the legislative history on this issue. Justice Stevens argued that a fair reading of the legislative history would support municipal liability on the basis of the doctrine of *respondeat superior*.¹²⁶

A. *The Effect of the Court's Holding*

The majority decision that a single, unusually excessive use of force cannot constitute policy or custom should not be surprising. Most courts of appeals had rejected the principle prior to *Tuttle*.¹²⁷ Furthermore, a close analysis of the cases that have been cited as allowing the establishment of municipal policy on the basis of a single, unusually excessive act of force will show that in fact more than a mere single act served as the basis for liability or potential for liability.¹²⁸

*Owens v. Haas*¹²⁹ is often cited as the leading case establishing that municipal policy may be predicated on a single act.¹³⁰ In *Owens*, jail

124. Justice Brennan, in his concurring opinion rejecting the "single incident" instruction as being in violation of *Monell's* proscription against municipal liability on a *respondeat superior* basis, stated:

A single police officer may grossly, outrageously, and reckless misbehave in the course of a single incident. Such misbehavior may in a given case be fairly attributable to various municipal policies or customs Yet it is equally likely that the misbehavior was attributable to numerous other factors for which the city may not be responsible.

Id. at 2440.

125. *Id.* at 2446 (Stevens, J., dissenting). Justice Stevens had characterized this aspect of the Court's opinion as "merely advisory" in his concurring opinion in *Monell*. 436 U.S. at 714. This view is correct in the sense that this issue was not in controversy in *Monell* and apparently neither party had raised or briefed the issue. See Schnapper, *supra* note 5, at 215-16. However, this is not an issue that the Court as a whole has shown any inclination to readdress.

126. 105 S. Ct. at 2442-45.

127. See, e.g., *Popow v. City of Margate*, 476 F. Supp. 1237, 1246 (D.N.J. 1979) (a single egregious incident is not sufficient in and of itself to give rise to municipal liability under § 1983); cf. *Languirand v. Hayden*, 717 F.2d 220, 227-28 (5th Cir. 1983) (a single instance of misconduct is not enough to establish municipal liability; the plaintiff must also show a pattern of prior but similar abuse), *cert. denied*, 104 S. Ct. 2656 (1984).

128. See *infra* notes 129-54 and accompanying text.

129. 601 F.2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).

130. See, e.g., *Tuttle*, 105 S. Ct. at 2431 (*Owens* stands for the proposition that "proof of a single incident of unconstitutional activity by a police officer could suffice to establish municipal liability");

officers ordered a federal prisoner to leave his cell. He refused and was beaten severely, suffering numerous injuries. The prisoner brought an action against the Federal Bureau of Prisons and the county in whose jail he was housed at the time of the beating.¹³¹ The district court dismissed the section 1983 claim against the county because no official policy or pattern of constitutional violation had been pleaded so as to hold the county liable under *Monell*.¹³² On appeal, the Second Circuit Court of Appeals reversed and remanded the case on the ground that the plaintiff should be given limited discovery so that he might have opportunity to amend his complaint if warranted.¹³³

Though there was only one incident in *Owens*, a severe beating, the court of appeals thought that the facts and circumstances surrounding the beating indicated that official action or acquiescence may have been involved.¹³⁴ Such action or acquiescence would have taken the form of gross negligence or reckless indifference of the supervising jail officials to the constitutional rights of their prisoners.¹³⁵ Evidence of this "policy" came not from the single brutal act, however, but from other information before the court.

Shortly after the incident, Owens appeared for sentencing before another district court judge in an unrelated case. That judge, noticing Owens' injuries, questioned him about them, and subsequently ordered a hearing into the circumstances surrounding them.¹³⁶ One officer involved, Officer Haas, stated to the judge conducting the inquiry that one of the guards involved in the incident was "fairly new" on the job.¹³⁷ Officer Haas also indicated that his philosophy was that a "'show of force' involving the presence of several officers is a good way to control an inmate who refused to obey an order."¹³⁸ He also admitted that a new officer in this situation might not be properly prepared and as a

Wellington v. Daniels, 717 F.2d 933, 936 (4th Cir. 1983) (*Owens* is an exception to the general rule that an "isolated incident" is usually insufficient to establish culpable inaction under § 1983).

131. 601 F.2d at 1244-45.

132. 456 F. Supp. 1009, 1011-12 (E.D.N.Y. 1978), *rev'd*, 601 F.2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979). The trial court dismissed Owens' complaint, which was filed before the Supreme Court's decision in *Monell*, for failure to state a claim. The district court concluded that he had failed to plead an official policy or custom as the cause of his injuries. 456 F. Supp. at 1012.

133. 601 F.2d at 1247.

134. *Id.* at 1246-47.

135. *Id.* at 1246.

136. *Id.* at 1245.

137. *Id.* at 1246.

138. *Id.*

consequence things “might get out of hand.”¹³⁹ From these facts, the court concluded that the plaintiff might have grounds to plead a cause of action against the county based on inadequate training amounting to gross negligence or reckless indifference.¹⁴⁰

Establishing policy through independent evidence is clearly different from stating that a single brutal incident is sufficient, standing alone, to show policy. As the court made clear in *Owens*, policy established in the manner that the court allowed in that case does not run afoul of *Monell*'s admonition that municipal liability cannot be predicated on the doctrine of *respondeat superior*.¹⁴¹ To the contrary, the “policy” that the court allowed the plaintiff to plead in *Owens* would hold the county liable for its own acts.

Cases subsequent to *Owens* have varied in their treatment and acceptance of the single incident theory articulated in *Owens*. *Turpin v. Mailet*¹⁴² is an example of many cases that cite *Owens* as a way of establishing municipal policy by a single unusually brutal incident, but find that the incident in question is not of the *Owens* type.¹⁴³ Other cases allow recovery for a single incident of conduct but do not rely solely on the incident itself to prove that execution of municipal policy caused the constitutional violation. Instead, they rely on *Owens* for the proposition that if a plaintiff independently proves grossly inadequate training by a city, he may recover based upon proof of only one incident.¹⁴⁴

139. *Id.*

140. *Id.* at 1246-47.

141. *Id.* at 1246 (citing *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978)).

142. 619 F.2d 196, 200-04 (2d Cir.), *cert. denied*, 449 U.S. 1016 (1980). The *Turpin* court stated: [A] single, unusually brutal or egregiously beating administered by a group of municipal employees may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to deliberate indifference or 'gross negligence' on the part of the officers in charge.

Id. at 202 (citing *Owens v. Hass*).

Turpin, however, involved an allegation that the defendant city had failed to discipline a single officer who had earlier violated the plaintiff's constitutional rights. This failure to discipline allegedly encouraged another officer at a later date to violate the plaintiff's rights. *Id.* at 198. The court found that the plaintiff had failed to prove that a policy of the city caused a violation of his rights. *Id.* at 203.

143. *See, e.g.*, *Clayton v. City of New York*, 596 F. Supp. 355, 359 (S.D.N.Y. 1984) (although *Owens* provides that a single act of brutality may be enough to show municipal custom or policy, this is not such a case).

144. *See, e.g.*, *Rymer v. Davis*, 754 F.2d 198, 201 (6th Cir.) (*Owens* indicates that “official acquiescence may be inferred from the lack of training even in the face of only a single brutal incident”), *vacated*, 105 S. Ct. 3518, *aff'd*, 775 F.2d 757 (6th Cir. 1985); *Finkelstein v. City of New York*, 543 F. Supp. 161 (S.D.N.Y. 1982). In *Finkelstein*, the district court stated:

One such case is *Rymer v. Davis*,¹⁴⁵ in which state and municipal law enforcement officers stopped the plaintiff as a part of a convoy on an interstate highway in Kentucky. During Rymer's arrest, a police officer violently kicked and beat Rymer to the point that he required treatment by an emergency medical technician.¹⁴⁶ The officer later rejected the recommendation of the technician that Rymer be taken to a hospital.¹⁴⁷ Subsequently, Rymer filed a suit under 42 section 1983 against numerous defendants, including the officer and the city. He did not seek to establish policy by showing that this particular egregious incident must have been attributable to the municipality's inadequate training program. Instead, he relied on direct proof of policy by demonstrating the existence of the city's inadequate training program.¹⁴⁸ The jury rendered verdicts against the officer and the city and, on appeal, the Sixth Circuit Court of Appeals upheld the jury's verdict.¹⁴⁹

The court of appeals found that the facts demonstrated that the city had no rules or regulations governing its police force, that the initial training of its police was on-the-job training, and that none of the formal training that the officer received thereafter involved arrest procedures or treatment of injured persons.¹⁵⁰ These facts met the Sixth Circuit's requirement that a municipality may be held liable for the unconstitutional acts of its officers if it trained its officers in a manner that was "so reckless or grossly negligent that future police misconduct [was] almost inevi-

Owens . . . is distinguishable from the instant case [involving a single instance of police abuse], because the circumstances of that case were such that an inference of official condonation and *policy* could be properly drawn from the nature of the single transaction which formed the basis for the plaintiff's complaint. That is not the case here.

Id. at 163 n.3 (emphasis added).

145. 754 F.2d 198 (6th Cir.), *vacated*, 105 S. Ct. 3518 (1985). The Court granted certiorari and remanded the *Rymer* case to the Sixth Circuit in light of *Tuttle*. 105 S. Ct. 3518 (1985). The Sixth Circuit has subsequently affirmed its early decision, see 775 F.2d 756 (6th Cir. 1985).

The Sixth Circuit found that this case was unlike *Tuttle* in that the court below had not given an instruction which would have allowed the jury to infer municipal policy solely upon proof of a single brutal act of an employee. There was independent evidence presented at trial as to the City's inadequately trained police force. The court stated: "Consequently, the City was not liable because it 'hired 'one bad apple,'" but because the City was itself a bad actor in failing to train its police force." *Id.* at 757 (citation omitted).

146. 754 F.2d at 199.

147. *Id.*

148. *Id.* at 200.

149. *Id.* at 201.

150. *Id.* at 200-01.

table . . . or . . . certain to result.”¹⁵¹ Acknowledging that a general failure to train was not sufficient to establish liability, the *Rymer* court found that the failure to train was “directly related to the ultimate abuse [that the plaintiff] received during the arrest.”¹⁵² Liability was based on the fact that the city defendant had a “municipal custom that authorizes or condones police misconduct.”¹⁵³ The court inferred such a “custom” from the municipality’s failure to train or its grossly negligent training of its officers. When custom is established in this manner, the court concluded, relying on earlier Sixth Circuit cases and *Owens v. Haas*, a municipality is liable “even in the face of only a single brutal incident of police misconduct.”¹⁵⁴

In sum, the Court’s narrow holding in *Tuttle* that a single brutal act is not sufficient, standing alone, to establish policy is not likely to have much impact because it is consistent with the previous holdings of most lower federal courts on this issue. In cases which a single act has arguable served as the basis of policy, close analysis reveals that though recovery is sought for injuries or death sustained as the result of a single incident, a means other than the single incident is used to establish the policy.

B. *An Analysis of the Court’s Dicta*

1. *What Proof is Necessary to Prove Constitutional and Unconstitutional Customs and Policies*

In rejecting the notion that a single incident could serve to establish policy, Justice Rehnquist felt a need to place limitations upon establishing municipal liability based on policies that he deemed to be not unconstitutional per se, such as the inadequate training involved in *Tuttle*.¹⁵⁵ Thus, he concluded:

Proof 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. Otherwise the existence of the unconstitutional policy, and its origin, must be separately

151. *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982) (citations omitted), cert. denied, 459 U.S. 833 (1983).

152. 754 F.2d at 201.

153. *Id.*

154. *Id.*

155. *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427, 2436 (1985).

proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.¹⁵⁶

An analysis of the plurality opinion indicates that Justice Rehnquist divides the means of establishing municipal policy into three categories. The first and second categories involve unconstitutional policies; the third category involves situations in which liability is predicated on policies that are not unconstitutional per se but which cause unconstitutional violations.

Justice Rehnquist suggests that a violation of unconstitutional policies may be proved by introducing proof of the unconstitutional policy as part of proof of the incident.¹⁵⁷ Cases of the *Monell* type are particularly susceptible to this type of proof; because the policy commands the violation, proof of the violation is often coincident with proof of the policy. For example, a plaintiff might put a witness on the stand in a *Monell*-type situation to testify both as to the incident, that her supervisor told her that she must take a leave of absence, and as to the policy, that he told her that all pregnant employees of the city had to take leave in their seventh month and/or that she had a written copy of this policy signed by the appropriate administrator.

Municipal liability under section 1983 pursuant to an unconstitutional policy might also be established in a second manner: by proving the policy separate from the violation.¹⁵⁸ In a *Monell*-type case, testimony of the employee who was required to take the leave might prove the constitutional deprivation, and testimony of other witnesses, for example the policymaker who promulgated the rule, might prove the policy. In some cases, especially those involving unconstitutional custom¹⁵⁹ as a basis of liability, proof will almost necessarily be of this two-step type. For exam-

156. *Id.* at 2436.

157. *Id.* at 2435-36.

158. *Id.*

159. Admittedly, Justice Rehnquist's discussion of the proof required to establish municipal liability under section 1983 did not expressly refer to custom. However, the context reveals that he intended to include it. He begins his discussion of the requisite proof by saying: "[P]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless" *Id.* at 2436. Because *Monell* provides for recovery both on the basis of policy and custom, custom is necessary within the scope of his discussion. Furthermore, in *Monell* itself, the Court on one occasion used policy to include custom. There, the Court stated: "Congress did not intend municipalities to be held liable unless action pursuant to official municipal *policy* of some nature caused a

ple, if a plaintiff is seeking to prove a constitutional violation based on the use of excessive force as custom, he will inevitably need to resort to someone other than the victim or witness to the incident to prove the pervasive pattern of conduct that *Monell* and *Adickes* require.¹⁶⁰

The *Tuttle* situation is representative of Justice Rehnquist's third category—constitutional violations caused by policies not in themselves unconstitutional—which he feels should be the most difficult to establish.¹⁶¹ In regard to policies that are not themselves unconstitutional, he feels that “considerably more proof than the single incident will be necessary in every case to establish both the requisite fault . . . and the causal connection between the ‘policy’ and the constitutional deprivation.”¹⁶² One might arguably interpret this requirement to mean that one cannot recover for a single act of unconstitutional police misconduct pursuant to a city policy that is not itself unconstitutional.¹⁶³ A close analysis of Justice Rehnquist's opinion, however, reveals that his requirement of “considerable” proof does not dictate such a conclusion. He does not state that a plaintiff *cannot* recover for a single incident of misconduct. He states that a plaintiff must offer more proof than the act itself to show the requisite policy or as he terms it, “fault.”¹⁶⁴ The problem with the lower court's instruction in *Tuttle* is that the jury could infer from the single act both a municipal policy and causation. However, under Justice Rehnquist's analysis if the plaintiff can independently show, for example, that police training is so inadequate as to amount to gross negligence or deliberate indifference, and thus, a municipal policy, then the plaintiff might be allowed recovery despite his proof of only one incident.

The same analysis pertains to Justice Rehnquist's argument that more than the single incident is necessary to prove that the municipal policy caused the plaintiff's injuries. Scrutiny of this requirement reveals that if causation is shown other than by the incident itself, then recovery can be had for a single constitutional violation. For example, Justice Rehnquist

constitutional tort.” 436 U.S. at 691 (emphasis added). Finally, the rationale of Justice Rehnquist's argument would extend to custom as well.

160. See *supra* note 50 and accompanying text.

161. 105 S. Ct. at 2436.

162. *Id.*

163. See, e.g., *Ramie v. City of Hedwig Village*, 765 F.2d 490, 493 (5th Cir. 1985) (quoting *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427, 2436 (1985)) (“The plurality opinion authored by Justice Rehnquist would require that the damaging incident ‘be caused by an existing, *unconstitutional* municipal policy’ . . . ”); *Justices Limit Liability of City in Police Errors*, N.Y. Times, June 4, 1985, at 9, col. 5 (same).

164. 105 S. Ct. at 2436 & n.7.

evidences in a footnote his dissatisfaction with the lower court's instruction that the requisite causation exists if the jury found that the grossly inadequate training *might* lead to police misconduct.¹⁶⁵ To establish that the inadequate training is the "moving force" or cause of the violation as *Monell* requires, he argues that "[t]here must at least be an affirmative link between the training inadequacies alleged, and the particular constitutional violation at issue."¹⁶⁶ This is no more than lower federal courts already require.¹⁶⁷ For example, if the training inadequacy alleged relates to crowd control, and the police officer's violation does not relate to crowd control, there is no appropriate link between the policy and the violation.¹⁶⁸ However, if the policy is established by showing inadequate training in the use of force and the alleged violation occurred as a result of such lack of training, the affirmative link will have been established.¹⁶⁹

In summary, under Justice Rehnquist's analysis, whether a plaintiff seeks to prove that an unconstitutional policy or a policy that is not unconstitutional per se is the moving force of a violation, he must still establish policy (or custom) and causation (that plaintiff's federal rights were violated as a result of the execution of that policy or custom). Though *Monell* violations are the easiest kind of violations to prove, as

165. *Id.* at 2436 n.8.

166. *Id.*

167. See *Grandstaff v. City of Borger*, 767 F.2d 161, 169-70 (5th Cir. 1985) (policy of city policymaker must proximately cause the deprivation of the plaintiff's constitutional rights); *Milligan v. City of Newport News*, 743 F.2d 227, 230 (4th Cir. 1984) (to demonstrate "moving force" requirement, policy of inaction must be such that municipal employees could infer from it tacit approval of the misconduct in issue); *Batista v. Rodriguez*, 702 F.2d 393, 397, 399 (2d Cir. 1983) ("[a]bsent a showing of a causal link between official policy or custom and the plaintiff's injury", there is no municipal liability under § 1983).

168. See, e.g., *Means v. City of Chicago*, 535 F. Supp. 455, 463 (N.D. Ill. 1982) (failure to provide a specific type of police training must be relevant to alleged misconduct of officers).

169. See, e.g., *McQuarter v. City of Atlanta*, 572 F. Supp. 1401, 1420-21 (N.D. Ga. 1983), *appeal dismissed*, 724 F.2d 881 (11th Cir. 1984). In the rare situation which a total failure to train exists, the affirmative link is much easier to prove.

Although many courts appear to be willing to find sufficient causation between an inadequate training policy and constitutional deprivations resulting from police misconduct, some have expressed their skepticism. As the district court in *Johnson v. Green*, No. 81 C 1737 (N.D. Ill. Mar. 26, 1982), stated:

As to the issue of proximate cause, even an acknowledgedly inadequate training program could hardly be the causal factor for the deprivation of a persons and rights by an individual policeman any more than an allegedly inferior law or medical school education could be deemed the proximate cause of the subsequent malpractice of the lawyer or doctor.

Id. slip op.

the Court suggests,¹⁷⁰ the elements of proof as to municipal liability of all section 1983 cases are the same.

2. *Whether Recovery Should Be Limited To Unconstitutional Policy or Custom*

Aside from the dichotomy of proof between unconstitutional policies and policies not per se unconstitutional, Justice Rehnquist also added a footnote, pregnant with implication, which concerned a related issue. The footnote indicated that the Court has not decided whether constitutional policies, such as inadequate training, may ever serve as policies that can give rise to municipal liability under section 1983.¹⁷¹

Lower court decisions as well as the statutory purposes of section 1983 demonstrate, however, that this issue is not as "open" as Justice Rehnquist suggested. The majority of federal court decisions have, for the most part, failed to make a distinction between constitutional and unconstitutional policies as a basis for municipal liability. When language has been employed that suggests that recovery may be had only for violations pursuant to unconstitutional policies, the courts have generally used this language to apply to any policy causing a constitutional violation.¹⁷² Furthermore, as Mr. Justice Brennan correctly stated in his concurring opinion in *Tuttle*, no meaningful distinction exists between unconstitutional policies and policies not in themselves unconstitutional that cause constitutional violations, for purposes of section 1983 liability.¹⁷³ The language of the statute and its legislative history make clear that a municipality is liable if it "subjects, or causes to be subjected, any citizen . . .

170. 105 S. Ct. at 2436 ("To establish the constitutional violation in *Monell*, no evidence was needed other than the statement of the policy by the municipal corporation, and its exercise . . .").

171. *Id.* at 2436 n.7.

172. For example, in *Wellington v. Daniels*, 717 F.2d 932 (4th Cir. 1983), the court indicated that a municipality could be held liable under § 1983 only if its unconstitutional policy or custom caused the violation of the plaintiff's constitutional rights. *Id.* at 935. However, the court later in its opinion speaks of a municipal custom of acquiescence in police misconduct or a policy of inadequate training as examples of policies that can give rise to municipal liability. *Id.* at 936. Thus, although such customs or policies are not thought of as unconstitutional in and of themselves by Justice Rehnquist, see *Tuttle*, 105 S. Ct. at 2435 n.7, the *Wellington* court includes them within its definition of unconstitutional policies. Cf. *Dick v. Watonwan County*, 738 F.2d 939, 943 (8th Cir. 1984) (Failure to train or supervise will be an unconstitutional policy only if the supervisors had prior notice of misbehavior and failed to take action, or if the misbehavior was foreseeable); *Landesman v. City of New York*, 501 F. Supp. 837, 842 (E.D.N.Y. 1983) (plaintiffs failed to satisfy their burden of pleading an unconstitutional policy in order to show municipal liability, plaintiffs can allege a single egregious incident which evidences inadequate training) (pre-*Tuttle* case).

173. 105 S. Ct. at 2441 n.8 (Brennan, J., concurring in part).

to the deprivation of any rights . . . secured by the Constitution and laws."¹⁷⁴ The policy of the statute, as clearly articulated in *Owen v. City of Independence*,¹⁷⁵ would be vitiated if municipalities could escape liability for their actions by simply failing to articulate a policy or by articulating a policy in such general or nonspecific terms that it cannot be said to command a constitutional violation. The purpose of *Monell's* policy or custom requirement was to ensure that a municipality was liable only if the city itself was at fault. Thus, when the city's policy is not unconstitutional per se but causes a constitutional violation, the city is not being held vicariously liable; it is being held liable for its own wrongful acts.¹⁷⁶

V. TOWARD A CLARIFICATION OF INADEQUATE TRAINING THEORY AS A BASIS OF RECOVERY

The key inquiry in determining whether a municipality may be held liable for violation of federal rights under section 1983 is whether or not it can be said that the municipality itself has caused the violation. The Supreme Court indicated in *Monell* that a municipality is liable if an individual's rights are violated pursuant to official city policy whether it be officially adopted by the legislative body of the municipality or by those whose acts can be said to represent policy.¹⁷⁷ Further, the Court said that a municipality was liable if rights were violated pursuant to governmental custom.¹⁷⁸

In defining custom, the Court relied on *Adickes v. S.H. Kress & Co.*¹⁷⁹ *Adickes* which used such terms as "persistent and widespread practices" and "deeply embedded traditional ways of carrying out policy" to describe custom.¹⁸⁰ Both *Adickes* and *Monell* make clear that custom is viewed as informal policy. Because it is not officially pronounced, one must view a pattern of conduct before one can safely infer such conduct to be pursuant to a policy of the city. Otherwise, to hold a municipality

174. 42 U.S.C. § 1983 (1982).

175. 445 U.S. 622, 650-52 (1980).

176. Alternatively, one could argue that even if a policy does not command a violation as in *Monell*, the policy is nevertheless unconstitutional if it causes a constitutional violation. For example, a city policy that fails to offer training when experience clearly dictates that training is warranted is arguably as unconstitutional as offering training that is itself unconstitutional.

177. *Monell*, 436 U.S. at 694.

178. *Id.* at 690-91.

179. *Id.* at 691 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

180. *Adickes*, 398 U.S. at 167-68. In *Adickes* the Court held that a white plaintiff had stated a cause of action under § 1983 when she alleged that she was denied a seat at a lunch counter when accompanied by blacks pursuant to a state enforced custom of segregation. *Id.* at 174.

liable would violate *Monell's* holding that municipalities are liable only for their own torts.¹⁸¹ The requirement of *Monell* and *Adickes*, however, that a pattern and/or practice must be shown to infer policy through custom does not always mean that a pattern of constitutional violations must be always shown. For example, if there is a practice on the police force to "shoot to miss" but scare all fleeing suspects and no one is hurt pursuant to such practice until its second year of existence, nevertheless one might properly conclude on appropriate facts that this practice was pursuant to a custom of the city. It was an informal way of carrying out its policy. Thus recovery could be had even for the first violation. Furthermore, the nature and extent of the pattern or practice necessary to prove governmental custom will vary depending on such factors as how widespread it is, how long it has endured, and the gravity of the conduct.¹⁸² Each of these factors bears on whether one may properly infer that this conduct is pursuant to a custom of the city.¹⁸³

Many courts addressing the inadequate training issue have interchangeably described such lack of training as both policy and custom.¹⁸⁴ Others have consistently referred to inadequate training as custom.¹⁸⁵ Still others have referred to it as policy.¹⁸⁶ Regardless of the nomenclature employed, few courts or commentators have addressed this issue with analytical clarity.

Whether the failure to train adequately is deemed to be policy or custom has a significant bearing on the nature of proof required in a single incident case; it may also have bearing on the ultimate outcome. If inadequate training amounting to gross negligence or reckless indifference is deemed to be policy, then once such policy is established, recovery may be had, assuming sufficient evidence of causation, even for a single incident. *Owen v. City of Independence*¹⁸⁷ demonstrates that one can recover for violations caused by an official policy even if it pertains only to one incident and causes but one constitutional violation. Therefore, if inade-

181. *Monell*, 436 U.S. at 694.

182. *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 3476 (1985); *Schnapper supra* note 5, at 230.

183. *Bennett*, 728 F.2d at 768; *Schnapper supra* note 5, at 230.

184. *See, e.g.*, *Milligan v. City of Newport News*, 743 F.2d 227, 230-31 (4th Cir. 1984).

185. *See, e.g.*, *Rymer v. Davis*, 754 F.2d 198, 200-01 (6th Cir. 1985); *Gilmere v. City of Atlanta*, 737 F.2d 894, 901-05 (11th Cir. 1984), *aff'd in part, rev'd in part, vacated in part, on other grounds on rehearing*, 774 F.2d 1495 (11th Cir. 1985) (*en banc*).

186. *See, e.g.*, *Grandstaff v. City of Borger*, 767 F.2d 161, 169-70 (5th Cir. 1985); *Vippolis v. Village of Haverstraw*, 768 F.2d 40, 44 (2d Cir. 1985).

187. 445 U.S. 622 (1980).

quate training is considered as official policy, then one might recover for a decision resulting in the inadequate training of a single police officer, even though the policy of inadequate training caused but one constitutional violation.¹⁸⁸ If proof, separate and in addition to proof of the incident, establishes the policy as *Tuttle* requires,¹⁸⁹ no rationale consistent with the purposes of section 1983 would preclude recovery for the incident.

When, however, inadequate training is analyzed as a custom, courts require proof of a pattern of inadequate training and/or incidents of police misconduct before recovery can be had.¹⁹⁰ The purpose of requiring a pattern of inadequate training and/or misconduct is to ensure that the municipality is not held liable on a *respondeat superior* basis because under *Monell*, a city is liable only for its own tortious acts. Thus, it is not until inadequate training and/or incidents of misconduct are pervasive and widespread may the conclusion follow that the city's custom is to encourage or acquiesce in such conduct, even though in some cases, it may have official policies to the contrary.

188. Justice Brennan, in his concurring opinion, while agreeing with the plurality that a single incident of misconduct by a non-policymaking official could not establish city policy as the lower court's instruction in *Tuttle* would have allowed, stated:

A rule that the city should be entitled to its first constitutional violation without incurring liability—even where the first incident was the taking of the life of an innocent citizen—would be a legal anomaly, unsupported by the legislative history or policies underlying § 1983. A § 1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims; by exposing a municipal defendant to liability on the occurrence of the first incident, it is hoped that future incidents will not occur.

105 S. Ct. at 2440-41.

189. The requirement of separate and additional proof is based upon the dichotomy between constitutional and unconstitutional policies drawn by the plurality opinion in *Tuttle*. Even if a policy of inadequate training is considered an unconstitutional policy, in and of itself, separate proof of the training policy will almost always be necessary apart from proof of the ensuing constitutional violation. Because the violation usually involves a police officer's use of excessive force, proof of such an incident, such as by testimony of the victim, will be unavailable to show any related training policy because the victim is unaware of such policy. If an inadequate training policy can be considered as not unconstitutional per se, the plurality opinion expressly requires "more proof than the single incident" to establish policy. *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427, 2436 (1985).

190. See, e.g., *Languirand v. Hayden*, 717 F.2d 220, 227-28 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2656 (1984):

[A] municipality is not liable under section 1983 for the negligence or gross negligence of its subordinate officials, including its chief of police, in failing to train the particular officer in question, in the absence of evidence or at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.

An analysis of *Monell, Owen v. City of Independence*, and the legislative history of section 1983 reveals that inadequate training is more consistent with the concept of policy rather than custom. As previously indicated, the *Monell* Court indicated that a municipality was liable for acts executing a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."¹⁹¹ The Court also held that a municipality was liable for policy made "by those whose edicts or acts may fairly be said to represent official policy."¹⁹² The primary reason that courts have difficulty fitting inadequate training within these definitions of policy is that inadequate training cases often do not involve an affirmative program, action, or decision that a municipality has pursued.¹⁹³ Instead, the inadequate training issue involves what program or action the city did *not* pursue. Policy is, thus, viewed in this context as failure to choose whereas policy is normally thought of as a course chosen or pursued from alternatives.

However, a close analysis of the concept of policy reveals that it can encompass inaction as well.¹⁹⁴ Policy is the result of policymaking that requires a consideration of policy alternatives or policy choices. One of the choices that one may have in formulating policy in a particular area is not to prescribe *any* rules or guidelines for subordinates in the area. In some circumstances, this policy choice may prove inadequate and may indeed cause one's subordinates acting pursuant to such a choice to violate a citizen's constitutional rights. In making policy the officials may also affirmatively prescribe rules or guidelines that are inadequate or incomplete in regard to an area. Logic would dictate that if a city pursues a policy alternative, whether it is a choice to pursue training in an area or not to pursue training, the city bears responsibility in either case if the policy choice causes a constitutional violation.¹⁹⁵

Viewing inadequate training in this fashion, if a city trains one officer

191. *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 (1978).

192. *Id.* at 694.

193. For example, the plaintiff in *Tuttle* contended that the inadequate training consisted, *inter alia*, of a failure by the municipality to train the officer involved in the proper response to a robbery in progress and the use of his weapon. See *Tuttle v. City of Oklahoma City*, 728 F.2d 456, 461 (10th Cir. 1984), *rev'd*, 105 S. Ct. 2427, 2439 n.4 (1985).

194. See H. SIMON, *ADMINISTRATIVE BEHAVIOR* 3-4 (3d ed. 1976) (all decisions result from a selection process that may be conscious or unconscious and in which if an individual follows a particular course of action, he necessarily rejects other courses of action).

195. The city has only a "potential for responsibility" in view of the *Tuttle* plurality's requirement that there must be, besides sufficient causation, "requisite fault on the part of the municipality" to find municipal liability under section 1983. 105 S. Ct. at 2436.

in a manner that is grossly negligent or recklessly indifferent with respect to its citizens' constitutional rights, recovery may be had even for a single constitutional violation. Such a violation was the result of an act or decision of a policymaker to deploy the officer on the street without adequate training. Justice Brennan in his concurring opinion in *Tuttle* views inadequate training in this manner. He states: "[T]here can be little doubt that the city's actions establishing particular police training procedures were actions taken 'under color of state law,' as that term is commonly understood."¹⁹⁶ Elsewhere, he states: "In this case, the municipal policies involved were the set of procedures for training and supervising police officers."¹⁹⁷

Though failure to provide adequate training may be considered policy, it cannot as logically be considered custom. In general, to infer the existence of a custom, the plaintiff must show a widespread pattern of employee misconduct before he can attribute the acts of subordinates to the city. Normally, a showing of the subordinates' acts of misconduct and a further showing of a policymaker's knowledge of or acquiescence in such conduct proves this custom. When speaking of a custom of inadequate training, however, some courts require proof that there is a widespread and pervasive *pattern of inadequate training* and/or incidents of misconduct. To speak of such a pattern in regard to inadequate training is inconsistent with the way the term "custom" is normally used. Custom normally connotes city action or "policy" that is evidenced in conduct of subordinates *and* acquiescence and approval by superiors. Because inadequate training, as discussed above in terms of policy, results in most cases from a decision made by a city policymaker, the requisite city "action" is already present and does not have to be evidenced by city acquiescence in a course of conduct by subordinates. There is no concern that absent a pattern of conduct, one might be holding the city vicariously liable.

Even if inadequate training could appropriately be viewed as custom requiring proof of a widespread pattern of instances of inadequate training, no justification exists for the additional requirement of proof of a pattern of abuse.¹⁹⁸ The widespread pattern of inadequate training would be sufficient to ensure that the city is being held liable for its own torts. As previously indicated, nothing in section 1983, its legislative his-

196. *Id.* at 2439.

197. *Id.*

198. *See, e.g., Languirand*, 717 F.2d at 227-28.

tory, or *Monell* generally countenances a denial of recovery for a first act of misconduct. Furthermore, the option of proof of a custom through evidence of several instances of misconduct is a theory upon which plaintiffs must rely apart from any proof of inadequate training. Thus, to have to prove both a custom of inadequate training and, in effect, a custom of abuse caused by the training makes recovery under the custom theory a meaningless alternative.

Inadequate training and custom should be viewed as two different ways of attributing liability to a municipality: (1) If a plaintiff can show that the policymakers have made a training policy choice by choosing no policy or by choosing an inadequate alternative, recovery should be had even if the choice involves a single officer and only results in one incident of misconduct; and (2) in cases involving a pattern of incidents of police misconduct, proof of a custom may be an alternative theory of recovery. In seeking to prove municipal liability based on custom, that is on a pattern and practice of incidents of misconduct, no proof of inadequate training is required even if such abusive incidents resulted from the city's inadequate training of its officers. Viewed in this manner, the Tenth Circuit's decision in *Rock*,¹⁹⁹ allowing recovery against a municipality for its failure to train the two officers who used excessive force in arresting the plaintiff, was correct. On the other hand, the Fifth Circuit's decision in *Languirand*²⁰⁰ denying recovery for failure to show a pattern of inadequate training, in which the lack of training of the single officer involved was clearly demonstrated, is incorrect. Furthermore, the Eleventh Circuit's decision in *Gilmere*²⁰¹ is incorrect in only recognizing custom, and not inadequate training, as a theory of liability.

VI. CONCLUSION

In *Monell*,²⁰² the Supreme Court held that a municipality was a "person" for purposes of section 1983 and thus could be held liable for violation of a citizen's federal rights under color of law. The Court unequivocally indicated that a municipality was liable only for its own constitutional torts; it could not be held liable for the torts of its employees on a *respondeat superior* basis. In an effort to give some guidance on

199. 763 F.2d 394 (10th Cir. 1985).

200. 717 F.2d 220 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2656 (1984).

201. 737 F.2d 894 (11th Cir. 1984), *aff'd in part, rev'd in part, vacated in part, on other grounds on rehearing*, 774 F.2d 1495 (11th Cir. 1985) (*en banc*).

202. 436 U.S. 658, 690 (1978).

when a city employee's tortious act might be considered an act of the city itself, the Court indicated that the city would be liable for an unconstitutional action occurring as a result of implementation or execution of a city policy. Policy included a "statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers,"²⁰³ as well as the action of "those whose edicts or acts may fairly be said to represent official policy."²⁰⁴ The Court also held that a city is liable for the deprivation of constitutional rights pursuant to governmental custom "even though [the] custom has not received formal approval through the body's official decisionmaking channels."²⁰⁵

However, because there was no dispute as to whether city policy was involved in *Monell*, and because the Court had no occasion to address other aspects of municipal liability, the Court left many of its contours undefined. The Supreme Court itself has subsequently defined some aspects of liability, concluding for example that municipalities are not entitled to qualified immunity or that punitive damages are not recoverable against a municipality under section 1983. The Supreme Court in *City of Oklahoma City v. Tuttle* addressed another aspect of municipal liability, concluding that a "single *unusually* brutal act" could not in and of itself establish an inadequate training policy of the city.²⁰⁶ The conclusion is consistent with the requirement established in *Monell* that recovery against a municipality could be had only for its own tortious acts. Although many courts have cited language indicating that one might recover on such a theory, few lower courts actually rested recovery on such a theory prior to *Tuttle*. Thus, the *Tuttle* holding should have little effect on lower court decisionmaking.

The broader issue raised in the petition for certiorari and in the briefs of both parties, but not decided by the Supreme Court in *Tuttle*, is one of the most difficult issues the lower courts face in police misconduct litigation: whether a plaintiff may recover against a municipality for a single act of brutality upon a showing of an inadequate training policy amounting to gross negligence or reckless indifference. The analysis and resolution of this issue depends upon whether inadequate training is deemed to be a municipal custom or policy.

This Article concludes that inadequate training is best analyzed as pol-

203. *Id.*

204. *Id.* at 694.

205. *Id.* at 691.

206. 105 S. Ct. 2427 (1985).

icy. Such training is the result of an inadequate policy choice—choosing the wrong policy alternative. The characterization of inadequate training as a custom is much more strained. Proof of a custom usually involves a previous pattern of misconduct of which municipal decisionmakers or “those whose edicts and acts may be fairly said to represent” the acts of a decisionmaker have actual or constructive knowledge. If inadequate training is viewed as policy as opposed to custom, which necessarily requires a pattern of incidents, a plaintiff should be able to recover for a single act of police misconduct upon proof of inadequate training of one officer.

The reasoning employed here in regard to why inadequate training should be deemed as policy is equally applicable in other contexts in which failure to act serves as the basis of liability. Nothing in the legislative history of section 1983 countenances a conclusion that Congress meant to attach greater liability to the actions of a municipality that violated constitutional rights than to its failures to act which caused constitutional violations. To the contrary, history suggests that Congress in promulgating section 1983 was concerned with all forms of official misconduct whether evidenced through action or neglect.

WASHINGTON UNIVERSITY LAW QUARTERLY

VOLUME 64

NUMBER 1

1986

EDITORIAL BOARD

Editor in Chief
JOANNE LEVY

Managing Editor
W. GORDON DOBIE

Executive Articles Editor
RUSSELL D. PHILLIPS, JR.

Articles Editors
SHERRI GLATT CAPLAN
DAVID M. COFFEY

Notes and Comments Editors
MARCIA L. ANDERSEN
CHRISTIAN A. BOURGEACQ
MERIBETH RICHARDT
ANDREW M. STAUB

Executive Notes and Comments Editors
JAMES G. BUELL
PAUL I. RACHLIN

Developments Editor
J. DAVID HERSHBERGER

Topics/Notes & Comments Editor
JOHN W. HOFFMAN

Associate Editors

LAWRENCE J. FEY
PAUL T. FULLERTON
ALEXANDER H. GILLESPIE
TOM A. GLASSBERG

RICHARD L. GREEN
ROGER HERMAN
MICHAEL H. IZSAK
JEFFREY J. MAYER

MICHAEL E. MERMALL
ROBERT G. OESCH
JILL I. PILKENTON
SHERRY ROZELL

STAFF

KEVIN W. BARRETT
JIM BEHRENS
MARCIA BENDER
DEAN C. BURNICK
SUSAN J. COOPER
PAUL J. DEZENBERG
MONTY L. DONOHEW
WENDY D. FOX
RANDY L. GEGELMAN

YVONNE G. GRASSIE
RAYMOND W. GRUENDER
DAVID P. HABERMAN
ALANA L. HELVERSON
JOSEPH J. JANATKA
WILLIAM A. KOHLBURN
JAMES E. MADDEN
LAURA A. MELLAS
CATHERINE R. PHILLIPS

LISA GAYLE PICKARD
CHRISTIE M. QUICK
CHRISTINE M. RAMATOWSKI
MICHAEL R. RICKMAN
DWIGHT ROBBINS
ALAN J. WERTJES
KAREN A. WINN
GARY E. WISEMAN
WENDY WOODS

FACULTY ADVISOR: RONALD M. LEVIN

STAFF ASSISTANT: ELEANOR M. THOMPSON

ADVISORY BOARD

CHARLES C. ALLEN III
MARK G. ARNOLD
FRANK P. ASCHEMEYER
DANIEL M. BUESCHER
REXFORD H. CARUTHERS
MICHAEL K. COLLINS
DAVID L. CORNFELD
DAVID W. DETJEN
WALTER E. DIGGS, JR.
GLEN A. FEATHERSTUN
ROBERT A. FINKE
FRANCIS M. GAFFNEY

JULES B. GERARD
JEROME A. GROSS
DONALD L. GUNNELS
MICHAEL HOLTZMAN
GEORGE A. JENSEN
HARRY W. JONES
STEPHEN C. JONES
LLOYD R. KOENIG
ALAN C. KOHN
FRED L. KUHLMANN
PAUL M. LAURENZA
WARREN R. MAICHEL
R. MARK MCCAREINS

JAMES A. MCCORD
DAVID L. MILLAR
GREGG R. NARBER
DAVID W. OESTING
NORMAN C. PARKER
CHRISTIAN B. PEPER
ALAN E. POPKIN
ROBERT L. PROOST
ORVILLE RICHARDSON
W. MUNRO ROBERTS
STANLEY M. ROSENBLUM
EDWIN M. SCHAEFFER, JR.
A. E. S. SCHMID

JAMES W. STARNES
JAMES V. STEPLETON
MAURICE L. STEWART
WAYNE D. STRUBLE
ROBERT E. TRAUTMANN
DOMINIC TROIANI
ROBERT M. WASHBURN
ROBERT S. WEININGER
J. DOUGLAS WILSON
JUDITH BARRY WISH
WAYNE B. WRIGHT
PAUL L. YANOWITZ