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## I. Introduction

GOVERNMENT LIABILITY under 42 U.S.C § 1983, an important federal civil rights statute which created a fourteenth amendment action for damages, is a growth area of litigation.<sup>1</sup> Ever since 1978, when the Supreme Court held in *Monell v. Department of Social Services*<sup>2</sup> that local governments are considered persons amenable to suit under section 1983, the amount of litigation dealing with the standards for such liability has been ever increasing, both at the federal district court and court of appeals level and in the Supreme Court. This should not be surprising given the importance for section 1983 plaintiffs of the availability of such deep-pocket defendants for whom, as will be seen, even qualified immunity is not available.<sup>3</sup>

This article will analyze recent developments concerning government liability under section 1983. It will begin with a brief description of the prior law, then move into a discussion of the current law. The following will be addressed: the status of states as suable persons under section 1983; the official policy or custom requirement for government liability; the two ways in which a government can be held liable under section 1983; the differences among cases dealing with affirmative acts and failures to train or supervise; and government immunities from section 1983 liability. Significant Supreme Court cases will be analyzed, together with illustrative circuit court decisions.

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1. The same is true for due process, qualified immunity, and attorney fees. See on these topics, S. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* (2d ed. 1986 & 1988 Supp.) chs. 3, 8 & 1, respectively [hereinafter S. NAHMOD]. Government liability under § 1983 is extensively dealt with in *id.* ch. 6.

2. 436 U.S. 658 (1978).

3. *Owen v. City of Independence*, 455 U.S. 622 (1980).

## II. The Prior Law: Local Governments Were Not Suable Persons

The prior law of section 1983 government liability was very simple: local governments were not "persons" capable of being sued. This was the holding of the Supreme Court in the seminal, otherwise pro-plaintiff, decision of *Monroe v. Pape*,<sup>4</sup> which undertook what can charitably be described as a superficial look at section 1983's legislative history. According to *Monroe*, Congress did not intend to subject local governments to section 1983 liability, even though Congress could have. This meant that local governments were in effect absolutely immune from damages liability under section 1983. It also meant that local governments could not be sued for injunctive relief in their own names. Furthermore, local government officials could not be sued for damages in their official capacities because, as will be discussed later in more detail, such official capacity damages actions were in effect damage actions against local governments themselves.<sup>5</sup>

The implications of *Monroe* were, of course, significant. Section 1983 plaintiffs could seek damages only from individual defendants, many of whom would assert the affirmative defenses of absolute and qualified immunity.<sup>6</sup> Even if these hurdles could be overcome, there was often the problem of recovery from effectively judgment-proof defendants. For these reasons, the Supreme Court's unexpected decision in *Monell v. Department of Social Services*<sup>7</sup> had a major impact on section 1983 cases.

## III. The Current Law: Local Governments Are Suable Persons

In *Monell*, the Court was confronted with a challenge to a regulation which forced women to take pregnancy leave without pay. Not only did the Court decide that this regulation was unconstitutional, but it overruled *Monroe*. The Court confessed error as to *Monroe*'s assessment of section 1983's legislative history and held that local governments are suable persons under section 1983. *Monell* meant that section 1983 plaintiffs could sue local governments of all kinds, whether they be general purpose government bodies like cities and counties, or special purpose government bodies. Moreover, after *Monell*, such local govern-

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4. 365 U.S. 167 (1961).

5. See *infra* text accompanying note 27-29.

6. See S. NAHMOD, *supra* note 1, at chs. 7, 8.

7. 436 U.S. 658 (1978).

ments could be sued both in federal court and in state court for either damages or injunctive relief. There is, it should be noted, no eleventh amendment problem with respect to suing local governments in federal court. Long ago, in *Lincoln County v. Luning*,<sup>8</sup> the Supreme Court held that local governments are not protected by the eleventh amendment.

#### IV. States Are Probably Not Suable Persons

After *Monell*, it became possible to argue that because local governments were now suable persons, so too should states be classified as suable persons. After all, section 1983 was enacted in part to deal with abuses perpetrated against the newly freed blacks and their sympathizers by southern states. However, it was and is not that simple.

Before *Monell*, the Supreme Court had held that Congress, when it enacted section 1983, did not intend to eliminate the eleventh amendment immunity of the states.<sup>9</sup> After *Monell*, Justice Brennan contended that this eleventh amendment ruling was now suspect. Indeed, Justice Brennan went on to argue that *Monell* meant that states could be considered suable persons. But the Court, in *Quern v. Jordan*,<sup>10</sup> appeared to have rejected this position. On the other hand, because *Quern* was a section 1983 case filed in federal court, it was possible to read it as an eleventh amendment case only, and not as a case considering whether states are suable persons.

The difference between the two readings is much more than academic. If a state is deemed to be a person, then it can be sued in state court under section 1983 in the same situations as local governments because the eleventh amendment does not apply in state courts. Furthermore, since eleventh amendment immunity may be waived in certain limited situations, it would be possible to sue certain states in federal court in these situations. Indeed, the First Circuit so held in *Grotta v. Rhode Island*.<sup>11</sup>

The Supreme Court will likely clear up this matter this term since it has granted certiorari in *Will v. Michigan Department of State Police*.<sup>12</sup> In *Will*, the Michigan Supreme Court held both that a state was not a person when sued for damages in state court under section 1983 and that

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8. 133 U.S. 529 (1890).

9. *Edelman v. Jordan*, 415 U.S. 651 (1974).

10. 440 U.S. 651 (1979).

11. 781 F.2d 343 (1st Cir. 1986).

12. *Smith v. Department of Public Health*, 428 Mich. 540, 410 N.W.2d 749 (1987), *cert. granted sub nom. Will v. Michigan Dept. of State Police*, 108 S. Ct. 1466 (1988).

a state official, when sued in his official capacity for damages under section 1983, was similarly not a person. More probably than not, the Court will affirm the Michigan Supreme Court.

Regardless of the outcome in *Will*, there is no eleventh amendment problem when a state official is sued in his official capacity for prospective injunctive relief for fourteenth amendment violations. Under the Court's long-standing *Ex parte Young*<sup>13</sup> fiction, we pretend that the state official is stripped of his official involvement for purposes of securing injunctive relief and that it is not the state that is being sued. This fiction is obviously necessary in order to make the fourteen amendment meaningful as against the states.

However, the Supreme Court has made clear that this fiction only applies to strictly prospective relief. If a plaintiff seeks from state officials benefits that were wrongfully withheld, as for example, back pay, then the eleventh amendment prohibits federal courts from granting such retrospective relief. In effect, this relief acts as a damage award against the state.<sup>14</sup> There is, surprisingly, even an eleventh amendment prohibition against federal court grants of prospective injunctive relief against state officials based on pendent state claims.<sup>15</sup> This eleventh amendment prohibition applies, though, only to suits against state officials in their official capacities; it does not apply to damages actions against state officials in their individual capacities.

## V. Requirements for Local Governments Liability

The Court made clear in *Monell* that *respondeat superior* is not a proper basis of liability in section 1983 cases. That is, the mere fact that a government employee violated a plaintiff's constitutional rights does not mean that the government employer is liable under section 1983. The Court reasoned that section 1983's "subjects, or causes to be subjected" language excluded *respondeat superior* liability. However, the Court was incorrect in putting the matter in causation terms: surely there is a causal relation, however attenuated, between the government's decision to hire the employee and the plaintiff's constitutional deprivation. What the Court must have meant was that there is no section 1983 duty on the government to compensate the plaintiff arising out of the employment relation standing alone. In any event, *Monell* makes

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13. 209 U.S. 123 (1908).

14. *Edelman v. Jordan*, 415 U.S. 651 (1974).

15. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

clear that *respondeat superior* may not be used in section 1983 cases, whether for government liability or for supervisory liability. As will be seen, however, the line between *respondeat superior* liability and liability for failures to train may be very narrow indeed.

If *respondeat superior* is not sufficient for government liability under section 1983, then what is? The Court stated in *Monell* that local government liability requires that “the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.”<sup>16</sup> In addition to this “official policy” requirement, local government liability can be based on “custom” as well, but the custom must be persistent and well-settled. Custom is a *de facto* official policy but differs from official policy in that there is no formal declaration of the establishment of the custom. It is important to note, with regard to custom, that it is not sufficient that only lower level employees engage in a custom. Some awareness or approval of the custom on the part of the local government or its high-ranking officials is necessary.

The central consideration to keep in mind for section 1983 local government liability is that it is brought about in one of two ways. Either the local government itself acted unconstitutionally or one (or more) of its high-ranking officials acted unconstitutionally and it is sought to attribute this conduct to the local government. The latter possibility was articulated by the Court in *Monell* when it stated that official policy or custom may be “made by . . . lawmakers or by those whose edicts or acts may fairly be said to represent official policy. . . .”<sup>17</sup>

*Monell* was in this regard an easy case because there the challenged conduct was an officially promulgated regulation of the department of social services, the local government body itself. Thus, no attribution issue arose in *Monell*. The same is true where an ordinance is challenged: here, too, the local government has acted formally. In addition, a local government can itself have an actionable custom. For example, it could be the practice of a city council to make employment or other decisions on the basis of race, despite the existence of statutes, ordinances, and rules prohibiting such conduct. In such a case, the local government would be liable for its own conduct.

Before getting into important local government liability cases in which the foregoing distinction must always be kept in mind, it is neces-

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16. *Monell*, 436 U.S. at 690.

17. *Monell*, 436 U.S. at 695-96.

sary to deal briefly with several preliminary issues relating to section 1983 local government liability.

*A. Must the Official Policy or Custom Itself Be Unconstitutional?*

In *Polk County v. Dodson*,<sup>18</sup> the Supreme Court suggested in dictum that in order for an official policy or custom to be actionable under section 1983, it must itself be unconstitutional. However, it turns out that there is a split on the Court regarding this issue with no majority ruling as yet. As reflected in *City of Oklahoma City v. Tuttle*,<sup>19</sup> the more conservative wing of the Court, led by now-Chief Justice Rehnquist, took the position that an actionable official policy or custom must indeed be unconstitutional while the more liberal wing, led by Justice Brennan, argued that an actionable official policy or custom need not itself be unconstitutional. According to Justice Brennan, it is sufficient for section 1983 local government liability that it could have been reasonably foreseen that the official policy or custom would lead to plaintiff's constitutional deprivation.

This article is not the place to delve deeply into this issue inasmuch as this author has written extensively about it elsewhere.<sup>20</sup> Simply put, Chief Justice Rehnquist's interpretation of section 1983 seems more persuasive than that of Justice Brennan. Under the former, the official policy or custom itself must, when executed or implemented, violate the fourteenth amendment. This is not to say that Congress could not have rendered local governments liable in circumstances such as those maintained by Justice Brennan, but only that Congress, when it enacted section 1983, did not do so. Consequently, under the preferable "fourteenth amendment interpretation" of section 1983, a section 1983 plaintiff has the additional burden of showing that the official policy or custom was unconstitutional. To put it somewhat differently, the plaintiff must show that the local government had the state of mind constitutionally required for liability. In an equal protection case, for example, the local government must have purposely discriminated and in a due

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18. 454 U.S. 312 (1981).

19. 471 U.S. 808 (1985).

20. See Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1 (1982), arguing that the text, history and policy considerations of section 1983 demonstrate that an actionable official policy or custom must be unconstitutional either on its face or as applied. This is called a "fourteenth amendment interpretation," in contrast to Justice Brennan's "causation interpretation."

process case, the local government must have acted more than negligently.<sup>21</sup>

### *B. Bending the Federal Rules of Civil Procedure*

The federal judicial system is a notice pleading jurisdiction. One would therefore have thought that it is enough for a section 1983 plaintiff to allege an unconstitutional official policy or custom in general terms sufficient to give notice to the defendant of the challenged conduct. However, that is not the case in the Seventh Circuit which held that a section 1983 plaintiff seeking local government liability must plead some facts to support the allegation that a municipal policy existed that caused the complained of injury.<sup>22</sup> The court reached this conclusion even though it acknowledged that this was hard for a plaintiff to do where he or she claimed a policy of acquiescence in prior misconduct.

The Seventh Circuit is obviously concerned with meritless suits against local governments which, even if ultimately won, cost local governments a great deal to defend, including discovery costs. This concern, which led the Seventh Circuit to bend the Federal Rules of Civil Procedure, is not unique to local government liability. Several circuits have indicated that a section 1983 plaintiff must allege the unavailability to the defendant of absolute or qualified immunity even though these are affirmative defenses which the defendant ordinarily has the burden of pleading.<sup>23</sup> Similarly, the Supreme Court itself has bent the procedural rules governing appeals and has approved interlocutory appeals from district court denials of defense motions for summary judgment based on qualified immunity.<sup>24</sup>

These developments indicate that the federal courts, apparently frustrated by what they consider the failure of substantive attempts to reduce the section 1983 case load, are unfortunately beginning to discriminate against section 1983 actions through such procedural techniques. It would not be surprising if one day the Court held that denials of local government motions for summary judgment based on the claimed absence of an unconstitutional official policy or custom are immediately appealable.

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21. *Washington v. Davis*, 426 U.S. 229 (1976) (equal protection violation requires purposeful discrimination; discriminatory effect not sufficient); *Daniels v. Williams*, 474 U.S. 327 (1986) (deprivation of life, liberty or property requires more than negligent conduct for due process violation).

22. *Strauss v. City of Chicago*, 760 F.2d 765 (7th Cir. 1985).

23. *See, e.g., Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985).

24. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

### C. *The Derivative Nature of Local Government Liability*

Suppose a section 1983 plaintiff sues a police department alleging its responsibility for a constitutional violation committed by one of its police officers on the ground that the police officer acted pursuant either to an official policy of the local government itself or to a policy declared by the superintendent of police. The Supreme Court held in *City of Los Angeles v. Heller*<sup>25</sup> that if it turns out that the police officer is found not to have violated plaintiff's constitutional rights, then the local government cannot be liable. The reason is simple: without an underlying constitutional violation by the police officer, there is nothing for the local government to be liable for.

It is only in this sense that the liability of a local government is derivative. If, for example, the police officer escapes liability only because he or she prevailed on qualified immunity grounds, then the local government can still be liable because there was nevertheless a constitutional violation by the police officer. The successful assertion of a qualified immunity defense means only that at the time of the challenged conduct, there was no clearly settled law declaring such conduct unconstitutional.<sup>26</sup> This is different from a determination that the challenged conduct was indeed constitutional. Note, moreover, that a constitutional violation by the police officer, although necessary for local government liability, is not sufficient. An official policy or custom must also be proved by the plaintiff.

### D. *The Important Distinction Between Individual and Official Capacity Damage Actions*

It was mentioned earlier that the distinction between individual capacity and official capacity damage actions against state officials is significant for eleventh amendment purposes. This distinction is also crucial for local government liability purposes. An official capacity damage action against a local government official is in effect a damage action against the local government itself, while an individual capacity damage action against a local government official is a damage action against the official personally.

Much turns on this point. If the section 1983 suit is in effect brought only against the local government, then (1) the plaintiff must allege and prove an official policy or custom, (2) the absolute and qualified

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25. 475 U.S. 796 (1986).

26. See S. NAHMOD, *supra* note 1, at ch. 8.

immunity of the official are irrelevant, (3) punitive damages are not available,<sup>27</sup> and (4) the successful plaintiff recovers against the local government. In contrast, if the section 1983 suit is in effect brought only against the official individually, then (1) the plaintiff need not allege and prove an official policy, (2) the official's possible absolute and qualified immunity may be relevant, (3) punitive damages may be available, and (4) the official, if held liable, must pay personally.

The mess that ensues when the parties and the courts are confused about who is being sued was demonstrated in the Court's decisions in *Kentucky v. Graham*<sup>28</sup> and *Brandon v. Holt*.<sup>29</sup> In these cases the Court struggled against a background of just this kind of confusion in an attempt to determine what the parties and the courts actually thought and how they in fact treated the suits before them. The lessons should be clear: a section 1983 plaintiff who wishes to sue a local government should sue it by name in the complaint, and not simply sue a local government official in his or her official capacity. Similarly, a section 1983 plaintiff who wishes to sue a local government official personally should sue him or her individually. Thus, where both the official and the local government are to be sued, they both should be named separately as defendants. Any section 1983 plaintiff's lawyer who does otherwise acts irresponsibly and will, at the very least, waste the parties' money and the court's time.

## **VI. Important Cases on Local Government Liability**

This article will now address major local government liability issues in the context of important section 1983 cases in the circuits and the Supreme Court. These cases are divided into two categories: the first consists of cases involving affirmative conduct, and the second consists of cases dealing with failures to train and/or supervise. The all-important distinction between section 1983 liability for conduct of the local government itself and section 1983 liability for conduct of high-ranking officials which may be attributed to the local government should be kept in mind throughout.

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27. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

28. 473 U.S. 159 (1985).

29. 469 U.S. 464 (1985).

*A. Affirmative Local Government Conduct Where Either the Government Itself Acted Formally or Informally, or High-Ranking Officials Acted; the Dispute over Attribution Rules in the Circuits and the Supreme Court*

1. WOLF-LILLIE v. SONQUIST<sup>30</sup>

In this Seventh Circuit case the plaintiff sued a county for damages in connection with the execution of an invalid writ against her property. Affirming the district court, the Seventh Circuit found that there was evidence of a widespread practice of executing outdated writs by the sheriff's department which caused the deputy sheriffs to execute the invalid writ against plaintiff. The point worth emphasis is that the challenged conduct was affirmative in nature, it was considered the conduct of the government department itself, and it was therefore an official policy or custom of the local government.

2. WESTBOROUGH MALL, INC. v. CITY OF CAPE GIRARDEAU<sup>31</sup>

Comparable affirmative conduct, with attribution from a high-ranking official, was involved in this Eighth Circuit case where the plaintiff developers claimed that a city interfered with their attempt to develop a shopping center. Ruling for the plaintiffs, the Eighth Circuit determined that the city manager's action in bringing about a revision of plaintiffs' zoning was attributable to the city. Even though he was subject to the city council's control, it turned out that the city manager had communicated his views to the city council which had in effect ratified his conduct. In addition, there was evidence of other incidents that may have represented the city's official policy regarding plaintiffs' zoning.

3. ROOKARD v. HEALTH AND HOSPITALS CORP.<sup>32</sup>: THE FINAL REPOSITORY APPROACH

This Second Circuit case, in addition to involving affirmative conduct, is significant because it represented the prevailing attribution approach in the circuits prior to recent Supreme Court decisions. Here, the plaintiff was fired from a hospital because of her whistle-blowing activities. Holding that the city hospital was liable, the Second Circuit emphasized that the plaintiff proved that the officials who demoted and fired her—the executive director and the vice president for corporate affairs—had a declared and communicated policy against whistle-blowers. Further,

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30. 699 F.2d 864 (7th Cir. 1983).

31. 693 F.2d 733 (8th Cir. 1982).

32. 710 F.2d 41 (2d Cir. 1983).

using a “final repository of decision-making authority” approach, the Second Circuit found that these officials had final authority in personnel matters because the hospital was decentralized. Thus, their conduct was attributable to the hospital.

4. BENNETT v. CITY OF SLIDELL:<sup>33</sup> THE  
DELEGATION OF POLICYMAKING  
AUTHORITY APPROACH

This Fifth Circuit case is extremely significant because it was apparently the first circuit court decision to adopt an attribution approach different from the final repository approach exemplified by *Rookard*. In *Bennett*, the plaintiff sued a city for delays experienced in obtaining a liquor license and occupancy permit. Initially, a panel of the Fifth Circuit, using a final repository approach, affirmed a jury verdict against the city on the ground that the city inspector who enforced the zoning ordinances against the plaintiff in a discriminatory manner was vested with official power to pass on occupancy certificate applications. Further, he and the city attorney together had secured the disconnecting of plaintiff’s electric power without notice or hearing. However, upon rehearing *en banc*, the Fifth Circuit reversed in an elaborate opinion setting out its view of the official policy or custom requirement in attribution cases.

The Fifth Circuit *en banc* asserted that where a local government is to be held liable through high-ranking officials:

the delegation of policymaking authority requires more than a showing of mere discretion or decision-making authority on the part of the delegee. . . . [Rather, t]he governing body must expressly or impliedly acknowledge that the agent or board acts in lieu of the governing body to set goals and to structure and design the area of the delegated responsibility, subject only to the power of the governing body to control finances and to discharge or curtail the authority of the agent or board.<sup>34</sup>

Applying this new “delegation of policymaking authority” approach, the Fifth Circuit observed that the city attorney was only employed to give legal advice and the building inspector’s job was to execute the city’s building code policy. Neither had any policymaking authority, even though the inspector was chief of the city’s office of permits and inspections. Thus, the city could not be held liable for the unconstitutional conduct of these officials.

What underlies the Fifth Circuit’s concern with attribution rules in *Bennett* is clear: the fear that in many situations lower-level officials make decisions for local governments which are effectively final. Un-

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33. 728 F.2d 762 (5th Cir. 1984) (*en banc*).

34. *Id.* at 769.

der a final repository approach, such decisions would be attributed to local governments for section 1983 liability purposes, thereby amounting, in the Fifth Circuit's view, to *respondeat superior* liability. It was for this reason that, creating a split among the circuits, the Fifth Circuit ruled that finality of decision making, standing alone, is insufficient, and that there must be a delegation of policymaking authority, either express or implied, as well.

5. PEMBAUR v. CITY OF CINCINNATI<sup>35</sup>: THE  
SUPREME COURT CONFRONTS  
ATTRIBUTION FOR THE FIRST TIME

The Supreme Court dealt with these issues in the 1986 *Pembaur* decision which involved the question of whether the decision by a county prosecutor and sheriff to force entry unconstitutionally into a doctor's office on a single occasion constituted an official policy or custom of the county. The Sixth Circuit ruled that it did not, even though it believed that the prosecutor and sheriff could, "in a proper case," establish county policy. In the case before it, the Sixth Circuit, after looking at the nature and duties of the sheriff, found it obvious that the sheriff was a county official who could establish county policy "in some areas." So too was the county prosecutor. However, there was no proof that the sheriff and prosecutor forced entry on more than this one occasion.<sup>36</sup>

In an opinion by Justice Brennan, the Supreme Court reversed and held that the county could be liable for plaintiff's fourth amendment deprivation. At the outset, the Court pointed out that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances."<sup>37</sup> An official policy may be tailored to a particular situation and need not be "intended to control decisions in later situations." The Court went on to assert that an official policy may be determined by an official who is "responsible for establishing final government policy respecting such activity." According to the Court, local government liability "attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives"<sup>38</sup> by such responsible officials. In applying this standard to the case before it, the Court found, relying on the Sixth Circuit's exami-

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35. 475 U.S. 469 (1986), *rev'g*, 746 F.2d 337 (6th Cir. 1984).

36. In contrast, there was proof of a "policy and past practice" of the city's police department—which had assisted the sheriff's deputies in forcing entry—to use whatever force was necessary, including forcible entry, to serve a *capias*. Because it was not clear whether plaintiff suffered an injury as a result of this city policy, a remand was necessary.

37. *Id.* at 480.

38. *Id.* at 483.

nation of state law, that the county prosecutor made official policy regarding the forcible entry into plaintiff's office. The county sheriff had referred the matter to the county prosecutor and had followed the latter's instructions based upon his understanding of the law. This was more than the rendering of legal advice.

Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, dissented.<sup>39</sup> They argued first that the fourth amendment principle, which had been declared by the Court in another case only *after* the events in question in *Pembaur*, should not be applied retroactively.<sup>40</sup> More important for present purposes, they also contended that the majority improperly focused on the "status of the decision maker" rather than on the nature and meaning of "policy." In their view, the majority made too much of state law. Rather, whether official policy has been made depends on the nature of the decision or act and the process by which the decision or act was determined. In this case, there was no rule of general applicability but only an ad hoc decision which should not render the county liable.

In *Pembaur*, a majority of the Court correctly ruled that even a one-time decision by a policymaker can render a local government liable. It also wisely defined "policymaking" as "a deliberate choice to follow a course of action from among various alternatives." However, Justice Brennan's opinion with its repeated emphasis on authority to make "final" policy could indicate a preference for the "final repository of decision-making authority" approach of a majority of the circuits and a rejection of the Fifth Circuit's *Bennett* approach. On the other hand, in an important footnote<sup>41</sup> which may have been inserted to obtain a majority, Justice Brennan observed that a county sheriff "may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy." What counts is whether the board of county commissioners, which ordinarily sets county employment policy, "delegated its power to establish final employment policy to the Sheriff." Only in such a case would the sheriff's employment decisions represent county policy. This footnote may be read as adopting the *Bennett* approach. It is also possible that the Court was suggesting that there was in reality not all that much difference between the "final repository" and *Bennett* approaches, especially since

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39. *Id.* at 492.

40. Based on the nonretroactivity guidelines of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). However, the county in *Pembaur* apparently did not raise this issue. In effect, then, the dissenters were providing legal advice to local governments.

41. *Pembaur*, 475 U.S. at 483 n.12.

the latter encompassed cases involving implicit delegations of policy-making authority.

Note, moreover, that two of the six person *Pembaur* majority, Justices White and O'Connor, parted company with Justice Brennan's reasoning insofar as it might apply to render a local government liable for the conduct of an official who violates local law.<sup>42</sup> This must be characterized as an open question after *Pembaur* since only four Justices joined in that portion of Justice Brennan's opinion. Nevertheless, there surely could be situations where local government liability results from the conduct of "policymaking" officials, even where that conduct violates local law. "Policymaking" authority, when delegated, is typically based on the local government's expectation that resulting official conduct will be legal under local law. But this, standing alone, should no more insulate the local government from section 1983 liability than the expectation that resulting official conduct will be legal under constitutional law. In this respect, then, local law should be relevant to local government liability but it should not automatically result in a finding of no government liability. As will be seen next, however, it turns out that the Court is split on the significance of state law in an attribution setting.

6. PRAPROTNIK v. CITY OF ST. LOUIS:<sup>43</sup> THE  
COURT'S SPLIT ON ATTRIBUTION  
CONTINUES

The Supreme Court held in the 1988 *Praprotnik* case that the transfer and layoff of the plaintiff, a city employee, were not acts of city policy rendering the city liable under section 1983 for the violation of plaintiff's first amendment rights. However, the Court split as to the proper approach in such cases.

In the Eighth Circuit decision in *Praprotnik v. City of St. Louis*,<sup>44</sup> the plaintiff architect was a city planner who claimed that his transfer and layoff by his supervisors in the city's community development agency

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42. Justice White concurred in *Pembaur*, emphasizing that it was significant to him that the forcible entry here was not illegal under federal, state or local law. In his view, had the "controlling law" placed limits on the prosecutor's and sheriff's authority in this regard, they would not have had the authority to establish contrary policy. Deliberate or mistaken acts contrary to local law would not render a local government liable. Justice O'Connor also concurred in part and in the judgment. She agreed with Justice White that the prosecutor and sheriff had acted as policymakers within the meaning of *Monell*. However, she was concerned that the majority's reasoning went too far in exposing local governments to liability, especially where local law is violated. Justice Stevens concurred in part and in the judgment, arguing that *respondeat superior* liability was proper under section 1983.

43. *Praprotnik v. City of St Louis*, 108 S. Ct. 915 (1988), *rev'g*, 798 F.2d 1168 (8th Cir. 1986).

44. 798 F.2d 1168 (8th Cir. 1986).

violated the first amendment and procedural due process. In addition, he asserted that the conduct of his supervisors—who included the agency's director—should be attributed to the city and thereby render it liable as well. At trial, the jury exonerated the individual defendants but returned a verdict against the city. On appeal, with one judge dissenting, the Eighth Circuit affirmed the jury's verdict holding the city liable for the first amendment violation. It determined that the plaintiff's supervisors, as appointing authorities, acted on behalf of the city in plaintiff's transfer and layoff. In the court's view, they had been delegated authority on behalf of the city to make such decisions.

The Eighth Circuit went on to reject the argument that the supervisors could not be city policymakers because of the existence of civil service review procedures available to an aggrieved employee. The decisions of the supervisors with respect to the plaintiff were effectively final. First, the civil service commission refused to hear plaintiff's appeal of his transfer on the ground that he had lost nothing. Second, because the commission's scope of review of supervisory layoff decisions was so circumscribed, the commission in effect deferred substantially to such decisions. Thus, final authority for the transfer and layoff decisions respecting the plaintiff was in the hands of the supervisors, thereby rendering the city liable under section 1983.

Judge Ross dissented.<sup>45</sup> He argued that civil service rules did not grant plaintiff's supervisors, as appointing authorities, the power to make city personnel policy; this power belonged to the mayor and city council, as well as the civil service commission. Also, the supervisors did not have final authority to make employment decisions because a civil service commission proceeding was available to aggrieved employees. Judge Ross maintained that the commission was not simply a "rubber stamp" for decisions of appointing authorities.

The Supreme Court reversed and remanded, however, without an opinion for the Court. Justice O'Connor wrote the plurality opinion in which Chief Justice Rehnquist and Justices White and Scalia joined.<sup>46</sup> Justice Brennan, joined by Justices Marshall and Blackmun, concurred in the judgment,<sup>47</sup> while Justice Stevens dissented.<sup>48</sup> Justice Kennedy did not participate.

Justice O'Connor's plurality opinion began by asserting, in reliance on *Pembaur*, that the identification of policymaking officials was a

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45. 798 F.2d at 1179.

46. *Praprotnik*, 108 S. Ct. at 919.

47. *Id.* at 928.

48. *Id.* at 936.

question of state law, not federal law. In this regard, the plurality maintained, the focus should be on whom the applicable formal state law placed municipal policymaking authority. Because of its legal nature, the jury should have no role in this inquiry. However, this did not mean that local governments could insulate themselves from liability simply by delegating their policymaking authority to others: in most such cases, according to the plurality, plaintiffs could still show the existence of a widespread custom sufficient for liability.

The plurality went on to emphasize:

[T]he authority to make municipal policy is necessarily the authority to make *final* policy. When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.<sup>49</sup>

Applying these considerations to the case before it, the plurality found that the Eighth Circuit used erroneous legal standards for local government liability. The supervisors, even though they had authority to initiate transfers and layoffs, were not policymakers under local law. For one thing, only the mayor and aldermen were authorized to adopt ordinances, consistent with the city charter, relating to personnel matters. For another, the city charter expressly stated that the civil service commission was the final decision maker with regard to the administration and enforcement of all ordinances and rules relating to personnel matters as well as appeals from individual personnel decisions. The plurality stressed: "Simply going along with discretionary decisions made by one's subordinates . . . is not a delegation to them of policymaking authority."<sup>50</sup> In the plurality's view, the *Praprotnik* case was on all fours with the hypothetical in the *Pembaur* footnote,<sup>51</sup> where the Court observed that a county sheriff could have discretion to hire and fire employees without also being the county's policymaker for employment matters.

Finally, the plurality rejected the contention that it had left a "gaping hole" in section 1983 that should be filled with what it called the "vague" concept of de facto final policymaking authority. This concept would "foster needless unpredictability in the application of 1983."<sup>52</sup>

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49. *Id.* at 926 (emphasis in original, citation omitted).

50. *Id.* at 927.

51. See *supra* text accompanying note 41.

52. *Id.* at 928.

Moreover, it would improperly give the jury the power to decide for itself who was a policymaker.

Justice Brennan's concurring opinion, in which Justices Marshall and Blackmun joined, agreed that the agency director was not the city's policymaker with respect to the challenged conduct. The agency's director was not a policymaker either in fact or under the city charter: the record demonstrated that at most he had the authority to determine how best to effectuate transfer policies of his superiors, but not the power to establish such policies. Such transfers were subject to the approval of both the director of personnel and the appointing authority of the transferee agency. Further, there was no indication that the director had ever attempted to exercise any such policymaking authority. In Justice Brennan's view, this was comparable to *Pembaur*'s county sheriff hypothetical. For these reasons, any unconstitutional conduct on the part of the director could not be attributed to the city. As to the other supervisors, their conduct was apparently not unconstitutional because it was not motivated by constitutionally impermissible motives. Hence, any attribution of their conduct was irrelevant.

However, the more significant portion of Justice Brennan's opinion was his disagreement with the plurality's approach to the attribution issues. He criticized its "formulaic" emphasis on state statutory law, and argued that in many cases where "real and apparent authority may diverge," a more realistic determination has to be made which takes account of where policymaking authority actually resides. Hence, even though the jury may not be given unfettered discretion to make this determination, nevertheless the jury should make this "essentially factual determination" with proper instructions. That is, the jury should decide whether a city delegated de facto final policymaking authority to a given official.

Justice Brennan also disagreed with the plurality's position that whenever an official's decisions were subject to some form of review, even if limited—as in *Praprotnik* itself—those decisions were consequently not final. He contended that there may be circumstances where reviewing officials seldom or ever exercised their oversight authority or where their review powers were highly circumscribed. In such cases, according to Justice Brennan, the subordinate's decisions became the final decisions of the local government. In short, "any assessment of a municipality's actual power structure is necessarily a factual and practical one" regarding which the jury has a meaningful role.<sup>53</sup>

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53. *Id.* at 935.

Finally, Justice Brennan argued that, contrary to the plurality's suggestion, the "custom or usage" doctrine did not adequately cover the "gaping hole" in local government liability created by the plurality's approach. He stated:

A city practice of delegating final policymaking authority to a subordinate or mid-level official would not be unconstitutional in and of itself, and an isolated unconstitutional act by an official entrusted with such authority would obviously not amount to a municipal "custom or usage." Under *Pembaur*, of course, such an isolated act *should* give rise to municipal liability. Yet a case such as this would fall through the gaping hole the plurality's construction leaves in 1983, because state statutory law would not identify the municipal actor as a policymaking official, and a single constitutional deprivation, by definition, is not a well settled and permanent municipal practice carrying the force of law.<sup>54</sup>

Justice Stevens alone dissented. In addition to noting his previously articulated position that *respondeat superior* was a permissible basis of local government liability, he contended that there was sufficient evidence for the jury to have found that many of the city's high officials, "including officials directly under the mayor, agency heads, and possibly the mayor himself," cooperated to retaliate against plaintiff in violation of the first amendment.<sup>55</sup>

The plurality's attempt to provide greater predictability in section 1983 local government liability cases involving attribution of the conduct of high-ranking officials is commendable. However, insofar as its approach is premised on making state statutory law determinative, and is similarly dependent upon a significant diminution in, if not the total elimination of, the jury's role, the plurality's position is seriously questionable. First, one wonders why the identification of the relevant policymaker is a matter of state law *alone*. After all, the official policy or custom requirement stems from an interpretation of section 1983, a federal statute. It is one thing to maintain that state law is relevant to this issue; it is a very different matter to assert that state law is determinative of what appears to be, at least in part, a federal question. Compare, for example, the use of state law in the determination of whether a particular governmental entity is an arm of the state for eleventh amendment purposes.<sup>56</sup> The Court admittedly looks to state law in its inquiry into that entity's powers. But the ultimate question whether that entity is protected by the eleventh amendment involves the application of eleventh amendment or federal standards as to which the Court, not the state, has the last word.

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54. *Id.* at 934-35.

55. *Id.* at 950.

56. *See* S. NAHMOD, *supra* note 1, at 5.08.

Second, the plurality's emphasis on the *formality* of state statutory law is fundamentally flawed. In its eagerness to remove the jury from decision making in local government liability cases involving attribution, the plurality improperly elevated form over substance. Surely a high-ranking official can be a policymaker even if state (including local government) statutory law does not so provide. The plurality's contrary position is inconsistent with its positions elsewhere. For example, the state action inquiry<sup>57</sup> is not limited to an investigation of statutory law. Rather, the Court has time and again emphasized that all of the facts and circumstances of the specific case must be pragmatically and realistically assessed in order to decide whether the conduct of an apparently private person or entity is to be attributed to the state for state action, and thus fourteenth amendment, purposes. Similarly, in procedural due process cases, the Court has made clear that the question whether a property interest exists is not dependent solely on statutory law but also requires a determination of what the parties actually do in practice.<sup>58</sup>

For these reasons, the plurality's attempt to articulate a judicially administered "bright line" test for attribution is not sound. It is true that the judicially administered "clearly settled law" test may have effectively removed from the jury the qualified immunity inquiry by focusing on constitutional law precedents.<sup>59</sup> However, the question of who is a policymaker is not so readily susceptible of resolution on the basis of formal law alone. Rather, the question must be addressed on a realistic basis, as Justice Brennan suggested, with a concomitant role for the jury where appropriate.

Two additional observations are in order. The plurality indicated in *Praprotnik* that an authorized local government policymaker would be responsible for the unconstitutional decision of a subordinate only if it approved both the decision and the basis for it. To the plurality, this means that ratification of a subordinate's decision, standing alone, is not enough for local government liability. Further, the future of section 1983 local government attribution rules obviously depends in large measure on Justice Kennedy's role in the Supreme Court's 1988-89 and subsequent Terms. For the time being, therefore, lawyers and courts will have to muddle through.

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57. See S. NAHMOD, *supra* note 1, at 2.04--10.

58. See *Board of Regents & State Colleges v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

59. See S. NAHMOD, *supra* note 1, at ch. 8.

*B. Government Failures to Train, Control, or Supervise Employees, Especially Police Officers*

The second category of cases consists of those dealing with section 1983 plaintiffs' claims that government failures to train, control, or supervise employees constituted an actionable official policy or custom which brought about constitutional deprivations. These cases often raise the same attribution issues discussed earlier. However, these cases are somewhat harder to deal with than those in the first category because they implicate failures to act rather than affirmative conduct.<sup>60</sup> Indeed, plaintiffs in such cases lose more often than not because of difficulties of proof.

1. *LENARD v. ARGENTO*<sup>61</sup>

This Seventh Circuit case dealt with plaintiff's claim that a village was liable for his beating at the hands of police officers both before and after arrest on the ground that the village improperly failed to screen, hire, train, and supervise its police officers. Ruling for the village, the Seventh Circuit noted that liability based on this theory required an extremely high degree of culpability. It stated: "At a minimum, a plaintiff must show that the [supervisory] official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending officers."<sup>62</sup> Applying this standard in favor of the village, the Seventh Circuit observed that one of the police officers had been a police officer in another community, and that he and another police officer had attended a police academy. In addition, the police chief, a thirty-year veteran, testified that the police officers received training pertaining to physical restraint of prisoners. Thus, the requisite high degree of culpability for local government liability was absent.<sup>63</sup>

2. *WEBSTER v. CITY OF HOUSTON*<sup>64</sup>

In contrast to *Lenard*, the facts in *Webster* made it a relatively easy case in which to find that the city was liable for its failure to train and super-

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60. This is not to say that there is always a clear distinction between failures to act and affirmative conduct. Many failure-to-act cases in fact involve affirmative conduct. Further, it is often possible to convert affirmative-conduct cases into failure-to-act cases and failure-to-act cases into affirmative-conduct cases.

61. 699 F.2d 874 (7th Cir. 1983).

62. *Id.* at 885-86.

63. *Compare* Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983), where the Fifth Circuit stated that in order for failures to train and supervise to be actionable, there must be gross negligence amounting to conscious indifference in the training of police officers. It also asserted that gross negligence in training the particular police officer who acted unconstitutionally was not sufficient unless there was a pattern of similar incidents, or such misconduct was widespread or general.

64. 689 F.2d 1220 (5th Cir. 1982), *aff'd*, 735 F.2d 838 (5th Cir. 1984) (en banc).

vise its police officers. In this case, plaintiffs' decedent was shot and killed by police officers. Affirming a jury verdict in favor of plaintiffs, the Fifth Circuit found that there was sufficient evidence to show that it was departmental policy or custom to use a "throw-down" gun near an unarmed suspect who had been shot by police officers, so as to justify the shooting. Among other factors, the use of throw-downs was widely known to high officials in the police department but they never told officers to stop, and officers knew that they could get away with using throw-downs. All of this, according to the Fifth Circuit, encouraged police officers in their illegal activities, including the shooting of decedent and the subsequent attempt to cover up at all levels of the police department.

3. CITY OF OKLAHOMA CITY v. TUTTLE:<sup>65</sup> THE  
SUPREME COURT CONFRONTS FAILURES  
TO TRAIN AND SINGLE INCIDENTS

*Tuttle* is currently the leading Supreme Court failure to train case. It involved the shooting death of plaintiff's decedent by a police officer where the decedent had no weapon and did not threaten the officer. Plaintiff sued both the police officer and the city, which resulted in a jury verdict in favor of the police officer on the basis of qualified immunity but against the city for failure to train. Affirming the verdict against the city, the Tenth Circuit found that the district court had properly charged the jury that the city could be liable for gross negligence in failing to train if it had "actual or imputed knowledge of the almost inevitable consequences that arise from completely inadequate training or supervision."

Also, there was sufficient evidence to support a finding of an official policy or custom of gross negligence and deliberate indifference, even though this finding was largely, if not completely, based on the single incident in question. "The act here was so plainly and grossly negligent that it spoke out very positively on the issue of lack of training. . . ."<sup>66</sup> In this connection, the jury had been charged that "*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.*"<sup>67</sup>

Finally, there was "plenty of independent proof of lack of actual training": the officer had been on the force for a very short time, he

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65. 471 U.S. 808 (1985), *rev'g*, 728 F.2d 456 (10th Cir. 1984).

66. *Tuttle v. City of Oklahoma City*, 728 F.2d 456, 461 (10th Cir. 1984).

67. *Tuttle*, 471 U.S. at 813.

admitted his lack of training to cope with robberies and yet he was permitted to go to a robbery scene by himself which resulted in his "gross failure" to handle the matter satisfactorily. In short, "the single incident rule is not to be considered as an absolute where the circumstances plainly show a complete lack of training."<sup>68</sup> Judge Barratt concurred, saying that he was "at a loss" to ascertain the basis for the jury's finding of grossly negligent and deliberately indifferent training beyond the incident itself.

The Supreme Court reversed. There was no opinion for the Court but only Justice Stevens dissented as to the judgment. Justice Rehnquist, joined by Chief Justice Burger and Justices White and O'Connor, held that the instruction was reversible error because it allowed the jury, on the basis of a single incident, to find that a policy of training and supervising police officers resulted in inadequate training and the claimed constitutional violations. It was significant for the Court that there was no claim that the city had a policy of authorizing its police force to use excessive force in apprehending criminals. Justice Rehnquist 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 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.<sup>69</sup>

However, Justice Rehnquist expressed "no opinion on whether a policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here can ever meet the 'policy' requirement of *Monell*."<sup>70</sup> Further, he insisted that there "must at least be an affirmative link between the training inadequacies alleged, and the particular constitutional violation alleged," a requirement not satisfied by the fact that "a municipal 'policy' might lead to 'police misconduct'."<sup>71</sup>

Justice Brennan, joined by Justices Marshall and Blackmun, concurred in the judgment. He agreed with Justice Rehnquist that the jury instruction was defective. In Justice Brennan's view, the single incident

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68. *Tuttle*, 728 F.2d at 461.

69. *Tuttle*, 471 U.S. at 823-24.

70. *Id.* at 824 n.7.

71. *Id.*

instruction could result in unpermitted *respondeat superior* liability under section 1983.<sup>72</sup>

After *Tuttle*, it is clear that a majority of the Court agrees that it will be a rare case indeed in which a single incident of police officer misconduct can serve as the sole evidentiary basis for a finding of local government liability for failure to train. It is also noteworthy that the Court did not deal with the question whether there was a violation either of due process or of the fourth amendment.<sup>73</sup> Thus it did not reach the question of the requisite states of mind for these constitutional violations.

In light of the Court's later due process decisions in *Daniels v. Williams*<sup>74</sup> and *Davidson v. Cannon*,<sup>75</sup> more than negligent conduct is now required for local government liability based on substantive due process violations. Whether the Court will ultimately rule that intentional conduct is required and that consequently even gross negligence, recklessness, and deliberate indifference are insufficient is an open question. Nevertheless, as demonstrated by the circuit court decisions dealing with the issue,<sup>76</sup> recklessness and deliberate indifference are currently sufficient for local government liability for failures to train or supervise police officers or other lower level employees in connection with substantive due process and other constitutional violations.

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72. However, Justice Brennan disagreed with Justice Rehnquist's approach to official policy or custom in general. Putting the matter in causation terms in light of section 1983's "subjects" language, he rejected the "metaphysical distinction between policies that are themselves unconstitutional and those that cause constitutional violations." Instead, he contended that there could be liability for "a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right. . . ." Justice Stevens dissented, arguing that as a matter of both statutory interpretation and policy the Court had been wrong in *Monell* when in "dicta" it rejected *respondeat superior* as a permissible basis for section 1983 liability. In his view the "policy" issue should be removed from section 1983 litigation altogether.

The important but subtle difference between the views of Justices Rehnquist and Brennan regarding the question of whether an official policy or custom must itself be unconstitutional was mentioned earlier.

73. *Id.* at 817 n.4.

74. 474 U.S. 327 (1986), discussed in S. NAHMOD, *supra* note 1, at ch. 3.

75. 474 U.S. 344 (1986), discussed in S. NAHMOD, *supra* note 1, at ch. 3.

76. Circuit court decisions holding that local governments may be liable for more than negligent failure to train or supervise police officers and other lower level employees include the following:

*Second Circuit:* *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782 (2d Cir. 1983) (local government liability for deliberate indifference in failing to supervise child's placement in foster home where she was sexually abused); *Owens v. Haas*, 601 F.2d 1242 (2d Cir. 1979) (local government liability for gross negligence or deliberate indifference in failing to train or supervise prison guards who beat plaintiff; however, reliance on single incident now improper after *Tuttle*).

*Third Circuit:* *Estate of Bailey v. County of York*, 768 F.2d 503 (3d Cir. 1985) (local government liability for gross negligence, recklessness or deliberate indifference in failing to prevent killing of child by mother's boyfriend where some "special relationship" alleged).

It is often difficult, though, for plaintiffs to prove such an official policy or custom because failures to act, in contrast with affirmative acts, are involved. *Tuttle*, of course, made the plaintiff's task even more difficult than it already was because now a single incident of police officer misconduct, no matter how egregious, cannot serve as the sole evidentiary basis for a finding of an official policy or custom of failure to train or supervise. But irrespective of *Tuttle*, plaintiffs have a substantial burden in this kind of case, a burden which includes not only proof of an official policy or custom but its causal relation to the plaintiff's constitutional deprivation.

4. CITY OF SPRINGFIELD v. KIBBE:<sup>77</sup> LESSONS  
FROM A DENIAL OF CERTIORARI

The Court had initially granted certiorari in *Kibbe* to deal with a city's liability for inadequate training in connection with the use of excessive force by several police officers in a single incident. Plaintiff's decedent, suspected of criminal assault and of abducting a woman, was fatally shot by police during the course of a motor vehicle chase. The jury found against the city and one of the officers, and the First Circuit affirmed. However, the Court dismissed the writ as improvidently granted because, inasmuch as the city did not object to a jury instruction

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*Fourth Circuit:* Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981) (local government could be liable if its "failure to promulgate policies and regulations rose to the level of deliberate indifference to [plaintiff's] right of procreation or constituted tacit authorization of her sterilization").

*Fifth Circuit:* Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983) (for local government liability purposes, city's failure to train police officers must be at least grossly negligent amounting to deliberate indifference).

*Sixth Circuit:* Hays v. Jefferson County, 668 F.2d 869 (6th Cir. 1982) (in absence of pattern of police misconduct, what is required for local government liability for inadequate training and supervision of police officers is "essentially a complete failure to train a police force, or training that is so recklessly or grossly negligent that future police misconduct is almost inevitable . . . or would properly be characterized as substantially certain to result").

*Seventh Circuit:* Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194 (7th Cir. 1985) (local government liability for failure to train police officers only where there is either "intentional conduct at the municipal level" or "massive neglect"; problems must be "systemic" in nature); Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983) (local government liability for failure to train or supervise police only where there is an extremely high degree of culpability).

*Tenth Circuit:* Rock v. McCoy, 763 F.2d 394 (10th Cir. 1985) (local government liability for gross negligence in failure to train police officers in connection with the use of force).

*Eleventh Circuit:* Gilmore v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984), *rev'd on other grounds*, 774 F.2d 1495 (11th Cir. 1985) (en banc) (local government's gross negligence or deliberate indifference in failing to train *individual* police officer properly insufficient for liability; what is required is the existence of a custom of improper selection and training in general).

77. 480 U.S. 257 (1987).

that gross negligence would suffice for the city's liability, the Court could not reach the negligence question. In the Court's view, its "inability to reach the negligence issue makes this case an inappropriate vehicle for resolving the inadequate training question, because of the close interrelationship between the two matters. . . .",<sup>78</sup>

Justice O'Connor, joined by the Chief Justice and Justices White and Powell, dissented from dismissal of the writ.<sup>79</sup> More importantly, these four Justices, setting out their standard for liability for inadequate training, would have decided the case on the merits in favor of the city. Justice O'Connor characterized the causal connection between the city's policy and decedent's constitutional deprivation as "an inherently tenuous one": the plaintiff did not claim that the city authorized the use of deadly force in such circumstances, but only that if the officers had been given more complete training, they would have used alternative methods.

Because there were so many intervening factors operating at the time of the conduct, such as the disposition of the officers, their experience with similar incidents and the conduct of other officers,

[t]o conclude, in a particular instance, that omissions in a municipal training program constituted the "moving force" in bringing about the officer's unconstitutional conduct, notwithstanding the large number of intervening causes also at work up to the time of the constitutional harm, appears to be largely a matter of speculation and conjecture.<sup>80</sup>

For this reason, Justice O'Connor asserted that liability for failure to train must be premised on inadequate training amounting to "reckless disregard for or deliberate indifference to the rights of persons within the city's domain." In her view, heightened negligence was not enough. Applying this reckless disregard standard to the facts before the Court, Justice O'Connor concluded that there was insufficient evidence to support the jury's verdict of liability. There were also too many inferences drawn from the single incident itself, contrary to the holding in *Tuttle*.

The reckless disregard, deliberate indifference standard of the four Justices is not surprising. Indeed, as noted earlier, the circuits already often speak in such terms regarding liability for failure to train.<sup>81</sup> It is regrettable, though, that Justice O'Connor did not discuss the relationship between this standard and the particular constitutional violation asserted in *Kibbe*. This standard, as a *constitutional* standard, is consistent

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78. *Id.* at 259.

79. *Id.* at 260.

80. *Id.* at 268 (O'Connor, J., dissenting).

81. *See supra* note 76 and accompanying text.

with the requirements of substantive due process, the constitutional provision typically implicated in failure to train cases involving the use of excessive force. However, as a *section 1983* standard, it is inconsistent with the rule that section 1983 has no independent state of mind requirement for the *prima facie* case.<sup>82</sup>

Now that Justice Kennedy has taken his seat on the Court, it is likely that there will eventually be a majority on the attribution issues discussed earlier and the failure to train issues just considered. Indeed, the Court has granted *certiorari* in *City of Canton v. Harris*<sup>83</sup> which dealt with a claim of denial of adequate medical care following plaintiff's arrest. Plaintiff, one of whose theories of liability was grounded on grossly negligent failure to train, alleged that the city police department gave police commanders unfettered discretion whether to refer prisoners to a hospital, and that the commanders were not given training or guidelines for making these decisions. Plaintiff's other theory of city liability was based on the participation of supervisory personnel. *Harris* could serve as a vehicle both for articulating the proper failure to train standards for local government liability and for setting out the appropriate attribution rules for such liability.

## VII. Local Government Immunity

### A. *No Immunity from Compensatory Damages Liability*

After the Supreme Court's decision in *Monell*, it was clear that local governments were not protected by absolute immunity because a contrary rule would have meant, in effect, that local governments were still not persons. However, *Monell* left open the question whether local governments were protected by the same qualified immunity applicable to individual defendants.<sup>84</sup> Soon thereafter, though, the Court held in *Owen v. City of Independence*<sup>85</sup> that local governments are not in fact

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82. See *Parratt v. Taylor*, 451 U.S. 527 (1981), discussed extensively in S. NAHMOD, *supra* note 1, at 3.09-.11.

83. 108 S. Ct. 1105 (1988).

84. Qualified immunity originally had both subjective and an objective parts. The subjective part required that the defendant honestly have believed that he or she was acting constitutionally at the time of the challenged conduct while the objective part required of the defendant that such belief was reasonable. Ultimately, the subjective part was eliminated by the Court and the objective part was converted into an "objective" inquiry into whether the defendant's conduct violated *clearly settled law* at the time it took place. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). See S. NAHMOD, *supra* note 1, at ch.8.

85. 455 U.S. 622 (1980).

protected by any kind of qualified immunity. In an opinion by Justice Brennan, the Court interpreted section 1983 as not providing for such protection for local governments.

Interestingly, even though the Court was interpreting a statute enacted in 1871, it justified its decision in part through the use of rather modern theories of equitable loss-spreading. This was Justice Brennan's way of telling us that the "background of tort liability"<sup>86</sup> of section 1983 is not frozen into the tort law rules extant in 1871, but rather that section 1983 interpretation can be influenced by current tort law developments so long as they are consistent with the policies underlying section 1983. Indeed, this point was made explicitly by Justice Brennan in an important section 1983 punitive damages case.<sup>87</sup>

The *Owen* rule of no qualified immunity is not the same as a rule imposing strict liability upon local governments. After all, the section 1983 plaintiff must still prove that there was a constitutional deprivation which was brought about by an official policy or custom of the local government. However, it remains true that there is a strict liability "flavor" to local government liability where a local government is held liable in a case of first impression.

One possible way around this problem for local governments is through the use of the well-established doctrine of nonretroactivity as set out in *Chevron Oil Co. v. Huson*.<sup>88</sup> The Court declared that the following three factors are relevant in determining whether a newly declared legal rule should be applied retroactively: (1) was a new rule of law in fact established? (2) would retrospective application of the new rule further or retard the new rule's application? and (3) would retroactive application produce substantially inequitable results? Local governments should make much more use of this doctrine in cases of first impression than they have in the past.

#### B. *Absolute Immunity from Punitive Damages Liability*

In contrast to the lack of any immunity from compensatory damages liability, local governments are absolutely immune from punitive damages liability. The Supreme Court so held in *City of Newport v. Fact Concerts, Inc.*<sup>89</sup> In its opinion, the Court purported to rely on legislative history and policy considerations. However, in this author's view the true motivation

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86. *Monroe v. Pape*, 365 U.S. 167 (1961).

87. *Smith v. Wade*, 461 U.S. 30 (1983).

88. 404 U.S. 97 (1971).

89. 453 U.S. 247 (1981).

for the ruling of *Fact Concerts, Inc.* was the Court's sense that "enough is enough." It had overruled *Monroe* and held in *Monell* that local governments were suable persons; it had ruled in *Owen* that local governments were not protected by any immunity from compensatory damages liability; it had clearly indicated, and was later to hold explicitly, that punitive damages are available against individual section 1983 defendants;<sup>90</sup> and finally, it was certainly aware of the availability of attorney fees to prevailing plaintiffs under 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act. Consequently, there was little reason to hold a local government's taxpayers responsible for punitive damages.

### VIII. Conclusion

Even when (and if) the Supreme Court, in this 1988 Term, resolves some of the government liability issues evaluated in this article, including section 1983 attribution rules and the status of states as persons, the volume of section 1983 local government liability cases will in all likelihood not be reduced significantly. For one thing, the availability of a deep pocket defendant unprotected by qualified immunity from compensatory damages liability will continue to attract section 1983 plaintiffs. For another, many local government liability cases involve either formal local government conduct or conduct of high-ranking officials who most would concede are policymakers even within the meaning of the plurality opinion in *Praprotnik*. Additionally, a Supreme Court decision holding that states are not persons would not represent a departure from the predominant position of the circuits and the states.

This does not mean, though, that section 1983 attribution rules will not make much practical difference. As suggested earlier, a Supreme Court decision linking local government liability to state statutory law would indeed be significant, even if unsound. This is because local governments frequently act through high-ranking officials who may be policymakers. In addition, a Supreme Court decision, as unlikely as it may be, that states are suable section 1983 persons, would dramatically expand the current scope of section 1983. Consequently, whatever the Supreme Court does, local government liability under section 1983, at least in the absence of congressional amendment,<sup>91</sup> is here to stay.

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90. See *Smith v. Wade*, 461 U.S. 30 (1983).

91. In a recent study sponsored by the National League of Cities, this author analyzed various suggestions for amending section 1983 for the protection of local governments. See Nahmod, *Municipal Liability: What Should Be Done About Section 1983?*, National League of Cities Policy Working Paper (July 1987).