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Michael P. Seng

*John Marshall Law School*

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# MUNICIPAL LIABILITY FOR POLICE MISCONDUCT

*Michael P. Seng\**

## I. INTRODUCTION

The absolute immunity from liability in civil rights actions under 42 U.S.C. section 1983,<sup>1</sup> formerly enjoyed by municipal corporations, has now been definitively withdrawn by the Supreme Court of the United States.<sup>2</sup> Indeed, in only two years, the Supreme Court has moved from the position that municipalities are absolutely immune, to the position that municipalities are strictly liable under section 1983.<sup>3</sup> In 1978, the Court held in

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\* Associate Professor of Law, John Marshall Law School, B.A., 1964, J.D., 1967, University of Notre Dame.

<sup>1</sup> 42 U.S.C. § 1983 (Supp. III 1979) provides:

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

The Supreme Court in *Martinez v. California*, 445 U.S. 920 (1980), ruled that state courts may entertain § 1983 actions. This article, however, will concentrate on suits commenced in federal court.

<sup>2</sup> The Supreme Court had expressly held that municipal corporations could not be sued for damages in *Monroe v. Pape*, 365 U.S. 167, 191 (1961). Although local public entities were commonly named as defendants in suits in equity both prior to and after *Monroe*, the Supreme Court seemed to disapprove of this procedure in *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973). Distinguishing § 1983, some lower courts held that municipal corporations could be named as defendants in actions filed under 42 U.S.C. § 1981 (1976). See, e.g., *Mahone v. Waddle*, 564 F.2d 1018, 1031 (3d Cir. 1977) (city not immune from liability under § 1981 for police brutality); *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1160 (9th Cir. 1976) (water district not categorically immune from liability under § 1981); *Rafferty v. Prince George's County*, 423 F. Supp. 1045, 1058 (D. Md. 1976) (county not immune from liability under § 1981); *Hines v. D'Artois*, 383 F. Supp. 184, 190 (W.D. La. 1974) (police service board not immune from liability for equitable relief under § 1981); *Washington v. Chester County Police Dep't*, 300 F. Supp. 1279, 1281 (E.D. Pa. 1969) (police department not immune from liability under § 1981).

<sup>3</sup> *Owen v. City of Independence*, 445 U.S. 622, 665 (1980) (Powell, J., dissenting).

*Monell v. Department of Social Services*<sup>4</sup> that local governmental entities are "persons" to whom section 1983 applies and therefore are not wholly immune from suit under that statute.<sup>5</sup> Two years later, in *Owen v. City of Independence*,<sup>6</sup> the Court reaffirmed the rule in *Monell* and held that municipalities may not assert a qualified immunity, defense, or privilege based upon the good faith of the official involved in the deprivation of rights secured by the Constitution and laws.<sup>7</sup>

Consequently, it would seem that the only issue in any suit against a municipality under section 1983 is whether it has deprived the plaintiff of a protected constitutional or statutory right.<sup>8</sup> At first blush this is a simple question of causation. In both *Monell* and *Owen*, however, the Court emphasized that:

[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.<sup>9</sup>

Although neither *Monell* nor *Owen* necessarily involved an attempt to impose liability under a theory of respondeat superior, the Court in each case specifically precluded any attempt

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<sup>4</sup> 436 U.S. 658 (1978).

<sup>5</sup> The Supreme Court has stated in dictum that the *Monell* ruling is not applicable to the states or to state governmental entities. Justice Brennan had previously indicated he would favor such an extension. *Hutto v. Finney*, 437 U.S. 678, 703 (1978) (Brennan, J., concurring). Cf. *Thompson v. New York*, 487 F. Supp. 212, 226-27 (N.D.N.Y. 1979) (court reluctantly held that state is not a person under § 1983). Justice Rehnquist, joined by six other justices, emphasized in *Quern v. Jordan*, 440 U.S. 332, 341 (1979) that *Monell* was a limited ruling and had not authorized suits against states under § 1983. See, e.g., *Familias Unidas v. Briscoe*, 619 F.2d 391, 405 (5th Cir. 1980) (court followed *Quern* in dismissing § 1983 suit against a state and county). For this reason this article will focus on city ordinances, policies, and local law enforcement problems. The same analysis would seem to apply, however, if *Monell* should be interpreted in the future to apply to state law enforcement activities.

<sup>6</sup> 445 U.S. 622 (1980).

<sup>7</sup> *Id.* at 638.

<sup>8</sup> The Supreme Court has now affirmatively resolved the question whether an action will lie under § 1983 for federal statutory violations. *Maine v. Thiboutot*, 100 S. Ct. 2503 (1980).

<sup>9</sup> 445 U.S. at 633 (citing *Monell v. Department of Social Servs.*, 436 U.S. at 694).

to premise future lawsuits on that theory.<sup>10</sup> The policy behind this rule is the result of two important observations. In *Owen*, the Court recognized that the effect of its earlier opinions allowing public officials to assert a good faith defense in actions for damages was to leave many victims remediless.<sup>11</sup> The Court noted that this was particularly true when the injury resulted from the interaction of several government officials, each of whom acted in good faith.<sup>12</sup> The *Owen* Court stated that one particular benefit of abrogating a municipality's good faith defense is the prevention of "systemic" injuries in which the plaintiff has clearly suffered harm but liability could not be established against any individual officer.<sup>13</sup> On the other hand, the Court was equally concerned that the municipality might be held liable for the acts of an officer not actually "caused" by the municipality's policies.<sup>14</sup> The Court stated that it was thus allocating costs in a section 1983 action among the victim, the officer who caused the injury, and the public, as represented by the municipal entity. This allocation of costs is guided by the accommodation arrived at by the Court:

The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by "execution of a government's policy or custom, whether made by its lawmakers or by those

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<sup>10</sup> In only one previous case had the Supreme Court indicated that § 1983 liability could not be premised solely upon a respondeat superior rationale. See *Rizzo v. Goode*, 423 U.S. 362, 370-71, 376 (1976) (discussing the matter in the context of causation). *Rizzo* was not a suit for damages; the plaintiff had sought only to require supervisory officers to implement procedures to curb the incidence of police brutality by their subordinates.

<sup>11</sup> 445 U.S. at 651.

<sup>12</sup> *Monell* and *Owen* thus seem to open the door for a recovery, previously denied, against municipalities responsible for civil rights deprivations. See, e.g., *Burton v. Walker*, 502 F.2d 1261, 1273 (5th Cir. 1974) (municipality not liable under § 1983 for shooting deaths of college students at hands of city police), *cert. denied*, 420 U.S. 964 (1975).

<sup>13</sup> 445 U.S. at 651.

<sup>14</sup> 436 U.S. at 692 & n.57.

whose edicts or acts may fairly be said to represent official policy."<sup>16</sup>

The accommodation reached by the Court is not entirely trouble-free. It can be assumed that defendants will still try to create gaps in which a plaintiff may be wronged but no recovery is possible. Furthermore, even where a plaintiff has a clear case against an officer, he will still need to sue the public entity if his remedy for damages is not to be illusory. Unless the defendant official is self-insured or is covered by a municipal or union insurance policy, any judgment in the plaintiff's favor will likely be uncollectible, especially where the amount of the judgment is substantial. Therefore, if the plaintiff expects to recover for his injuries, the funds will have to come from the municipality.

This article will pursue these considerations in the context of police misconduct and will delineate the circumstances under which a municipality may be held responsible for the misconduct of its police officers. In the following discussion, three varieties of police misconduct will be addressed. The first variety involves the arrest or detention of a suspect pursuant to a municipal law or policy that is illegal on its face. The second variety consists of certain abuses of process by law enforcement officials, excluding police brutality cases. The third variety is the traditional police brutality case. Although the same *Monell-Owen* principles apply in each of these situations, the factual contexts are sufficiently diverse to justify considering each case separately. Finally, this article will discuss specific problems of pleading, proof, and remedies common to all three forms of action for police misconduct.

## II. POLICE MISCONDUCT PURSUANT TO AN ORDINANCE OR POLICY ILLEGAL ON ITS FACE

A Jehovah's Witness distributes leaflets and is arrested by a police officer pursuant to a city ordinance banning the distribution of leaflets on public streets and sidewalks. Unable to post bond, the defendant is incarcerated until his appearance before the local magistrate when he is found guilty and fined fifty dol-

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<sup>16</sup> 445 U.S. at 657 (quoting *Monell v. Department of Social Servs.*, 436 U.S. at 694).

lars. Although the defendant succeeds in having his conviction reversed on appeal,<sup>16</sup> this is the classic case where the innocent victim formerly was left without a remedy for damages. He could not sue the city council members who enacted the ordinance,<sup>17</sup> the prosecutor who charged him,<sup>18</sup> or the judge who found him guilty,<sup>19</sup> because they all enjoyed absolute immunity from suit. Similarly, the arresting officer's convincing defense was that he was enforcing an official city policy in good faith.<sup>20</sup> *Monell* and *Owen* now provide the Jehovah's Witness a remedy against the city, regardless of whether its officials knew or even should have known that the ordinance was unconstitutional.<sup>21</sup>

Formerly, a city could pass with impunity an ordinance effectively prohibiting blacks from using municipal swimming pools<sup>22</sup> or barring vagrants or other "undesirables" from the city.<sup>23</sup> The ordinance would serve its intended purpose until someone successfully challenged the act's constitutionality. Even then the city might achieve the same result by instituting a different but equally objectionable law. The realization by city officials that injured parties can now recover damages in suits against municipalities under *Monell* and *Owen* should eliminate

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<sup>16</sup> See, e.g., *Schneider v. State*, 308 U.S. 147, 153-54, 165 (1939) (reversal of four convictions under city ordinances prohibiting or regulating the distribution of literature in public places).

<sup>17</sup> See *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (legislative immunity); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 613-14 (8th Cir. 1980) (absolute immunity for municipal legislators).

<sup>18</sup> See *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (prosecutors enjoy absolute immunity under § 1983).

<sup>19</sup> See *Stump v. Sparkman*, 435 U.S. 349, 356 (1978) (judicial immunity not abrogated by § 1983); *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967) (same).

<sup>20</sup> See *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (common law defense of good faith available to police officers in § 1983 actions).

<sup>21</sup> The *Owen* opinion expressly rejected any defense by the municipality that its actions were "legislative" rather than "ministerial." 445 U.S. at 644. A defense by the municipality that the Jehovah's Witness assumed the risk of arrest and prosecution likewise would prove unsuccessful. Because the ordinance was void, the petitioner could properly ignore it without first resorting to an action in equity or a suit for declaratory relief. See *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (one may wait until charged to challenge an ordinance void on its face).

<sup>22</sup> See *Palmer v. Thompson*, 403 U.S. 217, 219 (1971) (closing of city pools to all persons).

<sup>23</sup> See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161 (1972) (municipal vagrancy ordinance).

such blatant misconduct. In addition, under the balance struck in *Owen*, even those city officials who are conscientious will be forced to give greater consideration to the constitutional implications of the ordinances and policies which they choose to enforce. Consequently, if the officials harbor any doubts about the lawfulness of their intended action, they will have greater incentive "to err on the side of protecting citizens' constitutional rights."<sup>24</sup>

Municipal liability under *Monell* and *Owen* is not limited to those situations where a positive law enacted by the city is held unconstitutional on its face. As explained in parts III and IV of this article, a custom may also give rise to municipal liability "even though such a custom has not received formal approval through the body's official decision making channels."<sup>25</sup> Although not authorized by written law, customs are those practices of a municipality that are so permanent and well-settled as to transform merely private predilections into compulsory rules of behavior.<sup>26</sup> Thus, a city may well be answerable if it is the routine practice for police to stop blacks who are on the streets after dark in certain areas of the city.<sup>27</sup> The city would be liable

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<sup>24</sup> 445 U.S. at 652.

<sup>25</sup> *Monell v. Department of Social Servs.*, 436 U.S. at 691.

<sup>26</sup> See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 168 (1970). The Court, quoting Representative Garfield, stated that a "systematic maladministration" of laws equal and just on their face or a "neglect or refusal to enforce their provisions" could constitute a custom or usage within the ambit of § 1983. *Id.* at 167. The Court noted that the statute's scope was limited: although § 1983 was meant to provide a remedy for constitutional deprivations stemming from official failure to enforce duties owed under existing laws, it was not meant to provide a remedy for constitutional deprivations arising from official failure to enact corrective legislation. *Id.* at 167 n.39; see *Supreme Court v. Consumers Union*, 446 U.S. 719, 731-34 (1980) (Supreme Court of Virginia, acting in legislative capacity, enjoyed absolute legislative immunity for failure to lift ban against attorney advertising); *Mayes v. Elrod*, 470 F. Supp. 1188, 1192 (N.D. Ill. 1979) (liability for failure to enact corrective legislation not within scope of § 1983).

<sup>27</sup> In *Rizzo v. Goode*, 423 U.S. 362 (1976), minority citizens alleged a pervasive pattern of police mistreatment. The district court ordered city officials to draw up guidelines for handling citizen complaints alleging misconduct, and the Third Circuit affirmed. The Supreme Court, concluding there was no "affirmative link" between the misconduct complained of and the approval of municipal policymakers, reversed. *Id.* at 380-81. Thus, for instance, the all-white Chicago suburb of Cicero could be held liable for an injury to a black if it could be proven that the injury was caused by an official policy not to afford police protection to blacks who come into the town. See *Thompson v. New York*, 487 F. Supp. 212, 227 (N.D.N.Y. 1979) (withdrawal of police protection may be categorized as a

regardless of whether the practice was instituted by the city council or by the police department itself.<sup>28</sup> If an agency or a department has the authority or, in a more informal sense, is free to set its own policies or priorities, its edicts and acts should represent "official policy" for which the city is ultimately responsible.<sup>29</sup> In *Owen*, the Court expressed the hope that the

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policy under § 1983); *Huey v. Barloga*, 277 F. Supp. 864, 874 (N.D. Ill. 1967) (public officials are not always immune from suit for failure to provide police protection). Similarly, *Cairo*, Illinois might be liable for injuries suffered as a result of the concerted efforts of law enforcement officials to prevent blacks from exercising their first amendment right to protest racial injustice. See *Littleton v. Berbling*, 468 F.2d 389, 402 (7th Cir. 1972) (§ 1983 action against county officials for systematic discriminatory application of criminal law), *rev'd in part sub nom. O'Shea v. Littleton*, 414 U.S. 488, *vacated and remanded in part sub nom. Spomer v. Littleton*, 414 U.S. 514 (1974).

In *Mayes v. Elrod*, 470 F. Supp. 1188 (N.D. Ill. 1979), a cause of action for damages was found to exist against Cook County, Illinois. A jail inmate sued the county and its officials for violating his eighth amendment rights. He alleged that living conditions in the Cook County Jail were inhumane and that, as a result of lax security and overcrowding, he had been subjected to assaults and rape. He further alleged that his injuries were directly caused by the defendants' continuing practice of underfunding county corrections programs. Judge Prentice Marshall denied the county's motion to dismiss. Finding a statutory duty on the part of the county to keep jails repaired and in suitable condition, the judge held that the persistent maladministration or nonenforcement of the county's mandatory duty could amount to an official custom within the scope of § 1983. *Id.* at 1193.

<sup>28</sup> See *Sala v. County of Suffolk*, 604 F.2d 207 (2d Cir. 1979), *cert. granted, vacated and remanded*, 446 U.S. 903 (1980) (remanded for further consideration in light of *Owen*). The Second Circuit had held that the county was not liable in damages for a policy of the sheriff's department requiring the strip search of all women taken into custody because the department had adopted the policy in good faith. 604 F.2d at 209-11.

<sup>29</sup> The court in *Turpin v. Mailet*, 579 F.2d 152, 164 (2d Cir.), *vacated*, 439 U.S. 988 (1978), *modified and remanded*, 591 F.2d 426 (2d Cir. 1979), held that "a damage action can be maintained against a municipality to redress injuries resulting from those actions of its employees that have been authorized, sanctioned or ratified by municipal officials or bodies functioning at a policy-making level." 579 F.2d at 164. However, the district court in *Smith v. Ambrogio*, 456 F. Supp. 1130 (D. Conn. 1978), narrowly construed *Turpin* to refer only "to those making what can realistically be considered the policy of the town, rather than all officials at any level of authority within the town government exercising discretion and thereby in some sense creating policy guiding the actions of subordinates." *Id.* at 1134. *Smith* was decided before the Supreme Court's most recent decision in *Owen*.

The determination of who makes official policy for the city will presumably be a mixed question of law and fact decided on a case-by-case basis. See *Schneider v. City of Atlanta*, 628 F.2d 915, 920 (5th Cir. 1980) (city sued for racial discrimination in discharge of employee; whether director of bureau of corrections had final authority to make personnel decisions was question of fact); *Stinson v. Sheriff's Dep't*, 499 F. Supp. 259, 265 (S.D.N.Y. 1980) (whether official policy existed dependent on surrounding facts and cir-



threat of damages would encourage those in policy-making positions to institute internal rules and programs designed to minimize the likelihood of objectionable conduct by their subordinates.<sup>30</sup> Thus, the Court issued a clear warning: municipalities cannot insulate themselves from liability by allowing policies to be shaped informally by subordinate officials rather than taking action at the top.<sup>31</sup> Whichever course a city chooses as a way of defining city policy that policy is "officially" the city's, and the public will be called upon to bear the cost of it.

### III. ABUSES OF PROCESS

A second variety of police-citizen tension is created when the police violate personal rights while enforcing an otherwise valid law or custom. Generally included in this category are those situations where the officer makes an illegal arrest under an otherwise valid city ordinance. For example, in *Gregory v. City of Chicago*,<sup>32</sup> police enforced a disorderly conduct ordinance against civil rights protestors in violation of the demonstrators' first amendment rights. Similarly, in *Cantwell v. Connecticut*,<sup>33</sup> a Jehovah's Witness who played a recording offensive to Catholics was arrested for inciting a breach of the peace. Recovery of damages against individual officers would be difficult in both situations. Nevertheless, these appear to be the very situations in which the *Owen* Court intended the municipality to

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cumstances). State laws and municipal ordinances allocating power and delegating responsibilities as well as actual practices will be relevant to the policy-making power determination. If a single official's judgment can be said to bind the city, then the city should be required to accept the responsibility. See Schnapper, *Civil Rights Litigation after Monell*, 79 COLUM. L. REV. 213, 215-40 (1979) (factors relevant to a determination of who represents city or county policy); *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) (judge's enforcement of state statute not a policy-making act). But see *Katris v. City of Waukegan*, 498 F. Supp. 48, 52 (N.D. Ill. 1980) (mayor's actions, pursuant to authority conferred by city council, were those of municipality).

<sup>30</sup> 445 U.S. at 652.

<sup>31</sup> *Id.* On the facts, the *Owen* Court rejected a narrow definition of "official" action. The Court concluded that the discharge of police chief Owen by the city manager, in violation of Owen's procedural and substantive due process rights, was concerted, systematic conduct that could be said to represent "official" city policy. *Id.* at 657.

<sup>32</sup> 394 U.S. 111, 112 (1969).

<sup>33</sup> 310 U.S. 296, 301-03 (1940).

be liable.<sup>34</sup> If the arrest was ordered as part of a pervasive scheme to harass demonstrators, then "official" liability is clear.<sup>35</sup> Similarly, even if the decision to arrest was an individual officer's, it still was an "official" determination to take someone into custody.<sup>36</sup> This is particularly true where the city ratifies the arrest by prosecuting the person arrested rather than discharging him.<sup>37</sup> In this situation, the municipality is unquestionably directing the illegal proceeding.

An abuse of process may also occur where an officer errs in determining whether probable cause exists for an arrest or search. For example, an officer's arrest of a man for burglary on only the most general of descriptions,<sup>38</sup> or an entry into a private home without a warrant in order to arrest a suspect,<sup>39</sup> may constitute an abuse of process. Although liability for damages can be imposed against an officer who acts in an unreasonable manner,<sup>40</sup> a favorable verdict will be meaningless if the defendant is judgment proof. Because immunity is unavailable to the public entity as a defense<sup>41</sup> and because the city has a "deeper pocket" than any individual officer, victims of police misconduct are finding it increasingly attractive to sue the municipality.

The defense which the municipality will invariably raise is

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<sup>34</sup> 445 U.S. at 657-58.

<sup>35</sup> See *Allee v. Medrano*, 416 U.S. 802, 811, 815 (1974) (Court affirmed injunction against policy upon a showing of persistent pattern of police misconduct); *Hague v. CIO*, 307 U.S. 496, 505, 517 (1939) (injunctive relief ordered against city officials who adopted and enforced a policy forbidding plaintiffs from holding public meetings in city).

<sup>36</sup> See notes 46 through 49 and accompanying text *infra*.

<sup>37</sup> See note 49 and accompanying text *infra*.

<sup>38</sup> *People v. Byrd*, 47 Ill. App. 3d 804, 365 N.E.2d 443, 446 (App. Ct. 1977); see *Delaware v. Prouse*, 440 U.S. 648, 648 (1979) (random stop of motorist in absence of specific articulable facts justifying the stop held constitutionally impermissible); *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969) (evidence was inadmissible where police detained petitioner and obtained fingerprints without probable cause).

<sup>39</sup> *Payton v. New York*, 445 U.S. 573, 574-75 (1980).

<sup>40</sup> Compare *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (if officers "reasonably believed in good faith" that arrest was constitutional, they could not be held liable if arrest was in fact unconstitutional) with *Butler v. Goldblatt Bros.*, 589 F.2d 323, 325-26 (7th Cir. 1978) (arrest made without probable cause; good faith defense under § 1983 inapplicable), *cert. denied*, 444 U.S. 841 (1979) and *Joseph v. Rowlen*, 402 F.2d 367, 370 (7th Cir. 1968) (police officer liable for damages where arrest made without a warrant or probable cause).

<sup>41</sup> *Owen v. City of Independence*, 445 U.S. at 657.

that liability cannot be premised on a theory of respondeat superior<sup>42</sup> and that a local governmental entity can be liable only for the execution of its "official" policies and customs.<sup>43</sup> The municipality will deny that the officer acted pursuant to "official" policy and indeed will attempt to show that he violated "official" policy in making the illegal search or seizure.<sup>44</sup> The municipality, in a futile attempt to regain immunity, may also try to introduce legislation requiring officers to act in accordance with the laws and the Constitution of the United States.<sup>45</sup>

The city's defense should not be accepted. One can argue that the officer who performs an arrest or a search does so as an "official" representative of the public. His judgment may indeed be erroneous, but he has been designated to make that judgment on the public's behalf. Just as a city council or county legislature has been delegated power "officially" to enact ordinances,<sup>46</sup> and just as a city manager has been delegated power "officially" to discharge a municipal employee,<sup>47</sup> so a police officer has been delegated power "officially" to make arrests and conduct searches. In this narrow sphere, his edicts and acts represent official policy for which the public should be ultimately answerable.<sup>48</sup> Again, this is especially true when the city subsequently ratifies the policeman's conduct by prosecuting the person arrested. The city should not be permitted to dispute the extent of the officer's authority. If the city intends to use the fruits of an arrest or search to prosecute wrongdoers, then it should be willing to accept the consequences should the arrest or search be

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<sup>42</sup> *E.g.*, *Monell v. Department of Social Servs.*, 436 U.S. at 691. The Court stated: "a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." *Id.*

<sup>43</sup> *Id.* at 690-91.

<sup>44</sup> *Cf. Ex parte Young*, 209 U.S. 123, 159-61 (1908) (if state official's acts are unconstitutional, he is individually answerable for his acts).

<sup>45</sup> *Schnapper*, *supra* note 29, at 231.

<sup>46</sup> *Monell v. Department of Social Servs.*, 436 U.S. at 690.

<sup>47</sup> *Owen v. City of Independence*, 445 U.S. at 663 & n.13.

<sup>48</sup> *Id.* at 654-55, 657. *Compare Turpin v. Maillet*, 579 F.2d 152, 164 (2d Cir. 1978) (municipality liable in damages when its employees' actions authorized, sanctioned, or ratified at municipal policy-making level) *with Smith v. Ambrogio*, 456 F. Supp. 1130, 1134 (D. Conn. 1978) (city officials who possess authority or exercise discretion do not necessarily make town policy).

deemed illegal. Thus, the only way a municipality should be allowed to limit its liability is to withdraw completely the police officer's power to arrest or search.<sup>49</sup>

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<sup>49</sup> The authorities have not adopted such a policy. In *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980), a county judge, in compliance with a county school board request and pursuant to an unconstitutional Texas statute, exacted disclosure of the membership lists of organizations that sought to interfere with the operation of public schools. In a suit for damages under § 1983, the Fifth Circuit held for the county. The court reasoned that the judge had not acted in a capacity in which his "edicts or acts may fairly be said to represent official [county] policy." *Id.* at 404 (quoting *Monell v. Department of Social Servs.*, 436 U.S. at 694). Instead, the judge was enforcing "the policy of the State of Texas . . . , for which the citizens of a particular county should not bear singular responsibility." 619 F.2d at 404.

One commentator argues for an intermediate position. See Schnapper, *supra* note 29, at 221-23. He reasons that a city should be held liable where it allows officers to make ad hoc decisions but not where it has enacted specific rules and regulations circumscribing the authority of the officer. *Id.* at 221-22. While this argument is sound in the abstract, it is doubtful that sufficiently specific rules could be enacted to curtail or eliminate judgments by individual officers. *Id.* at 222-23. Additionally, in most instances the city will readily accept the officer's judgment if it is ultimately upheld by the courts but repudiate it if it is not.

In suits for damages against a municipality, the plaintiff may also argue that his arrest or search was part of a city-wide policy or custom which supported false arrests or illegal searches. *Ellis v. City of Chicago*, 478 F. Supp. 333, 335-36 (N.D. Ill. 1979) (amended complaint presented factual question whether repeated fourth amendment violations perpetrated against plaintiffs by Chicago police constituted city "policy or custom"). See Part II of text and accompanying footnotes *supra*. As further developed in Part IV *infra*, the plaintiff can also argue that the municipality by its inaction has improperly trained or supervised its officers, or has shown "deliberate indifference" to or ratified the conduct of its officers, or in some other way has directly contributed to the injury sustained by the plaintiff.

The same reasoning that would hold a municipality liable for abuses of process committed by police officers would hold a city liable when a prosecutor secures an indictment or conviction by the knowing use of perjured testimony. While public policy supports an absolute immunity for the prosecutor, see *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976), no similar public policy supports an immunity for the local governmental entity.

Of course, in all of these cases, municipal liability is premised on the invasion of a right protected by the laws or Constitution of the United States. Thus, an innocent person arrested pursuant to a valid warrant or with probable cause probably cannot recover under § 1983. See *Pierson v. Ray*, 386 U.S. 547, 555, 557 (1967) (police officers' common law defenses preserved under § 1983); *cf. Baker v. McCollan*, 443 U.S. 137, 146 (1979) (§ 1983 imposes liability for violations of rights secured by the Constitution, not for violations of duty of care). However, the Court in *Baker* left open the question whether extended confinement after authorities reasonably should have determined that a detainee is innocent would violate a constitutionally protected liberty interest. *Id.* at 145. In such a situation, the police and jailer probably have a good faith defense, see note 40 *supra*, while the judge and prosecutor enjoy absolute immunity. *Stump v. Sparkman*, 435 U.S.

The argument for an extension of municipal liability is supported by the Court's opinion in *Owen*. Although the Court expressed hope that the threat of liability would increase the attentiveness with which higher officials supervise their subordinates<sup>50</sup> and would "encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights,"<sup>51</sup> it did not imply that by instituting such measures the municipality necessarily would escape liability. This conclusion is buttressed by the Court's adoption of the loss-spreading principle that "when it is the local government itself that is responsible for the constitutional deprivation—it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government, rather than to let the entire burden fall on the injured individual."<sup>52</sup> Imposition of liability upon the municipality in these situations will further the objective articulated by the Court—that innocent individuals should be assured compensation for injuries sustained as the result of an abuse of governmental authority.<sup>53</sup>

#### IV. POLICE BRUTALITY

The third variety of police misconduct can be denominated police brutality. Distinguished from the situation in which the officer acted pursuant to a law or custom unconstitutional on its face or the situation involving an illegal arrest or search, it is unlikely that a finder of fact will conclude that an officer acted in good faith when the latter beat a suspect. Nonetheless, the reasons discussed earlier for trying to impose liability on the public entity are especially applicable here. Since damages resulting from police brutality can be substantial, it is crucial to find a "deep pocket" in these cases. Furthermore, the potential for such abuses should be minimized if municipal treasuries are

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349, 363-64 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976). Again, this is the type of systemic injury, referred to in *Owen*, where liability should be borne by the public. 445 U.S. at 657-58.

<sup>50</sup> 445 U.S. at 652 n.36.

<sup>51</sup> *Id.* at 652 (emphasis added).

<sup>52</sup> *Id.* at 655 n.39.

<sup>53</sup> *Id.* at 657.

threatened. However, the Court in *Monell* expressly rejected premising municipal liability on a theory of respondeat superior.<sup>54</sup> An argument can and should be made that, when the city has failed to promulgate specific rules to prevent police brutality, it has delegated that power to the officers. However, the lower courts, rejecting the theory that officers automatically are policymakers in such instances, have required plaintiffs to demonstrate that the municipality caused the unconstitutional deprivation.<sup>55</sup> As the existing decisions indicate, this is not an easy task.

To establish liability against a municipality, it is generally required that there be some "affirmative link" between the actions or policies of the city and the unconstitutional deprivation.<sup>56</sup> The municipality will be held responsible only if it is shown to be "culpable" in its own right.<sup>57</sup>

The easiest way to establish an "affirmative link" or "culpability" is to show an articulated policy favoring or promoting police brutality. Such an articulated policy may be shown through a state statute or city ordinance authorizing unconstitutional conduct<sup>58</sup> or through a police department regulation outlining unconstitutional procedures.<sup>59</sup> For obvious reasons, the cases

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<sup>54</sup> *Monell v. Department of Social Servs.*, 436 U.S. at 691.

<sup>55</sup> *See, e.g., Owens v. Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979) (federal prisoner, injured by corrections officers while in county jail, stated a cause of action for deprivation of rights); *Turpin v. Mailet*, 579 F.2d 152, 168 (2d Cir.) (municipality liable for unconstitutional arrest of appellant where employees' actions were authorized or sanctioned at the policy-making level), *vacated*, 439 U.S. 988 (1978), *modified and remanded*, 591 F.2d 426 (2d Cir. 1979); *Molina v. Richardson*, 578 F.2d 846, 847-48 (9th Cir. 1978) (city immune from suit where plaintiff failed to argue that police officers' allegedly illegal conduct could fairly be said to represent the city's official policy); *Knight v. Carlson*, 478 F. Supp. 55, 58 (E.D. Cal. 1979) (county may be liable if employees of sheriff's department were untrained as a result of county policy); *Popow v. City of Margate*, 476 F. Supp. 1237, 1246 (D.N.J. 1979) (city may be liable if its procedure for reprimand is so inadequate as to ratify unconstitutional conduct by police officers); *Leite v. City of Providence*, 463 F. Supp. 585, 591 (D.R.I. 1978) (municipality may be held liable if training of police force was nonexistent, reckless, or grossly negligent).

<sup>56</sup> *Rizzo v. Goode*, 423 U.S. 362, 371, 376 (1976) (mere right to control, without exercise of control or failure to supervise, insufficient to establish § 1983 liability).

<sup>57</sup> *Turpin v. Mailet*, 579 F.2d 152, 166 (2d Cir. 1978).

<sup>58</sup> *See Garner v. Memphis Police Dep't*, 600 F.2d 52, 53 (6th Cir. 1975) (statute authorized officers to shoot fleeing felons).

<sup>59</sup> In *Duchesne v. Sugarman*, 566 F.2d 817, 832 (2d Cir. 1977), the court held that

where such an affirmative link can be established will be rare.

In most cases, therefore, "culpability" will have to be proven either by demonstrating that city policymakers affirmatively intervened to cause the abuse, or by showing such a pervasive pattern and practice of abuse as to indicate a city policy which supports it.<sup>60</sup> In either situation, the familiar tort principle that one intends the natural consequences of his acts should govern.

One can establish municipal "culpability" by showing that persons in policymaking positions have affirmatively directed the misconduct.<sup>61</sup> In some situations policymakers will single out special groups for harassment. For instance, in *Hague v. CIO*,<sup>62</sup> the Supreme Court found that the mayor, the director of public safety, the police chief, and city commissioners were collectively engaged in a policy of harassing labor organizers.<sup>63</sup> Similarly, in *Allee v. Medrano*,<sup>64</sup> the Court found a continuing pattern of harassment and violence by the Texas Rangers against farm union organizers.<sup>65</sup> If city policymakers are directly implicated in such actions, liability should be clear. Liability will be more difficult to establish, however, where it is premised on a theory that officials, by their inaction, have allowed such practices to persist. In

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plaintiffs could try to show that policies and procedures in a welfare manual proximately caused the unconstitutional action of city welfare workers in taking and retaining custody of plaintiffs' children without benefit of a hearing or court order.

<sup>60</sup>See *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (overruled on other grounds by *Monell*); cf. *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969), where the court stated: "From a legal standpoint, it makes no difference whether the plaintiff's constitutional rights are violated as a result of police behavior which is the product of the active encouragement and direction of their superiors or as a result of the superiors' mere acquiescence in such behavior." *Id.* at 1086.

<sup>61</sup> See *Turpin v. Mailet*, 579 F.2d 152, 164 (2d Cir. 1978) (actions authorized, sanctioned, or ratified by municipal policy-making officials or bodies). It is sometimes difficult to determine whether an official is a policymaker. Certainly police chiefs, especially those authorized to formulate department policy, should be considered policymakers under *Monell* and *Owen*. The policy-making status of officials at lower levels of the municipal hierarchy should be judged on the facts of each case. *But cf.* *Smith v. Ambrogio*, 456 F. Supp. 1130, 1134 (D. Conn. 1978) (construing *Turpin* to refer only to those officials who institute town policy and not officials at every level).

<sup>62</sup> 307 U.S. 496 (1939).

<sup>63</sup> *Id.* at 505.

<sup>64</sup> 416 U.S. 802 (1974).

<sup>65</sup> *Id.* at 804-09.

*Rizzo v. Goode*,<sup>66</sup> plaintiffs produced approximately 250 witnesses to testify to numerous incidents of brutality by Philadelphia police officers. Nonetheless, the Supreme Court refused to find any "affirmative link" between those occurrences and the adoption of any plan or policy—"express or otherwise—showing . . . approval of such misconduct."<sup>67</sup>

Municipal inaction, manifested in a failure to train or supervise officers properly, may be the direct cause of a deprivation of civil rights. Similarly, municipal inaction in the face of a pervasive pattern or practice of police brutality may denote official acquiescence in or ratification of that misconduct. Despite apparent improprieties by officials, the possibility of imposing liability in these circumstances is still uncertain.<sup>68</sup>

Supervisory officials have been found culpable for inaction when laws or regulations of the state or locality impose a duty to act and the officials' inaction results in an unconstitutional deprivation.<sup>69</sup>Hence, if there is a breach of state laws requiring min-

<sup>66</sup> 423 U.S. 362 (1976).

<sup>67</sup> *Id.* at 371. Compare *id.* (no official custom or policy linked to illegal conduct by police officers) with *Ellis v. City of Chicago*, 478 F. Supp. 333, 336 (N.D. Ill. 1979) (amended complaint, citing four specific instances in which officers invaded plaintiffs' fourth amendment rights, may have illustrated a "custom or policy").

<sup>68</sup> See, e.g., *Turpin v. Mailet*, 619 F.2d 196, 202-04 (2d Cir. 1980) (although official policy may be inferred from omissions of municipal officials, police commissioner's failure to discipline officer insufficient to establish indifference to rights of arrestee); *Mayes v. Elrod*, 470 F. Supp. 1188, 1194 (N.D. Ill. 1979) (superior's failure to act insufficient to establish liability in absence of a pervasive, regular pattern of violations); *Smith v. Ambrogio*, 456 F. Supp. 1130, 1135-37 (D. Conn. 1978) (same).

In *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977), the court stated:

Where conduct of the supervisory authority is directly related to the denial of a constitutional right it is not to be distinguished, as a matter of causation, upon whether it was action or inaction. . . . "[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."

*Id.* at 832 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

<sup>69</sup> See, e.g., *Sims v. Adams*, 537 F.2d 829, 832 (5th Cir. 1976) (plaintiff stated § 1983 cause of action against mayor and police chief for negligent failure to control officer with known propensity for use of force); *Roberts v. Williams*, 456 F.2d 819, 822-23 (5th Cir.) (superintendent of prison farm negligently failed to train guard in use of weapon), *cert. denied*, 404 U.S. 866 (1971); *Carter v. Carlson*, 447 F.2d 358, 365 (D.C. Cir. 1971) (cap-



imum police training, supervision, or other standards of conduct, courts have imposed liability. However, caution in relying on these precedents is advised. Some language in *Rizzo* indicates that mere inaction, even though premised on a breach of duty, will still not be sufficient to establish supervisory responsibility.<sup>70</sup> Recently, however, the Court in *Monell* construed the language in *Rizzo* to mean only 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."<sup>71</sup> This has led one lower court to conclude that inaction combined with the exercise of some control may be a sufficient basis upon which to found supervisory responsibility.<sup>72</sup>

Courts have not hesitated to impose liability for inaction which is so reckless or so grossly negligent as to show "deliberate indifference."<sup>73</sup> For example, providing line officers with firearms without giving them any training or instruction on their use

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tain and chief of police subject to § 1983 suit for negligent failure to train officer who deprived plaintiff of constitutional rights), *rev'd on other grounds*, 409 U.S. 418 (1973); *Moon v. Winfield*, 368 F. Supp. 843, 845 (N.D. Ill. 1973) (chief of police subject to § 1983 suit for negligent failure to act on 13 misconduct complaints against a single officer); *cf. Duchesne v. Sugarman*, 566 F.2d 817, 832 n.31 (2d Cir. 1977) (question presented whether state and local law imposed duty on commissioner of welfare bureau to control employees who took children from mother and retained custody without her consent).

<sup>70</sup> See *Rizzo v. Goode*, 423 U.S. at 376 (plaintiff's theory of recovery blurred issues and amounted to an amorphous proposition which the Court declined to consider).

<sup>71</sup> 436 U.S. at 694 n.58.

<sup>72</sup> *Mayes v. Elrod*, 470 F.Supp. 1188, 1194 (N.D. Ill. 1979).

<sup>73</sup> *Owens v. Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979); *Mayes v. Elrod*, 470 F. Supp. 1188, 1194 (N.D. Ill. 1979); *Leite v. Providence*, 463 F. Supp. 585, 590-91 (D.R.I. 1978); *Perry v. Elrod*, 436 F. Supp. 299, 302 (N.D. Ill. 1977). The "deliberate indifference" standard was articulated by the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), a suit against prison officials under the eighth amendment for their failure to provide medical care to penitentiary inmates. However, in *Edmonds v. Dillin*, 485 F. Supp. 722 (N.D. Ohio 1980), the court held that the "deliberate indifference" standard should be limited to eighth amendment cases and formulated its own standard for "police training" cases:

If a municipality completely fails to train its police force, or trains its officers in a manner that is in reckless disregard of the need to inform and instruct police officers to perform their duties in conformity with the constitution, and if the municipality might reasonably foresee that unconstitutional actions of its police officers might be committed by reason of the municipality's failure or reckless disregard, then the municipality would have implicitly authorized or acquiesced in such future unconstitutional acts.

*Id.* at 727.

might well be so reckless as to evidence "deliberate indifference" to the rights of the public on the part of those in authority.<sup>74</sup> "Deliberate indifference," while most easily established in pattern and practice cases, may also be proved by a single incident.<sup>75</sup>

A final way to establish municipal "culpability" is to show that the city has ratified police misconduct.<sup>76</sup> As discussed above, such culpability may be difficult to establish simply by showing inaction by the city, *i.e.*, that it has failed to set up a police review mechanism. However, if a city creates such a program, its failure to administer it properly may be actionable.<sup>77</sup> Ratification may also be found where the city or its police review board consistently condones police misconduct despite repeated complaints or where the city rewards or promotes officers who engage in police brutality.

In the final analysis, whichever theory one employs for imposing liability against municipalities for police brutality, proof of causation will be the key to recovery.<sup>78</sup> Has the plaintiff's injury resulted from some fault of the municipality itself?<sup>79</sup> If the officer truly acted on his own, plaintiffs presumably will have to be content with recovering damages from him alone.<sup>80</sup> If one can demonstrate, however, that the city, through its "policy-making" officials, either directed or in a meaningful way allowed the bru-

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<sup>74</sup> *Cf. Roberts v. Williams*, 456 F.2d 819, 822-23 (5th Cir.) (superintendent of prison farm negligently failed to train guard in use of weapon), *cert. denied*, 404 U.S. 866 (1971).

<sup>75</sup> Compare *Turpin v. Mailet*, 619 F.2d 196, 202 & n.7 (2d Cir. 1980) (a single incident may establish a basis for liability) and *Owens v. Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979) (same) with *Popow v. City of Margate*, 476 F. Supp. 1237 (D.N.J. 1979) (rejecting view that a single brutal incident is sufficient to establish municipal liability).

<sup>76</sup> *Turpin v. Mailet*, 619 F.2d 196, 201 (2d Cir. 1980); *Cook v. City of Miami*, 464 F. Supp. 737, 739 (S.D. Fla. 1979).

<sup>77</sup> See *Popow v. City of Margate*, 476 F. Supp. 1237, 1247 (D.N.J. 1979) (city's inadequate maintenance of its review procedure for police shooting incidents may have led officers to believe their unconstitutional conduct would not subject them to any discipline).

<sup>78</sup> See *Monell v. Department of Social Servs.*, 436 U.S. at 691 (municipality cannot be held liable on basis of respondeat superior; constitutional tort must be caused by official policy).

<sup>79</sup> *Id.*; see notes 54 through 78 and accompanying text *supra*.

<sup>80</sup> 436 U.S. at 691; see notes 54 through 57 and accompanying text *supra*.

tality to occur, then the city should be held culpable.<sup>81</sup> In *Owen*, the Court suggested that the threat of damages will encourage cities to institute internal procedures to minimize abuses and will encourage officials at higher levels to supervise more closely the conduct of their subordinates.<sup>82</sup> In cases involving municipal culpability, the courts should recognize that police brutality is less likely to occur if officers are properly trained and supervised and if the department has adopted and enforced strict policies prohibiting police misconduct. The absence of such checks and protections should establish a prima facie case of municipal liability.<sup>83</sup> *Owen* clearly indicates that municipalities cannot insulate themselves from liability by declining to take action at the top,<sup>84</sup> and simple justice demands that the person injured by municipal action or inaction be compensated.

## V. PLEADING AND PROOF

Because municipal liability under section 1983 is such a recent development, many of the reported cases have involved preliminary questions of pleading. Although the federal rules require that pleadings be "simple, concise, and direct,"<sup>85</sup> some courts have required that a cause of action against a municipality be pled with greater specificity.<sup>86</sup> Thus, in *Smith v. Ambrogio*,<sup>87</sup> the Federal District Court for the District of Connecticut ruled that the complaint should state facts which clearly articulate the level of decisionmaking or the identity of agents whose actions are deemed to reflect town policy. The court found that in a pattern and practice case this was justified to ensure that neither the court nor the municipality be burdened with an un-

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<sup>81</sup> See notes 60 through 78 and accompanying text *supra*.

<sup>82</sup> 445 U.S. at 652.

<sup>83</sup> See generally Schnapper, *supra* note 29, at 223.

<sup>84</sup> See *Owen v. City of Independence*, 445 U.S. at 652 (encouraging programs to minimize possibility of constitutional violations).

<sup>85</sup> Fed. R. Civ. P. 8(3) (1).

<sup>86</sup> See *Smith v. Ambrogio*, 456 F. Supp. 1130, 1137 (D. Conn. 1978) (requirement of fact pleading appropriate; pleader must specify overt acts forming basis of unconstitutional action); cf. *Leite v. City of Providence*, 463 F. Supp. 585, 591 (D.R.I. 1978) (allegations of simple negligence insufficient to state a claim against municipality under § 1983).

<sup>87</sup> 456 F. Supp. 1130 (D. Conn. 1978).

warranted action.<sup>88</sup> Although this special rule is not in accord with the federal policy favoring notice pleading,<sup>89</sup> plaintiffs nevertheless are well advised to be as specific as possible in their pleadings.

Assuming that the pleadings adequately state a cause of action, the plaintiff then must determine what evidence can be garnered to prove the city's responsibility. As previously explained, the evidence required to establish the existence of an official policy will depend on the character of the misconduct alleged. The existence of a city policy need be proven only by a preponderance of the evidence.<sup>90</sup>

The best evidence of an official policy would be a city ordinance or authorized police regulation approving the particular conduct.<sup>91</sup> If such proof does not exist, then the plaintiff can try to establish such a policy by implication. For example, the absence of any standards or checks governing police action may demonstrate the city's indifference to citizens' rights.<sup>92</sup> Although a city cannot insulate itself from liability merely by announcing that officers should not engage in misconduct, the city's silence, especially when coupled with other evidence indicating a perva-

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<sup>88</sup> *Id.* at 1137.

<sup>89</sup> *E.g.*, *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (notice pleading under federal rules does not require detailed facts; discovery and pretrial procedures are the means for determining the basis of the claim). With regard to notice pleading in the context of § 1983 actions against municipalities, see *Thompson v. Village of Evergreen Park*, 503 F. Supp. 251, 252 (N.D. Ill. 1980) (Federal Rules of Civil Procedure do not require specific allegations in § 1983 actions); *Thompson v. New York*, 487 F. Supp. 212, 217 (N.D.N.Y. 1979) (lack of specific allegations of defendant's tortious conduct not fatal under liberal approach of Rule 8(f)); *Edmonds v. Dillin*, 485 F. Supp. 722, 728 (N.D. Ohio 1980) (same). In *Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1972), *rev'd in part sub nom.* *O'Shea v. Littleton*, 414 U.S. 488, *vacated and remanded in part sub nom.* *Spomer v. Littleton*, 414 U.S. 514 (1974), defendants objected to a civil rights complaint because it did not contain "highly specific factual averments." The Seventh Circuit commented that the purpose of federal pleadings is to avoid the semantical donnybrooks inherent in differentiating what is evidence, ultimate facts and conclusions of law and fact . . . ." and that "dismissal should be sparingly used whenever it appears that a basis for federal jurisdiction in fact exists or may exist and can be stated by plaintiff." 468 F.2d at 394.

<sup>90</sup> *Cf.* *Kerr v. City of Chicago*, 424 F.2d 1134, 1139-40 (7th Cir.) (upholding jury instruction on this and other points), *cert. denied*, 400 U.S. 833 (1970).

<sup>91</sup> *Cf.* *Monell v. Department of Social Servs.*, 436 U.S. 658, 690-91 (1978) (formal approval through the municipal policy-making process).

<sup>92</sup> See notes 68 through 75 and accompanying text *supra*.

sive pattern or practice of abuse, may evidence an official city policy that fosters police misconduct.<sup>93</sup>

The likelihood of recovery against a municipality increases if the misconduct is traced to someone high in the chain of command.<sup>94</sup> Thus, an effort should be made to identify all city officials who participated in the acts that caused the deprivation of rights. Similarly, evidence tending to show a high degree of autonomy on the part of these officers will be necessary. The greater the policy-making discretion of the official, the more likely it is that he will be found to have acted in an "official" capacity.<sup>95</sup> Although the best evidence of an official's authority is the city's own ordinances or regulations, his authority can also be shown from his employment agreement with the city, directions he has received from those in official positions, or long-standing practices.

Plaintiffs should discover whether the city has properly trained and supervised its officers.<sup>96</sup> It also would be advisable to discover whether municipal officers have been involved in similar incidents.<sup>97</sup> In this regard, police documents relating to citizens' complaints and internal investigations may be helpful in proving municipal culpability.<sup>98</sup> Official ratification of an officer's misconduct may also be shown by evidence either that the city relied on the fruits of its officer's misconduct to prosecute the plaintiff or that the manner of conducting investigations is designed to justify the misconduct.

*Rizzo v. Goode*<sup>99</sup> illustrates the difficulty of proving

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<sup>93</sup> See note 68 *supra*.

<sup>94</sup> See note 61 *supra*.

<sup>95</sup> *Id.*

<sup>96</sup> See note 69 *supra*.

<sup>97</sup> Evidence of similar incidents should be admissible at trial pursuant to Fed. R. Evid. 404(b) and 406.

<sup>98</sup> See *Moon v. Winfield*, 368 F. Supp. 843, 845 (N.D. Ill. 1973) (police department documents used to show police superintendent's negligence in failing to act on brutality complaints); *cf. Kerr v. United States Dist. Court*, 511 F.2d 192, 196 (9th Cir. 1975) (prison board personnel files discoverable in suit attacking members' qualifications), *aff'd*, 426 U.S. 394 (1976).

<sup>99</sup> 423 U.S. 362 (1976). In *Rizzo*, plaintiffs offered evidence of the unconstitutional conduct of individual police officers. The police officers were not made parties to the action; rather, the defendants were the Mayor of Philadelphia and the police commissioner. The Court held that plaintiffs had failed to prove an "affirmative link between

supervisory responsibility where the evidence reveals only a number of unrelated incidents occurring in a large metropolitan area. Internal complaints and investigations may be helpful in establishing a pattern and practice.<sup>100</sup> Problems may be reduced if the plaintiff concentrates on proving only that an illegal official policy or practice exists in a particular neighborhood within a metropolitan area, or against a particular racial or ethnic group.<sup>101</sup> Prison and other institutional cases demonstrate that a pattern and practice can be proven by repeated incidents occurring in an institutional setting.<sup>102</sup> Also, proof may be facilitated if the plaintiff concentrates on one established police practice rather than on system-wide failures.<sup>103</sup>

The first cases brought against a particular municipality will require extensive discovery. Consequently, it may be worthwhile to establish a local clearinghouse procedure for sharing information secured in other cases. Even though each case will have its own particular problems of proof, such a procedure may never-

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the occurrence of the various incidents of police misconduct and the adoption of any plan by [defendants] showing their authorization or approval of such misconduct." *Id.* at 371.

<sup>100</sup> See, e.g., *Boyd v. Gullett*, 64 F.R.D. 169, 177-78 (D. Md. 1974) (discovery of police investigative files permitted in civil rights case charging a systematic pattern of police brutality aimed at blacks); *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 345-46 (E.D. Pa. 1973) (civil rights case against police officers and officials; court granted plaintiff's request to discover police department investigative files); *Wood v. Breier*, 54 F.R.D. 7, 9-10 (E.D. Wis. 1972) (plaintiffs in civil rights action entitled to discover police department investigative file).

<sup>101</sup> See *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1065-66 (7th Cir. 1976) (proof of individual instances of mistreatment of Mexicans by officials of the Immigration and Naturalization Service sufficient to support preliminary injunction), *aff'd and modified*, 548 F.2d 715 (7th Cir. 1977).

<sup>102</sup> See, e.g., *Dimarzo v. Cahill*, 575 F.2d 15, 17-21 (1st Cir.) (unconstitutional prison conditions shown by evidence of inhumane living facilities and recreation procedure), *cert. denied*, 439 U.S. 927 (1978); *Jackson v. Bishop*, 404 F.2d 571, 572-80 (8th Cir. 1968) (evidence of prison's policy of whipping prisoners with strap established eighth amendment violation); *Rogers v. Okin*, 478 F. Supp. 1342, 1366-83 (D. Mass. 1979) (evidence of procedures for commitment, regulations concerning treatment, and medication practices sufficient to show state mental hospital violated patients' constitutional rights); *Rennie v. Klein*, 476 F. Supp. 1294, 1308-11 (D.N.J. 1979) (proof of procedure concerning patients' refusal of medication established violation of constitutional rights at state mental hospital).

<sup>103</sup> See *Lyons v. City of Los Angeles*, 615 F.2d 1243, 1245-50 (9th Cir.) (plaintiff attacked police practice of using strangleholds in non-life-threatening situations), *cert. denied*, 101 S. Ct. 333 (1980).

theless serve to expedite litigation.

## VI. REMEDIES

Section 1983 provides that plaintiffs may sue for redress in either law or equity.<sup>104</sup> Thus, the possible remedies against police misconduct include injunctive relief, a declaratory judgment, or damages.

Because common law immunities do not apply to municipalities,<sup>105</sup> a victim of police misconduct almost certainly will want to sue the municipality for damages. Although the Supreme Court indicated that common law tort rules regarding damages apply in section 1983 actions,<sup>106</sup> it has also stated that rules governing compensation for injuries caused by the deprivation of constitutional rights should correspond to the particular constitutional interests in question.<sup>107</sup> Furthermore, the Court has indicated that the question of damages will be determined by federal standards as provided by 42 U.S.C. section 1988.<sup>108</sup> However, the Court has construed section 1988 to allow application of either damages rule in order to fulfill the policies of the federal statutes.<sup>109</sup>

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<sup>104</sup> See note 1 *supra*.

<sup>105</sup> *Owen v. City of Independence*, 445 U.S. at 638.

<sup>106</sup> *Carey v. Phipus*, 435 U.S. 247, 257-58 (1978). The Court addressed common law tort damages as a starting-point for inquiry into § 1983 damages. *Id.* at 257-58. *Piphus* involved two consolidated cases in which a customary 20-day suspension was enforced without a hearing, thereby denying petitioners' procedural due process rights. *Id.* at 249-50. The Court analogized tort interests to constitutional rights while simultaneously recognizing that some constitutional rights do not have analogous tort interests. *Id.* at 258.

<sup>107</sup> *Id.* at 258-59.

<sup>108</sup> See *id.* at 258 n.13 (§ 1988 authorizes courts to use common law of states where necessary to provide appropriate relief under § 1983); *Baskin v. Parker*, 588 F.2d 965, 970 (5th Cir. 1979) (damages for deprivation of a federally protected right are governed by federal standards under § 1988). 42 U.S.C. § 1988 (1976) provides:

The jurisdiction in civil matters . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all causes where they are not adapted to the object, or are defined in the provisions necessary to furnish suitable remedies and punish, . . . the common law, as modified and changed by the constitutions and statutes of the state . . . so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

<sup>109</sup> *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239-40 (1969) (awarding compen-

At the very least, a plaintiff who has suffered a constitutional deprivation is entitled to nominal damages.<sup>110</sup> Furthermore, he is entitled to any compensatory damages he can prove.<sup>111</sup> Thus, the plaintiff can be compensated for his illegal arrest,<sup>112</sup> illegal search,<sup>113</sup> unlawful confinement,<sup>114</sup> or for any pain, suffering or humiliation caused by the unconstitutional misconduct.<sup>115</sup> If he has been forced to expend money to defend himself in a court proceeding initiated by the local governmental entity, then he is entitled to recover those costs as well.<sup>116</sup>

Although the Supreme Court has left the question open, most lower federal courts have awarded punitive damages against public officials in appropriate cases.<sup>117</sup> The lower courts

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satory damages under § 1983 for racial discrimination by a community recreation corporation that excluded a black resident from park facilities).

<sup>110</sup> See *Carey v. Piphus*, 435 U.S. 247, 248 (1978) (nominal damages may be awarded for deprivation of procedural due process without proof of actual injury). The common law traditionally awarded nominal damages for deprivation of certain absolute rights without proof of actual injury. *Id.* at 266. The Court in *Piphus* reasoned that the right of procedural due process does not depend on the merits of substantive claims and is vital to organized society. *Id.* Since procedural due process is an absolute right the Court ruled that recovery of nominal damages for denial of procedural due process does not require proof of actual injury. *Id.*

<sup>111</sup> *Id.* at 266. However, the Court held that it will not presume substantial damages where a plaintiff has been denied his right to procedural due process. *Id.* at 262-63.

<sup>112</sup> See, e.g., *Basista v. Weir*, 340 F.2d 74, 85-87 (3d Cir. 1965) (nominal, compensatory, and punitive damages available under § 1983 for arrest without provocation or warrant in private home); *Rhoads v. Horvat*, 270 F. Supp. 307, 311 (D. Colo. 1967) (actual and punitive damages available for warrantless arrest). These cases also indicate that a successful plaintiff may be compensated for medical expenses or loss of earnings occasioned by the illegal arrest. 340 F.2d at 84-85. The *Rhoads* court concluded that out-of-pocket losses should be determined by the jury. 270 F. Supp. at 310.

<sup>113</sup> *Baskin v. Parker*, 588 F.2d 965, 967 (5th Cir. 1979) (compensatory damages for illegal and unreasonable search without probable cause); *Sexton v. Gibbs*, 327 F. Supp. 134, 142 (N.D. Tex. 1970) (illegal search; nominal, compensatory and exemplary damages recoverable), *aff'd*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972).

<sup>114</sup> *Whirl v. Kern*, 407 F.2d 781, 796-97 (5th Cir. 1968) (recovery for physical and mental injury as well as physical discomfort in jail during false imprisonment or unlawful detention), *cert. denied*, 396 U.S. 901 (1969).

<sup>115</sup> *Carey v. Piphus*, 435 U.S. 247, 264 (1978); *Baskin v. Parker*, 588 F.2d 965, 970 (5th Cir. 1979); *Whirl v. Kern*, 407 F.2d 781, 797 (5th Cir. 1968).

<sup>116</sup> *Kerr v. City of Chicago*, 424 F.2d 1134, 1141 (7th Cir. 1970) (in a § 1983 action for unlawful detention of a minor, funds expended by minor's parents for attorney's fees in criminal proceedings are recoverable).

<sup>117</sup> *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978). For a list of lower court opinions awarding punitive damages against public officials, see C. ANTIBAU, FEDERAL CIVIL



currently are divided on the question of whether punitive damages may be recovered from a municipality.<sup>118</sup> It can be argued that a prevailing plaintiff is made whole by an award of compensatory damages,<sup>119</sup> and that the imposition of exemplary damages will operate to punish the taxpayers rather than the corporate entity itself.<sup>120</sup> In many cases, however, the amount of compensatory damages recoverable will be minimal. Therefore, if a major goal of section 1983 is to deter unconstitutional conduct, punitive damages should be available against a municipality guilty of flagrant misconduct in its official capacity. At a minimum, punitive damages should be available against a municipality if they would be available under state law.<sup>121</sup> In addition to monetary relief, an order to expunge all records of an illegal arrest or seizure may be proper.<sup>122</sup>

Federal courts also have power to enjoin enforcement of an unconstitutional statute or ordinance.<sup>123</sup> However, concerns of comity and federalism may warrant a declaratory remedy in such cases because the latter remedy is less intrusive into state affairs than an injunction.<sup>124</sup> In any event, prospective relief may

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RIGHTS STATUTES § 212 n.21 (2d ed. 1980).

<sup>118</sup> Compare *Simineo v. School Dist. No. 16*, 594 F.2d 1353, 1357 (10th Cir. 1979) (public school teacher recovered punitive damages against school board for termination without procedural due process) and *Cook v. City of Miami*, 464 F. Supp. 737, 739 (S.D. Fla. 1979) (denial of motion to strike plaintiff's demand for punitive damages in § 1983 case) with *Edmonds v. Dillin*, 485 F. Supp. 722, 725, 730 (N.D. Ohio 1980) (municipality not liable for punitive damages in a civil rights action).

<sup>119</sup> *Edmonds v. Dillin*, 485 F. Supp. 722, 730 (N.D. Ohio 1980).

<sup>120</sup> *Id.*

<sup>121</sup> See *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239-40 (1969) (both federal and state rules on damages are available to serve policies expressed in federal statutes).

<sup>122</sup> *Sullivan v. Murphy*, 478 F.2d 938, 958 (D.C. Cir.) (order to expunge records appropriate to preserve basic legal rights), *cert. denied*, 414 U.S. 880 (1973); *Wilson v. Webster*, 467 F.2d 1282, 1283-84 (9th Cir. 1972) (plaintiffs entitled to hearing on expungement of records to show impairment of fundamental rights by continued existence of records).

<sup>123</sup> See *Wooley v. Maynard*, 430 U.S. 705, 711-12 (1977) (injunctive relief preventing enforcement of unconstitutional statute appropriate in exceptional circumstances); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (preliminary injunction may be granted to prevent enforcement of contested statute against plaintiff if enforcement would result in irreparable injury); *Hague v. CIO*, 307 U.S. 496, 518 (1939) (petitioners were entitled to injunction prohibiting enforcement of ordinance declared void).

<sup>124</sup> See *Steffel v. Thompson*, 415 U.S. 452, 460-73 (1974) (declaratory relief appropriate where injunctive relief not); *Cicero v. Olgiati*, 410 F. Supp. 1080, 1089-90

be made available whether the law is alleged to be unconstitutional on its face or merely as applied.<sup>125</sup>

Injunctive relief has also been granted to correct abuses of process such as warrantless searches of homes.<sup>126</sup> Similarly, in *Illinois Migrant Council v. Pilliod*,<sup>127</sup> the Court of Appeals for the Seventh Circuit affirmed the issuance of a preliminary injunction against agents and officials of the Immigration and Naturalization Service to prohibit them from detaining people solely on the basis of race and without probable cause to believe them to be aliens.<sup>128</sup>

The question of federal courts' power to issue injunctions to prevent police brutality was raised in *Rizzo v. Goode*.<sup>129</sup> The Supreme Court cautioned that equitable relief should not exceed the scope of the constitutional violation and that considerations of comity and federalism may limit the availability of broad mandatory injunctions against police departments.<sup>130</sup>

*Rizzo*, however, has not been interpreted to withdraw completely the power of federal courts to remedy police brutality by injunction. Thus, in *Lyons v. City of Los Angeles*,<sup>131</sup> the Court

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(S.D.N.Y. 1976) (judgment on validity of state administrative procedure permissible where no cases under the statute are pending).

<sup>125</sup> *Steffel v. Thompson*, 415 U.S. 452, 473-75 (1974). Once a prosecution is pending in state court, equitable considerations as well as considerations of comity and federalism will ordinarily prevent a federal court from interfering with the proceeding. *See, e.g.*, *Hicks v. Miranda*, 422 U.S. 332, 348-52 (1975) (district court erred in declaring statute unconstitutional while criminal prosecution was pending); *Samuels v. Mackell*, 401 U.S. 66, 73-74 (1971) (declaratory judgment improper when criminal prosecution pending); *Younger v. Harris*, 401 U.S. 37, 43-53 (1971) (injunctive relief by federal court improper while state criminal action in progress).

<sup>126</sup> *Lankford v. Gelston*, 364 F.2d 197, 201 (4th Cir. 1966). Police officers over a 19-day period had made more than 300 routine searches of homes without warrants or probable cause. *Id.* at 198. *See Allee v. Medrano*, 416 U.S. 802, 815 (1974) (if there is a persistent pattern of police misconduct injunctive relief is appropriate).

<sup>127</sup> 540 F.2d 1062 (7th Cir. 1976), *aff'd and modified*, 548 F.2d 715 (7th Cir. 1977). Plaintiffs produced evidence of repeated actions by I.N.S. officials in stopping members of the plaintiff class without legal cause and in conducting illegal searches of dwelling places and factories. The court held the evidence sufficient to prove a practice and policy of the I.N.S. 540 F.2d at 1065-66.

<sup>128</sup> 540 F.2d at 1072.

<sup>129</sup> 423 U.S. 362 (1976).

<sup>130</sup> *Id.* at 377-80.

<sup>131</sup> 615 F.2d 1243 (9th Cir.), *cert. denied*, 101 S. Ct. 333 (1980) (White, Powell, and Rehnquist, JJ., dissenting).

of Appeals for the Ninth Circuit held that a federal court could issue an injunction against the Los Angeles Police Department if the latter encouraged police officers to apply strangleholds to motorists stopped for minor traffic violations.<sup>132</sup> Unlike *Rizzo*<sup>133</sup> and *O'Shea v. Littleton*,<sup>134</sup> which sought massive structural relief, the Court of Appeals noted that Lyons merely sought to enjoin the use of an established police practice that violated the constitutional rights of himself and others.<sup>135</sup> The court concluded that such narrowly tailored relief would not involve the federal courts in supervising the day-to-day functioning of a police department.<sup>136</sup>

In addition to damages and equitable relief, section 1988 provides for attorney's fees to the prevailing party in a section 1983 action.<sup>137</sup> The amount of attorney's fees recoverable in individual cases may well equal or even exceed the value of any compensatory damages awarded to the plaintiff.<sup>138</sup> Therefore, the availability of attorney's fees should have a twofold effect: first, plaintiffs will have greater incentive to bring section 1983 suits and second, municipalities will have increased incentive to eliminate those conditions which may give rise to municipality liability.

## VII. CONCLUSION

The availability of remedies against a municipality in police misconduct cases should result in increased protection for inno-

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<sup>132</sup> 615 F.2d at 1246-50.

<sup>133</sup> 423 U.S. at 365.

<sup>134</sup> 414 U.S. 488, 500, *vacated and remanded in part sub nom. Spomer v. Littleton*, 414 U.S. 514 (1974). The Supreme Court in *O'Shea* noted that the injunction requested would result in an "ongoing federal audit of state criminal proceedings. . . ." *Id.* at 500.

<sup>135</sup> 615 F.2d at 1247.

<sup>136</sup> *Id.*

<sup>137</sup> 42 U.S.C. § 1988 (1976). See *Maine v. Thiboutot*, 100 S. Ct. 2502, 2506-07 (1980) (attorney's fees recoverable in § 1983 action for statutory violation of federal law whether suit in federal or state court).

<sup>138</sup> See *Donaldson v. O'Connor*, 454 F. Supp. 311, 315 (N.D. Fla. 1978) (settlement does not limit award of attorney's fees under § 1988). See generally Comment, *Calculation of a Reasonable Award of Attorney's Fees Under the Attorney's Fees Awards Act of 1976*, 13 J. MAR. L. REV. 331 (1980) (examination of factors used by courts to calculate attorney's fees awarded under § 1988).

cent victims. Once an official policy is established by the evidence, responsibility can be placed upon a single entity.

In addition, naming a municipality as a defendant may well be wise strategy. Previously, if a police officer was sued for misconduct, the city automatically rushed to his defense claiming he acted in good faith and the plaintiff's injury, if any, was the result of systemic failures for which no one was legally answerable. As a result of *Monell* and *Owen*, the officer and the city may actually become enemies. The officer will argue that his actions were reasonable and done in good faith. The city will deny that a policy authorizing or condoning police misconduct exists. All of these factors should motivate municipalities both to eliminate conditions which foster police misconduct and to deal swiftly and efficiently with those officers who violate the rules. This appears to be precisely the result the Supreme Court in *Owen* sought to achieve.

\*Editor's note: As we go to press, it is essential to note that in *City of Newport the Fact Concerts, Inc.*, 49 U.S.L.W. 4860 (June 23, 1981), the United States Supreme Court held municipalities are immune from punitive damages under 1983.



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