NOTES

Municipal Liability under *City of Oklahoma City v. Tuttle*: Federalism, Due Process, and the Implications of a Restricted Section 1983 Remedy

> A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies, is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.[1]

Throughout the American past, our jurisprudence has been troubled by the question of which tribunal—state or federal court—should hear claims arising from the violation of federal constitutional rights by persons acting under color of state law. The Fourteenth Amendment protects against the deprivation of life, liberty, and property without due process of law.[2] Although title 42, section 1983 of the United States Code[3] provides a federal remedy for violations of the Fourteenth Amendment, the states have a legitimate interest in adjudicating claims of abuses by its officers.

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1. Message sent to Congress by President Grant, *cited in* Monroe v. Pape, 365 U.S. 167, 172-73 (1961) (quoting CONG. GLOBE, 42d Cong., 1st Sess., 244 (1871)).

2. U.S. CONST. amend. XIV § 1.

3. Title 42 U.S.C. § 1983 (1982) grants a private right of action to redress violations of constitutional rights committed by persons acting under color of state law. The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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.

Section 1983 was enacted pursuant to § 5 of the Fourteenth Amendment; it created no substantive rights in and of itself. *See* Baker v. McCollan, 443 U.S. 137, 140 (1979).

In the years since the passage of the 1964 Civil Rights Act,[4] the number of civil rights suits pursued in the federal court system has risen exponentially.[5] As victims of police misconduct began to join municipalities as defendants under section 1983, the United States Supreme Court, as well as the federal courts, issued decisions designed to stem the tide of section 1983 suits flooding the federal court system.[6] Consequently, vindicating and protecting constitutional rights through federal causes of action became less important to federal judges than the interests of federalism[7] and clearing the federal court dockets.[8] Against this backdrop, the Supreme Court decided *City of Oklahoma City v. Tuttle*.[9]

This Note addresses the *Tuttle* Court's treatment of municipal liability for a supervisory official's failure to remedy police misconduct. After discussing the facts in *Tuttle*, this Note examines: (1) the history and purpose of section 1983 as interpreted by the Supreme Court in *Monroe v. Pape*,[10] *Monell v. Department of Social Services*,[11] and *Rizzo v. Goode*;[12] (2) the *Tuttle* decision; and (3) the contours of municipal liability and the problems generated after *Tuttle*. The ramifications of *Tuttle* are evaluated in light of federalism, due process, and the inadequacy of the remedies afforded in state courts to vindicate federal constitutional rights. This Note concludes that if the federal courts are to foster municipal responsibility for individual rights as guaranteed by the Fourteenth Amendment, *Tuttle* should be limited to its particular facts and narrowly construed.

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4. Pub. L. 88-352, 78 Stat. 241 (July 2, 1964).

5. *See* Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 781 n.3 (1979) ("Suits against police officers brought under the civil rights statutes have increased from 2,000 in 1971 to over 6,000 in 1977. . . . Civil rights actions in general have increased from 287 in 1960 to 13,113 in 1977 . . . . ") (citing *Police: Under Fire, Fighting Back*, U.S. NEWS & WORLD REPORT, April 3, 1978, at 39); Maine v. Thiboutot, 448 U.S. 1, 27 n.16 (1980)(between 1961 and 1979, the number of civil rights actions—predominantly section 1983—filed in federal court rose from 296 to 24,951) (citing DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANNUAL REPORT, at A16-A17, Table C-3 (1979)).

6. *See infra* note 40.

7. *See* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 26-30 (1980).

8. *See, e.g.*, Kupfer, *Restructuring the Monroe Doctrine: Current Litigation Under Section 1983*, 9 HASTINGS CONST. L.Q. 463, 473 n.57 (1982) (" 'It is difficult to resist the conclusion that much of this federal door closing is not so much a function of enlightened federalism or even an evolving political environment as of crowded dockets.' ") (citing Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1203 (1977) (footnote omitted)).

9. 105 S. Ct. 2427 (1985).

10. 365 U.S. 167 (1961), *overruled in part*, 436 U.S. 658 (1978). For a discussion of *Monroe*, see *infra* notes 18-30 and accompanying text.

11. 436 U.S. 658 (1978).

12. 423 U.S. 362 (1976).

I. An Introduction to the Supreme Court Decision in *City of Oklahoma City v. Tuttle*

In *Tuttle*, after her husband was killed by an Oklahoma City police officer, the plaintiff brought a section 1983 action against the city alleging that it failed to adequately train its police force. The fatal incident arose when Officer Julian Rotramel responded to an all-points bulletin of a robbery in progress at an Oklahoma City bar.[13] Officer Rotramel was the first to arrive on the scene, where he recognized Albert Tuttle from the bulletin's description of the alleged robber. While questioning the barmaid, who declared that no robbery had taken place, Officer Rotramel tried to restrain Mr. Tuttle inside the bar. Mr. Tuttle broke free from the officer's hold, however, and ran outside.[14] Officer Rotramel followed Mr. Tuttle onto the street, finding him crouched on the ground with his hands near his boot. Officer Rotramel ordered Mr. Tuttle to halt, but as Mr. Tuttle rose from his crouched position, the officer shot him, explaining later that he believed Mr. Tuttle had removed a gun from his boot.[15]

Mrs. Tuttle filed suit under section 1983 for the wrongful deprivation of her husband's constitutional rights, naming both Officer Rotramel and the City of Okalahoma City as defendants. Despite the jury's finding that Officer Rotramel's use of force was excessive and unlawful, he was absolved of personal liability based on his good faith belief that his life was in danger.[16] As to the municipal defendant, Mrs. Tuttle produced an expert who testified that the city's training curriculum was grossly inadequate. The judge's instructions to the jury, however, permitted the jury to find the city liable based solely upon the incident of excessive force, without consideration of the expert's testimony.[17]

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13. 105 S. Ct. at 2429.

14. *Id.* at 2430.

15. *Id.* Mr. Tuttle was later found to have a toy pistol in his boot.

16. The good faith immunity protects officers when their illegal or unconstitutional acts are committed in good faith, i.e., without malice or intent to illegally deprive a person of constitutionally protected rights. Voutour v. Vitale, 761 F.2d 812, 818 (1st Cir. 1985); York v. City of San Pablo, 626 F. Supp. 34 (N.D. Cal. 1985). The Supreme Court, in Owen v. City of Independence, 445 U.S. 622 (1980), held that the good faith immunity does not attach to a government entity when its agents have been absolved of liability by way of good faith. *See also* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

17. 105 S. Ct. at 2435. The trial judge instructed the jury as follows:

> If a police officer denies a person his constitutional rights, the city that employs that officer is not liable for such a denial of the right simply because of the employment relationship. . . . But there are circumstances under which a city is liable for a deprivation of a constitutional right. Where the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, the city may be liable.
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> Absent more evidence of supervisory indifference, such as acquiescence in a prior matter of conduct, official policy such as to impose liability . . . under the

The Court concluded that Mrs. Tuttle could not state a cause of action against the city based solely upon one incident of a police officer's excessive use of force. Consistent with a long history of section 1983 interpretation, this resolution of *Tuttle* reflects the Court's current trend to limit the scope and availability of the section 1983 remedy.

II. A Historical Perspective of Section 1983 Litigation

A. *Monroe v. Pape:* Fashioning a Remedy under Section 1983

The scope of section 1983 as a mode of redress for unconstitutional acts committed by police officers, acting under the authority of state law, was not realized prior to the Supreme Court's decision in *Monroe*. *Monroe* arose from an incident involving thirteen Chicago police officers. The officers unlawfully searched and ransacked the petitioner's home, detained him at a police station without an opportunity to consult counsel or appear before a magistrate for arraignment, and ultimately released him without pressing criminal charges.[18] The lower courts dismissed the plaintiff's section 1983 claim as to all the defendants, including the City of Chicago and the individual officers involved in the incident.[19]

The Supreme Court characterized the issue in *Monroe* as "whether Congress, in enacting section . . . [1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."[20] Recognizing the function of section 1983 as a remedy for the deprivation of rights protected by the Fourteenth Amendment, the Court's inquiry focused on whether section 1983 should be construed as coexistent with, or precluded by, state common law tort remedies.

In its analysis of the statute, the *Monroe* Court noted that section 1983 was "one of the means whereby Congress exercised the power vested in it by section 5 of the Fourteenth Amendment to enforce the provisions of that Amendment."[21] From the Congressional debates surrounding the passage of the 1871 Act, the Court identified three express purposes of section 1983: First, section 1983 was enacted to "override certain [invidious] state laws," where the state substantive law was

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federal Civil Rights Act cannot ordinarily be inferred from a single incident of illegality such as a first excessive use of force to stop a suspect; *but 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.* . . . Furthermore, the plaintiff must show a causal link between the police misconduct and the adoption of a policy or plan by the defendant municipality.

Id. at 2430-31 (emphasis in original).

18. 365 U.S. at 169.

19. *Id.* at 170.

20. *Id.* at 172.

21. *Id.* at 171 (citing CONG. GLOBE, 42d Cong., 1st Sess., App. 68, 80, 83-85 (1871)).

facially unconstitutional;[22] second, it "provided a remedy where state law was inadequate," such as where federal law provided remedies or procedures unavailable in state courts;[23] and third, it "provide[d] a federal remedy where the state remedy, though adequate in theory, was not available in practice."[24]

Based on this legislative history, the *Monroe* Court concluded that Congress intended section 1983 to supplement state common law tort remedies:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.
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> . . . .
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> It is no answer that the State has a law which if enforced would give relief. *The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.*[25]

The Court held that Congress intended section 1983 to remedy violations of constitutional rights committed by city police officers, but that municipal corporations were not "persons" within the meaning of the statute[26] and thus, that a section 1983 suit could not be maintained against a municipality itself.[27] This conclusion was based on Congress' rejection of the proposed "Sherman amendment" to the 1871 Ku Klux Klan Act,[28] which "would have made 'the inhabitants of the county, city, or parish' in which certain acts of violence occurred liable 'to pay full compensation' to the person damaged or his widow or legal representative."[29]

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22. 365 U.S. at 173.

23. *Id.* For example, a black person in Kentucky could not testify against a white person in state court, but he or she could so testify in federal court. By prohibiting blacks from testifying on their own behalf against whites, the state courts essentially deprived blacks of a remedy when they were wronged, and of a defense when they were accused. *See id.* at 173-74 (citing CONG. GLOBE, 42d Cong., 1st Sess., 345 (1871) (remarks of Senator Sherman)).

24. *Id.* at 174. This theory is premised on the fact that certain Southern states were unable or unwilling to control the activities of the Ku Klux Klan, and thus failed to "enforce the laws with an equal hand." *Id.*

25. *Id.* at 180, 183 (emphasis added).

26. 365 U.S. at 191 n.50. *Compare* Santa Clara County v. Southern Pac. Ry., 118 U.S. 394 (1886) (corporations are considered "persons" for purposes of the Equal Protection Clause of the Fifth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

27. 365 U.S. at 187, 192.

28. Section one of the 1871 Act was the precursor to 42 U.S.C. § 1983 (1982).

29. 365 U.S. at 188 (citing CONG. GLOBE, 42d Cong., 1st Sess., 663 (1871)). Although the amendment passed in the Senate, it was rejected by the House of Representatives.

The rejection of municipal liability under section 1983 weakened the statute's remedial function because, as a practical matter, a judgment against an individual police officer could not compensate the plaintiff, nor have the desired effect on municipal policies and police practices, as would a judgment casting blame on the municipal entity. To join a municipality as a defendant after *Monroe,* a plaintiff would have to pursue state remedies. Although the *Monroe* Court acknowledged the possible inadequacy of state law to effectively remedy a wrong of constitutional dimension,[30] it declined to address this issue until seventeen years later, in *Monell.*

B. *Monell v. Department of Social Services*: Municipal Liability for "Custom" or "Policy"

In *Monell,* female employees of the Department of Social Services and the Board of Education of New York challenged a city policy which required pregnant employees to take a mandatory maternity leave before it was medically necessary to do so. The Supreme Court held that the plaintiffs stated a cause of action against the city, overruling that portion of *Monroe* which held municipalities could not be sued under section 1983.[31] Based on a "fresh analysis of the debate on the [1871 Ku Klux Klan Act]," the Court found *Monroe* had incorrectly interpreted Congress' rejection of the Sherman amendment.[32] What Congress rejected in 1871, the *Monell* Court reasoned, was the imposition of municipal liability for actions of "persons riotously and tumultously assembled;"[33] Congress did not intend that a municipality should be immune from "its *own* violations of the Fourteenth Amendment."[34]

The *Monell* Court then proceeded to define the contours of municipal liability under section 1983. Expressly rejecting a theory of liability based on *respondeat superior,*[35] the Court held a municipality could only be liable pursuant to a governmental "custom" or "policy":

> Local governing bodies . . . can be sued directly under section 1983 for monetary, declaratory, or injunctive relief where, as here,

30. The *Monroe* Court concluded:

> It is said that doubts should be resolved in favor of municipal liability because private remedies against officers for illegal searches and seizures are conspicuously ineffective, and because municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level. We do not reach those policy considerations.

365 U.S. at 191 (footnotes omitted).

31. 436 U.S. 658, 663 (1978).

32. *Id.* at 665.

33. *Id.* at 666.

34. *Id.* at 683 (emphasis added).

35. *Id.* at 691 ("a municipality cannot be held liable *solely* because it employs a tortfeasor" (emphasis in original)). *See* W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS §§ 69-70 (5th ed 1984).

> 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. Moreover, although the touchstone of the section 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other section 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. . . . "Congress included customs and usages [in section 1983] because of the persistent and widespread discriminatory practices of state officials. . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom' or usage with the force of law."[36]

Under *Monell*, "custom" includes any act promulgated by municipal employees which is sanctioned through the acquiescence of policymaking officials. *Monell* contemplates, therefore, that municipalities may be liable not only for official action in promulgating policy, but also for official "inaction" in the face of unconstitutional practices by subordinates.[37]

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36. *Id.* at 690-91 (citations omitted). In formulating this theory, the Court relied on Adickes v. S.H. Kress, 398 U.S. 144 (1970). *Adickes* involved an action brought under sections 1983 and 1985 (a conspiracy statute) after the plaintiff, a white woman, was denied service in a restaurant and subsequently arrested because she was accompanied by blacks. The complaint against the restaurant owner, a private party, was held to state a cause of action under section 1983, provided the plaintiff could prove that the defendant "refused her service because of a state-enforced custom of compelling segregation" in local restaurants. *Id.* at 169. The Court further held that the plaintiff could prove this state-enforced custom by showing that the restaurant employee and the police officer "reached an understanding to deny [her] service . . . or to cause her subsequent arrest" because she was in the company of blacks. *Id.* at 152. It is this type of invidious discrimination, enforced and sanctioned by the state, which *Monell* sought to remedy by ruling that *unofficial* customs could rise to the level of official "policy" for purposes of municipal liability.

37. 436 U.S. at 690-91. Claims against municipalities based on official inaction have generally received a favorable reception in the federal courts. *See* Gilmore v. City of Atlanta, 774 F.2d 1495, 1504 (11th Cir. 1985) (recognizing that acts of non policymaking employees could establish municipal custom under *Monell*, but holding an isolated incident insufficient to establish such a policy); Herrera v. Valentine, 653 F.2d 1220, 1224 (8th Cir. 1981) (woman beaten and threatened by police officer stated a cause of action for failure to properly hire, train, supervise, discipline, and control defendant and other police officers); Turpin v. Mailet, 619 F.2d 196, 201 (2d Cir.), *cert. denied*, 449 U.S. 1016 (1980) (recognizing a cause of action based on failure to discipline, but holding evidence insufficient to sustain a finding of liability); Owens v. Haas, 601 F.2d 1242, 1246-47 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979) (cause of action for failure to train and supervise police sustained: the court held that one excessively brutal incident was sufficient to create an inference of policy); Duchesne v. Sugarman, 566 F.2d 817, 832 (2d Cir. 1977) ("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."); Spell v. McDaniel, 591 F. Supp. 1090, 1108-09 (E.D.N.C. 1984) (sustaining the plaintiff's cause of action for official inaction based on the

Lower courts have interpreted *Monell* to mean that when an official's indifference to the unconstitutional practices of subordinates amounts to "tacit authorization" of such practices, then those practices may be attributed to municipal policy, and the municipality can be named as a defendant in a section 1983 suit.[38] The lower courts are in disagreement, however, over what facts must be alleged in the plaintiff's pleadings to defeat a municipal defendant's motion to dismiss—an issue that has never been directly addressed by the Supreme Court.[39]

In resolving this question, the courts have had to balance the competing interests in section 1983 litigation: vindicating a plaintiff's consti-

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city's failure to respond to past instances of police misconduct); Popow v. City of Margate, 476 F. Supp. 1237, 1242 (D.N.J. 1979) (upholding cause of action for failure to adequately train, supervise, and discipline, when failure amounted to gross negligence or recklessness); Leite v. City of Providence, 463 F. Supp. 585, 590-91 (D.R.I. 1978) (recognizing a cause of action for failure to train police when their training was so reckless or grossly negligent that future police misconduct was almost inevitable).

Those cases which cast doubt on the viability of a section 1983 claim for official inaction generally turn on the insufficiency of the pleadings, and on the absence of a showing of a "causal link" between the policy alleged and the constitutional violation suffered. *See, e.g.*, Strauss v. City of Chicago, 760 F.2d 765, 767 (7th Cir. 1985) ("A complaint that tracks *Monell*'s requirement of official policy with bare allegations cannot stand when the policy identified is nothing more than acquiescence in prior misconduct."); Berry v. McLemore, 670 F.2d 30, 33 (5th Cir. 1982) ("a policy cannot be inferred from a municipality's isolated decision not to discipline a single officer for a single incident of illegality"); Thurman v. City of Torrington, 595 F. Supp 1521 (D. Conn. 1984); Appletree v. City of Hartford, 555 F. Supp. 224 (D. Conn. 1983); Schramm v. Krischell, 84 F.R.D. 294 (D. Conn. 1979); Smith v. Ambrogio, 456 F. Supp. 1130 (D. Conn. 1978); *see* discussion of Rizzo v. Goode, 423 U.S. 362 (1976), *infra* notes 48-64 and accompanying text.

38. Herrera v. Valentine, 653 F.2d 1220, 1224 (8th Cir. 1981). *See also Turpin v. Mailet*:

> We . . . reject at the outset appellant's suggestion that an "official policy" within the meaning of *Monell* cannot be inferred from informal acts or omissions of supervisory municipal officials. Indeed, by holding that a municipality can be held liable for its "custom" *Monell* recognized that less than formal municipal conduct can in some instances give rise to municipal liability under section 1983. To require that senior officials must have formally adopted or promulgated a policy before their conduct may be treated as "official" would for present purposes render *Monell* a nullity, exalting form over substance.

619 F.2d 196, 200 (2d Cir.), *cert. denied*, 449 U.S. 1016 (1980); Spell v. McDaniel, 591 F. Supp. 1090, 1108 (E.D.N.C. 1984) ("Informal actions, if they reflect a general policy, custom, practice or pattern of official conduct which even tacitly encourages conduct depriving individuals of their constitutional rights satisfies section 1983 standards."); *Popow v. City of Margate*:

> [R]egarding discipline of officers, the rule is that where a city's procedure of reprimand is so inadequate as to ratify unconstitutional conduct, the city may be liable under section 1983. A police chief's persistent failure to discipline or control subordinates in the face of knowledge of their propensity for improper use of force may constitute an official custom or *de facto* policy, actionable under section 1983.

476 F. Supp. 1237, 1246-47 (D. N.J. 1979).

39. While *Tuttle* addresses the measure of *proof* required to sustain a finding of municipal policy, 105 S. Ct. at 2436, it does not specifically address what level of pleading is required if the plaintiff is to survive a municipal defendant's motion to dismiss. In light of the Court's resolution, however, it seems clear that a complaint which alleges only one unconstitutional incident will not survive a motion to dismiss.

tutional rights; minimizing the burden on the municipality, as well as on the federal courts, from numerous and potentially groundless suits; and allowing the individual states to regulate their own affairs.[40] The tension

40. For those cases finding the interests of the plaintiff to be of primary concern, see Hirst v. Gertzen, 676 F.2d 1252, 1263 (9th Cir. 1982) (a pleading which outlined a systematic failure of officials to exercise minimal care in hiring and supervising a deputy was held to allege a triable issue of fact); Murray v. City of Chicago, 634 F.2d 365, 367 (7th Cir. 1981) (a policy may be inferred from allegations that "similar unwarranted arrests have occurred frequently, to the knowledge of the parties involved"); Owens v. Haas, 601 F.2d 1242, 1246-47 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979) (an egregiously brutal, isolated incident of abuse by prison guard was held sufficient to suggest official acquiescence); Means v. City of Chicago, 535 F. Supp. 455, 460 (N.D. Ill. 1982) (pleadings should be liberally construed because the plaintiff has limited access to discovery at the pleading stage); Scott v. Donovan, 539 F. Supp. 255 (N.D. Ga. 1982) (an allegation of a warrantless and malicious arrest states a cause of action under section 1983); Leite v. City of Providence, 463 F. Supp. 585, 590 (D.R.I. 1978) ("the city's citizens do not have to endure a 'pattern' of past police misconduct before they can sue the city under section 1983").

By contrast, many cases found the potential burden on the municipality to be the paramount concern. *See* Strauss v. City of Chicago, 760 F.2d 765, 768-69 (7th Cir. 1985) (to prove failure to discipline the police, the plaintiff must identify a statistical pattern of complaints filed with the police department, explain why those prior arrests were illegal, and show a similar illegality was involved in his or her case); Berry v. McLemore, 670 F.2d 30, 33 (5th Cir. 1982) ("a policy cannot be inferred from a municipality's isolated decision not to discipline a single officer for a single incident of illegality"); Landrigan v. City of Warwick, 628 F.2d 736, 747 (1st Cir. 1980) (an allegation of a single incident of mistreatment was insufficient in so far as the record failed to indicate "whether any departmental or municipal investigation of the . . . incident and its aftermath was ever undertaken or whether the officers were subjected to any internal disciplinary proceedings"); Schramm v. Krischell, 84 F.R.D. 294, 298 (D. Conn. 1984) ("to bypass . . . [a] motion to dismiss . . . the complaint must make reference in detail to specific incidents of misconduct by government officials and must extrapolate from these incidents to indicate the particular manner in which the governmental body, by omission or commission, has placed its imprimatur upon the actions of its officers."); Smith v. Ambrogio, 456 F. Supp. 1130, 1137 (D. Conn. 1978) (particularized fact pleading required: "At a minimum the pleader must specify the overt acts relied upon as a basis for the claim that a pattern of unconstitutional actions exist and that the senior officials of the town knew of the unconstitutional actions and encouraged their repetition by inaction.").

The requirement of a higher pleading threshold in section 1983 actions squarely contradicts the liberal philosophy behind the federal rules. *See* Conley v. Gibson, 355 U.S. 41, 45-46 (1957); FED. R. CIV. P. 8(a). The cases with rigid pleading requirements have justified their departure from that philosophy based on the incapacitating effect unlimited suits would have upon a municipality:

> [A] claim of municipal liability based on an alleged policy reflected by a pattern of prior episodes will inevitably risk placing an entire police department on trial. Sweeping discovery will be sought to unearth episodes in which allegedly similar unconstitutional actions have been taken, and the trial will then require litigation of every episode occurring in the community that counsel believes can be shown to involve a similar constitutional violation. Even if a trial of that scope is warranted by a complaint that does allege overt acts with requisite particularity, neither a federal court nor a municipality should be burdened with such an action unless a detailed pleading is presented.

Smith v. Ambrogio, 456 F. Supp. at 1137 (citations omitted). Courts which heighten pleading requirements presume that most section 1983 actions against municipalities will be frivolous, brought only to reach the deep pockets of the government entity, and thereby inhibiting federal

between the competing interests is illustrated in two decisions of the Northern District of Illinois. In *Means v. City of Chicago*,[41] the court stated:

> [T]he test is not whether the plaintiff has pleaded factual instances demonstrating that an unconstitutional policy exists, but rather whether the policy, custom or practice, once pleaded, can be proved. . . . We are at a loss as to how any plaintiff, including a civil rights plaintiff, is supposed to allege with specificity prior to discovery acts to which he or she personally was not exposed, but which provide evidence necessary to sustain the plaintiff's claim, i.e., that there was an official policy or a *de facto* custom which violated the Constitution.[42]

Two years later, in *Rodgers v. Lincoln Towing Service*,[43] the same court asserted:

> While paying lip service to the doctrine of *Monell* . . . [boilerplate policy] allegations are now used to justify the addition of the municipality as a defendant in virtually every section 1983 case against individual municipal employees in a transparent attempt to circumvent the *Monell* Court's explicit rejection of a *respondeat superior* theory of municipal liability under section 1983. The municipality can then be dragged into what one respected commentator has called "the swamp of discovery," in the hope that it will capitulate or that by rooting through its records the plaintiff's lawyer can unearth something to prop up his otherwise unsupported hypothesis. Because of this enormous potential for abuse, a plaintiff wishing to assert such a claim must plead facts tending to show a pattern of illegal conduct going beyond a single incident of wrongdoing.[44]

The different treatment accorded the two cases by the same court may be explained by the facts of each case: *Means* involved a wrongful death claim when policemen shot and killed an arrestee during the course of the arrest,[45] whereas in *Rodgers*, the plaintiff alleged false arrest with no attendant misconduct by police officers.[46] The standard of proof posited by the court in *Rodgers* reflects the concerns articulated by the Court in *Tuttle*.[47]

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court access to those with legitimate claims. The law, however, authorizes federal courts to impose sanctions for frivolous actions, including attorney's fees, which should serve as an effective deterrent. *See* FED. R. CIV. P. 11.

41. 535 F. Supp. 455 (N.D. Ill. 1982), *aff'd*, 771 F.2d 194 (7th Cir. 1985).

42. *Id.* at 459-60 (citations omitted).

43. 596 F. Supp. 13 (N.D. Ill. 1984).

44. *Id.* at 20. The court imposed sanctions on the attorney for bringing a frivolous action. *See supra* note 40.

45. *Means*, 535 F. Supp. at 458.

46. *Rodgers*, 596 F. Supp. at 16.

47. *See infra* notes 65-79 and accompanying text.

C. *Rizzo v. Goode*: The Need for a Causal Connection Between an Official's Inaction and the Constitutional Violation

When a plaintiff sustains her action beyond the pleading stage and can prove at trial that an unconstitutional municipal policy exists, she must then show it was this policy which violated her constitutional rights—the issue addressed in *Rizzo v. Goode*.[48] In *Rizzo*, a pre-*Monell* case, the plaintiffs instituted a class action suit against the Philadelphia Mayor, Police Commissioner, and others, alleging a pattern of illegal and unconstitutional treatment of minorities by members of the Philadelphia police department. At trial, the plaintiffs proved twenty of the more than forty alleged incidents of illegal and unconstitutional police conduct.[49] The suit was initially brought for injunctive and declaratory relief, the plaintiffs requesting the court to supervise the police department until police conduct conformed to constitutional standards.[50]

The district court found the number of incidents of unconstitutional police conduct to be "unacceptably high."[51] Although the plaintiffs failed to show that the city officials had knowledge of, or were directly responsible for, the actions of the police officers, the court granted injunctive relief based on the officials' failure to act in response to a statistical pattern of unconstitutional police conduct.[52]

The Supreme Court reversed, holding that the petitioners could not be liable for *inaction* when they were not "causally linked" to the proven statistical pattern of police misconduct.[53] The Court disagreed with the district court's finding that twenty incidents of unconstitutional conduct, within the span of a year, was "unacceptably high," because the incidents "occurr[ed] at large in a city of three million inhabitants, with 7,500 policemen,"[54] and "there was no showing that the behavior of the Philadelphia police was different in kind or degree from that which exists elsewhere."[55]

The application of *Rizzo* by the lower courts has proven inconsistent. While under *Rizzo* the municipal policy must be a "moving force" behind the constitutional violation,[56] the federal courts are split on

48. 423 U.S. 362 (1976).

49. *Id.* at 366-68.

50. 506 F.2d 542, 545 (3d Cir. 1974).

51. 423 U.S. at 375.

52. *Id.* at 373, 375-76.

53. *Id.* at 375.

54. *Id.* at 373.

55. *Id.* at 375. As the Court noted, the district court found "the problems disclosed by the record . . . [to be] fairly typical of [those] afflicting police departments in major urban areas." *Id.*

56. *See* Polk County v. Dodson, 454 U.S. 312, 326-27 (1981) (citing *Monell*, 436 U.S. at 694).

whether that causal link can be inferred solely from an official's failure to act.

In *Lewis v. Hyland*,[57] for example, the plaintiffs sought injunctive relief against the New Jersey state police and troopers, to quell their alleged "pattern and practice" of illegally stopping and searching "long-haired highway travelers."[58] The plaintiffs introduced evidence of sixty-six incidents, thirty-four of which involved constitutional violations. The Third Circuit denied relief, based on the plaintiffs' failure to prove a causal connection between the unconstitutional acts of the individual officers, and the officials' failure to take remedial action, as required by *Rizzo*. The court held: "Plaintiffs' evidence here demonstrated *at most an unfortunate insensitivity* on the part of responsible officials towards reports of abuses by individual troopers."[59] Such insensitivity, the court continued, "extended in several instances to departmental awards being conferred upon individual troopers, named as defendants here, for their performance during the very time in which they instituted flagrantly illegal searches."[60] Notwithstanding this evidence, the court concluded that the police "insensitivity" was not the result of a conscious choice by state officials to encourage unconstitutional conduct, and thus relief was denied.[61]

In contrast, the Second Circuit, in *Owens v. Haas*,[62] held that one brutal incident of unconstitutional conduct would suffice to prove that a municipal policy was the moving force behind the constitutional violation.[63] In *Owens*, the plaintiff, a federal prisoner, was beaten by several

57. 554 F.2d 93 (3d Cir. 1977), *cert. denied*, 434 U.S. 931 (1978).

58. *Id.* at 95.

59. *Id.* at 101 (emphasis added).

60. *Id.* at 101 n.21.

61. *Id.* at 101.

62. 601 F.2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).

63. *Id.* at 1246. In allowing a single incident of police misconduct to establish that the municipal policy was the moving force behind the constitutional violation, the Second Circuit is nonetheless consistent with the federal rule that, absent exceptional circumstances, a causal link cannot be inferred from inaction alone. *Compare Owens, id., with* Smith v. Ambrogio, 456 F. Supp. 1130, 1136 (D. Conn. 1978):

> What *Rizzo* requires when a supervisor is held liable for failure to prevent continuation of a pattern of prior unconstitutional episodes is that the supervisor be "causally linked" to the pattern. 423 U.S. at 375. There are surely intimations in *Rizzo* that this causal link cannot be inferred from inaction alone. If such a case can be stated after *Rizzo*, it must present such extreme facts that inaction by a supervisor with knowledge of a pattern of unconstitutional actions by his subordinates is the equivalent of approval of the pattern as a policy of the supervisor and hence tacit encouragement that the pattern continue. Plainly that will not be an easy standard to meet.

See also Duchesne v. Sugarman, 566 F.2d 817, 831 (2d Cir. 1977) (court distinguished between an official's "failure to act in the face of misconduct by subordinates" and an official's "affirmative policy-making which may have caused the misconduct," suggesting that the failure to act is too tenuous a basis on which to infer a causal link between the municipal policy and the police misconduct).

county prison officers when he refused to leave his cell. The court stated that "[w]hile some causal link must be made between the county's failure to train and the violation of constitutional rights, a single brutal incident . . . may be sufficent to suggest that link."[64] As noted below, *Tuttle* explicitly rejects the approach taken in *Owens*, thereby increasing the evidentiary burden on the section 1983 plaintiff at the pleading stage.

III. *Tuttle*'s Reshaping of the Municipal Liability Standard under Section 1983

A. The Decision

The *Tuttle* Court reviewed the evidence presented to the jury, and the jury instructions given by the trial judge,[65] to determine whether the jury's finding of municipal liability was warranted.

1. The Plurality Opinion

The plurality opinion, written by Justice Rehnquist and joined by Chief Justice Burger and Justices O'Connor and White,[66] began with a summary of *Monell*'s municipal "policy" standard of liability.[67] The plurality then distinguished *Monell* on the basis that the city officials in that case took affirmative steps in promulgating the challenged municipal policy,[68] whereas in *Tuttle*, the municipal policy was to be inferred from the city officials' inaction—the failure to adequately train the police force.[69] Focusing on this distinction, the *Tuttle* plurality questioned (1) whether a policy which is not unconstitutional on its face, such as the failure to provide adequate training for municipal employees, "can *ever*

64. 601 F.2d at 1246.

65. *See supra* note 17 and accompanying text.

66. Justice Powell did not participate in the decision.

67. 105 S. Ct. 2427, 2429 (1985).

68. *Id.* at 2435-36. *See, e.g.*, Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986) (municipal policy can be inferred from a municipal official's single decision which affected a single person).

69. Throughout the opinion, the plurality distinguished the municipal policy of inaction sought to be proven in *Tuttle*, from the type of policy involved in *Monell*, apparently fearing the prospect that a municipality could be haled into court each time a nonpolicymaking employee, such as a police officer, violated a person's constitutional rights. In demonstrating the subjectivity of a policy of "inaction," the plurality observed:

> [S]ome limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official; for example, Rotramel would never have killed Tuttle if Oklahoma City did not have a "policy" of establishing a police force.

105 S. Ct. at 2436. *See also infra* text accompanying note 73.

meet the 'policy' requirement of *Monell*,"[70] and (2) whether under *Monell* "'gross negligence' in establishing police training practices could establish a 'policy' . . . or whether a more conscious decision on the part of the policymaker would be required."[71]

Without resolving these issues, the *Tuttle* plurality held, as a matter of law, that a municipal policy of inadequate training could never be inferred from a single incident of excessive force:

> 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 unconstitutional deprivation.[72]

2. *The Concurring Opinion*

Justice Brennan, joined by Justices Marshall and Blackmun, wrote a concurring opinion in which he addressed the requirements of pleading and proof under section 1983.[73] The concurring justices agreed with the plurality that if a municipal policy could be inferred solely from an un-

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70. 105 S. Ct. at 2436 n.7 (emphasis added). Another example of a facially constitutional municipal policy is when an official fails to discipline a subordinate police officer who overstepped his or her constitutional authority (e.g., by using excessive force to effectuate an arrest). The municipal "policy" is the city's failure to take disciplinary action, which implicitly condones the unconstitutional action. *See, e.g.*, Herrerra v. Valentine, 653 F.2d 1220 (8th Cir. 1981); Spell v. McDaniel, 591 F. Supp. 1090 (E.D.N.C. 1984). Such a policy, which is not in itself unconstitutional, can be contrasted to an articulated policy of the city, such as that in *Monell*, which compelled all pregnant city employees to leave their jobs at a specified point in their pregnancy, notwithstanding their ability to continue working. 436 U.S. 658, 660-61 (1978). The policy in *Monell* was held facially unconstitutional, and the Court held one application of the policy by the municipality was sufficient to prove the policy's existence. 436 U.S. at 694-95.

71. 105 S. Ct. at 2436 n.7. The Court withheld opinion on these two issues, but its line of questioning reveals the path which the Rehnquist Court may follow in the future. Recently, in Davidson v. Cannon, 106 S. Ct. 668 (1986), the Court held that a prison guard's negligence or lack of due care does not give rise to municipal liability under section 1983: "[W]here a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required." 106 S. Ct. at 670. *See also* Daniels v. Williams, 106 S. Ct. 662 (1986).

72. 105 S. Ct. at 2436 (footnotes omitted) (emphasis added).

73. Justice Brennan summarized the elements of a section 1983 action as follows: "The plaintiff must prove that (1) a person (2) acting under color of state law (3) subjected the plaintiff or caused the plaintiff to be subjected (4) to the deprivation of a right secured by the Constitution or laws of the United States." *Id.* at 2439 (Brennan, J., concurring).

constitutional act committed by a nonpolicymaking municipal employee, a jury could impose liability on the municipality on the basis of *respondeat superior*, a theory expressly rejected in *Monell*.[74] The concurrence, however, rejected the plurality's implication that the first victim of unconstitutional police activity could not—whereas subsequent victims could—obtain a remedy from the responsible municipality under section 1983:

> A rule that the city should be entitled to its first constitutional violation without incurring liability—even where the first incident was the taking of the life of an innocent citizen—would be a legal anomaly, unsupported by the legislative history or policies underlying section 1983. A section 1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims; by exposing a municipal defendant to liability on the occurrence of the first incident, it is hoped that future incidents will not occur.[75]

The concurring justices also rejected the plurality's distinction between policies that are unconstitutional per se, and policies which must be inferred from a municipal official's failure to act:

> I do not understand, nor do I see the necessity for, the metaphysical distinction between policies that are themselves unconstitutional and those that cause constitutional violations. . . . If a municipality takes actions—whether they be of the type alleged in *Monell* . . . or this case—that cause the deprivation of a citizen's constitutional rights, section 1983 is available as a remedy.[76]

3. *The Dissenting Opinion*

Justice Stevens was the sole dissenter in *Tuttle*. Construing the language of section 1983, which does not contain the word "policy," he argued that *Monell*'s "policy" analysis is merely dicta, and that a plaintiff should be able to state a section 1983 cause of action against a municipality on the basis of *respondeat superior*.[77] Justice Stevens maintained that "[t]he interest in providing fair compensation for the victim, the interest in deterring future violations by formulating sound municipal policy, and the interest in fair treatment for individual officers who are performing difficult and dangerous work, all militate in favor of placing primary responsibility on the municipal corporation."[78] Justice Stevens concluded that this construction of section 1983 would best effectuate Congress' in-

74. *Id.* at 2440, 2441 n.7.

75. *Id.* at 2440-41.

76. *Id.* at 2441 n.8.

77. *Id.* at 2445 (Stevens, J., dissenting) ("If the doctrine of *respondeat superior* would impose liability on the city in an ordinary tort case, *a fortiori*, that doctrine must apply to the city in a section 1983 case.").

78. *Id.* at 2447 (footnotes omitted).

tent in enacting the remedial statute.[79]

B. The Ramifications of *Tuttle*'s Municipal "Policy" Standard

The rule of law announced in *Tuttle* should be limited to the statement that a single incident of unconstitutional police conduct is insufficient by itself to prove an official policy for purposes of municipal liability under section 1983.[80] If the plurality opinion is thus construed, *Tuttle* will most notably impact the section 1983 plaintiff's evidentiary burden. After *Tuttle*, a section 1983 plaintiff will bear a heavier burden to plead and prove prior instances of police misconduct, and, when inadequate training of municipal employees is alleged, to produce expert testimony on the inadequacy of the police training curriculum.[81] The dicta in *Tuttle*, however, has broad implications regarding the viability of the current standards under *Monell* and *Rizzo*.

1. An official's Failure to Act as Municipal Policy

In *Monell*, the Court identified two types of municipal "policy": official action and official inaction. Official action, based on an articulated or written rule promulgated by municipal decision-making channels, is easily proven.[82] In *Pembaur v. City of Cincinnati*,[83] the Court reaffirmed that a single decision of a municipal official can constitute municipal policy for purposes of imposing liability on the municipality.[84] Official inaction, however, is inherently more nebulous and difficult to prove. It must be inferred from an official's failure to act, such as failing to discipline an officer who engaged in wrongful conduct, or failing to adequately train and supervise members of a police force.

The *Monell* Court included official inaction in its municipal policy standard of liability with the recognition that, although municipalities formally draft their policies to comport with constitutional standards, in practice these policies may be abused or disregarded by municipal employees.[85] Abusive practices or "customs" fail to pass constitutional

79. *See supra* notes 21-24 and accompanying text.

80. 105 S. Ct. at 2436.

81. *Id.*

82. *Monell*, 436 U.S. at 690-91. *See also* Fann v. City of Cleveland, 616 F. Supp. 305, 313 (N.D. Ohio 1985) (policy of strip searching motorists who violated traffic laws held facially unconstitutional upon evidence of one application of the policy).

83. 106 S. Ct. 1292 (1986).

84. *Id.* at 1299-1300. In *Pembaur*, the plaintiff, a licensed physician, was indicted by a grand jury on various counts of fraud. When Dr. Pembaur barred entry into his medical clinic to Deputy Sheriffs seeking to serve capiases on two of Dr. Pembaur's employees, the Assistant Prosecutor authorized the Deputy Sheriffs to "go in and get [the witnesses]." *Id.* at 1294-95. Acting on this instruction, city police officers broke down the door to the clinic with an axe, and the Deputy Sheriffs entered. *Id.* at 1295.

85. For example, police officers, as a matter of "custom," may use excessive force in effectuating arrests. *See, e.g.*, Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981).

muster, even though the "official" municipal policy is facially constitutional. When an official has knowledge of unlawful employee customs, yet fails to take remedial action,[86] these customs "have the force of law" and are attributable to the municipality as official policy.[87]

The *Tuttle* plurality deviated substantially from *Monell*'s directive by questioning whether official inaction can *ever* constitute municipal policy,[88] and by positing an unduly restrictive definition of "policy":

> To establish the constitutional violation in *Monell* no evidence was needed other than a statement of the policy by the municipal corporation, and its exercise; but the type of "policy" upon which respondent relies, and its causal relation to the alleged constitutional violation, are not susceptible to such easy proof. In the first place, the word "policy" generally implies a course of action consciously chosen from among various alternatives; it is therefore difficult in one sense even to accept the submission that someone pursues a "policy" of "inadequate training," unless evidence be adduced which proves that the inadequacies resulted from conscious choice—that is, proof that the policymakers deliberately chose a training program which would prove inadequate.[89]

The above language reflects the plurality's reluctance to impose liability on a municipality when an official fails to take action to remedy the unconstitutional practices of police officers.

The plurality justified its restrictive approach by admonishing that "some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter."[90] Although in accord with *Monell* there must be limits on when a municipality can be held liable for the unconstitutional acts of its police officers, the plurality's approach gives license to the lower courts to absolve a municipality of liability when its policies are facially constitutional, but unconstitutionally implemented.[91] Such a result would be wholly inconsistent with *Monell* and with the Congressional intent in enacting section 1983, which was to provide a federal remedy for invidious state practices.[92] To immunize a municipality from liability for invidious practices when the articulated

86. For example, the official may institute an investigation of the alleged misconduct, or take disciplinary measures against the culpable police officer. *See, e.g.*, Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980), *cert. denied*, 449 U.S. 1016 (1981); Popow v. City of Margate, 476 F. Supp. 1237 (D. N.J. 1979).

87. *Monell*, 436 U.S. at 690-91. *See supra* text accompanying note 36.

88. 105 S. Ct. at 2436.

89. *Id.* (footnote omitted).

90. *Id.*

91. A municipality should not be permitted to avoid liability for constitutional violations simply because it has a written or articulated policy which is facially constitutional, when that policy is not adhered to in practice. *See* Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213, 231 (1979).

92. *Monroe*, 365 U.S. at 173-74. *See supra* text accompanying notes 22-24.

policy is facially constitutional, is a futile exercise of form over substance.[93]

Moreover, by absolving a municipality of liability when a plaintiff can prove only one instance of unconstitutional conduct, or one unconstitutional application of an offical policy, the Court arbitrarily denies a section 1983 remedy to a large class of plaintiffs—the first victims of an unconstitutional municipal policy ratified by municipal officials' inaction.[94] Although the Court may have policy reasons[95] for denying a federal remedy to those plaintiffs injured by the "inaction" of an official policymaker, while granting relief to those plaintiffs injured by the affirmative action of that policymaker, there is no constitutional basis for such a distinction.[96] For the injured party, as well, there is no distinction between the harm caused by official "action" versus official "inaction."

93. Many lower courts have narrowly construed this aspect of *Tuttle*. *See, e.g.,* Fiacco v. City of Rensselaer, 783 F.2d 319, 326-27 (2d Cir. 1986) (a municipal policy which is not facially unconstitutional can be the basis for a section 1983 cause of action); Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985), *cert. granted*, 106 S. Ct. 1374 (1986) (despite *Tuttle*'s implications, a policy of municipal inaction is still within the purview of section 1983); Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985) (the plaintiff's complaint, which alleged gross neglect of officials after the brutal beating of the plaintiff by several officers, was held to state a cause of action under section 1983); Jamieson v. Shaw, 772 F.2d 1205 (5th Cir. 1985) (the plaintiff stated a cause of action for official inaction—inadequate training); Rymer v. Davis, 775 F.2d 756 (6th Cir. 1985) (the plaintiff's complaint stated a cause of action for injuries which were the result of inadequate police training); Fundiller v. City of Cooper City, 777 F.2d 1436, 1442-43 (11th Cir. 1985) (the court stated that it may be "questionable" whether official inaction can form the basis for municipal liability after *Tuttle*, but the plaintiff may state a cause of action by alleging official acquiesence to police officers' use of excessive force); Loza v. Lynch, 625 F. Supp. 850 (D. Conn. 1986) (the plaintiff stated a cause of action against the city when the city failed to take disciplinary action against a single officer); Bynum v. City of Pittsburg, 622 F. Supp. 196, 201 (N.D. Cal. 1985) (the plaintiffs stated a cause of action by alleging an "ongoing policy of inadequate training which caused their son's death and involved the injuries and deaths of other minorities").

However, many federal district courts still impose strict pleading requirements after *Tuttle*. *See, e.g.,* Camarano v. City of New York, 624 F. Supp. 1144 (S.D.N.Y. 1986); York v. City of San Pablo, 621 F. Supp. 34 (N.D. Cal. 1985); Titus v. Newton Township, 621 F. Supp 754 (E.D. Pa. 1985); Bibbo v. Mulhern, 621 F. Supp. 1018 (D. Mass. 1985); Garcia v. Wyckoff, 615 F. Supp. 217 (D. Colo. 1985).

94. *Tuttle* creates a classic dog-bite situation: the second victim to be "bitten" by an unconstitutional municipal policy is able to state a section 1983 action, while the first victim is precluded from doing so. If the legislature were to promulgate such a scheme, the scheme would run counter to the equal protection component of the Fifth Amendment Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (unlike the Fourteenth Amendment, which applies to the states, the Fifth Amendment, which applies to the federal government, does not expressly contain an Equal Protection Clause; the Supreme Court held that the Due Process Clause of the Fifth Amendment impliedly contains an equal protection component); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 519 (1977); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

95. For example, the concern for overcrowded court dockets. *See Kupfer, supra* note 8.

96. Whether the unconstitutional activity results from official action or inaction, the net result is the same: the violation of the victim's constitutional rights. *Compare Monell*, 436

The ramifications of an official's failure to rectify police misconduct, such as the perpetuation of discrimination against a certain ethnic or minority group,[97] can be more insidious and socially harmful than an articulated policy, which is formally drafted so as not to have a disparate impact on a county's citizens. Given the difficulties of proving official inaction, the federal courts should help facilitate the fact finding process in an effort to protect federal constitutional rights from state encroachment.[98]

2. *The Causation Requirement*

Tuttle's impact on the *Rizzo* requirement that a municipal policy be causally related to the constitutional violation, is to raise the plaintiff's burden of proof. When the municipal policy alleged is facially constitutional, the Court held that "considerably more proof than the single incident will be necessary in every case to establish . . . the causal connection between the 'policy' and the constitutional deprivation."[99] *Tuttle* requires the plaintiff to show, at the very least, an "affirmative link between the policy and the particular constitutional violation alleged."[100] In formulating this standard, the Court expressed its concern that municipal liability not be imposed when an official's action, or inaction, is attenuated from the misconduct of a nonpolicymaking employee.[101]

IV. Federalism, Due Process, and the Inadequacy of State Court Remedies

The Supreme Court's concern for federalism and the proper scope of section 1983 has shaped both its definition of the conduct which rises to the level of a constitutional tort,[102] and its development of due process

U.S. 658 (1978) (official action), *with* Owens v. Haas, 601 F.2d 1242 (2d Cir.), *cert. denied,* 444 U.S. 980 (1979) (official inaction).

97. *Cf.* Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981) (systematic mistreatment of Indian residents). Unconstitutional police activity tends to fall disproportionately on minority groups. *See* Stormer & Bernstein, *The Impact of Kolender v. Lawson on Law Enforcement and Minority Groups,* 12 HASTINGS CONST. L.Q. 105 (1984).

98. *See* Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right,* 54 N.Y.U. L. REV. 723, 732 (1979).

99. 105 S. Ct. at 2436 (footnote omitted). The Court is silent regarding the quantum of evidence which a plaintiff must introduce to meet the criteria of "considerably more proof" than one incident of unconstitutional conduct.

100. *Id.* at 2436, 2436-37 n.8.

101. *Id.* at 2435, 2436; *id.* at 2440 (Brennan, J., concurring).

102. While it is clear that to pursue an action under section 1983, a person must suffer the deprivation of a constitutional right (Baker v. McCollan, 443 U.S. 137, 140 (1979)), there is some debate as to what type of police misconduct will rise to the level of a "constitutional tort." *See* Whitman, *supra* note 7; Friedman, *Parratt v. Taylor: Opening and Closing the Door on Section 1983,* 9 HASTINGS CONST. L.Q. 545 (1982). Some courts caution that "assault and battery do not become violations of the Fourteenth Amendment merely because the defendant is a city police officer" (Spell v. McDaniel, 591 F. Supp. 1090, 1100 (E.D.N.C. 1984) (citations

analysis in police misconduct cases.[103]

Federalism, the doctrine invoked to preserve state sovereignty against encroachment by the federal government, calls for federal abstention from areas historically within the control or direction of the states.[104] In *Younger v. Harris*,[105] Justice Black wrote:

> What [federalism] . . . represent[s] is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with legitimate activities of the States.[106]

The role of section 1983 litigation within this backdrop can be understood by examining the history of the section 1983 remedial scheme. With the passage of the Ku Klux Klan Act in 1871, Congress determined

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omitted)), yet others deem the misconduct of government officers, as opposed to private citizens, to have graver implications on constitutionally protected rights. *See, e.g.*, Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1982) (a child struck on the head by a police officer's flashlight suffered complete body paralysis and severe reduction in mental capacity). The *Wellington* court stated:

> The type of serious injury inflicted by a member of the . . . police force does not by its very nature, of itself, give it constitutional stature. Nevertheless there is a distinction between conduct by state actors and private citizens. Therefore, legitimate concerns with stemming the federalization of common law tort actions must not subvert a court's duty to safeguard legitimate constitutional rights.

Id. at 935. *See also* Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177, 1181 (M.D. Tenn. 1982) (to rise to the level of a constitutional tort, the government agent's actions must have been "sufficiently egregious").

Under the Fourth Amendment, the Supreme Court in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), noted that "power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own . . . ." The same rationale should afford protection, vis-a-vis a comprehensive remedy, to victims of police misconduct. *See generally* Friedman, *supra*, at 573-75; Note, *A Theory of Negligence for Constitutional Torts*, 92 YALE L. J. 683, 698 (1983).

103. *See infra* notes 111-130 and accompanying text.

104. *See generally*, Scheiber, *Federalism and the Constitution: The Original Understanding*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 85 (L. Friedman & H. Scheiber eds. 1978).

105. 401 U.S. 37 (1971).

106. *Id.* at 44. The demarcation between the spheres of federal and state power is fluid:

> The proper balance of state and national powers, Woodrow Wilson wrote in 1911, is not a matter that can be settled "by the opinion of any one generation." Changing conditions and the perceptions of social need, transformations of political values, and the lessons of time will serve, he contended, to make federal-state relationships "a new question" subject to reconsideration by each successive generation.

Scheiber, *Some Realism About Federalism: Historical Complexities and Current Challenges*, from EMERGING ISSUES IN AMERICAN FEDERALISM, ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS 41 (1976). The *Tuttle* plurality's concept of federalism is to give primacy to state autonomy over the concern for the vindication of an individual's constitutionally guaranteed rights. *See supra* notes 65-72, 88-93 and accompanying text.

that when a person acting under color of state law violates an individual's constitutional rights, the victim is to be afforded a remedy in federal court, notwithstanding the existence of an adequate state law remedy.[107] While under the original scheme of the Constitution, the state courts were "the primary guarantors of constitutional rights,"[108] after the Civil War "[t]he assumption was abandoned that the state courts were the normal place for enforcement of federal law save in rare and narrow instances where they affirmatively demonstrated themselves unfit or unfair."[109] This dual remedial scheme reflects Congress' belief that the federal courts are the best forum for the adjudication of rights protected by the Constitution.[110]

The Burger Court departed from Congress' original intent in a series of due process decisions which abrogated the section 1983 remedy in favor of state adjudication of constitutional rights. For example, in *Paul v. Davis*,[111] the police wrongfully published the plaintiff's name and picture on a list identifying "active shoplifters," and distributed it to local merchants.[112] The Court in *Paul* declined to find a constitutionally protected liberty or property interest in a person's reputation, thereby limiting the claimant to a state tort action for defamation.[113] As Professor Monaghan posited, when the Supreme Court desires to limit the process due under the Fourteenth Amendment, it will define an interest so as not to be a protected life, liberty, or property interest, and therefore not a

107. *See Monroe*, 365 U.S. at 183; *supra* notes 22-25 and accompanying text; *see also* Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Company*, 1982 U. ILL. L. F. 831; Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1164 (1977) [hereinafter cited as Note, *Section 1983*].

108. Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953). *See also* Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52-56 (1975) (history of the compromise struck at the Constitutional Convention between those favoring no lower federal courts (and thus state adjudication of federal rights) and those favoring mandatory establishment of lower federal courts (and thus federal adjudication of federal rights)).

109. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 828 (1965); Note, *Section 1983, supra* note 109, at 1152-53 ("because of 'the unreliable behavior of the state courts during the war and their evident susceptibility to local pressures, the courts that the Republicans turned to were the federal trial courts.' ").

110. *See Monroe*, 365 U.S. at 180, and *supra* text accompanying note 25; *see also* Note, *A Theory of Negligence, supra* note 102, at 92; Friedman, *supra* note 102, at 573-75. *But cf. Monroe*, 365 U.S. at 238-45 (Frankfurter, J., dissenting) (Congress, in enacting section 1983, arguably did not intend to replace state tort law with federal remedies whenever the tortfeasor was employed by a public body); Durchslag, *supra* note 98, at 734-42; Whitman, *supra* note 7, at 36-37 (it is important that state courts set standards for local police officers).

111. 424 U.S. 693 (1976).

112. *Id.* at 695.

113. *Id.* at 712.

federal issue.[114]

The Court again deferred to the state's authority in *Ingraham v. Wright*.[115] In *Ingraham*, the practice of Florida public school teachers and officials of rendering disciplinary corporal punishment against students was challenged as a denial of the students' procedural due process rights. The Court held that although the students had a constitutionally protected liberty interest, due process did not require prior notice and an opportunity to be heard when an adequate common law postdeprivation remedy was available.[116] Justices White and Stevens dissented, arguing that a state postdeprivation remedy does not provide adequate due process when liberty interests are jeopardized.[117]

Finally, in *Parratt v. Taylor*,[118] a state prison inmate brought a section 1983 action to recover the value of a mailhobby kit lost by prison officials who failed to follow formal procedures for receiving mail packages. The Court held that where there is an adequate state postdeprivation remedy, the violation of a constitutionally protected property interest is not actionable under section 1983, because the state procedure afforded the individual "due process."[119] Comparing the adequacy of state postdeprivation remedies with the federal remedy under section 1983, the *Parratt* Court stated: "Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under section 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process."[120] The Court's overriding concern was that plaintiffs would turn "every alleged injury which may have been inflicted by a state offical acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under section 1983."[121] Justice Blackmun, concurring, limited the *Parratt* decision to cases involving property interests, as opposed to life or liberty interests,[122] despite the Court's prior holding in *Ingraham* that state postdeprivation remedies were sufficient to redress the deprivation of liberty interests.

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114. *See* Monaghan, *Of "Liberty" and "Property"*, 62 CORN. L. REV. 401, 429 (1977) ("Rather than facing the balancing question at the merits stage, the Court struck a compromise at the definitional stage.").

115. 430 U.S. 651 (1977).

116. *Id.* at 672.

117. *Id.* at 701 (Stevens, J., dissenting). "[The common law] tort action is utterly inadequate to protect against erroneous infliction of punishment. . . . The infliction of physical pain is final and irreparable; it cannot be undone in a subsequent proceeding." *Id.* at 693-95 (White, J., dissenting).

118. 451 U.S. 527 (1981), *overruled in part*, 106 S. Ct. 662 (1986).

119. *Id.* at 543-44.

120. *Id.* at 544.

121. *Id.*

122. *Id.* at 545 (Blackmun, J., concurring).

There are several inconsistencies in the Court's resolution of *Paul, Ingraham*, and *Parratt*. First, by relegating constitutional claims to state tort actions, the Court defied the purpose and limited the scope of *Monroe*'s directive that section 1983 is *supplementary* to state law remedies.[123] Second, the court treads on procedural due process guarantees. The fundamental requirements of due process are notice and an opportunity to be heard.[124] In the context of police misconduct, where life and liberty interests are implicated, notice is impracticable and therefore the constitutional onus is placed on the postdeprivation hearing.[125]

Addressing the due process issue, the Court's decision in *Cleveland Board of Education v. Loudermill*[126] reverses the trend of *Paul, Ingraham*, and *Parratt*. In *Loudermill*, two civil service employees were discharged according to civil service procedures: with notice but without an opportunity to respond to the charges levied against them. The Court ruled that once a constitutionally protected interest is conferred by the state, it is the role of the Federal Constitution, and not the state legislature, to define what process is due.[127] Under *Loudermill*, then, the states may develop a compensation system for the harm inflicted by state officers, provided those state procedures satisfy federal constitutional standards.[128]

The analysis in *Loudermill* can be applied to the situation where police officers deprive citizens of their life or liberty in violation of the Fourteenth Amendment. Given the Court's inclination to relegate victims of police misconduct to state forums, the constitutional sufficiency of state court relief becomes crucial.

When evaluating the adequacy of the state courts to vindicate federal constitutional rights, a distinction must be drawn between life and liberty interests, on the one hand, and property, on the other.[129] Whereas the value of lost property can easily be restored through a

123. *See Monroe*, 365 U.S. at 183.

124. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). Procedural due process analysis entails a two-pronged test. First, the plaintiff's claim must implicate a constitutionally protected interest: life, liberty or property. Second, if the court identifies a protected entitlement, it must then determine what process is due. Board of Regents v. Roth, 408 U.S. 64 (1972). If a protected entitlement is not recognized, the court's inquiry ends. *Cf.* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 489-90 (1977).

125. For the process to be adequate within the mandate of the Fourteenth Amendment, the postdeprivation hearing must be procedurally "fair." NOWAK, *supra* note 94, at 477, 478-514.

126. 105 S. Ct. 1487 (1985).

127. *Id.* at 1493.

128. *Id.* ("The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee . . . .'" (citations omitted)). *See Durchslag, supra* note 98, at 724-25; Smolla, *supra* note 107.

129. *See Ingraham*, 430 U.S. at 694-701 (White, J., and Stevens, J., dissenting); Rosenberg, *Ingraham v. Wright: The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75, 76-79 (1978) (postdeprivation remedies cannot adequately compensate victims for loss of life or lib-

postdeprivation state remedy,[130] life and liberty are constitutionally more significant and more highly valued than property interests, and the deprivation of life or liberty is of a permanent and monetarily immeasurable nature.[131] Although the states have a legitimate interest in adjudicating claims of dereliction by municipal officials and police officers, the federal interest in vindicating constitutional rights is more compelling.

State adjudication of municipal liability claims enables the states to: (1) protect individual liberties; (2) set their own standards for the regulation of police behavior; and (3) make substantive common law contributions to the development of federal law.[132] Additionally, adjudication of constitutional torts in state forums may substantially reduce the federal caseload.[133]

However compelling the state interests may be in theory, the federal interests, in practice, are paramount. First, section 1983 enables the federal courts, including the Supreme Court, to pass upon the constitutionality of local police practices. As suggested by Professor Amsterdam, the only vehicle for the Supreme Court to review police practices is through the exclusionary rule in the law of criminal procedure.[134] Without an avenue of review via section 1983, the Supreme Court cannot develop a comprehensive scheme regarding criminal suspect's rights.[135] Because there is a paucity of legislation governing this area,[136] local norms and practices must prevail. Federal judges, removed from state political pressures and possible state bias,[137] may be more willing to utilize section 1983 as a "watchdog on abuses of power by state officers,"[138] and therefore eradicate abuses committed at the local level.

Second, federal courts retain primary responsibility for, and federal judges are more attuned to, the protection and vindication of constitu-

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erty, as they can for loss of property). *But cf.* Smolla, *supra* note 113, at 850; Kirby, *Demoting 14th Amendment Claims to State Torts*, 68 A.B.A. J. 166, 170-71 (1982).

130. *See Parratt*, 451 U.S. 527 (1981).

131. *See* Rosenberg, *supra* note 129.

132. Whitman, *supra* note 7, at 35-38.

133. *Id.* at 40. See *supra* note 44, for statistics on the increase of section 1983 suits brought in federal courts.

134. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 787 (1970).

135. *Id.* at 787-88.

136. *Id.* at 790-91.

137. California voters recently enacted Proposition 51, The Fair Responsibility Act of 1986, into law. 1986 Cal. Legis. Serv. 6 (West). The statute is designed to limit a defendant's potential tort liability for the non-economic losses suffered by a plaintiff (such as pain and suffering), to the percentage of fault attributable to that individual defendant. *See generally,* PEYRAT, PROPOSITION 51: A FIRST ANALYSIS (CEB Supp. 1986). The overwhelming victory of the measure may be reflected in the state courts by an inhospitable climate towards plaintiffs seeking redress from municipal defendants.

138. Friedman, *supra* note 102, at 575-76.

tional rights.[139] By analogy to the Supreme Court, which is traditionally perceived as the "last resort" guardian of individual liberties,[140] the lower federal courts perform a similar function on a local level by protecting individuals from the action, and inaction, of municipal policymakers. Additionally, a fundamental guarantee of due process is the uniform application of constitutional principles. Consistent application of constitutional principles depends, in turn, on the competence of the judiciary. As early as 1821, the Supreme Court recognized that federal judges interpret the Federal Constitution more reliably than state court judges.[141]

Third, state common law tort schemes are procedurally inferior to the federal remedy, which has substantive ramifications on the vindication of constitutional rights. For example, in a section 1983 action, the plaintiff may receive damages,[142] injunctive relief,[143] and attorney's fees,[144] whereas in a state tort action, damages are often precluded because of an officer's immunity,[145] injunctive relief is generally unavailable,[146] and attorney's fees are not recoverable.[147] Because of the procedural advantages of a section 1983 action, especially the attorney's fee provision, it is more likely that victims of unconstitutional police misconduct will bring federal actions to vindicate their fourteenth amendment rights. Section 1983 was designed to provide private enforcement of fourteenth amendment rights, and as such, it serves as a deterrent of police misconduct and official acquiescence in that conduct.[148] Although these actions may be burdensome on the federal dockets and the munici-

139. Kupfer, *supra* note 8, at 466; Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1124 (1977).

140. *See* Durchslag, *supra* note 98, at 732.

141. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

142. Damages may be awarded against the municipality even if the individual officer is exonerated by way of the good faith immunity. *See* Owen v. City of Independence, 445 U.S. 622 (1980); *see also supra* note 16.

143. *Monell*, 436 U.S. at 690-91. *See generally*, Whitman, *supra* note 7, at 41-67 (equitable relief may produce better results than a damage award).

144. 42 U.S.C. § 1988 (1982). Attorney's fees may be awarded even when the plaintiff is awarded only nominal damages. *Cf.* Carey v. Piphus, 435 U.S. 247, 266 (1978). This policy encourages the private enforcement of fourteenth amendment rights.

145. Under state tort law, the right to sue a public entity is generally conferred by statute. The immunity of an individual agent or officer is generally imputed to the municipality in a state tort action. *See, e.g.*, Cal. Tort Claims Act, CAL. GOVT. CODE § 815.2(b) (West 1980): "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

146. *See* Kupfer, *supra* note 8, at 477.

147. The "American rule" is that absent statutory provision or agreement to the contrary, each party is to pay its own attorney's fees and costs. *See* Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); *see, e.g.*, CAL. CIV. PROC. CODE § 1021 (West 1980).

148. In a state tort action, the individual actors are often shielded from liability due to either the good faith immunity, *see supra* note 16, or the fact that municipal insurance covers

pal pocketbook, statistics have shown that section 1983 suits help improve police practices.[149]

Finally, federal court adjudication of constitutional rights does not impinge on a state's legitimate interest in setting its own standards for police behavior: the function of the federal courts is to ensure that states implement procedures and practices which induce constitutionally adequate behavior by individual police officers and their supervisors.[150] The threat of federal suit itself may induce municipalities to act more responsibly to protect constitutional rights.[151] Thus, federal courts do not interfere with state policymaking authority, rather, they serve as a referee to ensure that municipal policies and their implementation comport with constitutional standards.

Conclusion

The Supreme Court decision in *Tuttle*, by exalting form over substance, may set an undesirable precedent. If read narrowly, the only significant change from *Monell* will be that a plaintiff must introduce evidence of more than one incident of unconstitutional police activity before a municipality can be held liable under section 1983.[152] If interpreted broadly, however, *Tuttle* will substantially limit the course and scope of section 1983 litigation. The limitations imposed by the *Tuttle* plurality are constitutionally inadequate in light of the due process guarantees of the Fourteenth Amendment.

To remedy the constitutional infirmities posed by *Tuttle*'s per se rule, the Court should develop a more flexible standard that focuses on the knowledge of the municipal policymaker charged with inaction. If an official with knowledge of a police officer's unconstitutional act fails to take investigative, disciplinary, or other corrective measures, a plaintiff should have the opportunity to prove that the offending police officer acted pursuant to an unconstitutional municipal custom or policy. The hardship to a municipality in defending suits of this nature would be no greater than it is under the present standard. The hardship on the plaintiff, in turn, would be lessened: to survive the pleadings, the plaintiff would be relieved of the burden to root out past instances of misconduct

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the cost of litigation and any damage award. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 32 (1974). *See also* Project, *supra* note 5, at 810-17.

149. *See* Blodgett, *People v. Police*, 71 A.B.A. L.J. 36 (Feb. 1985).

150. *See* Friedman, *supra* note 102, at 575-76.

151. *See* Smith v. Ambrogio, 456 F. Supp. 1130 (D. Conn. 1978) (trial judge dismissed suit against defendant-municipality on defendant's promise to institute an investigation and disciplinary measures, or both, against offending officers).

152. This is a significant burden, because the plaintiff generally does not have access to police records when the initial pleadings are filed, and plaintiffs are therefore especially vulnerable to a municipal defendant's motion to dismiss. *Cf.* Means v. City of Chicago, 535 F. Supp. 455 (N.D. Ill. 1982); *see also supra* note 40 and accompanying text.

amidst police files. A more flexible standard would better serve the objective of the Court to limit the number of section 1983 suits against municipalities, and minimize municipal intrusion upon constitutional rights.

The Court should de-emphasize its concerns for federalism, the overcrowded federal court dockets, and the financial burden on municipalities, and instead focus on the function of section 1983 suits as a mode of redress for police misconduct. Section 1983 suits against municipalities are a necessary deterrent to police misconduct, and help to stimulate institutional reform. Municipalities will not conduct a fluid reevaluation of their policies and practices unless they are called to task for their failure to protect constitutional rights. Although section 1983 suits require the use of valuable time and resources, both municipal and judicial, the benefits derived from such suits clearly justify the costs.

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