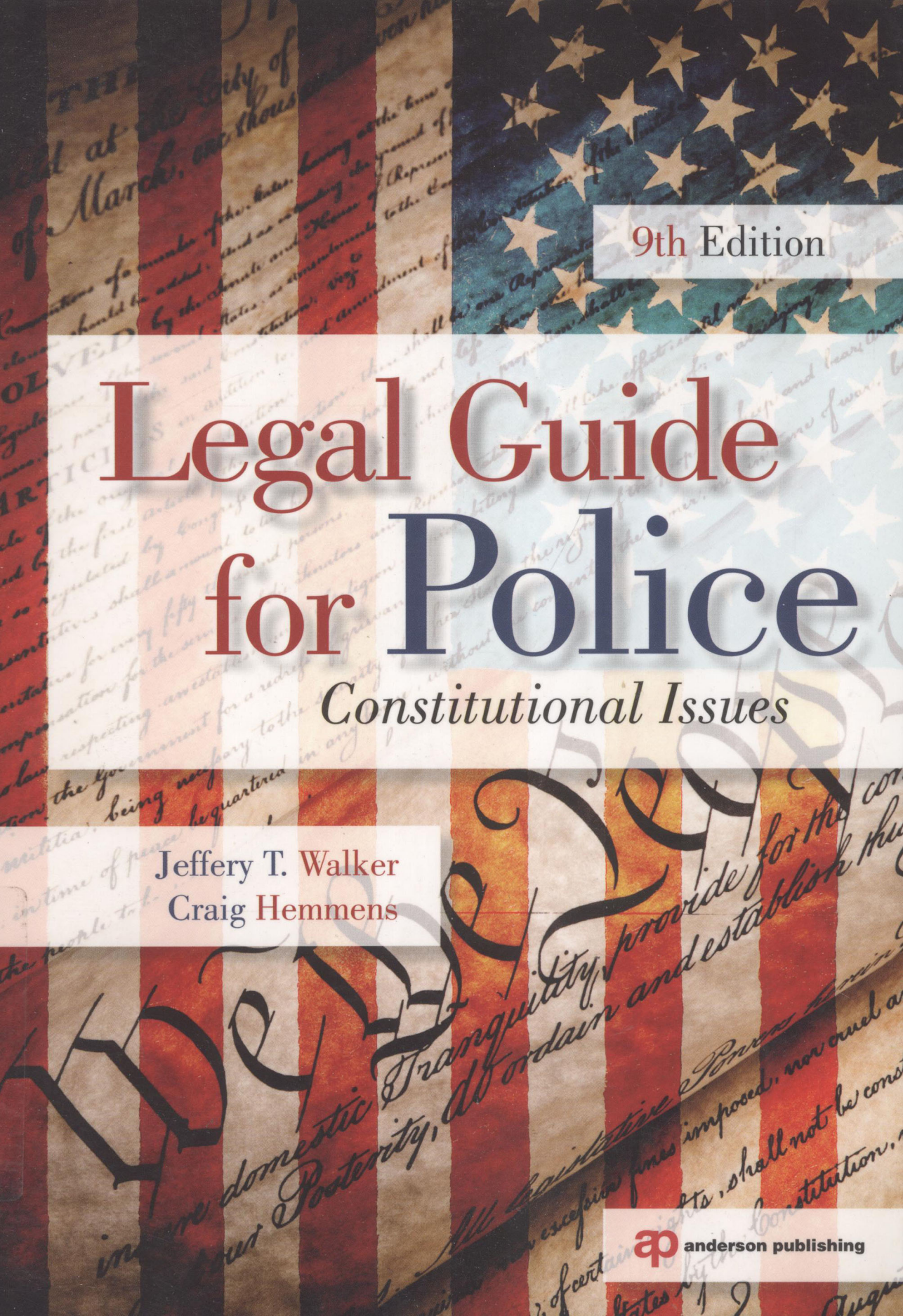

9th Edition

Legal Guide for Police

Constitutional Issues

Jeffery T. Walker
Craig Hemmens

anderson publishing

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Legal Guide for Police

Preface

Law enforcement officials must be highly skilled in the use of investigative tools and knowledgeable of the intricacies of the law. One error in judgment during initial contact with a suspect can, and often does, impede the investigation. For example, an illegal search or unauthorized questioning may so contaminate the evidence obtained that it will not be admitted into evidence in court. Such errors may result in the release of dangerous criminals.

In addition to losing evidence for prosecution purposes, failing to comply with constitutional mandates often leads to liability on the part of police officers, administrators, or agencies. A thorough knowledge of the U.S. Constitution as interpreted by the courts can reduce unauthorized action and make it possible for officers to act with confidence.

The legal rules under which law enforcement officers must operate as trained professionals are not simple, but neither are they impossible to master. The trend toward uniformity in state and federal laws in the area of criminal justice makes it possible to articulate general standards that may apply in all jurisdictions. However, a state, by statute or by interpretation of its own constitution, may place additional restrictions on the use of evidence. It is, therefore, necessary that police officers, especially investigators and administrators, be familiar with both federal and state laws and court decisions interpreting both state constitutions and the U.S. Constitution.

Due to the federalization of the Bill of Rights, most of the protections of the first eight amendments, which originally restricted the federal government, now apply to the states by way of the Fourteenth Amendment. The United States Supreme Court, using the due process clause of the Fourteenth Amendment as the conduit, has established minimum standards that must be followed by all public law enforcement officials.

After discussing the effects of failing to comply with constitutional mandates and considering the general limitations on police power, emphasis is placed on the common constitutional questions that confront officers when they are called on to enforce the law. In particular, the legal standards relating to detention, arrest, search, questioning suspects, and pretrial identification procedures are discussed.

This book is designed for officers who have the important task of protecting rights, seeking out illegalities, and preparing evidence for use in court. It may be used in departmental training programs as well as in colleges that offer courses for in-service and pre-service officers.

Because the law in this area changes constantly, it is necessary for all criminal justice personnel to keep up to date by reading United States Supreme Court decisions and relevant federal and state court decisions. This edition reflects U.S. Supreme Court decisions up to and including the 2009 term of court.

Jeffery T. Walker
Craig Hemmens

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Jeffery T. Walker is a professor of Criminal Justice and Criminology in the Department of Criminal Justice at the University of Arkansas, Little Rock, where he has worked for 19 years. His areas of interest are social/environmental factors of crime and the study of nonlinear dynamics as they relate to crime. He is a past President of the Academy of Criminal Justice Sciences. Previous publications include articles in *Justice Quarterly*, *Journal of Quantitative Criminology*, and *Journal of Criminal Justice Education*, and the books *Statistics in Criminal Justice and Criminology: Analysis and Interpretation*, Third Edition, and *Myths in Crime and Justice*.

Craig Hemmens is a professor in the Department of Criminal Justice at Boise State University. He holds a J.D. from North Carolina Central University School of Law and a Ph.D. in Criminal Justice from Sam Houston State University. He has previously served as Academic Director of the Paralegal Studies Program, Chair of the Department of Criminal Justice, and Director of the Honors College at Boise State. Professor Hemmens has published 17 books and more than 100 articles on a variety of criminal justice-related topics.

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The question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.

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Section

The failure of law enforcement officers to comply with the mandates of the U.S. Constitution, as interpreted by the courts, results not only in the dismissal and loss of cases, but also in possible liability on the part of the officer, as well as the administrator and the agency. Failure on the part of the agency to properly train or supervise officers, or to enact and enforce guidelines that are consistent with constitutional provisions, often results in civil actions in state courts and actions in federal courts under the civil rights statutes. In this chapter, areas of potential liability and the admissibility of evidence for failure to abide by constitutional mandates are discussed. In the chapters that follow, the constitutional requirements of searches, seizures, and interrogations are discussed in greater detail.

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§ 1.1 Civil Liabilities

When a civil action is initiated against a police officer or a police administrator, it is generally brought under the tort law of the jurisdiction. The plaintiff in a tort action must prove that: (1) the defendant had a duty; (2) the defendant breached that duty; (3) there was a causal connection between the breach of the duty and the plaintiff's injury; and (4) the injury to the plaintiff resulted from that breach.

When determining whether a duty does in fact exist, the courts look to the Constitution of the United States, the constitutions of the various states, state statutes, municipal ordinances, departmental regulations, and cases decided by the courts. For example, if an arrest violates the Fourth Amendment as interpreted by the Supreme Court, that arrest may serve as the basis for a state tort action for false arrest, as well as a federal action under the civil rights statutes for violation of the constitutional right to be free from unreasonable searches and seizures.

More actions are initiated in civil court against police officers and administrators than in criminal court because it is less difficult to prove that a duty has been breached and the plaintiff is more likely to obtain a civil judgment. The reason for this is that in a civil action, the plaintiff is required to show a breach of duty only by a *preponderance* of the evidence, rather than *beyond a reasonable doubt*. The preponderance of the evidence standard requires less proof than the beyond a reasonable doubt standard. Also, in a tort action, judgment may be rendered by a nonunanimous jury, whereas criminal cases generally require a unanimous jury.

§ 1.2 Civil Rights Actions

A. Civil Actions

Although the civil rights statutes under which most actions are initiated against police for failure to comply with constitutional mandates were passed just after the Civil War, it is only recently that they have been used extensively. The civil rights statute that provides civil remedies for official misconduct was enacted by Congress in 1871, and now is codified as Title 42 United States Code § 1983. Lawsuits under this statute are commonly referred to as § 1983 actions.

This statute 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, causes, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

To successfully pursue an action in federal court under § 1983, the person who claims an injury must establish: (1) that the defendant deprived the injured party of "rights, privileges, or immunities" secured by the Constitution or the laws of the United States; *and* (2) that the defendant against whom the action is brought acted "under color of statute, ordinance, regulation, custom, or usage."

The first concern of the plaintiff in a civil rights action under § 1983 is to show that the defendant officer deprived the plaintiff of a constitutional right provided by the Constitution, federal statute, or court decision.[1] When such a decision is made and the constitutional right is determined, the police are presumed to know that such a right exists. This requires that police and administrators not only be familiar with constitutional rights as interpreted by the U.S. Supreme Court and other courts, but also keep up to date as new decisions are handed down.

The second concern of the plaintiff in a civil rights action under § 1983 is to show that the officer acted under "color of law." A police officer acts under "color of law" when he or she has authority under state law. For example, an officer acts under "color of law" when investigating crimes, making arrests, conducting searches, quelling disturbances of the peace, or conducting other law enforcement activities. A police officer does not act under color of law if his or her behavior does not take place in the line of duty, or is not made possible because of his or her legal authority. For example, a police officer acts as a private citizen when engaged in an off-duty fight that arises out of a private matter.

When initiating an action under § 1983, the plaintiff alleges that the defendant acted under color of law and deprived the plaintiff of his or her constitutional rights. The plaintiff will also ask that damages be awarded. These are usually money damages and, occasionally, an order not to engage in similar conduct in the future.

The defendant then considers the defenses available. One defense that has been the basis of many court decisions is the defense of "qualified immunity." Discussion of some federal court decisions will clarify the scope of the "qualified immunity" defense.

The Ninth Circuit Court of Appeals explained that the doctrine of qualified immunity protects government officials performing *discretionary*

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[1] *Albright v. Oliver,* 510 U.S. 266 (1994).

functions from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a *reasonable person would have known.*[2] After indicating that "qualified immunity" protects all but the plainly incompetent or those who knowingly violate the law, the court explained that the determination of whether an official is entitled to qualified immunity involves a two-step analysis, asking: (1) whether the law governing the official conduct was *clearly established*; and (2) whether, under the law, a reasonable officer could have believed the conduct was lawful. For a right to be "clearly established" for qualified immunity purposes, its contours must be sufficiently clear that, at the time of the alleged unlawful action, a reasonable official will understand that what he or she is doing violates that right.

Using similar language, the Fifth Circuit Court of Appeals explained that the court conducts a bifurcated analysis to determine whether a defendant is entitled to qualified immunity.[3] The first step is to determine whether the plaintiff has alleged a violation of a clearly established constitutional right. The second step is to determine whether the defendant's conduct was "objectively reasonable." In defining "objectively reasonable," the court said that "objective reasonableness" supporting a claim of qualified immunity is assessed in light of legal rules clearly established at the time of the incident, and an officer's conduct is not "objectively reasonable" when reasonable officials would have realized that the particular officer's conduct violated a particular constitutional provision.

After many lower court decisions, the "qualified immunity" issue reached the United States Supreme Court in 2001.[4] The plaintiff in this case filed a suit, pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, against Saucier, a military police officer. Katz (the plaintiff) alleged, among other things, that Saucier had violated his Fourth Amendment rights by using excessive force in arresting him while he protested during then-Vice President Al Gore's speech at a San Francisco army base.[5] The district court declined to grant Saucier summary judgment on qualified immunity grounds, as did the Ninth Circuit Court of Appeals.

The United States Supreme Court disagreed with the lower courts, explaining that when the defendant claims qualified immunity, a ruling on that issue should be made early in the proceedings so the cost and expense of a trial are avoided where the qualified immunity defense is dispositive. The Court noted that, in determining that the defense of qualified immunity is appropriate, two questions must be answered. The first inquiry is whether a

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2 *Headwaters Forest Defense v. County of Humboldt,* 211 F.3d 1121 (9th Cir. 2000).

3 *Wooley v. City of Baton Rouge,* 211 F.3d 913 (5th Cir. 2000).

4 *Saucier v. Katz,* 533 U.S. 194 (2001).

5 *See Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971), which held that action could be brought against federal officers following legal principles developed where actions are brought against state officers under § 1983.

constitutional right would have been violated on the facts alleged. The second inquiry, assuming that the violation is established, is the question of whether the right was clearly established must be considered on a more specific level than that recognized by the Court of Appeals. If it is determined that there has been a violation of a constitutional right, the next step is to determine whether the right was clearly established. This inquiry must be undertaken in light of the case's specific context, not as a broad and general proposition. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he or she confronted.

Applying this rationale, the court concluded with this paragraph:

> In the circumstances presented to this officer, which included the duty to protect the safety and security of the Vice President of the United States from persons unknown in number, neither respondent nor the Court of Appeals has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did, nor are we aware of any such rule. Our conclusion is confirmed by the uncontested fact that the force was not so excessive that the respondent suffered hurt or injury. On these premises, petitioner was entitled to qualified immunity, and the suit should have been dismissed at an early stage in the proceedings.

Attempts by states to immunize conduct otherwise subject to suit under § 1983 have been unsuccessful. Federal courts have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted by the supremacy clause of the U.S. Constitution.[6]

B. Criminal Actions

Failing to comply with constitutional mandates as interpreted by the courts may also result in criminal action against the officer in federal court. The federal law that defines the criminal violation was enacted in 1886 and is now codified as Title 18 United States Code § 242. It provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District, to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts

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[6] *See, for example, Silva v. University of New Hampshire,* 888 F. Supp. 293 (D.N.H. 1994).

> committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Title 18 § 242 requires that the federal prosecutor introduce evidence to show: (1) that the person charged was acting under color of law; (2) that there was a deprivation of rights protected by the Constitution or laws of the United States; and (3) that the defendant acted willfully or intentionally to deprive a person of their rights. The first two requirements are similar to those required when an action is filed in civil court under § 1983. A third requirement is added, however, that requires the prosecution to show that the officer who acted under color of law did so *willfully* or *intentionally*.

In discussing the "willfully" element, a federal court explained that for purposes of a federal civil rights criminal prosecution, the defendant's act is done with the requisite willfulness if it is done "voluntarily and intentionally," and with the specific intent to do something the law forbids.[7]

Willfulness essentially means that the defendant intended to commit an act without necessarily intending to do the act for the specific purpose of depriving another of their constitutional rights.[8] To act "willfully," for purposes of the statute, the defendant must intend to commit an act that results in the deprivation of an established constitutional right. The defendant acts willfully if he or she *deliberately*, as opposed to accidentally or negligently, brings about a result that is forbidden by the Constitution, even though he or she is not thinking about violating a constitutional right. If an officer knowingly or unknowingly willfully deprives a person of a right that is protected by the Constitution, he or she may be liable under § 242 as well as § 1983.

Ordinarily, private citizens are not prosecuted under § 242. However, if private citizens are jointly engaged with police officers in the prohibited action, they could be convicted of deprivation of rights under color of law.[9] Although it is more difficult to prove a criminal case under § 242 than to successfully pursue a civil action under § 1983, there is no doubt that a police officer who, acting in the scope of his or her employment, deprives a person of a constitutional right, may be prosecuted in federal court.

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7 *United States v. Reese,* 2 F.3d 870 (9th Cir. 1993).

8 *United States v. Bradley,* 196 F.3d 762 (7th Cir. 1999).

9 *United States v. Causey,* 185 F.3d 407 (5th Cir. 1999).

§ 1.3 Liability of Supervisors, Administrators, and Agencies

Not only is an officer who deprives a person of a constitutional right civilly liable for failure to protect those rights, but the supervisor, administrator, or agency may also be held liable under a theory that is referred to as *vicarious liability*. Although some government agencies, especially state agencies, still cannot be held liable due to the doctrine of *sovereign immunity*, this doctrine has been rejected in many states by statute or court decision.

Some courts have used the *respondeat superior* doctrine to hold agencies liable for the acts of officers who deprive citizens of rights protected by state or federal constitution, laws of the states, ordinances of political subdivisions, departmental regulations, or court decisions.

Under the *respondeat superior* doctrine, a master is liable for the acts of a servant. Thus, when the tortious conduct of the employee is so closely connected in time, place, and causation that it is regarded as a risk of harm fairly attributable to the employer or business, the employer can be held liable. For example, the Supreme Court of Louisiana decided that the tortious conduct of a police officer toward an individual outside the geographical limits of the town was such as to render the town vicariously liable under the doctrine of *respondeat superior* when the officer was acting within the scope of his employment. In this case, the officer, acting within the scope of his employment, was accused of striking the plaintiff on the head without just cause while investigating a traffic violation and an intoxication offense.[10]

Vicarious liability makes it essential that supervisors and agencies provide appropriate training and oversight. Failure to do so may well result in liability for wrongdoing on the part of individual law enforcement officers.

A. Vicarious Liability Under Title 42 United States Code § 1983

In earlier cases, the U.S. Supreme Court held that police agencies were not "persons" under § 1983 and therefore could not be held liable when officers of the agency deprived citizens of their constitutional rights. However, in 1978, the Court made it clear that local government officials, sued in their official capacity, *are* "persons" under § 1983 and may be held liable for constitutional deprivations made pursuant to government customs, even if those customs have not received formal approval through the government's official decision-making channels.[11]

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[10] *Lamkin v. Brooks,* 498 So. 2d 1068 (La. 1986).

[11] *Monell v. Department of Social Services,* 436 U.S. 658 (1978).

In *Monell v. Department of Social Services,* the Supreme Court explained that the language of § 1983 compelled the conclusion that Congress did not intend a local government to be held liable solely because it employs a tort-feasor. That is, it cannot be held liable under the *respondeat superior* theory. However, local governing bodies and local officials *may* be sued directly under § 1983 for monetary, declaratory, and injunctive relief in situations in which the officer's action that is alleged to be unconstitutional implements or executes a policy, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy.

Under this interpretation, the acts of the chief of police and his or her subordinates in their official capacity, whether *de jure* or *de facto*, equate with the acts of the city itself. In a North Carolina case the action was brought against the patrol officer, the city, the command sergeant, the director of the internal affairs division, the chief of police, and the city manager, for an injury received by an arrestee. The court decided that the evidence supported a finding that the patrol officer assaulted a drug felon during and after arrest and that the assault proximately resulted from a de facto policy developed by supervisory officials.[12]

Although it is clear that a written policy established by an explicit directive will make a city liable for the acts of department employees, official policy may also be established by a de facto policy. In a civil rights action, the burden is on the plaintiff to show that a de facto policy did exist. This becomes difficult in some instances, but the Supreme Court shed some light on this requirement in two cases decided in 1985 and 1986.

In 1985, in *Oklahoma City v. Tuttle,* the Supreme Court held that it was reversible error to allow the jury to infer a policy of inadequate training on the city's part based on a single shooting incident.[13] The court indicated that a de facto policy cannot be established by *one* act of an officer who is not acting in an official decision-making capacity. The court explained that there must be an affirmative link between the municipality's policy and the alleged constitutional violation. If a cause of action is based on allegations of inadequate training, a *pattern* must be established or substantial proof that the policy was established or acquiesced in by a municipal policymaker.

One year later, in *Pembaur v. City of Cincinnati*, the Supreme Court decided that municipal liability may be imposed for a single decision *if* the decision is made by a municipal policymaker responsible for establishing final policy.[14] The court reasoned that this case differed from *Tuttle* because

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[12] *Spell v. McDaniel,* 604 F. Supp. 641 (E.D.N.C. 1985). However, neither a state nor its officials acting in their official capacity are "persons" under 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police,* 491 U.S. 58 (1989).

[13] *Oklahoma City v. Tuttle,* 471 U.S. 808 (1985).

[14] *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986).