

Jumping the Gun: Can Municipalities Be Held Liable Under 42 U.S.C. § 1983 for Failing to Provide Police Officers with Less-Lethal Weapons?

*"I'd like to say I didn't intend to kill her. But when you have a gun . . . you always intend . . ."*¹

I. INTRODUCTION

Almost from the inception of the modern police force, American police officers have carried guns.² Recently, in addition to guns, police forces have started using newly-developed less-lethal weapons.³ Because the safety of many of these weapons is not clear, several municipalities have refused to

1. THE FILE ON THELMA JORDON (Paramount Pictures 1950) (illustrating woman's frame of mind when she murdered her wealthy aunt). In the film, Thelma Jordon was involved in an illicit affair with a district attorney. Hal Erickson, *The File on Thelma Jordon*, N.Y. TIMES, available at http://movies2.nytimes.com/gst/movies/movie.html?v_id=91417 (last visited Mar. 8, 2005). The plot thickens when Thelma murders her wealthy aunt and her lover prosecutes the case. *Id.*

2. *New York City Police Museum Frequently Asked Questions*, at <http://www.nycpolicemuseum.org/html/faq.html> (last visited Feb. 11, 2005) (noting law enforcement started using guns in 1887); see also THE ROLE OF POLICE IN AMERICAN SOCIETY: A DOCUMENTARY HISTORY 77, 97 (Brian Vila & Cynthia Morris eds., 1999) [hereinafter THE ROLE OF POLICE] (noting early problems of training police officers on proper use of weapons). In historical terms, policing is a relatively new field. *Brief Definition and History of Policing*, Metropolitan Police Website, at <http://www.met.police.uk/history/definition.htm> (last visited Jan. 16, 2005). Municipalities did not have formally-established police forces until 1829, when Sir Robert Peel founded London's Metropolitan Police Force, although rudimentary forms of policing have existed since tribal times. *Id.* The United States' first formal police force was established in 1895 in New York City. *Supra* THE ROLE OF POLICE at xxxi.

3. Neal Miller, *Less-Than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability for the Use of Excessive Force*, 28 CREIGHTON L. REV. 733, 735 (noting recent trend in policing to use less-lethal weapons as alternatives to deadly force). Today, several less-lethal options are being used in police departments throughout the United States. *Id.* These include new, high-tech weapons such as bean-bag guns, pepper-ball guns, sage guns—which fire wooden pellets—and Tasers, as well as the more traditional mace and baton. *Id.* These new weapons have caused a flurry of deaths, leading people to question the utility of these weapons, which are ostensibly considered "less-lethal." See, e.g., Thomas Farragher & David Abel, *Postgame Police Projectile Kills an Emerson Student*, BOSTON GLOBE, Oct. 22, 2004, at A1 (describing how "non-lethal" pepper-ball gun killed student); see also *ACLU of Massachusetts Issues Recommendations on Less Lethal Force Policies for Police*, ACLU, at <http://www.aclu.org/PolicePractices/PolicePractices.cfm?ID=18213&c=25> (last visited May 10, 2005) (urging police forces to closely supervise less-lethal weapon use in light of recent accidents); Amnesty Int'l, USA, *Excessive and Lethal Force? Amnesty's Concerns About Death and Ill-Treatment Involving Police Use of Tasers*, at <http://www.amnestyusa.org/news/document.do?id=1A01E91E134A327080256F190042408D> (last visited Jan. 16, 2005) (describing excessive-force problems associated with Taser use).

provide officers with any form of less-lethal weapon, arming them only with a service revolver.⁴ This decision alleviates the potential problems associated with less-lethal weapons, but presents a new issue of whether municipalities can be held liable for shootings that occur because they have not provided officers with any less-lethal alternative.⁵ A recent Third Circuit opinion, *Carswell v. Borough of Homestead*,⁶ directly addressed this question.⁷

In *Carswell*, the plaintiff called the police several times to report that her husband was assaulting her.⁸ After the final call, police chased the husband in an attempt to apprehend him.⁹ The pursuit eventually ended when one officer blocked the path of the fleeing husband and ordered him to stop.¹⁰ When the husband refused to stop, the officer, fearing for his safety and the safety of those around him, shot and killed the husband.¹¹ At trial, the officer testified that he shot the husband because he had no less-lethal alternative.¹²

Following the incident, the deceased's widow filed suit under 42 U.S.C. § 1983 and named the municipality, the Borough of Homestead (Homestead), as one of the defendants.¹³ The plaintiff alleged that Homestead was liable either

4. Miller, *supra* note 3, at 735 (describing police reforms intended to reduce police excessive force); see generally *Carswell v. Borough of Homestead*, 381 F.3d 235 (3d Cir. 2004) (outlining issue of whether police officers should be required to carry less-lethal weapons). The phrase "non-lethal weapon" is a misnomer. Thomas Farragher & David Abel, *Postgame Police Projectile Kills an Emerson Student*, BOSTON GLOBE, Oct. 22, 2004, at A1 (describing how "non-lethal" pepper-ball gun killed student). These weapons should more properly be called "less-lethal weapons" because "non-lethal" implies that they will never kill the target, which is not the case. *Id.*

5. *Carswell v. Borough of Homestead*, 381 F.3d 235, 244 (3d Cir. 2004) (addressing question whether to hold municipality liable for not equipping officers with less-lethal weapons)

6. 381 F.3d 235 (3d Cir. 2004).

7. *Id.* at 239 (outlining testimony of officer who would not have used gun if he had less-lethal means). The officer specifically stated that "if he had had non-lethal weapons in his possession, he would not have pulled his gun from the holster." *Id.*

8. *Id.* at 238 (describing four occasions where wife called police to respond to domestic violence allegations).

9. *Id.* at 238 (describing manner in which husband evaded capture). The police officers had attempted to arrest the husband several times before the chase ensued. *Id.*

10. *Carswell*, 381 F.3d at 238 (detailing husband's behavior just prior to officer shooting). The husband refused to stop advancing, despite numerous commands to halt. *Id.*

11. *Id.* at 238 (recounting husband's advance on officer). The court noted that the suspect may have been armed, which created uncertainty as to whether the officer used an appropriate amount of force. *Id.*

12. *Carswell v. Borough of Homestead*, 381 F.3d 235, 239 (3d Cir. 2004) (emphasizing officer would not have used gun if provided with alternative). The officer also testified that he did not know whether the suspect was armed. *Id.* Importantly, had the husband been unmistakably armed, then the officer would have been justified in his use of deadly force and would thereby have defeated the plaintiff's municipal liability claims. *Id.* at 241.

13. *Id.* at 237 (describing case and identifying parties). 42 U.S.C. § 1983 (2000) states in relevant part:

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

for failing to properly train its officers on how to use deadly force within constitutional confines, or for failing to provide its police officers with adequate less-lethal alternatives to a service revolver.¹⁴ The Third Circuit refused to hold the municipality liable under either theory.¹⁵ The dissent concentrated on the latter theory, the constitutionality of the municipality's custom or practice of failing to adequately equip officers.¹⁶ The dissent concluded that this could provide a basis for municipal liability under § 1983.¹⁷

This Note will first consider the history of municipal liability under § 1983.¹⁸ It will then outline and analyze the Third Circuit's rejection of an attempt to expand liability to municipalities that have failed to provide their officers with less lethal weapons.¹⁹ This Note will conclude by recommending a structure that courts can use to analyze the issue in order to determine whether a municipality can be held liable.²⁰

II. § 1983 LIABILITY

Section 1983 was enacted as part of the Civil Rights Act of 1871 to provide a remedy for those whose federal statutory or constitutional rights have been violated by "persons acting under color of state law."²¹ By its text, § 1983

42 U.S.C. § 1983 (2000); see *Monroe v. Pape*, 365 U.S. 167, 172-73 (1961) (outlining legislative history of Civil Rights Act of 1871). The Court determined that one reason that the Civil Rights Act, the precursor to § 1983, 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." *Monroe*, 365 U.S. at 180.

14. *Carswell*, 381 F.3d at 243-44 (outlining issues raised by plaintiff).

15. *Id.* (refusing to require police departments to carry specific equipment). The court relied on *Plakas v. Drinski*, a Seventh Circuit decision, that stated "it is clear that the Constitution does not enact a police administrator's equipment list." *Id.* (quoting *Plakas v. Drinski*, 19 F.3d 1143, 1150-51 (7th Cir. 1994)).

16. *Id.* at 249 (McKee, J., dissenting) (noting majority's poor definition of issue). Judge McKee believed that the majority's focus on a mandated equipment list was ill-founded. *Id.* He noted that the issue was not whether the court can require police to carry a laundry list of weapons, but rather whether their refusal to provide police officers with any alternative to the service revolver would necessarily lead to violations of the Constitution. *Id.* See also *infra* Part II.B (providing historical discussion of municipal liability).

17. *Carswell*, 381 F.3d at 250 (concluding jury could find municipal liability under failure-to-train theory).

18. *Infra* Part II (providing background of § 1983 and history of municipal liability).

19. *Infra* Parts III-IV (outlining and critiquing analysis used in *Carswell v. Borough of Homestead*).

20. *Infra* Part V (developing analysis for courts in municipal liability cases for failure to provide less-lethal weapons).

21. MICHAEL G. COLLINS, SECTION 1983 LITIGATION IN A NUTSHELL, 1-6 (2001) (detailing enactment of § 1983). Congress enacted § 1983 as part of the post Civil War Reconstruction effort. *Id.* at 4. After the Civil War, three constitutional amendments were enacted to protect the rights of the newly-freed African Americans: the Thirteenth Amendment abolished slavery, the Fourteenth Amendment guaranteed due process and equal protection, and the Fifteenth Amendment ensured equality in voting. *Id.* at 3. Each of these amendments allows Congress to enact "appropriate" legislation to enforce its provisions. *Id.* Section 1983 was enacted to provide people with access to the federal courts when their federal constitutional rights had been violated by a person acting under color of state law. *Id.*

imposes liability only on “persons.”²² Through the early history of the statute, courts strictly interpreted this requirement, prohibiting plaintiffs from using § 1983 as a basis for municipal liability.²³ It was not until 107 years after the enactment of the original statute that the Supreme Court decided that § 1983 does allow for municipal liability.²⁴ In *Monell v. Department of Social Services of the City of New York*,²⁵ the Supreme Court reexamined its earlier analyses and concluded that Congress did not manifest an intent to preclude municipal liability.²⁶

After *Monell*, questions arose as to when and how municipalities may be held liable.²⁷ Four distinct theories of municipal liability have since emerged.²⁸ Liability can be based on actions pursuant to an official written regulation or policy.²⁹ A similar theory of liability is based on actions pursuant to an unwritten but well-established custom or practice.³⁰ A municipality may also

22. 42 U.S.C. § 1983 (2000); see also COLLINS, *supra* note 21 at 22 (noting Supreme Court interpretation of “persons” in *Monroe v. Pape*).

23. *Monroe v. Pape*, 365 U.S. 167, 187-92 (1961) (describing historical basis for excluding municipalities from scope of § 1983). The Court analyzed the adoption of the Civil Rights Act of 1871, a precursor to § 1983. *Id.* The Court concentrated on Congress’s rejection of an amendment proposed by Senator Sherman of Ohio, which would have imposed financial liability on “the inhabitants of the county, city, or parish” where particular violent acts occurred. *Id.* at 188-89. The amendment would have effectively created a type of respondeat superior liability. *Id.* The Court reasoned that the House of Representative’s rejection of the amendment demonstrated an intent to preclude municipal liability under § 1983. *Id.* at 188-90. For this reason, the Court provided municipalities with immunity from suit under § 1983. *Id.* at 192.

24. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 663 (1977) (overruling portion of *Monroe v. Pape* concerning municipal immunity). After analyzing the rejection of the Sherman Amendment in detail, the Court concluded that the amendment was only tangentially related to the municipal liability contemplated in the case before it. *Id.* at 683. The Sherman Amendment’s respondeat superior liability for municipalities was much more severe than the liability adopted by *Monell*, in which the municipality itself committed a constitutional tort. *Id.* at 692.

25. 436 U.S. 658 (1977).

26. *Id.* at 664-65 (noting differences between proposed Sherman Amendment and municipal liability under § 1983). Congress passed § 1 of the Civil Rights Act of 1871, the section that eventually became § 1983, after little debate and without amendment; the Sherman Amendment, however, underwent extensive debate. *Id.* at 665. The Sherman Amendment, moreover, was not meant to alter § 1, but, rather, was intended to be a separate section entirely. *Id.* at 666. Many representatives who voted against the Sherman Amendment had voted for § 1. *Id.* at 682. The legislative history of § 1 shows that Congress intended the statute to be interpreted broadly and that, because municipalities could commit wrongs that § 1 was intended to redress, Congress also intended for municipalities to be held liable under the statute. *Id.* at 685-86. Municipalities would have been included under the plain meaning of the term “person” because municipal corporations were prevalent in 1871. *Id.* at 688-89; see also *N.W. Fertilizing Co. v. Hyde Park*, 18 F.Cas. 393, 394 (C.C.N.D. Ill. 1873) (No. 10,336) (holding municipalities within plain meaning of “persons” in Dictionary Act).

27. *City of Canton v. Harris*, 489 U.S. 378, 380 (1989) (determining municipality can be liable for failure to properly train police officers); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) (holding municipalities potentially liable for decision of final policymaker); *Monell*, 436 U.S. at 690-91 (creating two different means of finding municipal liability).

28. Karen Blum, *The Theory of Municipal Custom and Practice*, 16 *TOURO L. REV.* 825, 825-30 (2000) (considering different methods of establishing municipal liability).

29. *Monell*, 436 U.S. at 690 (holding municipality liable where municipal policy facially unconstitutional).

30. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690-91 (1977) (establishing municipal liability where

be liable for a final policymaker's unconstitutional decision or order.³¹ Lastly, municipal liability may be based on inaction, such as a municipality's failure to properly train its officers.³²

A. Application of § 1983 to Police Shootings

Section 1983 applies to a police shooting when that shooting amounts to a constitutional violation.³³ When deadly force is used to apprehend a suspect, that use of force is analyzed under the Fourth Amendment's prohibition on unreasonable searches and seizures, and, as such, is subject to an objective reasonableness test.³⁴ The Supreme Court has held that, even if an officer has probable cause to arrest a suspect, it is not always constitutionally reasonable to use deadly force to effect the arrest.³⁵ Courts determine reasonableness by examining the totality of the circumstances, including the magnitude of the intrusion and the government's justification for that intrusion.³⁶ Applying this balancing test, the Supreme Court has found that deadly force is reasonable, and therefore constitutional, only when the police officer reasonably believes that the suspect poses an immediate threat either to the officer's safety or to the safety of others.³⁷ Thus, whenever a police officer uses deadly force on a free citizen without reasonable suspicion that the individual poses a bodily threat to the officer or others, that use of deadly force may provide a basis for a § 1983 claim.³⁸

well-established custom or practice unconstitutional).

31. *Pembaur*, 475 U.S. at 484-85 (holding municipality liable for single unconstitutional decision of final policymaker).

32. *City of Canton*, 489 U.S. at 390 (holding municipality potentially liable if decision deliberately indifferent to possibility of constitutional violation).

33. *Monell*, 436 U.S. at 692 (reiterating § 1983 liability exists only when person actually causes constitutional violation).

34. *Tenn. v. Garner*, 471 U.S. 1, 7 (1985) (describing Fourth Amendment seizure occurs when police arrest using deadly force). Courts have consistently held that "[w]henver an officer restrains the freedom of a person to walk away, he has seized that person" within the meaning of the Fourth Amendment. *Id.* The Court in *Garner* noted, however, that while this level of restraint may sometimes be unclear, it certainly exists when an officer shoots a suspect. *Id.* The Court also acknowledged that society's interest in a judicial determination of guilt is frustrated when police shoot and kill a suspect. *Id.* at 9. The only interest weighing in favor of shooting the suspect is society's general interest in apprehending criminals, which is insufficient when weighed against the competing interests. *Id.*

35. *Graham v. Connor*, 490 U.S. 386, 397 (1989) (describing reasonableness standard as objective rather than subjective).

36. *Garner*, 471 U.S. at 7-8 (noting determination of whether seizure constitutionally reasonable requires balancing test). The Court also weighs the time and manner in which the seizure is made in determining reasonableness. *Id.* at 8.

37. *Id.* at 11 (deciding use of deadly force on all fleeing suspects without regard to threat unconstitutional). The Court reasoned that "[i]t is not better that all felony suspects die than that they escape." *Id.* Therefore, if a suspect poses no threat to the officer or others, it is unconstitutional for the officer to shoot him, even if the officer has probable cause to believe that he has just committed a felony. *Id.*

38. *Graham*, 490 U.S. at 396 (outlining reasonableness standard used in Fourth Amendment analysis).

B. Liability Where Municipality Itself Commits Constitutional Violation

In any § 1983 claim, the court must answer two questions: was the act in question committed by a person acting under color of state law, and did the defendant's conduct deprive the plaintiff of a federal statutory or constitutional right.³⁹ In municipal liability cases, the second question can be broken down into two parts, was there a constitutional violation and did the municipality cause the violation.⁴⁰ *Monell* provides the initial framework for these analyses.⁴¹

The Court in *Monell* established that a municipality could be held liable where the municipality itself caused the constitutional violation.⁴² In that case, the New York City Department of Social Services forced the plaintiffs to take unpaid leaves of absence during pregnancy, even though the leaves were not medically required.⁴³ The Court reviewed the legislative history of § 1983, particularly the rejection of the Sherman Amendment, which would have made a city, county or parish liable for Constitutional violations inflicted by persons 'riotously and tumultuously assembled.'⁴⁴ From this analysis, the Court concluded that Congress did not intend for municipalities to be liable on a respondeat superior basis.⁴⁵ The Court, however, determined that situations exist where a municipality will not be liable based on respondeat superior, but

39. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) (outlining two "initial inquir[ies]" in § 1983 cases). The plaintiff in *Parratt* was an inmate who ordered hobby materials to be delivered to the prison. *Id.* at 530. At the time the materials arrived, the plaintiff was segregated from the general prison population and was unable to receive the materials. *Id.* By the time he was released, the prison officials had lost the package. *Id.* The plaintiff sued the prison warden and a prison official under 42 U.S.C. § 1983, alleging that they deprived him of his Fourteenth Amendment due process rights by negligently losing his property. *Id.* The Court held that the prisoner's claims did not amount to a Fourteenth Amendment violation because, although he was deprived of property, this deprivation did not occur "without due process of law." *Id.* at 542-43.

40. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1977) (holding municipalities can be liable for constitutional violations where municipality caused violation).

41. *Id.* at 694 (explaining when municipalities may be held liable). The Court stated that municipalities are only liable "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, *inflicts* the injury". *Id.* (emphasis added).

42. *Id.* at 690-91 (holding municipality potentially liable for damages under § 1983 but not under strict liability theory); *see also* *Collins v. City of Harker Heights*, 503 U.S. 115, 122 (1992) (holding city not liable because city's actions constitutional). In *Collins*, the Court emphasized that the question of whether a constitutional violation occurred is distinct from the question of whether the city should be held liable. *Id.* Under the facts of *Collins*, the municipality had not adequately trained its officials, but the court found no liability because no constitutional violation had occurred. *Id.* at 125-30.

43. *Monell*, 436 U.S. at 661-62 (noting state's mandate forcing women to leave work when pregnant violated constitutional rights).

44. *Id.* at 666-67 (outlining Senator Sherman's proposed amendment). Senator Sherman theorized that Congress could ensure that municipalities would enforce § 1983 by holding them liable for the actions of their citizens in violation of the legislation. *Id.* at 667.

45. *Id.* at 691 (reading Sherman Amendment rejection and wording of § 1983 as prohibiting respondeat superior liability).

based on its own unconstitutional actions.⁴⁶ In particular, the Court laid out two situations where the municipality could be liable: where it advanced a facially unconstitutional written policy and where it promoted an unconstitutional custom.⁴⁷ The facts in *Monell* illustrated the first situation, where the municipality's written policy of forcing pregnant teachers to leave, was itself unconstitutional.⁴⁸

Monell also recognized municipal liability through an unwritten but well-established "custom or usage."⁴⁹ In such a situation, there is no formally-adopted unconstitutional policy, but the municipality's acquiescence to an unconstitutional custom or practice has given that custom the same effect as a formally-adopted policy.⁵⁰ Courts require that the custom, to form a basis for liability, be so widespread as to have the force of law and actually cause the constitutional violation.⁵¹ Liability is further limited by the additional requirement that the municipality have actual or constructive notice of the custom.⁵² One court summarized these requirements as a three part test: did a policy exist, could the policy be fairly attributed to the municipality, and did a causal link exist between the policy and the constitutional violation.⁵³ Courts

46. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1977) (interpreting rejected Sherman Amendment as requiring respondeat superior liability). The Court stated that a municipality may be liable when the municipality's officers advance an officially-adopted "policy statement, ordinance, regulation or decision" that is unconstitutional. *Id.* at 690. The municipality may not be held liable merely for employing the "tortfeasor." *Id.* at 691.

47. *Id.* at 691 (determining Congressional intent allows municipal liability in limited circumstances).

48. *Id.* at 694 (holding officially-adopted municipal policy itself unconstitutional).

49. *Id.* at 691 (noting municipality may be liable even if custom has not been formally approved); see also 42 U.S.C. § 1983 (2000) (imposing liability where "custom or usage" violates Constitution); *Bouman v. Block*, 940 F.2d 1211, 1231 (9th Cir. 1991) (determining plaintiff may proceed in absence of formal policy when unwritten custom well-established); *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987) (recognizing possibility of municipal liability based on unwritten custom).

50. *Monell*, 436 U.S. at 691 (describing extent of custom required to give rise to municipal liability); see also *Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267, 1277-78 (11th Cir. 2000) (declining to impose liability without evidence of well-established custom); *Bordanaro v. McLeod*, 871 F.2d 1151, 1157 (1st Cir. 1989) (finding liability only where custom widespread and municipality does not prevent it).

51. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1985) (stating municipality potentially liable only if widespread custom caused constitutional violation); *Bordanaro*, 871 F.2d at 1156-57 (describing requirements for municipal liability based on custom or usage).

52. *Bennett v. City of Slidell*, 728 F.2d 762, 767-68 (5th Cir. 1984) (interpreting Supreme Court cases defining "custom or usage"). A widespread practice among subordinate officers will not suffice unless that widespread practice led to constructive knowledge on the part of the municipality. *Id.* at 768. The Court looked at both *Monell* and *Adickes v. S.H. Kress & Co.* and combined the possibility of municipal liability set forth in *Monell* with the description of custom in *Adickes* to find that a policy or custom must be so well-established as to be attributable to the governing body. *Id.* at 767-68 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970); *Monell*, 436 U.S. at 694); see *Spell*, 824 F.2d at 1387 (outlining required scope of custom and usage). The Fourth Circuit specifically stated that custom or usage is attributable to a municipality only "when the duration and frequency of the practices warrants a finding of either actual or constructive knowledge by the municipal governing body that the practices have become customary among its employees." *Spell*, 824 F.2d at 1387.

53. *Bordanaro v. McLeod*, 871 F.2d 1151, 1159-63 (1st Cir. 1989) (performing three-part test to determine municipal liability). In *Bordanaro*, an off-duty police officer became involved in an altercation with

have consistently used this analysis in all forms of municipal liability cases.⁵⁴

Since *Monell*, courts have expanded the possibilities for municipal liability.⁵⁵ In *Pembaur v. City of Cincinnati*,⁵⁶ the Court held that municipalities can be liable under § 1983 based on a single unconstitutional decision by a final policymaker, rather than requiring a concerted action on the part of the municipality.⁵⁷ In *Pembaur*, a physician blocked the door to his office, refusing to allow county deputy sheriffs in to serve a subpoena.⁵⁸ The deputy sheriffs consulted with police department officials and the county prosecutor, who told the deputy sheriffs to “go in and get [the witnesses].”⁵⁹ Pursuant to this order, the sheriffs chopped down the door, searched the office, and detained two individuals.⁶⁰ The physician then brought a § 1983 claim against the city, claiming that the search of his office was a Fourth Amendment violation.⁶¹ The Supreme Court agreed that the sheriffs’ search violated the plaintiff’s constitutional rights and held that the action of the prosecutor could fairly be attributed to the municipality; the Court thus established that the

one of the plaintiffs. *Id.* at 1153. When the officer lost the fight, he called his on-duty colleagues for help. *Id.* The on-duty police officers went to the scene and joined the fracas, severely injuring several of the plaintiffs and killing one. *Id.* In performing the three-part test, the First Circuit held that a jury could find that the city had a policy of providing “grossly and flagrantly deficient” training. *Id.* at 1161. Next, the court held that a jury would be warranted in finding that this insufficient training amounted to deliberate indifference to the possibility of constitutional violations. *Id.* at 1162. Finally, the court found sufficient evidence to show that the lack of training caused the constitutional violation in question. *Id.*

54. See, e.g., *Amnesty America v. Town of West Hartford*, 361 F.3d 113, 126 (2d Cir. 2004) (phrasing test as whether actions of employees “represent the conscious choices of the municipality”); *Buffington v. Baltimore County*, 913 F.2d 113, (4th Cir. 1990) (refusing to hold municipality liable where municipality’s policy, if followed, would have prevented violation); *Bordanaro*, 871 F.2d at 1159-63 (articulating and using three-part test for municipal liability).

55. See *City of Canton v. Harris*, 489 U.S. 378, 389-90 (1989) (expressly lifting *Monell*’s strict causation requirement).

56. 475 U.S. 469 (1986).

57. *Id.* at 480 (recognizing municipal liability may rest on final policymaker’s single decision). The Court noted the *Monell* requirement that § 1983 municipal liability must hinge on acts fairly attributable to the municipality itself. *Id.* at 479. The Court then explained that a single policymaker sometimes has the power to make decisions that can fairly be attributed to the municipality and concluded that such decisions may form the basis for municipal liability. *Id.* at 480.

58. *Id.* at 472 (describing deputy sheriffs’ attempts to serve witnesses in physician’s office). When the deputy sheriffs tried to enter the house, the physician blocked the door and stated that they had no legal right to enter. *Id.*

59. *Id.* at 472-73 (noting progression of events after physician blocked door).

60. *Pembaur*, 475 U.S. at 472-73 (describing deputy sheriffs’ forcible entry into physician’s office).

61. *Id.* at 473-74 (outlining actions of sheriffs). The physician was convicted of obstructing police operations and promptly sued both the city and relevant city employees under § 1983. *Id.* Even though the search was conducted pursuant to a valid arrest warrant, it amounted to a Fourth Amendment violation because the arrest warrant was for a third party, not for the owner of the office. *Id.* at 474. It is well-established that a search of a home is constitutionally unreasonable unless made pursuant to a valid warrant. *Steagald v. United States*, 451 U.S. 204, 211-12 (1981). Just after *Pembaur* filed his suit, the Supreme Court determined that an arrest warrant for a third party—rather than a resident of the home—is not sufficient to render the search constitutionally reasonable. *Id.* at 213-14. The *Pembaur* Court applied this principle to the situation at hand. 475 U.S. at 474.

municipality could be liable for the prosecutor's actions.⁶² In such a circumstance, the municipality is not held vicariously liable, as is prohibited under *Monell*, but rather is held liable for an action made on its behalf through the policymaker.⁶³

These forms of liability, laid out in *Monell* and *Pembaur* all share the requirement that the municipality itself directly caused the constitutional violation.⁶⁴ In both types of *Monell* liability, the municipality promoted an unconstitutional practice.⁶⁵ In *Pembaur*, a representative of the municipality ordered a state official to commit a constitutional violation.⁶⁶ The Court strictly adhered to the idea that a municipality could only be liable if the municipality itself committed the constitutional violation.⁶⁷ They did not relax this policy until the landmark decision of *City of Canton v. Harris*.⁶⁸

C. Municipal Liability Where Municipality's Actions Are Constitutional, but Lead to Constitutional Violation

In *City of Canton*, the court first recognized that a municipality may be liable for constitutional violations where the municipality's action was not, itself, unconstitutional.⁶⁹ In *City of Canton*, police arrested the plaintiff and brought her to the police station, where she collapsed so often that the police eventually left her lying on the floor.⁷⁰ The police never called for medical

62. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 477-480 (1986) (determining single action by final policymaker can give rise to liability). The Court categorized *Monell* as "a case about responsibility" and determined that certain individuals' actions were tantamount to being municipal actions. *Id.* at 478. Because the Court determined that, in certain circumstances, an individual's decision rises to the level of official policy, the court reasoned that *Monell* permits municipal liability in these circumstances. *Id.* at 480-81.

63. *Id.* at 480 (analogizing single act of policymaker to legislative body, as both potentially subject to municipal liability). The Court specifically held "that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 483.

64. See *Collins*, *supra* note 21 at 96, 102-03 (observing under both *Monell* and *Pembaur*, municipality must promulgate unconstitutional policy).

65. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1977) (allowing municipal liability only where violation results from execution of municipal policy or custom).

66. See *Pembaur*, 475 U.S. at 483 (creating municipal liability only where final policymaker chooses unconstitutional course of action).

67. See, e.g., *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820 (1985) (observing municipality must be "moving force" behind constitutional violation); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (holding municipality liable where it causes constitutional violation); *Monell*, 436 U.S. at 694 (requiring municipality to be "moving force" behind constitutional violation to find liability).

68. 489 U.S. 378, 389-90 (1989) (lifting strict causation requirement).

69. *City of Canton*, 489 U.S. at 388 (holding municipality liable when "failure to train amounts to deliberate indifference to rights"). The Court noted that it had previously declined to answer the question of failure-to-train liability in two earlier cases. *Id.* at 386. The Court, however, observed that all of the appellate courts that had addressed the question had recognized failure to train as a basis for municipal liability. *Id.* at 387 n.6.

70. *Id.* at 381 (recounting plaintiff's condition and officers' response). By the time that the plaintiff had arrived at the police station, was no longer sitting in the seat of the police wagon, but was on the floor instead.

attention.⁷¹ The plaintiff did not receive medical care until she was released to her family, at which point she was hospitalized for a week.⁷² The plaintiff later sued both the city and its officers, claiming that she was deprived of her Fourteenth Amendment due process right to receive adequate medical care.⁷³ The Supreme Court determined that the municipality could be held liable based on its failure to properly train its officers on the medical needs of arrestees.⁷⁴ The Court thus recognized, for the first time, that municipalities could be held accountable for making a facially constitutional decision—not training employees—that lead to a constitutional violation.⁷⁵

Although this decision departed from *Monell*'s strict causation requirement, the Court attempted to maintain the spirit behind *Monell* by imposing a "degree of fault" requirement.⁷⁶ The Court held that where the municipality's actions were constitutional, it can only be liable if its constitutional actions amounted to "deliberate indifference" to the plaintiff's constitutional rights.⁷⁷ This requirement is meant to ensure that the municipality's faulty training program was the cause of the constitutional violation, meaning that the injury could have been avoided had the training problem not been deficient.⁷⁸

The Court provided two situations where "deliberate indifference" might be found.⁷⁹ A municipality may be considered deliberately indifferent if there is

Id.

71. *Id.* (describing scene at booking and plaintiffs' ill state).

72. *Id.* (characterizing plaintiff's eventual medical treatment as evidence of her condition at booking).

73. *City of Canton v. Harris*, 489 U.S. 378, 381 (1989) (noting officers' negligent treatment of obviously ill detainee constituted key complaint).

74. *Id.* at 391 (outlining questions lower court must answer on remand). The Court stated that the lower court's application of failure-to-train liability was overly broad because it required only gross negligence of the municipality, whereas the rule required deliberate indifference. *Id.* at 382, 388. The Court therefore remanded the case in light of this new possibility for municipal liability. *Id.* at 393.

75. *Id.* at 387 (refusing to limit liability only to situations where municipal policy facially unconstitutional).

76. *Id.* at 388-89 (restricting liability to situations where municipality acting with deliberate indifference).

77. *City of Canton*, 489 U.S. at 389 (recalling *Monell* requirement that municipality be "moving force" behind constitutional violation). The Court determined that the "deliberate indifference" standard is the most consistent with *Monell*'s requirement. *Id.* at 388-89. Because a municipality traditionally must make a conscious choice before liability can arise, a failure to train must amount to a deliberate action before it can give rise to liability. *Id.* at 389. The deliberate indifference standard does not apply to the underlying constitutional violation. *Id.* at n.8. Prior case law should be used to determine the degree of fault necessary to give rise to the underlying violation. *Id.* Deliberate indifference applies only to the degree of municipal culpability required with respect to the decision not to train subordinates of the municipality. *Id.*

78. *Id.* at 390-91 (describing level of causation required); *see also infra* note 84 (outlining causation problems discussed by *City of Canton* Court).

79. *City of Canton v. Harris*, 489 U.S. 378, 390-91 (1989) (discussing requirements as means of limiting potentially limitless litigation based on failure to train). The Court acts very carefully with respect to failure-to-train cases in light of the possibility that plaintiffs will attempt to bring actions merely because an incident could have been avoided if the officer had gone through different training, which is nearly always the case. *Id.* at 391. *See also* *Dunn v. City of Elgin*, 347 F.3d 641, 646 (7th Cir. 2003) (recognizing *City of Canton*'s two methods of finding deliberate indifference); *Brown v. Shaner*, 172 F.3d 927, 931 (6th Cir. 1999) (adopting *City of Canton*'s means of establishing deliberate indifference).

an obvious need for training in a particular area but that training has not been provided.⁸⁰ In *City of Canton*, the Court provided as an example an obvious need to train police in the constitutional limits of use of deadly force because “city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons.”⁸¹ The second means of finding deliberate indifference is by constructive notice of a need to train provided by a history of constitutional violations in a particular situation.⁸² Although the Court did not provide an example of such a pattern, it described a situation where “the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are ‘deliberately indifferent’ to the need.”⁸³

As a part of the “degree of fault” requirement, a plaintiff must show that the municipality’s failure to train caused the injury.⁸⁴ This requirement has been

80. *City of Canton*, 489 U.S. at 390 (establishing failure to train in light of obvious need for training as basis for liability); see *Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 409-11 (1997) (recognizing obviousness basis for failure to train but rejecting same in failure to properly screen); *A.M. v. Luzerne County Juvenile Det. Ctr.*, 372 F.3d 572, 582-83 (3d Cir. 2004) (finding issue of fact regarding existence of obvious need to train). The court in *A.M.* found a triable issue of fact as to the existence of an obvious need for training of child-care workers in order to protect a resident from deprivation of his constitutional right to security and well-being. *A.M.*, 372 F.3d at 582-83; see also *Miranda v. Clark County*, 319 F.3d 465, 471 (9th Cir. 2003) (finding obvious need to train state defense lawyers to handle capital murder cases). One problem with establishing deliberate indifference through obvious need to train is that the municipality cannot be held liable if the need is overly obvious, because the officer should have known the right thing to do, even without any training. *Walker v. New York City Police Dep’t*, 2000 WL 233701 at *1 (2d Cir. 2000). In *Walker*, a district court judge held that a municipality would not be liable for failing to train its officers not to perjure themselves, reasoning that anyone should know not to do so. 1996 WL 391564 at *5-6 (E.D.N.Y. 1996). The Second Circuit affirmed the court’s reasoning. *Walker*, 2000 WL 233701 at *1.

81. *City of Canton*, 489 U.S. at 390 n.10 (providing example of obvious need to train).

82. *Id.* at 388-89 (requiring municipality constitute driving force behind constitutional violation); *Bordanaro v. McLeod*, 871 F.2d 1151, 1159-61 (1st Cir. 1989) (outlining problems of training program, which led to municipal liability). The *Bordanaro* court noted multiple problems with the municipality’s training of police officers, including the outdated nature of the rules and regulations distributed to the officers. *Bordanaro*, 871 F.2d at 1159-61. The court also noted that the municipality actively discouraged officers from seeking extra training, and that such discouragement could lead a court to find that the municipality had constructive notice of a need to train, which it deliberately disregarded. *Id.* at 1161-62. See also *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1319 (10th Cir. 2002) (finding deliberate indifference where prison guards not trained for common situation of obsessive compulsive prisoners).

83. *City of Canton*, 489 U.S. at 390 n.10 (clarifying situation where pattern of constitutional violations may lead to municipal liability). These constitutional violations need not be pervasive throughout the municipality, as multiple violations by one individual can be enough to establish deliberate indifference. See *Vann v. City of New York*, 72 F.3d 1040, 1050-51 (allowing possibility of liability where municipality fails to discipline problematic police officer).

84. *City of Canton*, 489 U.S. at 391 (noting plaintiff, on remand, must prove deficient training caused constitutional violation). The Court states that even if the plaintiff proves that a deficient policy existed, liability can only attach if the municipality “actually cause[d] [the] injury.” *Id.* at 390. The Court hoped to alleviate the possibility of limitless liability described in *City of Oklahoma City v. Tuttle*:

Obviously, if one retreats far enough from a constitutional violation some municipal ‘policy’ can be identified behind almost any . . . harm inflicted by a municipal official; for example, [a police officer] would never have killed Tuttle if Oklahoma City did not have a ‘policy’ of establishing a

interpreted strictly in *City of Canton*-type cases since the Supreme Court's decision in *Board of County Commissioners of Bryan County v. Brown*.⁸⁵ In *Brown*, the issue was whether a municipality could be held liable for a constitutional violation caused by a police officer who had been hired despite having a criminal history.⁸⁶ Essentially, the plaintiff sought to impose liability on the municipality for having made a poor hiring decision.⁸⁷ The Court noted the similarity to *City of Canton*, namely that the municipality's constitutional action, improperly screening job applicants, led to a constitutional violation.⁸⁸ The Court, however, distinguished this failure to screen case from the *City of Canton* failure to train cases by reasoning that the failure to screen cases can more easily lead to municipal liability in the absence of fault.⁸⁹ The Court explained that nearly all plaintiffs could state that their injuries would not have

police force. But *Monell* must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was 'caused' by the municipal 'policy.'

Id. at 389 n.9 (quoting *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985)). In *City of Canton*, the Court remanded the case for determination of causation, but warned that the plaintiff must show more than that a particular officer was poorly trained or that the violation could have been avoided with different training. 489 U.S. at 390-91. Instead, the Court stressed that the plaintiff must show that the violation would not have occurred under an adequate training program. *Id.* at 391.

85. 520 U.S. 397 (1997); see COLLINS, *supra* note 21 at 108 (noting *Brown*'s potential applicability to all failure-to-train cases).

86. *Brown*, 520 U.S. at 401 (recalling officer's criminal record). The plaintiff alleged that her constitutional rights would not have been violated if the officer had not been hired. *Id.* In addition, the officer would not have been hired if the municipality had adequately screened the officer prior to hiring him. *Id.*

87. *Id.* at 410 (establishing heightened causation requirement in "bad hiring" cases). *Brown* involved a hiring decision in which a reserve county deputy was hired without any investigation into his background. *Id.* at 401. The reserve county deputy had a record of both driving-related misdemeanors and other misdemeanors, such as assault and battery. *Id.* The deputy, while on duty, assaulted an innocent passenger in a car that was stopped for speeding. *Id.* at 400-01. As a result of this assault, the passenger sued the municipality, alleging that the municipality was liable under § 1983 for improperly screening the deputy before hiring him. *Id.* at 401. The Court found that the plaintiff's injuries were not the "plainly obvious consequence" of this officer's history. *Id.* at 412-13.

88. *Id.* at 410 (recognizing *City of Canton*'s deliberate indifference standard applicable in instant case).

89. *Id.* (observing danger in holding municipality liable for bad hiring decision). The Court noted that where the alleged municipal action is a poor hiring decision, there is a potential for limitless liability. *Id.* Nearly all plaintiffs could state that their injuries would not have occurred "but-for" the hiring of some individual. *Id.* In order to limit this liability, the Court developed a strict causation requirement:

The fact that inadequate scrutiny of an applicant's background would make a violation of rights more *likely* cannot alone give rise to an inference that a policymaker's failure to scrutinize the record of a particular applicant produced a specific constitutional violation. . . . Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.'

Id. at 410-11.

occurred “but-for” the hiring of some individual.⁹⁰ In order to counteract this potential for limitless litigation, the *Brown* Court decided that liability can only be found where the municipality was deliberately indifferent to the possibility of a specific constitutional wrong occurring.⁹¹ In other words, the constitutional violation must be the “plainly obvious consequence” of the decision in order for municipal liability to attach.⁹² The Court summarized its holding by stating:

in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the possibility that an officer lacking specific tools to handle that situation will violate citizens’ rights could justify a finding that policymakers’ decision not to train the officer reflected ‘deliberate indifference’ to the obvious consequence of the policymakers’ choice – namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation – that the municipality’s indifference led directly to the very consequence that was so predictable.⁹³

Although the Court specifically limited its holding to cases where the municipality made bad hiring decisions, many lower courts have applied this causation requirement to all *City of Canton*-type cases.⁹⁴ This means that in any such case a plaintiff may be required to show a heightened causal relationship between the municipal policy and the constitutional violation.⁹⁵

III. *CARSWELL V. BOROUGH OF HOMESTEAD*: AN ATTEMPT TO EXPAND MUNICIPAL LIABILITY

In *Carswell v. Borough of Homestead*,⁹⁶ the Third Circuit was presented

90. *Id.* (stating “but-for” liability not sufficiently close causal link).

91. *Bd. of County Comm’rs of Bryan County v. Brown*, 520 U.S. 397, 410-11 (1997) (rejecting liability where improper screening of potential employee merely increased likelihood of constitutional violation); *see also City of Canton*, 489 U.S. at 391 (noting courts must find insufficient training “closely related” to constitutional violation).

92. *Brown*, 520 U.S. at 412-13 (finding municipal liability only where unconstitutional action linked closely to facially constitutional earlier decision).

93. *Id.* at 409 (providing outline for determining whether obvious need exists).

94. *See, e.g., McDowell v. Brown*, 392 F.3d 1283, 1292 (11th Cir. 2004) (utilizing *Brown*’s heightened standard where municipality failed to adequately fund prison); *Carr v. Castle*, 337 F.3d 1221, 1229 (10th Cir. 2003) (requiring heightened standard whenever plaintiff alleges deliberate indifference to obvious need); *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001) (applying *Brown*’s heightened standard to any situation where “facially innocuous policy” leads to constitutional violation).

95. *See supra* note 94 and accompanying text (providing examples of situations where courts applied heightened causal relationship in *City of Canton*-type cases).

96. 381 F.3d 235 (3d Cir. 2004).

with an opportunity to expand municipal liability to cover situations where a municipality fails to properly equip police officers.⁹⁷ The *Carswell* plaintiff had been repeatedly abused by her husband and obtained a restraining order against him.⁹⁸ After her husband violated the restraining order, plaintiff applied for a second restraining order and filed an indirect criminal complaint.⁹⁹ The events surrounding the lawsuit occurred about one month later.¹⁰⁰ On the night in question, the plaintiff's husband violated the restraining order four times and each time the plaintiff called the police.¹⁰¹ The police were unable to apprehend her husband on each occasion.¹⁰² After the fourth incident, however, a police officer spotted the husband.¹⁰³ At that time, two officers cornered him, ordering him to lie down, but he turned and ran, sparking a chase.¹⁰⁴ One officer blocked the path of the fleeing husband with his police car, got out of the cruiser and ordered the husband to stop.¹⁰⁵ When the husband refused to stop running toward the police car, the police officer, fearing for his safety, drew his weapon and shot him.¹⁰⁶

As a result of this shooting, the decedent's widow brought suit against the police officer, the police chief and the municipality under § 1983, alleging that the officer's use of deadly force violated her husband's constitutional rights.¹⁰⁷

97. *Id.* at 244 (analyzing question of whether municipality can be liable for failing to properly equip police officers).

98. *Id.* at 237 (noting decedent presented "an immediate and present danger of abuse" to plaintiff and their children).

99. *Id.* at 237-38 (describing circumstances surrounding filing of criminal complaint). Specifically, in the time period between the first restraining order and the filing of the complaint, the plaintiff's husband violated the restraining order on three occasions. *Id.* First, in July 1999, plaintiff's husband went to her home and punched her. *Id.* at 237. He later physically damaged her house and sexually assaulted her. *Id.* at 237-38. Finally, on a third occasion, her husband punched her in the face. *Id.* at 238. Just after the criminal complaint was filed, plaintiff called the police when her husband violated the restraining order again. *Id.* At this time, plaintiff's husband "rammed" a responding police cruiser. *Id.*

100. *Carswell*, 381 F.3d at 238 (outlining events of November 17-18, 1999).

101. *Id.* (recalling husband's break-in). The plaintiff's husband broke into the plaintiff's house, ransacking the kitchen and destroying the television set. *Id.*

102. *Carswell v. Borough of Homestead*, 381 F.3d 235, 238 (3d Cir. 2004) (depicting police response to plaintiff's repeated calls).

103. *Id.* (stating police officer remained at plaintiff's house after third incident). By the time that the fourth incident occurred, the plaintiff had armed herself with a knife and a police officer was stationed at the house to protect the plaintiff. *Id.* Even with this additional protection, the husband escaped after the fourth break-in. *Id.* Two hours after the fourth incident, a police officer spotted the husband and radioed for help. *Id.*

104. *Id.* (describing pursuit). Two officers chased the husband and cornered him on a neighbor's porch. *Id.* At that time, one of the officers drew a gun, but the husband escaped. *Id.*

105. *Id.* (outlining progression of chase).

106. *Carswell*, 381 F.3d at 238 (describing husband's actions). The husband ran toward the police car which was blocking his path with his hands up. *Id.* The officer testified that he knew that the husband's hands were empty at the time, but that he shot the husband because he did not know whether the husband was armed. *Id.*

107. *Id.* at 237 (noting plaintiff's allegations of unconstitutional police actions). The case against the officer was dismissed by the district court at the close of plaintiff's evidence. *Id.* The holding was affirmed by the Third Circuit, which granted the officer qualified immunity. *Id.* at 244. In general, to grant qualified immunity, a court must ask two questions: did a constitutional violation occur, and, if so, was the

In her suit against the municipality, the plaintiff offered evidence showing that the municipality did not provide police officers with a baton or pepper spray.¹⁰⁸ She also introduced a statement made by the police officer, saying that “he would not have pulled his gun from the holster” if he had had a less-lethal alternative.¹⁰⁹ At the close of the plaintiff’s evidence, the district court granted the defendants’ motion for judgment as a matter of law.¹¹⁰ On appeal, the plaintiff presented the court with the question of whether the municipality could be held liable for failing to equip its officers with less-lethal weapons.¹¹¹ The court refused to impose such liability.¹¹²

To reach this conclusion, the court performed the analysis laid out by *Monell* and its progeny.¹¹³ The court assumed that the facts alleged by the plaintiff actually constituted a Fourth Amendment violation, namely that the use of deadly force was unreasonable under the circumstances.¹¹⁴ After finding a constitutional violation, the court analyzed whether the municipality improperly trained its officers, manifesting deliberate indifference toward the constitutional violation.¹¹⁵ The court concluded that the municipality had provided its police officers with adequate training in the use of deadly force and, thus, was not deliberately indifferent to the possibility of unconstitutional

constitutionality of the action clear at the time that the violation occurred. *Id.* at 241-42 (quoting *Wilson v. Layne*, 526 U.S. 603, 609 (1999)). The court stated that they did not believe that a constitutional violation occurred because “[a] reasonable officer would not be expected to take the risk of being assaulted by a fleeing man who was so close that he could grapple with him and seize the gun.” *Id.* at 243. The court, however, did not grant qualified immunity on this ground. *Id.* at 241. Instead, the court assumed, without deciding, that a constitutional violation occurred and granted qualified immunity because the constitutionality of the action was not clearly defined at the time of the incident. *Id.* at 244. *See infra* note 111 (discussing why case versus municipality can proceed even though officer received qualified immunity).

108. *Carswell v. Borough of Homestead*, 381 F.3d 235, 239 (3d Cir. 2004) (outlining weapons and training given to officers).

109. *Id.* (recalling officer’s testimony). The plaintiff presented expert testimony stating that the officer should not have drawn his gun, “but should have pushed, tackled, or tripped the fleeing suspect” because he knew the suspect was unarmed. *Id.* The court gave this evidence little weight, stating that the question of whether an action is constitutionally reasonable should be answered by a judge, not by an expert witness. *Id.* at 243-33.

110. *Id.* at 237 (recalling procedural history).

111. *Id.* at 244 (noting court must decide question of municipal liability notwithstanding grant of qualified immunity). The district court granted the municipality’s motion for judgment as a matter of law merely because of its qualified immunity determination. *Id.* The Third Circuit, however, noted that because the district court assumed that a constitutional violation had occurred, the court must inspect the municipality’s involvement in the violation before granting a judgment as a matter of law. *Id.* Thus, the court must determine whether the municipality improperly trained or improperly equipped its officers. *Id.*

112. *Carswell*, 381 F.3d at 245 (finding no evidence of deliberate indifference or causation).

113. *See supra* part II (describing *Monell*’s required analysis). The court performed a *City of Canton*-type analysis because the municipality’s alleged actions—failing to train or equip officers—were constitutional, but they led to unconstitutional actions. *Supra* part II.B.

114. *Carswell v. Borough of Homestead*, 381 F.3d 235, 241 (3d Cir. 2004) (assuming constitutional violation existed even though doubtful whether officer’s actions actually amounted to violation).

115. *Id.* at 245 (describing training received by officers on use of deadly force and “continuum of force”).

police shootings.¹¹⁶ The court, therefore, held that the municipality could not be liable under *City of Canton*.¹¹⁷

In answering the question of whether the municipality could be held liable for failing to equip its officers with less-lethal weapons, the court did not perform a full *City of Canton* analysis.¹¹⁸ Instead, the court distinguished “failure to train” from “failure to equip” and declined to impose liability in the latter situation based on public policy grounds, stating that the Fourth Amendment does not impose a mandated equipment list on police forces.¹¹⁹

The dissenting judge in *Carswell* took a different approach.¹²⁰ The dissenting judge first noted that the question of whether the municipality was deliberately indifferent was an issue of fact and therefore the majority should not have granted a judgment as a matter of law.¹²¹ He next observed that the issue at hand was not whether the municipality provided adequate training in the use of deadly weapons, but was rather whether the municipality provided police officers with adequate tools to perform their jobs.¹²² After framing the issue in this manner, the judge applied a *City of Canton* analysis to the question of the municipality’s policy of not equipping police officers with less-lethal weapons.¹²³ He concluded that a jury could reasonably find that the municipality was deliberately indifferent to an obvious need to equip, stating that

[i]t is obviously foreseeable that an officer who is equipped only with a lethal weapon, and trained only in the use of lethal force, will sooner or later have to

116. *Id.* (stating evidence presented did not show improper training). The court determined that the municipality’s training policy was not deliberately indifferent. *Id.* It also noted that the plaintiff did not show evidence of a pattern of constitutional violations that could have led to municipal liability. *Id.*

117. *Carswell*, 381 F.3d at 245 (holding, as matter of law, no municipal liability).

118. *Carswell v. Borough of Homestead*, 381 F.3d 234, 245 (3d Cir. 2004) (refusing to recognize municipal liability for failing to equip officers).

119. *Id.* (stating courts should not mandate type of equipment officers must use in various situations). The court held that it is not a “wise policy to permit every jury in these cases to hear expert testimony that an arrestee would have been uninjured if only the police had been able to use” some form of less lethal weapon. *Id.* In reaching this conclusion, the court relied heavily on *Plakas v. Drinski*. *Id.* at 243-44. In *Plakas*, a police officer shot a suspect who had escaped capture and was threatening to kill the police officer. 19 F.3d 1143, 1147 (7th Cir. 1994). The court found that the police officer’s use of force was reasonable under those circumstances. *Id.* Having found that the conduct was reasonable, the court noted that the Fourth Amendment does not require police officers to use the least amount of force necessary as long as the force used was reasonable. *Id.* Further, the court stated that the municipality is not required to equip police officers with a court-prescribed equipment list. *Id.* at 1150-51.

120. *Id.* at 247 (McKee, J. dissenting) (stating questions should have gone to jury because plaintiff established prima facie case).

121. *Id.* (observing majority’s mistake in deciding matter which should have gone to jury).

122. *Carswell*, 381 F.3d at 250 (stating majority failed to address issue submitted by plaintiff). The fact that the court has “never recognized municipal liability for a violation because of failure to equip police officers with non-lethal weapons” is irrelevant because the court has never been presented with the issue. *Id.* at 249.

123. *Id.* at 248-50 (finding Fourth Amendment violation and prima facie case for deliberate indifference and causation).

resort to lethal force in situations that officer believes could be safely handled using only non-lethal force under the Borough's own 'progressive force' policy. This record therefore presents that 'narrow range of circumstances, [where] the violation of federal rights [is] a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.'¹²⁴

For this reason, the dissenting judge determined that the question of municipal liability should have been submitted to the jury.¹²⁵

IV. WEAKNESSES IN THE *CARSWELL* COURT'S REASONING

The *Carswell* opinion can be criticized on a number of grounds.¹²⁶ First, as the dissent pointed out, findings of deliberate indifference and causation must be made by a jury, making a judgment as a matter of law inappropriate in all but the most obvious cases.¹²⁷ Second, the court proceeded through a *City of Canton* analysis only for the question of failure to train, not for the question presented by the plaintiff, failure to equip.¹²⁸ Instead, the court summarily rejected the possibility of municipal liability based on failure to equip without discussion.¹²⁹

In order to comply with precedent, the *Carswell* court should have conducted a full *City of Canton*-type analysis based on failure to equip.¹³⁰

124. *Carswell v. Borough of Homestead*, 381 F.3d 234, 249 (3d Cir. 2004) (quoting *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 409 (1997)). The judge noted that the plaintiff need not show a pattern of constitutional violations where the need to train is obvious. *Id.* at 250.

125. *Id.* at 251 (stating plaintiff entitled to new trial).

126. *See supra* notes 120-125 and accompanying text (describing mistakes noted by dissenting judge).

127. Fed. R. Civ. P. 50(a)(1) (defining when judgment as matter of law appropriate). Judgment as a matter of law should be granted only when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Id.* *See Carswell*, 381 F.3d at 247 (McKee, J. dissenting) (noting judgment as matter of law inappropriate where issue for jury exists); *see A.M. v. Luzerne Cty. Juvenile Detention Ctr.*, 372 F.3d 572, 588 (3d Cir. 2004) (calling existence of deliberate indifference "classic issue for the fact finder").

128. *See supra* notes 114-119 and accompanying text (describing court's analysis of failure to train and summary dismissal of failure to equip claims).

129. *Carswell*, 381 F.3d at 245 (refusing to recognize cause of action for failure to equip officers). Rather than proceeding through the appropriate analysis, the court stated, "we have never recognized municipal liability for a constitutional violation because of failure to equip police officers with non-lethal weapons. We decline to do so on the record before us." *Id.*

130. *Carswell v. Borough of Homestead*, 381 F.3d 235, 247 (3d Cir. 2004) (McKee, J. dissenting) (stating correct analysis: whether policy of poorly equipping officers constitutes deliberate indifference toward constitutional rights); *see supra* Part II (outlining framework for analyzing municipal liability cases). Although the *Carswell* court cites *Plakas v. Drinski*, *Plakas* is distinguishable. *Id.* at 245. In *Plakas*, the officer used deadly force against a suspect who was armed and attacking. 19 F.3d 1143, 1146 (7th Cir. 1994). Those facts fall well within *Garner's* boundary on Fourth Amendment reasonableness. *Id.* Because the officer had "probable cause to believe that the suspect pose[d] a significant threat of death or serious injury to the officer," deadly force was reasonable. *Id.* (quoting *Tenn. v. Garner*, 471 U.S. 1, 3 (1985)). The plaintiff argued that the municipality should be liable because it created the circumstances under which the use of force was reasonable. *Id.* at 1150. That argument has no merit under the facts of the case because deadly force was reasonable no

According to *Parratt*, the court should have asked two questions: was the act committed by a person acting under color of state law, and did the defendant's conduct deprive the decedent of his constitutional rights.¹³¹ The answer to the first question is straightforward under the *Carswell* facts because the act was committed by an on-duty police officer acting within the scope of his employment.¹³²

The second question is not so clear.¹³³ To determine whether the conduct deprived the decedent of his constitutional rights, *Monell* advises courts to ask if the conduct alleged amounted to a constitutional violation and, if so, did the defendant municipality's actions cause the deprivation.¹³⁴ Although the majority in *Carswell* expressed doubt that a constitutional violation occurred, the dissent noted that a constitutional violation could be found from the facts presented.¹³⁵ The majority observed that the test for a constitutional violation where a police officer uses deadly force to apprehend a suspect is a Fourth Amendment reasonableness test, "evaluated from the 'perspective of a reasonable officer on the scene.'"¹³⁶ Here, the officer on the scene stated that he would not have used his gun if he had had a less-lethal alternative.¹³⁷ This indicates that he did not think, at the time of the incident, that deadly force was reasonably necessary.¹³⁸ The officer's subjective perception on the scene could provide a jury insight into the objective reasonableness of the action and, consequently, could allow a jury to find a constitutional violation.¹³⁹ At the least, it raises a factual issue that makes judgment as a matter of law

matter what other options the officer had. *Id.* Moreover, because the court found no constitutional violation in *Plakas*, its discussion of municipal liability was mere dicta. *Id.* Conversely, in *Carswell*, the decedent was arguably unarmed when he was shot and the surrounding circumstances could indicate that the use of deadly force was unreasonable. 381 F.3d at 239. Under these facts, a full analysis of municipal liability was required. *Id.* at 247 (McKee, J. dissenting).

131. See *supra* note 39 and accompanying text (describing initial inquiries in § 1983 cases as described by *Parratt v. Taylor*).

132. COLLINS, *supra* note 21 at 19-21 (noting police officers acting under color of state law when acting within scope of job).

133. See *supra* notes 40-42 and accompanying text (outlining difficulties in determining whether municipality deprived plaintiff of constitutional rights).

134. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1977) (observing Congressional intent to hold municipalities liable only where municipality causes violation); see also, *City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989) (relaxing causation element and requiring only deliberate indifference toward constitutional violation).

135. See *Carswell*, 381 F.3d at 246 (McKee, J. dissenting) (stating officer's remarks allow jury to find unreasonable force).

136. *Carswell v. Borough of Homestead*, 381 F.3d 235, 240 (3d Cir. 2004) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)) (noting balancing test in determining constitutionality of force used by law enforcement officer); see *supra* notes 34-38 and accompanying text (describing balancing test required by Fourth Amendment).

137. *Carswell*, 381 F.3d at 239 (repeating officer's testimony).

138. *Id.* at 246 (McKee, J. dissenting) (noting officer likely knew he used excessive force).

139. *Id.* (stating officer's testimony sufficient to support finding of constitutional violation).

inappropriate.¹⁴⁰

Once the plaintiff established a constitutional violation, *Monell* instructs courts to determine whether a causal link existed between the municipality's conduct and that violation.¹⁴¹ *City of Canton* established that where, as here, the municipality did not directly commit the constitutional violation, the municipality still may be held liable if the municipality's policy was deliberately indifferent to the possibility of constitutional violations.¹⁴² Here, the municipality had a stated policy of not supplying officers with less-lethal weapons unless the officer specifically requested those weapons.¹⁴³ Thus, the court must grapple with whether this policy could allow a jury to find deliberate indifference toward the possibility of constitutional violations.¹⁴⁴ *City of Canton* stated that deliberate indifference could be shown through the municipality's disregard of either a pattern of constitutional violations or an obvious likelihood of constitutional violations.¹⁴⁵

The plaintiff in *Carswell* did not show a pattern of constitutional violations, so the court should have analyzed whether the municipality's policy of not providing officers with less-lethal alternatives amounted to deliberate indifference toward an obvious likelihood of constitutional violations.¹⁴⁶ This standard was expressly laid out in *Brown*, where the Supreme Court stated that an obvious need to act occurs where "a violation of federal rights [is] a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations."¹⁴⁷ Although the *Brown* Court stated that an obvious need exists only in a "narrow range or circumstances," whether the facts of a given case fall within this range is a question for the jury.¹⁴⁸

The *Carswell* court could have found that the facts presented could allow a jury to find deliberate indifference toward an obvious need to train.¹⁴⁹ Police officers are frequently in situations where less-lethal weapons would be the

140. See *supra* note 127 and accompanying text (describing standard for judgment as matter of law).

141. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1977) (holding strict causal link required to find municipal liability).

142. *City of Canton v. Harris*, 489 U.S. 378, 390 (1989) (developing deliberate indifference standard).

143. *Carswell v. Borough of Homestead*, 381 F.3d 235, 239 (3d Cir. 2004) (observing municipality did not routinely provide officers with baton or pepper spray).

144. *City of Canton*, 489 U.S. at 388 n.7 (noting lower courts' difficulty in determining degree of fault requirements).

145. *Id.* at 390 n.10 (explaining two different means of finding deliberate indifference).

146. *Carswell*, 381 F.3d at 248-50 (McKee, J. dissenting) (performing "obviousness" analysis on facts given). If the plaintiff had shown a pattern of constitutional violations, the municipality would have been on notice and if it had not corrected the situation, it would be liable. *City of Canton*, 489 U.S. at 390 n.10.

147. *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 409 (1997) (stating deliberate indifference test); see *supra* note Part II.C (explaining deliberate indifference test).

148. *Carswell*, 381 F.3d at 247 (noting deliberate indifference question of fact for jury).

149. *Carswell v. Borough of Homestead*, 381 F.3d 235, 249 (3d Cir. 2004) (McKee, J. dissenting) (observing municipal policy necessarily forces officers to use excessive force "sooner or later").

best option.¹⁵⁰ In addition to the situation presented in *Carswell*, police are frequently called on to diffuse situations with emotionally disturbed individuals, for example.¹⁵¹ Because these situations arise frequently and because police are trained to use the least amount of force necessary in any given situation, it is obviously foreseeable that, at some point, police officers will be in a position of unreasonably using deadly force because that was their only option.¹⁵² Even if a court found that the facts were not clear enough to make a determination as a matter of law, the question is certainly close enough to be submitted to a jury.¹⁵³

V. CONCLUSION

The *Carswell* facts presented a novel question of law, whether a municipality can be held liable for failing to equip officers with less-lethal weapons. Rather than applying precedent laid out in *Monell, City of Canton* and their progeny, however, the court summarily denied the possibility for this form of liability. Rather than repeat this summary rejection, a court facing this question should start by asking whether the conduct deprived the individual of his constitutional rights. Next, the court should determine whether the municipality was deliberately indifferent toward the possibility of such a deprivation. In answering this question, a court should decide whether a policy of poorly equipping officers exists, and whether that policy can be attributable to the municipality. The last question should be answered by determining whether the plaintiff advanced evidence either that the municipality ignored a pattern of constitutional violations or that the municipality ignored an obvious need to train. Because these are questions of fact, courts should be wary of granting judgment as a matter of law.

150. See *id.* (describing situation of advancing, unarmed individual and noting officer's desire to use less-lethal weapons); Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261 (2003) (describing police dealings with emotionally disturbed persons).

151. Avery, *supra* note 150, at 262-63 (detailing frequency with which officers come into contact with emotionally disturbed individuals). This situation arises in about seven percent of all police calls nationwide, making it nearly certain that an officer will be faced with this scenario at some point. *Id.* In dealing with emotionally disturbed individuals, police are cautioned that the individuals' response may be "delayed or inappropriate". *Id.* at 292. See *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989) (providing example of obviously foreseeable situation). According to *City of Canton*, the question of municipal liability must focus on the "adequacy of the training program in relation to the tasks the particular officers must perform." *Id.* at 390.

152. See Avery, *supra* note 150 at 262-65 (discussing frequency with which police officers encounter emotionally disturbed individuals). See also *Carswell*, 381 F.3d at 248-49 (describing municipality's "progressive force" policy). The municipality's "progressive force" policy instructs police officers to use "the minimum amount of force that is necessary." *Id.* According to the officer's own testimony, he violated the policy by using more force than he thought necessary because he was ill-equipped to handle the situation. *Id.* at 250.

153. See *supra* note 127 and accompanying text (describing deliberate indifference as question for fact finder).

2005] *MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983: LESS-LETHAL WEAPONS* 205

By not performing this analysis, the *Carswell* court foreclosed any possibility of municipal liability based on failure to train in the Third Circuit. In so doing, the court implicitly both encouraged courts to provide police officers with minimal equipment and condoned police officers' unreasonable use of deadly force. Instead of an abrupt denial of liability, the court should have proceeded through the analysis set out in *City of Canton* and remanded the case for jury determinations.

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