SECTION 1983: BASIC PRINCIPLES, INDIVIDUAL AND ENTITY LIABILITY

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I. PRELIMINARY PRINCIPLES

A. Deprivation of a Federal Right

Title 42 U.S.C. § 1983 provides 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 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.

Note that a plaintiff must assert the violation or deprivation of a right secured by federal law. The Supreme Court has made clear, for example, that an officer's violation of state law in making an arrest does not make a warrantless arrest unreasonable under the Fourth Amendment where the arrest was for a crime committed in the presence of the arresting officer. ***Virginia v.* Moore**, 128 S. Ct. 1598, 1607 (2008). *See also* ***Taake v. County of Monroe***, 530 F.3d 538, 542 (7th Cir. 2008) ("Our caselaw already explains that mere breaches of contract by the government do not support substantive due process claims under the Constitution, . . . but we will explain it again, for the sake of future litigants who may think it a good idea to bring regular state-law contract claims to federal court *via* § 1983. When a state actor breaches a contract it has with a private citizen, and the subject matter of that contract does not implicate fundamental liberty or property interests, the state acts just like any other contracting private citizen . . . . [T]he proper tribunal to adjudicate issues arising from the contract (or alleged contract) is a state court . . . ."); ***Wilder v. Turner***, 490 F.3d 810, 814(10th Cir.2007) ("Of course a 'violation of state law cannot give rise to a claim under Section 1983.' *Marshall v. Columbia Lea Regional Hosp.,* 345 F.3d 1157, 1164 (10th Cir.2003). 'Section 1983 does not ... provide a basis for redressing violations of *state law,* but only for those violations of *federal law* done under color of state law.' *Jones v. City and County of Denver,* 854 F.2d 1206, 1209 (10th Cir.1988). 'While it is true that state law with respect to arrest

is looked to for guidance as to the validity of the arrest since the officers are subject to those local standards, it does not follow that state law governs.' *Wells v. Ward,* 470 F.2d 1185, 1187 (10th Cir.1972). Nor, perhaps more importantly, are we bound by a state court's interpretation of federal law-in this case the Fourth Amendment."); ***Steen v. Myers***, 486 F.3d 1017, 1023 (7th Cir. 2007) ("The question of whether Myers's training indicated that he should stop the pursuit likewise does not raise questions that implicate the Constitution. Various sections of the pursuit manual are quoted by both sides to support arguments about whether Myers complied with department directives. As the Court in *Lewis* noted, however, a failure to comply with departmental policy does not implicate the Constitutional protections of the Fourteenth Amendment."); ***Andujar v. Rodriguez***, 480 F.3d 1248, 1252 n.4 (11th Cir. 2007) ("Whether a government official acted in accordance with agency protocol is not relevant to the Fourteenth Amendment inquiry. . . Thus, Andujar's argument that a City of Miami Rescue Policy required Newcomb and Barea to transport Andujar to a treatment facility, even if correct, is without consequence."); ***United States v. Laville***, 480 F.3d 187, 196 (3d Cir. 2007) ("[W]e hold that the unlawfulness of an arrest under state or local law does not make the arrest unreasonable *per se* under the Fourth Amendment; at most, the unlawfulness is a factor for federal courts to consider in evaluating the totality of the circumstances surrounding the arrest."); ***Thompson v. City of Chicago***, 472 F.3d 444, 455 (7th Cir. 2006) ("Whether Officer Hespe's conduct conformed with the internal CPD General Orders concerning the use of force on an assailant was irrelevant to the jury's determination of whether his actions on December 5, 2000 were 'objectively reasonable' under the Fourth Amendment. It may be that Officer Hespe's possible violation of the CPD's General Orders is of interest to his superiors when they are making discipline, promotion or salary decisions, but that information was immaterial in the proceedings before the district court and was properly excluded. Instead, the jury in all probability properly assessed the reasonableness of Officer Hespe's split-second judgment on how much force to use by considering testimony describing a rapidly evolving scenario in which Thompson attempted to evade arrest by leading the police on a high speed chase, crashed his car, and actively resisted arrest."); ***Hannon v. Sanner***, 441 F.3d 635, 638 (8th Cir. 2006) ("Hannon's action is premised on an alleged violation of the constitutional rule announced in *Miranda* and subsequent decisions. The remedy for any such violation is suppression of evidence, which relief Hannon ultimately obtained from the Supreme Court of Minnesota. The admission of Hannon's statements in a criminal case did not cause a deprivation of any 'right' secured by the Constitution, within the meaning of 42 U.S.C. § 1983."); ***Bradley v. City of Ferndale***, 148 Fed.Appx. 499, 2005 WL 2173780, at *6 (6th Cir. Sept. 8, 2005)

("[T]he violation of city policy is not in and of itself a constitutional violation under 42 U.S.C.§ 1983."); ***Waubanascum v. Shawano***, 416 F.3d 658, 667 (7th Cir.2005) ("Waubanascum suggests that Shawano County showed deliberate indifference by its 'long-standing custom of granting courtesy licenses without conducting investigations of the applicants.' Thus, he argues, 'Shawano County's policy was deliberately indifferent to a known risk to foster children.' Waubanascum seems to propose that state laws and regulations assume that failure to perform background checks necessarily will expose foster children to risk, thus constituting deliberate indifference. This argument misstates the legal standard, because it sidesteps the requirement that there be knowledge or suspicion of actual risk and substitutes the possibility of risk arising from the county's custom. Undoubtedly, foster children would be exposed to a heightened degree of risk if foster license applicants were subjected to no background checks at all. We may assume that it is this very concern that underlies Wisconsin's laws and regulations requiring such background checks before a foster license may be granted. But a failure to abide by a general statutory requirement for background checks cannot substitute for the requirement of actual knowledge or suspicion in the foster home context. . . . As noted, it is unclear that Shawano County actually did violate Wisconsin law in effect at the time that the county granted Fry the courtesy foster license. But in any event, state law does not create a duty under the federal constitution, so even if Shawano County failed to abide by Wisconsin law, this would not by itself amount to a violation of Waubanascum's due process rights."); ***Tanberg v. Sholtis,*** 401 F.3d 1151, 1164, 1165 (10th Cir. 2005) ("Although plaintiffs frequently wish to use administrative standards, like the Albuquerque SOPs, to support constitutional damages claims, this could disserve the objective of protecting civil liberties. Modern police departments are able--and often willing--to use administrative measures such as reprimands, salary adjustments, and promotions to encourage a high standard of public service, in excess of the federal constitutional minima. If courts treated these administrative standards as evidence of constitutional violations in damages actions under § 1983, this would create a disincentive to adopt progressive standards. Thus, we decline Plaintiffs' invitation here to use the Albuquerque Police Department's operating procedures as evidence of the constitutional standard. The trial court's exclusion of the SOPs was particularly appropriate because Plaintiffs wished to admit not only evidence of the SOPs themselves, but also evidence demonstrating that the APD found that Officer Sholtis violated the SOPs and attempted to discipline him for it. Explaining the import of these convoluted proceedings to the jury would have been a confusing, and ultimately needless, task. The Albuquerque Chief of Police followed the recommendation of an internal affairs investigator to discipline Officer Sholtis

both for making an impermissible off-duty arrest and for use of excessive force. An ad hoc committee subsequently reversed this decision. Additional testimony would have been necessary to help the jury understand the significance of these determinations and the procedures used to arrive at these contradictory results. This additional testimony explaining the procedures used at each step in the APD's investigation and decision-making would have led the jury ever further from the questions they were required to answer, and embroiled them in the dispute over whether Officer Sholtis's actions did or did not violate the SOPs. At the end of this time-consuming detour through a tangential and tendentious issue, the jury would have arrived at the conclusion that the APD itself seems to have been unable to resolve satisfactorily the question whether Plaintiffs' arrest violated the APD SOPs. . . . The similarity of the SOP addressing excessive force to the objective standard employed by state and federal law would render jury confusion even more likely, tempting the jury to conclude that if experienced police officers interpreted Officer Sholtis's actions as a violation of SOPs employing the same standards as the law, then Officer Sholtis must also have violated legal requirements. When, as here, the proffered evidence adds nothing but the substantial likelihood of jury confusion, the trial judge's exclusion of it cannot be an abuse of discretion."); ***McGee v. City of Cincinnati Police Dept.***, No. 1:06-CV-726, 2007 WL 1169374, at *5 n.4 (S.D. Ohio Apr. 18, 2007) ("Plaintiff argues that the CCA's finding that Officer Rackley's use of his taser against Plaintiff violated Cincinnati Police Department procedure on use of force demonstrates that Officer Rackley used excessive force against Plaintiff. . .However, the CCA's finding is not dispositive. A city's police department may choose to hold its officers to a higher standard than that required by the Constitution without being subject to or subjecting their officers to increased liability under § 1983. Violation of a police policy or procedure does not automatically translate into a violation of a person's constitutional rights."); ***Philpot v. Warren***, No. Civ.A.1:02-CV2511JOF, 2006 WL 463169, at *7 (N.D. Ga. Feb. 24, 2006) ("As an initial matter, the court notes the fact that Cobb County ultimately terminated Defendant Warren for his actions in this case would not necessarily preclude a determination that Defendant Warren is entitled to qualified immunity. Defendant Warren's supervisors terminated him based upon an analysis of the policies of the Cobb County Police Department. Plaintiff has not argued that these policies are coextensive with the constitutional parameters of the Fourth Amendment in the search and seizure context, or that those parameters were clearly established as a matter of law at the time of the incident. The fact that the Cobb County Police Department may hold its officers to a different standard than that constitutionally mandated in the Eleventh Circuit is not before this court. The role of the Cobb

County Police Department was to determine whether Defendant Warren violated department policy and whether his actions warranted punishment. The role of this court is to determine whether Defendant Warren is entitled to qualified immunity as a matter of law. See also *Durruthy v. Pastor*, 351 F.3d 1080, 1092 (11th Cir.2003) (concluding that officer's violation of department's internal policy does not vitiate finding of probable cause based on objective facts); *Craig v. Singletary*,127 F.3d 1030, 1044 (11th Cir.1997) (probable cause involves only constitutional requirements and not any local policies).”); ***Chamberlin v. City of Albuquerque,*** No. CIV 02-0603 JB/ACT, 2005 WL 2313527, at *4 (D.N.M. July 31, 2005)(Plaintiff barred from introducing as evidence “the Albuquerque Police Department's SOP's to support its allegation that [officer] acted unreasonably in directing his police service dog to attack the [plaintiff] in violation of his Fourth Amendment rights.”); ***Wilhelm v. Knox County, Ohio***, No. 2:03-CV-786, 2005 WL 1126817, at *14 (S.D. Ohio May 12, 2005) (not reported) (“[T]he Court recognizes that the Sixth Circuit has held that (1) a defendant cannot be liable under §1983 unless he or she violated one of a plaintiff's federal constitutional rights, and (2) a state right ‘as an alleged misdemeanant to be arrested only when the misdemeanor is committed in the presence of the arresting officer [is] not grounded in the federal constitution and will not support a § 1983 claim.’ . . The issue is whether probable cause to arrest existed, not whether the arrest violated state law. Accordingly, because probable cause to believe that a crime had occurred existed, Bradley's §1983 false arrest claim under the Fourth Amendment must fail.”).

See also ***McAtee v. Warkentin,*** 2007 WL 4570834, at *4 (S.D. Iowa Dec. 31, 2007) (“The court will admit evidence of the North Liberty pursuit and ramming policies. They will not be admitted to support any claim that Kyle Wasson was deprived of Fourth Amendment rights by Chief Warkentin's decision to pursue a high-speed chase. The *Scott* decision makes it clear that the decision to engage in a high-speed chase alone cannot support a Fourth Amendment claim. Similarly, the plaintiff will not be permitted to argue for responsibility based on the failure of Chief Warkentin to abandon the pursuit. . . However, the pursuit is part and parcel of the events giving rise to Kyle Wasson's ultimate death. The extent to which Chief Warkentin was willing to violate internal policies crafted for the safety of the police and public may be probative of other issues concerning the chief's judgment and intent on the evening in question. An appropriate jury instruction will be given, upon request, to place this evidence in its proper context.”).

Also note that compliance with state law does not mean there is no constitutional violation for purposes of liability under Section 1983. *See, e.g.,* ***Gronowski v. Spencer***, 424 F.3d 285, 297 (2d Cir. 2005) ("[W]e conclude that appellants' civil service defense provides no basis to vacate the judgment. We do not agree that appellants could not have violated §1983 if they complied with a state law that shares one of §1983's purposes. The fact that City officials had discretion to lay off Gronowski and did not violate civil service law in failing to reinstate her in the Consumer Protection Office does not foreclose the possibility that retaliation for the exercise of her constitutional rights motivated these actions. If there is sufficient evidence supporting a finding of illegal retaliation, we will not overturn a verdict arriving at such finding. Regardless of the City officials' conformity with civil service law, they must still refrain from violating rights protected under the United States Constitution.").

See also ***Gandara v. Bennett***, 528 F.3d 823, 825, 826 (11th Cir. 2008) ("The question presented in this matter is whether a foreigner who has been arrested and detained in this country and alleges a violation of the consular notification provisions of the Vienna Convention on Consular Relations (the "Treaty") can maintain an action under 42 U.S.C. § 1983. The answer to this question hinges on whether or not individual rights are bestowed by the Treaty. Although we find the issue a close one with strong arguments on both sides, we ultimately conclude the answer is 'no.'. . . This Circuit has not expressly addressed the issue of whether the Vienna Convention contains private rights and remedies enforceable in our courts through § 1983 by individual foreign nationals who are arrested or detained in this country. We have previously commented, however, on the issue of private rights in the context of criminal cases and indicated that we would follow the lead of the First and Ninth Circuits. *See United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir.2000) (the First and Ninths circuits have indicated that Article 36 does not create privately enforceable rights)."); ***Mora v. People of the State of New York***, 524 F.3d 183, 203, 204 (2d Cir. 2008) ("In sum, there are a number of ways in which the drafters of the Vienna Convention, had they intended to provide for an individual right to be informed about consular access and notification that is enforceable through a damages action, could have signaled their intentions to do so. . . . That they chose not to signal any such intent counsels against our recognizing an individual right that can be vindicated here in a damages action.").

B. Under Color of State Law

In order to establish liability under § 1983, the plaintiff must prove that she has been deprived of a federal statutory or constitutional right by someone acting "under color of" state law. ***Parratt v. Taylor***, 451 U.S. 527, 535 (1981). *See also* ***Lugar v. Edmonson Oil Co.,*** 457 U.S. 922 (1982) ("state action" under Fourteenth Amendment equated with "under color of law" for Section 1983 purposes) and ***Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n***, 531 U.S. 288 (2001) (discussing different tests for determining whether conduct of private actor constitutes "state action" and finding state action on basis of "pervasive entwinement" of state with challenged activity).

In ***Monroe v. Pape***, 365 U.S. 167, 180 (1961), the Court held that acts performed by a police officer in his capacity as a police officer, even if illegal or not authorized by state law, are acts taken "under color of" law. As the Supreme Court stated in ***United States v. Classic***, 313 U.S. 299, 326 (1941), "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken `under color of' state law."

Examples:

D.C. CIRCUIT

Williams v. United States, 396 F.3d 412, 414 (D.C. Cir. 2005) (federal police officer who arrested plaintiff for violation of D.C. law did not act under color of state law).

Maniaci v. Georgetown University, 510 F.Supp.2d 50, 62, 70 (D.D.C.,2007) ("[T]he Court notes that various circuits have applied Section 1983 and its limitations as set forth in *Monell* to private institutions such as Georgetown University where such private institutions employ quasi-state actors. [collecting cases] . . . . Plaintiff's Amended Complaint contains facts that, if taken as true, sufficiently raise a colorable claim that the Georgetown Public Safety Officers were acting under the color of law by exercising their state-granted authority to arrest or actions related thereto. The Public Safety Officers in this case were not merely verbally conveying a store policy (and thus functioning in a private capacity) . . . . On several occasions, Plaintiff sets forth facts that indicate that his physical liberty was restrained and that he was aware of the power asserted over him by the Public Safety Officers. . . Allegedly, he was physically grabbed and 'violently jerked ... from his seat.'. . He was 'surrounded by

six campus police offers and was pushed against a glass window.'. . His exit was blocked, and he was 'told not to go anywhere.'. . . Accordingly, at this time, the Court shall not dismiss Plaintiff's Section 1983 claim on the grounds that the Public Safety Officers were not acting under color of state law, as Plaintiff has alleged facts sufficient to suggest that an arrest or actions related thereto occurred.").

FIRST CIRCUIT

Burke v. Town of Walpole, 405 F.3d 66, 88 (1st Cir. 2005) (private forensic odontologist who rendered bite mark opinon at request of District Attorney's Office was acting under color of law and eligible for qualified immunity).

Martinez v. Colon, 54 F.3d 980, 987 (1st Cir. 1995) (an unintended shooting of a police officer at the police station, during the course of harassment and taunting by a fellow officer who was on duty and in uniform, did not constitute conduct under color of law where the court concluded that the behavior of the harassing officer represented a "singularly personal frolic[,]" and in no way was or purported to be in furtherance of the exercise of any police power)**.**

Miller v. City of Boston, No. 07-12076-JLT, 2008 WL 4936729, at *1 (D. Mass. Nov. 19, 2008) ("The City first argues that it is never liable for the misconduct of special officers. The only authority the City offers for this assertion is the text of the 1898 statute giving the City authority to license these special officers and virtually identical language in a corresponding police department rule.. . . The statute gives licensed special officers 'the power of police officers to preserve order and to enforce the laws and ordinances of the city.'. . The statute goes on to state that 'the corporation or person applying for an appointment under this section shall be liable for the official misconduct of the officer.' . . BPD argues that because the statute makes the special officers' employer liable for their misconduct, the City cannot be liable. . . The mere fact that the statute holds the employer of special officers liable, however, does not necessarily mean that the City may not also be held liable for the misconduct of special officers. Under the terms of the statute, special officers are granted the 'power of police officers.' Inasmuch as the statute grants special officers the authority of police officers, it seems logical to treat them as such for purposes of the City's liability. Because Plaintiff's complaint is deficient in other respects, however, this court assumes without deciding that the City may be held liable for special officer misconduct to the same extent as it may be liable for the misdeeds of other city employees.").

Shah v. Holloway, No. 07-10352-DPW, 2008 WL 3824788, at *5 (D. Mass. July 28, 2008) ("It is apparent that city and federal authorities were acting in concert with respect to law enforcement initiatives at the DNC. Given the need for further discovery to identify whether facts or circumstances justify treating this case as out of the 'ordinary' sufficiently to support a claim pursuant to § 1983 against federal agents, I decline to dismiss the § 1983 claim against the Agents.").

Carmack v. MBTA, 465 F.Supp.2d 18, 27 (D. Mass. 2006) ("In evaluating whether the conduct of an otherwise private actor constitutes indirect state action, courts conventionally have traveled a trio of analytic avenues, deeming a private entity to have become a state actor if (1) it assumes a traditional public function when it undertakes to perform the challenged conduct, or (2) an elaborate financial or regulatory nexus ties the challenged conduct to the State, or (3) a symbiotic relationship exists between the private entity and the State. . . The satisfaction of any one of these tests requires a finding of indirect state action. . . In addition, where '[t]he nominally private character of [an organization] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it,' the conclusion is that there is state action. . . The inquiry, under any of these theories, is necessarily fact-intensive, and the ultimate conclusion regarding state action must be based on the particular facts and circumstances of the case. . . This court finds that Mr. Carmack has alleged enough facts to support a claim that MBCR [Massachusetts Bay Commuter Railroad Company] was a state actor based on the traditional public function and symbiotic relationship theories.")

SECOND CIRCUIT

Jocks v. Tavernier, 316 F.3d 128, 134 (2d Cir. 2003) ("[W]hen an officer identifies himself as a police officer and uses his service pistol, he acts under color of law.").

THIRD CIRCUIT

Marcus v. McCollum, 394 F.3d 813, 818 (3d Cir. 2004) (noting Circuit agreement that officers are not state actors during private repossession if they act only to keep the peace).

FOURTH CIRCUIT

Rossignol v. Voorhaar, 316 F.3d 516, 523, 524, 527 (4th Cir. 2003) ("Defendants executed a systematic, carefully-organized plan to suppress the distribution of *St. Mary's Today*. And they did so to retaliate against those who questioned their fitness for public office and who challenged many of them in the conduct of their official duties. The defendants' scheme was thus a classic example of the kind of suppression of political criticism which the First Amendment was intended to prohibit. The fact that these law enforcement officers acted after hours and after they had taken off their badges cannot immunize their efforts to shield themselves from adverse comment and to stifle public scrutiny of their performance. . . .We would thus lose sight of the entire purpose of § 1983 if we held that defendants were not acting under color of state law. Here, a local sheriff, joined by a candidate for State's Attorney, actively encouraged and sanctioned the organized censorship of his political opponents by his subordinates, contributed money to support that censorship, and placed the blanket of his protection over the perpetrators. Sheriffs who removed their uniforms and acted as members of the Klan were not immune from § 1983; the conduct here, while different, also cannot be absolved by the simple expedient of removing the badge.").

FIFTH CIRCUIT

Barkley v. Dillard Dept. Stores, Inc., No. 07-20482, 2008 WL 1924178, at *3 (5th Cir. May 2, 2008) (not published) ("Although Dillard's notified Wilkinson of the shoplifter, Wilkinson made an independent decision to chase after and attempt to apprehend the suspect. These facts are in contrast with those in *Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93 (5th Cir.1975) (per curiam), in which we found that Brookshire was a state actor because 'the police and [Brookshire] maintained a pre-conceived policy by which shoplifters would be arrested based solely on the complaint of the merchant.'. . There is no evidence of a pre-conceived policy in this case. Therefore, based on the facts described above, we conclude that the district court did not err in deciding that Dillard's was not a state actor. Consequently, we affirm summary judgment for Dillard's.").

Cornish v. Correctional Services Corp., 402 F.3d 545, 550, 551 (5th Cir. 2005) (CSC's decision to terminate plaintiff's employment was made in its role as private prison management employer and could not be attributed to Dallas County or State of Texas).

Rosborough v. Management & Training Corporation, 350 F.3d 459, 461 (5th Cir. 2003) (agreeing with Sixth Circuit and with district courts "that have found that private prison-management corporations and their employees may be sued under § 1983 by a prisoner who has suffered a constitutional injury.").

SIXTH CIRCUIT

Powers v. Hamilton County Public Defender Com'n, 501 F.3d 592, 613, 614 (6th Cir. 2007) ("Powers alleges that the Public Defender engages in an across-the-board policy or custom of doing nothing to protect its indigent clients' constitutional rights not to be jailed as a result of their inability to pay court-ordered fines. Unlike the plaintiff in *Polk County*, Powers does not seek to recover on the basis of the failures of his individual counsel, but on the basis of an alleged agency-wide policy or custom of routinely ignoring the issue of indigency in the context of non-payment of fines. Although we acknowledge that requesting indigency hearings is within a lawyer's 'traditional functions,' the conduct complained of is nonetheless 'administrative' in character for the reasons already described: Powers maintains that the Public Defender's inaction is systemic and therefore carries the imprimatur of administrative approval. . . .He argues that the Public Defender systematically violates class members' constitutional rights by failing to represent them on the question of indigency. Given the reasoning of *Polk County*, it makes sense to treat this alleged policy or custom as state action for purposes of § 1983. The existence of such a policy, if proven, will show that the adversarial relationship between the State and the Public Defender--upon which the *Polk County* Court relied heavily in determining that the individual public defender there was not a state actor--has broken down such that the Public Defender is serving the State's interest in exacting punishment, rather than the interests of its clients, or society's interest in fair judicial proceedings.").

Lindsey v. Detroit Entertainment, L.L.C., 484 F.3d 824, 830, 831 (6th Cir. 2007) (where security personnel were not licensed by state, detention of plaintiffs could not be attributed to state action)

Swiecicki v. Delgado, 463 F.3d 489, 496, 497 (6th Cir. 2006) ("Here, we believe the record establishes that Delgado was a state actor from the beginning of the incident in question because he 'presented himself as a police officer.'. . Our conclusion is based not only on Delgado's attire, badge, and weapons, but also on the fact that Delgado told Swiecicki that '[w]e can either do this the easy way or the hard way.'.

. .Rather than calmly asking Swiecicki to leave the stadium, Delgado, while wearing his uniform and carrying his official weapons, threatened Swiecicki and forcibly removed him from the bleachers. This evidence, combined with the fact that Delgado was hired by Jacobs Field to intervene 'in cases requiring police action' suggests that his warning to Swiecicki amounted to a threat of arrest. Delgado apparently believed, moreover, that the incident was one requiring 'police action' because he approached Swiecicki before Labrie had a chance to further investigate. In sum, this was more than a case in which a civilian employed by the Indians peaceably ejected an unruly fan from a baseball game--a procedure clearly contemplated by the rules and regulations of Jacobs Field. Delgado, in full police uniform, forcibly removed Swiecicki in the escort position. All of this evidence, when considered together, indicates that Delgado was acting under color of state law at the time he removed Swiecicki from the bleachers.")

Durante v. Fairlane Town Center, 201 Fed. Appx. 338, 2006 WL 2986452, at *2, *3 (6th Cir. Oct. 18, 2006) ("The term 'public function' is a bit of a misnomer, at least in the context of private actors. As explained by the First Circuit, '[i]n order for a private actor to be deemed to have acted under color of state law, it is not enough to show that the private actor performed a public function.' *Rockwell v. Cape Cod Hosp*., 26 F.3d 254, 258 (1st Cir.1994). Rather, the private actor must perform a public function which has traditionally and exclusively been reserved to the State. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). This test is difficult to satisfy. 'While many functions have been traditionally performed by governments, very few have been exclusively reserved to the State.' . . . There are instances, however, when the performance of certain functions by a private security officer crosses the line from private action to state action. For example, the Seventh Circuit has held that private police officers licensed to make arrests could be state actors under the public function test. *Payton v. Rush-Presbyterian-St. Luke's Med. Ctr*., 184 F.3d 623, 627-30 (7th Cir.1999). The key distinction lies in whether the private defendant's police powers delegated by the State are plenary, or merely police-like. In the latter instance, the private action is not one considered exclusively reserved to the State, and is thus not undertaken under color of law. There is no evidence before us that the FTC security guards were licensed under M.C.L. S 338.1079. The fact that the they were security guards does not, in itself, imply that they were licensed--M.C.L. S 338.1079(2) expressly provides that private security guards are not required to be licensed. Durante did not allege that they were so licensed, nor did he take any depositions or seek discovery on this issue. Accordingly, *Romanski* lends Durante no support. Nor does Durante find support elsewhere under federal or state law. First,

a plaintiff who argues that a private actor acted under color of state law must offer some historical analysis on whether the power exercised is one that is traditionally the exclusive prerogative of the state. . . Durante has offered no historical analysis of a merchant's arrest and transport powers (if any) for criminal trespass under Michigan law. . . . Moreover, even if Durante had offered some historical analysis, he has not shown that the FTC defendants exercised a power exclusively left to the State of Michigan, and delegated to them by the State. Numerous cases decline to find that a private security guard acted under color of state law based on the authority of the common law shopkeeper's privilege.").

Chapman v. Higbee Company, 319 F.3d 825, 834, 835 (6th Cir. 2003) (en banc) ("Here, the Dillard's security officer who stopped and searched Chapman was an off-duty sheriff's deputy, wearing his official sheriff's department uniform, badge, and sidearm. . . Moreover, the Dillard's security officer was obligated to obey Dillard's policies and regulations while on-duty at the store. Although the state played no part in the promulgation of these policies, their strip searching provision directly implicates the state: 'Strip searches are prohibited. If you suspect that stolen objects are hidden on [the shopper's] person, call the police.' During the incident at issue, the Dillard's security officer did not represent himself as a police officer, threaten to arrest Chapman, wave his badge or weapon, or establish any contact with the sheriff's department. He did however initiate a strip search by requiring Chapman to enter a fitting room with the sales manager to inspect her clothing. Because Dillard's policy mandates police intervention in strip search situations, a reasonable jury could very well find that the initiation of a strip search by an armed, uniformed sheriff's deputy constituted an act that may fairly be attributed to the state. Additionally, if Chapman did not feel free to leave, as a result of the security officer's sheriff's uniform, his badge, or his sidearm, a reasonable jury could find the detention was a tacit arrest and fairly attributable to the state.").

Neuens v. City of Columbus, 303 F.3d 667, 670, 671 (6th Cir. 2003) ("[T]he district court erred when it accepted Bridges' stipulation that he was acting under color of law and considered only the second prong of § 1983 analysis. Because there is no indication in the record that Defendant- Appellant was acting under color of law at the time of the incident, we also conclude that the district court erred in denying Officer Bridges' summary judgment motion. . . . The record clearly demonstrates that Bridges was acting in his private capacity on the morning of December 26, 1998. Bridges was not in uniform, he was not driving in a police car, and he did not display a badge to Neuens or anyone else at the Waffle House restaurant. Bridges was not

at the Waffle House pursuant to official duties; rather, he was out with his personal friends for social reasons. Neither Bridges nor his friends made any suggestions that Bridges was a police officer. . . . If after its independent review the district court concludes that Bridges did not act under color of state law, we instruct the district court to dismiss the complaint for failure to state a claim upon which relief may granted..")

SEVENTH CIRCUIT

Johnson v. LaRabida Children's Hospital, 372 F.3d 894, 897 (7th Cir. 2004) (privately employed special police officer not entrusted with full powers possessed by the police does not act under color of state law).

EIGHTH CIRCUIT

Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 423 (8th Cir. 2007) ("In this case, the state effectively gave InnerChange its 24- hour power to incarcerate, treat, and discipline inmates. InnerChange teachers and counselors are authorized to issue inmate disciplinary reports, and progressive discipline is effectuated in concert with the DOC. Prison Fellowship and InnerChange acted jointly with the DOC and can be classified as state actors under § 1983 .").

Wickersham v. City of Columbia, 481 F.3d 591, 598, 599 (8th Cir. 2007) ("To be sure, the mere invocation of state legal procedures, including police assistance, does not convert a private party into a state actor. . . . The contributions of the Columbia police go beyond the kind of neutral assistance that would normally be offered to private citizens in enforcing the law of trespass. . . . When a private entity has acted jointly and intentionally with the police pursuant to a 'customary plan,' it is proper to hold that entity accountable for the actions which it helped bring about. . . . Since Salute and the city were knowingly and pervasively entangled in the enforcement of the challenged speech restrictions, we conclude that Salute was a state actor when it interfered with appellees' expressive activities. The district court did therefore not err in holding that Salute's curtailment of appellees' freedom of expression constituted state action and was actionable under § 1983.")**.**

Moore v. Carpenter, 404 F.3d 1043, 1046 (8th Cir. 2005) ("When a police officer is involved in a private party's repossession of property, there is no state action if the

officer merely keeps the peace, but there is state action if the officer affirmatively intervenes to aid the repossessor enough that the repossession would not have occurred without the officer's help. . . .").

NINTH CIRCUIT

Ibrahim v. Department of Homeland Sec., 538 F.3d 1250, 1257 (9th Cir. 2008) ("Ibrahim reads our decision in *Cabrera* as making an exception to this rule where, as here, federal officials recruit local police to help enforce federal law. But we created no such exception in *Cabrera*; instead, we reaffirmed the long-standing principle that federal officials can only be liable under section 1983 where there is a 'sufficiently close nexus between the State and the challenged action of the[federal actors] so that the action of the latter may be fairly treated as that of the State itself.' . . . California had nothing to do with the federal government's decision to put Ibrahim on the No-Fly List, nothing to do with the Transportation Security Administration's Security Directives that told United Air Lines what to do when confronted with a passenger on the No-Fly List, and nothing to do with Bondanella's decision to order the San Francisco police to detain Ibrahim.").

C. Statute of Limitations

Wallace v. Kato, 127 S. Ct. 1091, 1094, 1095 (2007) ("Section 1983 provides a federal cause of action, but in several respects relevant here federal law looks to the law of the State in which the cause of action arose. This is so for the length of the statute of limitations: It is that which the State provides for personal-injury torts. *Owens v. Okure,* 488 U.S. 235, 249-250, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); *Wilson v. Garcia,* 471 U.S. 261, 279-280, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) . . . . While we have never stated so expressly, the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law.").

D. No *Respondeat Superior* Liability

In ***Monell v. Dept. of Social Services***, 436 U.S. 658, 690-91 (1978), the Supreme Court overruled ***Monroe v. Pape***, 365 U.S. 167 (1961), to the extent that *Monroe* had held that local governments could not be sued as "persons" under § 1983. *Monell* holds that local governments may be sued for damages, as well as declaratory and injunctive relief, whenever

> the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover. . . local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's decisionmaking channels.

Monell rejects government liability based on the doctrine of *respondeat superior*. Thus, a government body cannot be held liable under § 1983 merely because it employs a tortfeasor. 436 U.S. at 691-92. *See also* ***Johnson v. Dossey***, 515 F.3d 778, 782 (7th Cir. 2008) ("Like public municipal corporations, they cannot be sued solely on that basis: a 'private corporation is not vicariously liable under § 1983 for its employees' deprivations of others' civil rights.'. . However, like a municipality, a private corporation can be liable if the injury alleged is the result of a policy or practice, or liability can be 'demonstrated indirectly "by showing a series of bad acts and inviting the court to infer from them that the policy-making level of government was bound to have noticed what was going on and by failing to do anything must have encouraged or at least condoned ... the misconduct of subordinate officers."'"); ***Smedley v. Corrections Corporation of America***, No. 04-5113, 2005 WL 3475806, at *2, *3 (10th Cir. Dec. 20, 2005) (not reported) ("While it is quite clear that *Monell* itself applied to municipal governments and not private entities acting under color of state law, it is now well settled that *Monell* also extends to private defendants sued under § 1983. *See e.g., Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1216 (10th Cir.2003) (collecting circuit court cases). As such, a private actor such as CCA 'cannot be held liable solely because it employs a tortfeasor--or, in other words ... cannot be held liable under §1983 on a respondeat superior theory.' . . . As we understand it, Ms. Smedley appears to argue that because corporations could be held liable under 42 U.S.C. § 1983 both before and after *Monell*, it 'simply defies logic to state that the traditional liability that existed for corporations prior to' *Monell* 'should somehow be abrogated as a result of the Supreme Court extending liability under § 1983 to municipalities where no such liability existed before.'. . We disagree. The Tenth Circuit, along with many of our sister circuits, has rejected vicarious liability in a § 1983 case for private actors based upon Monell. . . As Ms. Smedley has failed to provide any evidence that CCA had an official policy that was the 'direct cause' of her alleged injuries, summary judgment for CCA was appropriate."); ***Austin v. Paramount Parks, Inc.***, 195 F.3d 715, 728 (4th Cir. 1999) ("We have recognized, as has the Second Circuit, that the principles of § 1983

municipal liability articulated in *Monell* and its progeny apply equally to a private corporation that employs special police officers. Specifically, a private corporation is not liable under § 1983 for torts committed by special police officers when such liability is predicated solely upon a theory of respondeat superior."); ***Buckner v. Toro***, 116 F.3d 450, 452 (11th Cir. 1997) ("We conclude that the Supreme Court's decision in *Wyatt* has not affected our decision in *Howell v. Evans*. The policy or custom requirement is not a type of immunity from liability but is instead an element of a § 1983 claim. Accordingly, we affirm the district court's finding that the *Monell* policy or custom requirement applies in suits against private entities performing functions traditionally within the exclusive prerogative of the state, such as the provision of medical care to inmates."); ***Deese v. City of Jacksonville, Fla***., No. 3:06-cv-733-J-34HTS, 2008 WL 5158289, at *15 (M.D. Fla. Dec. 9, 2008) ("When a private entity like [CMS] contracts with a county to provide medical services to inmates, it performs a function traditionally within the exclusive prerogative of the state. . . In so doing, it becomes the functional equivalent of the municipality. . .Thus, the standard applicable for imposing liability in this § 1983 action on the COJ is equally applicable to CMS."); ***Lassoff v. New Jersey***, 414 F.Supp.2d 483, 494, 495 (D.N.J. 2006) ("The Amended Complaint alleges that Bally's security personnel conspired with Trooper Nepi to deprive him of his constitutional rights. . . In particular, Lassoff asserts that Bally's security personnel acted in concert with Trooper Nepi, denying Lassoff the assistance of counsel during their joint custodial questioning of Lassoff. . . He further alleges that he was in the custody and control of Bally's security personnel when Trooper Nepi beat him. . . 'Although not an agent of the state, a private party who willfully participates in a joint conspiracy with state officials to deprive a person of a constitutional right acts 'under color of state law' for purposes of S 1983.' . . Thus, Defendants Flemming and Denmead do not escape potential liability by virtue of being private security guards.. . . Bally's motion to dismiss, however, requires further analysis. Bally's, the corporate entity, is not alleged to have acted in concert or conspired with Trooper Nepi. Instead, Lassoff seeks judgment from Bally's on a vicarious liability theory. Neither the Third Circuit nor the Supreme Court has answered whether a private corporation may be held liable under a theory of respondeat superior in S 1983 actions. However, the Supreme Court's decision in *Monell v. Department of Social Services* provides guidance. . . *Monell* held that municipalities could not be held vicariously liable in S 1983 actions. Extrapolating the Court's reasoning in that case, other courts, including this one, have ruled that private corporations may not be held vicariously liable. *See Taylor v. Plousis*, 101 F.Supp.2d 255, 263 & n. 4 (D.N.J.2000). . . . The same result should obtain here. Accordingly, the S 1983 claims against Bally's will

be dismissed."); ***Olivas v. Corrections Corporation of America***, No. Civ.A.4:04-CV-511-BE, 2006 WL 66464, at *3 (N.D. Tex. Jan. 12, 2006) ("It is appropriate to apply the common law standards that have evolved to determine § 1983 liability for a municipal corporation to a private corporation; thus, a private corporation performing a government function is liable under §1983 only if three elements are found. . . The first is the presence of a policymaker who could be held responsible, through actual or constructive knowledge, for enforcing a policy or custom that caused the claimed injury. . . Second, the corporation must have an official custom or policy which could subject it to § 1983 liability. . . And third, a claimant must demonstrate that the corporate action was taken with the requisite degree of culpability, and show a direct causal link between the action and the deprivation of federal rights."); ***Wall v. Dion,*** 257 F. Supp.2d 316, 319 (D. Me. 2003) ("Though, it does not appear to me that the First Circuit has addressed this question head on, Courts of Appeal in other circuits have expressly concluded that when a private entity contracts with a county to provide jail inmates with medical services that entity is performing a function that is traditionally reserved to the state; because they provide services that are municipal in nature the entity is functionally equivalent to a municipality for purposes of 42 U.S.C. § 1983 suits. . . . Following the majority view that equates private contractors with municipalities when providing services traditionally charged to the state, Wall's claims against these movants will only be successful if they were responsible for an unconstitutional municipal custom or policy."); ***Mejia v. City of New York***, 119 F. Supp.2d 232, 276 (E.D.N.Y. 2000) (noting that Second Circuit and other circuits have held "that a private corporation cannot be held liable in the absence of the showing of an official policy, practice, usage, or custom.").

But see ***Cortlessa v. County of Chester***, No. Civ.A. 04-1039, 2006 WL 1490145, at *3, *4 (E.D. Pa. May 24, 2006) ("Count IX alleges that Primecare is liable, pursuant to 42 U.S.C. § 1983, for violations of Plaintiff's Eighth Amendment right to medical treatment while incarcerated. Stated differently, Plaintiff claims that Primecare is responsible, on the basis of *respondeat superior* liability, for the deliberate indifference of its employees towards Plaintiff's serious medical needs. Primecare has argued that it cannot be held liable under a theory of *respondeat superior* liability because it is an independent contractor for a municipality and, as such, should enjoy protection from vicarious liability similar to that granted to municipalities in *Monell* . . . . Primecare cites to *Natale v. Camden County Correctional Facility*, 318 F.3d 575 (3d Cir.2003) and a variety of decisions from other Circuit Courts and District Courts, for the proposition that private corporations

such as Primecare cannot be held liable under Section 1983 on the basis of *respondeat superior*. . . . The Court has analyzed this issue and reaches the following conclusions. First, the issue of whether immunity from *respondeat superior* liability under Section 1983 extends to private contractors was not one of the two issues presented to the *Natale* Court. . . The language relied on by Primecare is therefore merely dicta. As such, there is currently no Third Circuit authority requiring a decision in favor of Primecare. Second, the Court finds that there is clear disagreement among the federal courts concerning this issue. Both parties have cited persuasive authority for different conclusions. . . . Third, even if Primecare is correct and a *Monell*-type immunity applies to it, an entity entitled to such immunity can still potentially be held liable under Section 1983 based on a theory of failure to train its employees, which Plaintiff alleges. . . At this stage, therefore, the Court is not prepared to conclude that Primecare is entitled to summary judgment on this claim."); ***Hutchison v. Brookshire Brothers, Ltd.,*** 284 F.Supp.2d 459,472, 473 (E.D.Tex. 2003) ("The court now turns to the question of Brookshire Brothers' liability. Defendants' argue that, even if Plaintiff succeeds in proving concert of action between McCown and Shelton, Plaintiff's Fourth Amendment claim against Brookshire Brothers ought to be dismissed because '[o]bviously there is no respondeat superior for §1983 purposes.'. . Where Defendants brush aside Plaintiff's claim in a single sentence, the court finds a more complicated issue. What is clear is that Defendants have cited the wrong precedent to support their statement of law. *Collins v. City of Harker Heights* stands for the proposition that a municipality (and not a private employer) generally 'is not vicariously liable under §1983 for the constitutional torts of its agents.'. . .It is not so clear, however, that a private employer cannot be held vicariously liable under §1983 when its employees act under color of law to deprive customers of constitutional rights. The court can find no case that supports this proposition, and the language of §1983 does not lend itself to Defendants' reading. . . . Though the Supreme Court has stated that §1983 'cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor,' . . . the Court has made no similar statement regarding private employers. Indeed, there would be no textual basis for such a statement. Additionally, the court finds no persuasive policy justification for shielding private employers from vicarious liability. While the Supreme Court has found that Congress did not want to create a 'federal law of respondeat superior ' imposing liability in municipalities in the § 1983 context because of 'all the constitutional problems associated with the obligation to keep the peace,'. . . this court cannot find any similar concerns implicated in the private context. Imposing liability on private corporations affects

neither the state's police power nor its ability to regulate its municipalities. Instead, allowing the imposition of vicarious liability would seem to keep Congress within its broad power to regulate interstate commerce. Thus, no significant federalism issues are raised when private employers are held liable for the constitutional torts of their employees. For these reasons, the court holds that neither *Monell* nor its progeny can be read to shield private corporations from vicarious liability when their employees have committed a §1983 violation while acting within the scope of their employment. If Plaintiff can demonstrate that Shelton committed a Fourth Amendment violation in the course of his employment, Brookshire Brothers may be held liable. Such a violation would be 'within the scope of employment' if it were ' 'actuated, at least in part, by a purpose to serve the [employer],' even if it is forbidden by the employer.' . . The court infers that the scope of Shelton's responsibilities to Brookshire Brothers includes handling customer disputes and ensuring that customers pay for their gas; this may be reasonably inferred from Plaintiffs deposition testimony and Hill's statement that Plaintiff had to talk to her manager. . . Shelton's actions, as alleged by Plaintiff, allow the further inference that he was motivated at least in part by a desire to serve Brookshire Brothers. Though Shelton allegedly placed the siphoned gasoline into his own gas tank and collected no money for Brookshire Brothers, there is some evidence that Shelton first tried to collect on the alleged debt and resolve the dispute in favor of his employer. . .Thus Plaintiff has succeeded in demonstrating a genuine issue of material fact with regard to whether Shelton was acting within the scope of his employment. Defendants' motion for summary judgment is DENIED with respect to Brookshire Brothers on this claim."); ***Taylor v. Plousis***, 101 F. Supp.2d 255, 263 & n.4 (D.N.J. 2000) ("Neither the Supreme Court nor the Third Circuit has yet determined whether a private corporation performing a municipal function is subject to the holding in *Monell*. However, the majority of courts to have considered the issue have determined that such a corporation may not be held vicariously liable under § 1983. [citing cases] . . . . Although the majority of courts to have reached this conclusion have done so with relatively little analysis, treating the proposition as if it were self-evident, the Court accepts the holdings of these cases as the established view of the law. However, there remains a lingering doubt whether the public policy considerations underlying the Supreme Court's decision in *Monell* should apply when a governmental entity chooses to discharge a public obligation by contract with a private corporation. . . . An argument can be made that voluntarily contracting to perform a government service should not free a corporation from the ordinary respondeat superior liability. A parallel argument involves claims of qualified immunity which often protect government officials charged with a constitutional

violation. If a private corporation undertakes a public function, there is still state action, but individual employees of that corporation do not get qualified immunity. . . . The policy considerations which prompted the Supreme Court to reject qualified immunity for private prison guards are the same considerations which suggest that private corporations providing public services, such as prison medical care, should not be immune from respondeat superior liability under § 1983. In the context of a claim that the deprivation of medical care amounted to a constitutional violation, proof of such claim would almost certainly prove a case of ordinary state law malpractice where respondeat superior would apply. It seems odd that the more serious conduct necessary to prove a constitutional violation would not impose corporate liability when a lesser misconduct under state law would impose corporate liability.").

There is conflicting authority as to whether *Monell* applies to claims for only prospective relief. *See, e.g.,* ***Reynolds v. Giuliani,*** 506 F.3d 183, 191 (2d Cir. 2007) ("To the extent *Chaloux* proposes to exempt all claims for prospective relief from *Monell*'s policy or custom requirement, we are not persuaded by its logic. *Monell* draws no distinction between injunctive and other forms of relief and, by its own terms, requires attribution of misconduct to a municipal policy or custom in suits seeking monetary, declaratory or injunctive relief. . . We join several of our sister circuits in adopting the view that *Monell*'s bar on *respondeat superior* liability under § 1983 applies regardless of the category of relief sought."); ***Gernetzke v. Kernosha Unified School District No. 1,*** 274 F.3d 464, 468 (7th Cir. 2001) ("The predominant though not unanimous view is that *Monell's* holding applies regardless of the nature of the relief sought."). *Compare* ***Truth v. Kent School Dist.***, 542 F.3d 634, 644 (9th Cir. 2008) ("*Monell*'s requirements do not apply where the plaintiffs only seek prospective relief, which is the case here. *See Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir.1989). The District acknowledges the controlling effect of *Chaloux*, but argues that it should be overruled because it 'rests on shaky grounds.'It is well established in our circuit that while a three judge panel normally cannot overrule a decision of a prior panel on a controlling question of law, we may overrule prior circuit authority without taking the case *en banc* when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point. . . The District argues that two Supreme Court cases, *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), and *McMillian v. Monroe County* , 520 U.S. 781 (1997), show that the 'Supreme Court has re-emphasized the importance and vitality of the doctrine that requires a municipal policy as a precondition to a lawsuit under § 1983.' Neither of these cases

addresses whether *Monell* applies to actions only seeking prospective relief. We have no authority to overrule *Chaloux*. *Chaloux* applies, and the district court's *Monell* ruling is reversed.") *and* ***Los Angeles Police Protective League v. Gates***, 995 F.2d 1469, 1472 (9th Cir. 1993) ("City can be subject to prospective injunctive relief even if the constitutional violation was not the result of an 'official custom or policy'." [*citing* ***Chaloux v. Killeen***, 886 F.2d 247, 251 (9th Cir. 1989)]) *with* ***Dirrane v. Brookline Police Dept.,*** 315 F.3d 65, 70 (1st Cir. 2002) ("On appeal, Dirrane argues that *Monell* does not bar a federal claim for prospective *injunctive* relief (as opposed to damages) against the town. However, the Supreme Court, in imposing the precondition of an unconstitutional 'official municipal policy,' was directly addressing 'monetary, declaratory, or *injunctive* relief.' *Monell,* 436 U.S. at 690 (emphasis added). Thus, the Ninth Circuit's contrary position in *Chaloux v. Killeen,* 886 F.2d 247, 250 (9th Cir.1989), is on its face at odds with *Monell* itself. Several other circuits have assumed that the *Chaloux* interpretation is incorrect. [footnote citing cases]"), ***Los Angeles Police Protective League***, *supra*, 995 F.2d at 1477 (Fletcher, J., concurring) ("*Chaloux* held that the official policy or custom requirement of *Monell* does not apply to suits against municipalities that seek only prospective relief . . . This holding is in conflict with *Monell*.") *and* ***Nix v. Norman***, 879 F.2d 429, 433 (8th Cir. 1989) (insisting that plaintiff in official capacity injunctive relief action satisfy *Monell* policy or custom requirement).

See also ***Carbella v. Clark County School District***, No. 97-15755, 1998 WL 141182, *3 (9th Cir. Mar. 27, 1998) (Table) ("[T]he School District argues that even if the district court erred in granting summary judgment, this court nonetheless must grant partial summary judgment in its favor on the ground that the court cannot order it to reinstate Carbella. . . This argument is without merit. The district court properly held that the School District, like any municipal defendant, could be held liable for 'prospective injunctive relief even if the constitutional violation was not the result of an "official custom or policy." ' *Los Angeles Police Protective League v. Gates* . . . The School District's assertion that *Gates* is no longer good law in light of the Supreme Court's holding in *Board of County Comm'rs v. Brown* . . . is unpersuasive. *Brown* involved only a § 1983 plaintiff's right to obtain damages from a municipality, not the right to obtain prospective injunctive relief. The former, but not the latter, is subject to the 'official custom or policy' requirement described in *Monell* . . . . ").

See also ***Felton v. Polles,*** 315 F.3d 470, 482 (5th Cir. 2002) ("[R]equiring §1981 claims against state actors to be pursued through § 1983 is not a mere pleading formality. One of the reasons why the §1981 claim in this situation must be asserted

through § 1983 follows. Although *respondeat superior* liability may be available through § 1981, . . . it is *not* available through §1983 . . . ."); ***United States v. City of Columbus***, No. CIV.A.2;99CV1097, 2000 WL 1133166, at *8 (S.D. Ohio Aug. 3, 2000) ("In *City of Canton* . . ., the Supreme Court reaffirmed its rejection of liability under § 1983 based on a theory of vicarious liability because federal courts 'are ill-suited to undertake' the resultant wholesale supervision of municipal employment practices; to do so, moreover, 'would implicate serious questions of federalism.' This Court concludes that [42 U.S.C.] § 14141 is properly construed to similar effect. Its language does not unambiguously contemplate the possibility of vicarious liability and such legislative history as exists manifests a congressional intent to conform its substantive provisions to the standards of § 1983. . . . The Court therefore construes § 14141 to require the same level of proof as is required against municipalities and local governments in actions under § 1983.").

NOTE: In ***Barbara Z. v. Obradovich***, 937 F. Supp. 710, 722 (N.D. Ill. 1996), the court addressed the issue of "whether a political subdivision of a state, such as the School District, can sue (as opposed to being sued) under section 1983." The court concluded that a school district is not an "other person" that can sue within the meaning of section 1983. *Id. Accord* ***Housing Authority of Kaw Tribe of Indians of Oklahoma v. City of Ponca City***, 952 F.2d 1183, 1192 (10th Cir.1991); ***School Dist. of Philadelphia v. Pennsylvania Milk Marketing Bd.***, 877 F.Supp. 245, 251 n. 3. (E.D.Pa.1995); *Contra* ***South Macomb Disposal Authority v. Washington Tp.***, 790 F.2d 500, 503 (6th Cir.1986); ***Santiago Collazo v. Franqui Acosta***, 721 F.Supp. 385, 393 (D.Puerto Rico 1989).

See also ***Rural Water District No. 1 v. City of Wilson***, 243 F.3d 1263, 1274 (10th Cir. 2001) (agreeing with Sixth Circuit in *South Macomb* and holding that water district, a quasi-municipality, could sue under § 1983 to enforce federal statutory rights).

E. Individual Capacity v. Official Capacity Suits

When a plaintiff names an official in his individual capacity, the plaintiff is seeking "to impose personal liability upon a government official for actions he takes under color of state law." ***Kentucky v. Graham***, 473 U.S. 159, 165 (1985). Failure to expressly state that the official is being sued in his individual capacity may be construed as an intent to sue the defendant only in his official capacity. *See, e.g.,* ***Murphy v. Arkansas***, 127 F.3d 750, 755 (8th Cir. 1997) ("[W]e do not require that

personal capacity claims be clearly-pleaded simply to ensure adequate notice to defendants. We also strictly enforce this pleading requirement because '[t]he Eleventh Amendment presents a jurisdictional limit on federal courts in civil rights cases against states and their employees.' *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir.1989); *see Wells v. Brown*, 891 F.2d 591, 593 (6th Cir.1989). Although other circuits have adopted a more lenient pleading rule, *see Biggs v. Meadows*, 66 F.3d 56, 59-60 (4th Cir.1995), we believe that our rule is more consistent with the Supreme Court's Eleventh Amendment jurisprudence."); ***Williams v. City of Beverly Hills, Mo.***, No. 4:04-CV-631 CAS, 2006 WL 897155, at *8, *9 (E.D. Mo. Mar. 31, 2006) ("The Court does not reach the issue of the reasonableness of the seizure or issues concerning substantive due process, because a threshold issue is dispositive of plaintiff's claims against defendants Thiel and Fox. As the Eighth Circuit has explained, the capacity in which public servants such as Thiel and Fox are sued is extremely significant. . . . The complaint does not specify in what capacity plaintiff is suing defendants Thiel and Fox, who are named in the caption as 'Police Officer James Thiel' and 'Police Officer Josh Fox,' and described in the body of the complaint as residents of the State of Missouri and police officers employed by Beverly Hills and Pine Lawn, respectively. . . .Because of plaintiff's failure to specify the capacity in which Thiel and Fox are sued, the Court must assume these defendants are sued only in their official capacities. . . As a result, the Court must construe the section 1983 claims against Thiel and Fox as being brought against their municipal employers, Beverly Hills and Pine Lawn. . . .Plaintiff's section 1983 claims against Fox and Thiel in Counts III and VIII based on the Fourth and Fourteenth Amendments should therefore be dismissed."); ***Ware v. Moe,*** No. Civ.03-2504 ADM/JSM, 2004 WL 848204, at *5 (D. Minn. Apr. 19, 2004) ("The Second Amended Complaint does not explain whether Defendants are being sued as individuals or officials. The caption merely lists Defendants' names. Further, the Complaint itself states that certain Defendants 'acted as peace officers employed by the City of Appleton,' and others 'acted as social workers employed by ... Swift County,' suggesting that Defendants are being sued in their official capacities. . . Plaintiffs' assertion that its prayer for relief meets the requirement this Court discussed in *Lopez-Buric v. Notch*, 168 F.Supp.2d 1046 (D.Minn.2001), misconstrues that case's holding and Eighth Circuit precedent. In *Lopez-Buric*, we explained that a § 1983 plaintiff can easily meet the Eighth Circuit's pleading requirement by indicating that she 'sues each and all defendants in both their individual and official capacities.'. . Simply adding 'jointly and severally' to a damages request does not provide sufficient clarity to meet the pleading standard. . . Therefore, because Plaintiffs allege official capacity claims only against Defendants in count one, and

have stipulated that count one does not state a *Monell* claim, Defendants' Motions for Summary Judgment are granted."); ***Landsdown v. Chadwick,*** 152 F. Supp.2d 1128, 1138 (W.D. Ark. 2000) ("The Eighth Circuit has consistently advised plaintiffs to specifically plead whether government agents are being sued in their official or individual capacities to ensure prompt notice of potential personal liability. . . When the plaintiff fails to state whether he is suing an official in his individual capacity, the Eighth Circuit has construed the claim as against the official in his official capacity only.").

But see ***Young Apartments, Inc. v. Town of Jupiter, Fla***., 529 F.3d 1027, 1047 (11th Cir. 2008) ("The main concern of a court in determining whether a plaintiff is suing defendants in their official or individual capacity is to ensure the defendants in question receive sufficient notice with respect to the capacity in which they are being sued. . . . [W]hile it is 'clearly preferable' that a plaintiff state explicitly in what capacity defendants are being sued, 'failure to do so is not fatal if the course of proceedings otherwise indicates that the defendant received sufficient notice.' *Moore v. City of Harriman*, 272 F.3d 769, 772 (6th Cir.2001). In looking at the course of proceedings, courts consider such factors as the nature of plaintiff's claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims of qualified immunity which serve as an indicator that the defendant had actual knowledge of the potential for individual liability. . . In examining the course of proceedings in this case, we are persuaded that Young Apartments raised claims against the individual defendants in their personal capacities, and that the individual defendants were aware of their potential individual liability."); ***Powell v. Alexander,*** 391 F.3d 1, 22 (1st Cir. 2004) ("We now join the multitude of circuits employing the 'course of proceedings' test, which appropriately balances a defendant's need for fair notice of potential personal liability against a plaintiff's need for the flexibility to develop his or her case as the unfolding events of litigation warrant. In doing so, we decline to adopt a formalistic 'bright-line' test requiring a plaintiff to use specific words in his or her complaint in order to pursue a particular defendant in a particular capacity. However, we do not encourage the filing of complaints which do not clearly specify that a defendant is sued in an individual capacity. To the contrary, it is a far better practice for the allegations in the complaint to be specific. A plaintiff who leaves the issue murky in the complaint runs considerable risks under the doctrine we adopt today. Under the 'course of proceedings' test, courts are not limited by the presence or absence of language identifying capacity to suit on the face of the complaint alone. Rather, courts may examine 'the substance of the pleadings and the course of

proceedings in order to determine whether the suit is for individual or official liability.'"); ***Moore v. City of Harriman***, 272 F.3d 769, 773, 775 (6th Cir. 2001) (en banc) ("The officers in this case urge us to read *Wells* as adopting the Eighth Circuit's rule presuming an official capacity suit absent an express statement to the contrary. They argue that to withstand a motion to dismiss, *Wells* requires complaints seeking damages for alleged violations of §1983 to contain the words 'individual capacity,' regardless of whether the defendants actually receive notice that they are being sued individually. Although we acknowledge that *Wells* contains language supporting this reading, we find the more reasonable interpretation to be that §1983 plaintiffs must clearly notify defendants of the potential for individual liability and must clearly notify the court of its basis for jurisdiction. When a §1983 plaintiff fails to affirmatively plead capacity in the complaint, we then look to the course of proceedings to determine whether *Wells* 's first concern about notice has been satisfied. . . . In conclusion, we reaffirm *Wells* 's requirement that §1983 plaintiffs must clearly notify any defendants of their intent to seek individual liability, and we clarify that reviewing the course of proceedings is the most appropriate way to determine whether such notice has been given and received . . . . "); ***Biggs v. Meadows***, 66 F.3d 56, 59-60 (4th Cir. 1995) (adopting the view of the majority of circuits, including the Second, Third, Fifth, Seventh, Ninth, Tenth and Eleventh, that looks to "the substance of the plaintiff's claim, the relief sought, and the course of proceedings to determine the nature of a § 1983 suit when a plaintiff fails to allege capacity. [citing cases] . . . . Because we find the majority view to be more persuasive, we hold today that a plaintiff need not plead expressly the capacity in which he is suing a defendant in order to state a cause of action under § 1983."). *See also* ***Daskalea v. District of Columbia***, 227 F.3d 443, 448 (D.C. Cir. 2000) ("Neither the complaint nor any other pleading filed by plaintiff indicates whether Moore was charged in her official or her individual capacity. In some circuits, that would be the end of the matter, as they require a plaintiff who seeks personal liability to plead specifically that the suit is brought against the defendant in her individual capacity. . . Although it has not definitively resolved the issue, . . . the Supreme Court has typically looked instead to the 'course of proceedings' to determine the nature of an action. . . Following the Supreme Court's lead, this circuit has joined those of its sisters that employ the 'course of proceedings' approach."); ***Rodriguez v. Phillips***, 66 F.3d 470, 482 (2d Cir. 1995) ("Where, as here, doubt may exist as to whether an official is sued personally, in his official capacity or in both capacities, the course of proceedings ordinarily resolves the nature of the liability sought to be imposed."); ***Hill v. Shelander***, 924 F.2d 1370, 1374 (7th Cir. 1991) ("[W]here the complaint alleges the tortious conduct of an individual acting under color of state

law, an individual capacity suit plainly lies, even if the plaintiff failed to spell out the defendant's capacity in the complaint."). *Accord* ***Miller v. Smith***, 220 F.3d 491, 494 (7th Cir. 2000); ***Shabazz v. Coughlin***, 852 F.2d 697, 700 (2d Cir.1988) ("Notwithstanding the complaint's ambiguous language, ... Shabazz's request for punitive and compensatory damages, coupled with the defendants' summary judgment motion on qualified immunity but not Eleventh Amendment grounds, suggests that the parties believed that this action is a personal capacity suit."); ***Pollock v. City of Astoria***, No. CV 06-845, 2008 WL 2278462, at *5, *6 (D. Or. May 28, 2008) ("Here, the complaint does not expressly allege in which capacity Plaintiffs intend to sue Defendant Officers, but its construction gives the court no reason to depart from this circuit's controlling presumption in favor of personal capacity § 1983 claims. First, Plaintiffs separate their claims against the City of Astoria and Defendant Officers into two discrete sections . . . Construing Plaintiffs' claims against Defendant Officers as official capacity claims would render this intentional division superfluous. It would also render the claims themselves, as recited in the complaint, otherwise superfluous. Second, Plaintiffs name Defendant Officers personally in the complaint and seek money damages. . . . Third, the complaint does not explicitly allege that the claims against Defendant Officers are made in their official capacity. This activates the presumption that Plaintiffs' claims against Defendant Officers are personal capacity claims . . . . Therefore, Plaintiffs' claims against Defendant Officers are made in their personal capacity and not barred by the Eleventh Amendment prohibition against official capacity suits.").

See also ***Garcia v. Dykstra***, 260 Fed. Appx. 887, 895 (6th Cir. 2008) ("That Smutz and Pavlige asserted a qualified immunity defense in both the answer and the amended answer distinguishes this case from *Shepherd*, making it more factually similar to *Moore*. The qualified immunity defense shows that they were in fact on notice of the possibility of an individual capacity § 1983 claim by the time they filed both the original and the amended answer."); ***Rodgers v. Banks,*** 344 F.3d 587, 594, 595(6th Cir. 2003) ("Like the plaintiff in *Moore,* Plaintiff did request compensatory and punitive damages in the original complaint, which we have held provides some notice of her intent to hold Defendant personally liable. . . However, unlike the plaintiff in *Moore,* the caption on Plaintiff's complaint listed Defendant's name and her official title, and specifically stated that Defendant was being sued in her 'official capacity as the representative of the State of Ohio department of Mental Health.'. . .The amended complaint's caption still lists Defendant's name and official title, and the amended complaint incorporates by reference paragraphs 2-7 of the original complaint, including the statement that Defendant was being sued in her official

capacity. The amended complaint is otherwise silent as to whether Defendant is being sued in her official or individual capacity. Moreover, Defendant has not moved for summary judgment on the issue of qualified immunity, yet another indication that Defendant was not adequately notified that she was being sued in her individual capacity. . . Having applied the course of proceedings test, we hold that insufficient indicia exists in the original complaint and amended complaint suggesting that Defendant was on notice that she was being sued in her individual capacity. Therefore, the Eleventh Amendment bars Plaintiff's suit to the extent that she seeks money damages. Plaintiff's claim is hereafter limited to seeking other relief arising under 42 U.S.C. § 1983."); ***Shepherd v. Wellman,*** 313 F.3d 963, 966-69 (6th Cir. 2002) ("Where no explicit statement appears in the pleadings, this Circuit uses a 'course of proceedings' test to determine whether the §1983 defendants have received notice of the plaintiff's intent to hold them personally liable. . . Under this test, we consider the nature of the plaintiff's claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims for qualified immunity, to determine whether the defendant had actual knowledge of the potential for individual liability. . .We also consider whether subsequent pleadings put the defendant on notice of the capacity in which he or she is being sued. . . . In the instant matter, the plaintiffs failed to specify in their complaint that they were suing Wellman as an individual, rather than in his official capacity. The plaintiffs later amended their complaint, but the amended complaint also failed to specify the capacity in which the plaintiffs were suing Wellman. The plaintiffs filed a second motion to amend, in which they specified that they were suing Wellman as an individual. The magistrate judge denied the motion to amend, and the district court affirmed. . . .We think the magistrate judge had good reason to deny leave to file a second amended complaint, and that the denial was not an abuse of discretion. . . . [T]he plaintiffs' request for monetary damages is the only indication that they might be suing Wellman in his individual capacity. Although *Moore* recognizes that the request for monetary damages is one factor that might place an individual on notice that he is being sued in his individual capacity, we do not read that case as holding that a request for money damages is alone sufficient to place a state official on notice that he is being sued in his individual capacity. To so hold would be inappropriate, because the rest of the complaint so strongly suggests an official capacity suit. Furthermore, unlike in *Moore*, there were no subsequent pleadings in this case that put the defendant on notice that he was being sued as an individual. For these reasons, we conclude that the district court's dismissal of the § 1983 action against Wellman was proper."); ***Brown v. Karnes***, No. 2:05-CV-555, 2005 WL 2230206, at *3 (S.D. Ohio Sept. 13, 2005) ("Plaintiff's Complaint does not

specify whether he is suing Sheriff Karnes in his official capacity or his individual capacity. . . However, because neither the face of the Complaint nor the 'course of proceedings' indicates that Plaintiff is suing the Sheriff in his individual capacity, the Court finds that the Sheriff has been sued only in his official capacity. . . As such, the § 1983 claim against Sheriff Karnes is the equivalent of a claim against Franklin County, and is governed by [*Monell*].").

Naming a government official in his official capacity is the equivalent of naming the government entity itself as the defendant, and requires the plaintiff to make out *Monell*-type proof of an official policy or custom as the cause of the constitutional violation. *See, e.g.,* ***Potochney v. Doe,*** No. 02 C 1484, 2002 WL 31628214, at *3 (N.D. Ill. Nov. 21, 2002) (not reported) ("[A] suit against a Sheriff in his official capacity is a suit against the Sheriff's Department itself. . . Plaintiffs are not required to show any personal involvement of Sheriff Ramsey in such an official capacity case."). While qualified immunity is available to an official sued in his personal capacity, there is no qualified immunity available in an official capacity suit.

See ***Hafer v. Melo***, 112 S. Ct. 358, 361-62 (1991) (personal and official capacity suits distinguished). *See also* ***Petty v. County of Franklin, Ohio***, 478 F.3d 341, 349 (6th Cir. 2007) ("There simply is no evidence that Sheriff Karnes was in any way directly involved in what happened to Petty, either initially when he was beaten in the jail cell, or later when his surgery was delayed and his requests for liquid food were allegedly not met. . . . Thus, if Petty's suit is against Karnes in his personal capacity, Petty fails to meet the causation requirements laid out in *Taylor*. To the extent that Petty's suit is against Karnes in his official capacity, it is nothing more than a suit against Franklin County itself. . . And as Defendants point out, Petty was unable to come forward with evidence--beyond the bare allegations in his complaint--showing that a Franklin County custom or policy was the moving force behind the violation of his constitutional rights."); ***Med Corp., Inc. v. City of Lima***, 296 F.3d 404, 417 (6th Cir. 2002) ("The district court reasoned that an individual capacity suit could not be maintained against the Mayor 'because 1) the Mayor never acted in his individual capacity, and 2) the Fourteenth Amendment does not apply to individual actions' because '[t]he Fourteenth Amendment protects property interest[s] only from a deprivation by state action.'. . . [T]he fact that Mayor Berger acted in his official capacity as mayor does not immunize him from being sued as an individual under § 1983. The district court's second reason for rejecting the individual capacity suit--that the Fourteenth Amendment protects only against actions of the state--also conflicts with *Hafer.* The state action requirement of the Fourteenth

Amendment is satisfied by showing that a state official acted 'under color of' state law, as when the official exercises authority conferred by a state office. . . The state action requirement does not limit civil rights plaintiffs to suits against only government entities. The district court's interpretation of 'state action' would eliminate all § 1983 suits against individual state officers."); ***Ritchie v. Wickstrom***, 938 F.2d 689 (6th Cir. 1991) (clarifying confusion between official capacity and individual capacity). The official capacity suit is seeking to recover compensatory damages from the government body itself. *See* ***Brandon v. Holt***, 469 U.S. 464, 471-72 (1985); ***Kentucky v. Graham***, 473 U.S. 159 (1985); ***Letcher v. Town of Merrillville***, No. 2:05 cv 401, 2008 WL 2074144, at *6 (N.D. Ind. May 13, 2008) ("In the case of law enforcement defendants, meeting the under color of law requirement invariably will include similar allegations that the defendants were performing official duties, in uniform, or driving marked cars. . . The defendants' argument improperly conflates the requirement that a plaintiff allege that the defendants acted under color of law with the determination of their capacity in the suit. Accordingly, the court concludes that the defendants have been sued in their individual capacities."); ***Chute v. City of Cambridge,*** 201 F.R.D. 27, 29 (D. Mass. 2001) ("It is well settled that filing a civil action against a city official in that person's official capacity is simply another way of suing the city itself. When a plaintiff brings a civil action against a governmental agency, and against a person who is an official of the agency in that person's official capacity, it is critical that the parties be properly identified to provide complete clarity as to who the parties are and in what capacity they are being sued.").

To avoid confusion, where the intended defendant is the government body, plaintiff should name the entity itself, rather than the individual official in his official capacity. *See, e.g.,* ***Leach v. Shelby County Sheriff***, 891 F.2d 1241, 1245 (6th Cir. 1989) (prudent course for plaintiff who seeks to hold government entity liable for damages would be to name government entity itself to ensure requisite notice and opportunity to respond), *cert. denied*, 495 U.S. 932 (1990); ***Johnson v. Kegans***, 870 F.2d 992, 998 n.5 (5th Cir. 1989) (implying plaintiffs must expressly name governmental entity as defendant to pursue *Monell*-type claim), *cert. denied*, 492 U.S. 921 (1989); ***Pennington v. Hobson***, 719 F. Supp. 760, 773 (S.D. Ind. 1989) ("better practice is to make the municipal liability action unmistakably clear in the caption, by expressly naming the municipality as a defendant.").

Compare ***Asociacion De Subscripcion Conjunta Del Seguro DeResponsabilidad Obligatorio v. Flores Galarza,*** 484 F.3d 1, 26 (1st Cir. 2007), *reh'g and reh'g en banc denied* (1st Cir. 2007) ("Here, the complaint, in combination with the course of proceedings . . . establishes that Flores Galarza is being sued for damages in his personal capacity. If the JUA [Compulsory Liability Joint Underwriting Association of Puerto Rico, a Commonwealth-created entity] wishes to seek a personal judgment against Flores Galarza in a ruinous and probably uncollectible amount for actions that he took as the Commonwealth Treasurer to serve the interests of the Commonwealth, they are entitled to do that. . . . If such a judgment might induce the Commonwealth to indemnify Flores Galarza from the Commonwealth Treasury to spare him from ruin, that likelihood is irrelevant to the personal-capacity determination.") *with* ***Asociacion De Subscripcion Conjunta Del Seguro DeResponsabilidad Obligatorio v. Flores Galarza,*** 484 F.3d 1, 37 (1st Cir. 2007), *reh'g and reh'g en banc denied* (1st Cir. 2007) (Howard, J., concurring) ("The lead opinion concludes that a viable takings claim may exist against state officials acting in their individual capacities, but that Flores Galarza is entitled to qualified immunity because his withholding funds was reasonable in light of the unique circumstances present. . . I am not entirely convinced that federal takings claims may ever properly lie against state officials acting in their individual capacities.")**.**

See also ***Andrews v. Daw***, 201 F.3d 521, 523 (4th Cir. 2000) ("[A] government employee in his official capacity is not in privity with himself in his individual capacity for purposes of res judicata."); ***Wishom v. Hill,*** No. Civ.A. 01-3035-KHV, 2004 WL 303571, at *8 & n.6 (D. Kan. Feb. 13, 2004) ("Plaintiff brings official capacity claims against former Sheriff Hill. Suit against a person in his former official capacity, however, has no meaning. . . When a sheriff is replaced or ceases to hold office pending final resolution of an official capacity claim, his successor is automatically substituted as the party. *Kentucky v. Graham,* 473 U.S. 159, 166 n. 11 (1985) (citations omitted). Sheriff Steed replaced Sheriff Hill in January of 2001, and plaintiff brings suit against him in his official capacity. Substitution is not necessary and plaintiff's official capacity claim against the former Sheriff is redundant. The Court therefore dismisses plaintiff's official capacity claims against Sheriff Hill. . . . In addressing plaintiff's official capacity claim against current Sheriff Steed (a claim against the county), the Court still analyzes Sheriff Hill's conduct.").

F. Supervisory Liability v. Municipal Liability

Supervisory liability can be imposed without a determination of municipal liability. Supervisory liability runs against the individual, is based on his or her personal responsibility for the constitutional violation and does not require any proof of official policy or custom as the "moving force," ***City of Oklahoma City v. Tuttle***, 471 U.S. 808 (1985) (quoting ***Polk County v. Dodson***, 454 U.S. 312, 326 (1981)), behind the conduct.

"[W]hen supervisory liability is imposed, it is imposed against the supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates." ***Clay v. Conlee***, 815 F.2d 1164, 1170 (8th Cir. 1987). *See also* ***McGrath v. Scott,*** 250 F. Supp.2d 1218, 1222, 1223 (D.Ariz. 2003) ("[M]unicipal and supervisory liability present distinct and separate questions that are treated and analyzed as such. . . . Supervisory liability concerns whether supervisory officials' own action or inaction subjected the Plaintiff to the deprivation of her federally protected rights. Generally, liability exists for supervisory officials if they personally participated in the wrongful conduct or breached a duty imposed by law. . .In contrast, municipal liability depends upon enforcement by individuals of a municipal policy, practice, or decision of a policymaker that causes the violation of the Plaintiffs federally protected rights. . . . Typically, claims asserted against supervisory officials in both their individual and official capacities provide bases for imposing both supervisory liability (the individual claim) and municipality liability (the official capacity claim) if the supervisor constitutes a policymaker.").

As with a local government defendant, a supervisor cannot be held liable under § 1983 on a *respondeat superior* basis, ***Monell v. Dept. of Social Services***, 436 U.S. 658, 694 n.58 (1978), although a supervisory official may be liable even where not directly involved in the constitutional violation. The misconduct of the subordinate must be "affirmatively link[ed]" to the action or inaction of the supervisor. ***Rizzo v. Goode***, 423 U.S. 362, 371 (1976). *See, e.g.,* ***Iqbal v. Hasty***, 490 F.3d 143,152 (2d Cir. 2007) ("The personal involvement of a supervisor may be established by showing that he (1) directly participated in the violation, (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to act on information that constitutional

rights were being violated."), *cert. granted sub nom Ashcroft v. Iqbal,* 128 S. Ct. 2931 (2008).

Since supervisory liability based on inaction is separate and distinct from the liability imposed on the subordinate employees for the underlying constitutional violation, the level of culpability that must be alleged to make out the supervisor's liability may not be the same as the level of culpability mandated by the particular constitutional right involved.

While § 1983 itself contains no independent state of mind requirement, ***Parratt v. Taylor***, 451 U.S. 527, 535 (1981), *overruled in part on other grounds*, ***Daniels v. Williams***, 474 U.S. 327 (1986), lower federal courts consistently require plaintiffs to show something more than mere negligence yet less than actual intent in order to establish supervisory liability. *See e.g.*, ***Blankenhorn v. City of Orange***, 485 F.3d 463, 486 (9th Cir. 2007) ("While Chief Romero did not personally dismiss complaints against Nguyen, as was the case in *Larez* and *Watkins*, he did approve Nguyen's personnel evaluations despite repeated and serious complaints against him for use of excessive force. That approval, together with the expert testimony regarding the ineffectiveness of Nguyen's discipline for those complaints, could lead a rational factfinder to conclude that Romero knowingly condoned and ratified actions by Nguyen that he reasonably should have known would cause constitutional injuries like the ones Blankenhorn may have suffered."); ***Whitfield v. Melendez-Rivera***, 431 F.3d 1, 14 (1st Cir. 2005) ("Supervisors may only be held liable under § 1983 on the basis of their own acts or omissions. . . Supervisory liability can be grounded on either the supervisor's direct participation in the unconstitutional conduct, or through conduct that amounts to condonation or tacit authorization. . . Absent direct participation, a supervisor may only be held liable where '(1) the behavior of [his] subordinates results in a constitutional violation and (2) the [supervisor's] action or inaction was "affirmatively link [ed]" to the behavior in the sense that it could be characterized as "supervisory encouragement, condonation or acquiescence" or "gross negligence ... amounting to deliberate indifference."'. .Our holding with respect to Fajardo's municipal liability informs our analysis of the mayor's and the police commissioner's supervisory liability. Because the plaintiffs failed to provide sufficient evidence establishing that Fajardo's police officers were inadequately trained, it follows that the plaintiffs failed to prove that the mayor and the police commissioner were deliberately, recklessly or callously indifferent to the constitutional rights of the citizens of Fajardo. The plaintiffs failed to show that there were any training deficiencies, much less that the mayor or the police

commissioner'should have known that there were ... training problems.' . . Moreover, as discussed above, the evidence was insufficient to support the theory that the mayor or the police commissioner had condoned an unconstitutional custom."); ***Atteberry v. Nocona General Hospital***, 430 F.3d 245, 254, 256 (5th Cir. 2005) ("Ordinarily, supervisors may not be held vicariously liable for constitutional violations committed by subordinate employees. . . . Deliberate indifference in this context 'describes a state of mind more blameworthy than negligence.'[citing *Farmer* and *Estelle*] Accordingly, to prevail against either Norris or Perry, the Plaintiffs must allege, *inter alia*, that Norris or Perry, as the case may be, had subjective knowledge of a serious risk of harm to the patients. . . . In sum, the Plaintiffs alleged that Norris and Perry knew both that a dangerous drug was missing and that patients were dying at an unusually high rate. They also alleged that although Norris and Perry should and could have investigated the deaths and missing drugs or changed hospital policy, they did nothing for a considerable period of time. For Rule 12(b)(6) purposes, the requisite deliberate indifference is sufficiently alleged."); ***Doe v. City of Roseville,*** 296 F.3d 431, 441 (6th Cir. 2002) (Discussing standards of supervisory liability among the Circuits and concluding that "[a]lthough Jane had a constitutional right to be free from sexual abuse at the hands of a school teacher or official, she did not have a constitutional right to be free from negligence in the supervision of the teacher who is alleged to have actually abused her. Negligence is not enough to impose section 1983 liability on a supervisor."); ***Carter v. Morris***, 164 F.3d 215, 221 (4th Cir. 1999)("A plaintiff must show actual or constructive knowledge of a risk of constitutional injury, deliberate indifference to that risk, and 'an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.' [citing Shaw v. Stroud]"); ***Camilo-Robles v. Hoyos***, 151 F.3d 1, 7 (1st Cir. 1998) ("Notice is a salient consideration in determining the existence of supervisory liability. . . . Nonetheless, supervisory liability does not require a showing that the supervisor had actual knowledge of the offending behavior; he 'may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness.' *Maldonado-Denis v. Castillo- Rodriquez*, 23 F.3d 576, 582 (1st Cir.1994). To demonstrate deliberate indifference a plaintiff must show (1) a grave risk of harm, (2) the defendant's actual or constructive knowledge of that risk, and (3) his failure to take easily available measures to address the risk. . . . [T]he plaintiff must 'affirmatively connect the supervisor's conduct to the subordinate's violative act or omission.'. . This affirmative connection need not take the form of knowing sanction, but may include tacit approval of, acquiescence in, or purposeful disregard of, rights-violating conduct."); ***Lankford v. City of Hobart***, 73 F.3d 283, 287 (10th Cir.

1996) (following Third Circuit approach and requiring personal direction or actual knowledge for supervisory liability); ***Baker v. Monroe Township***, 50 F.3d 1186, 1194 & n.5 (3d Cir. 1995) (applying Third Circuit standard which requires "actual knowledge and acquiescence" and noting that other circuits have broader standards for supervisory liability); ***Howard v. Adkison***, 887 F.2d 134, 137,138 (8th Cir. 1989) (supervisors liable when inaction amounts to reckless disregard, deliberate indifference to or tacit authorization of constitutional violations); ***Gutierrez-Rodriguez v. Cartagena***, 882 F.2d 553, 562 (1st Cir. 1989) (supervisor's conduct or inaction must be shown to amount to deliberate, reckless or callous indifference to constitutional rights of others); ***Meriwether v. Coughlin***, 879 F.2d 1037, 1048 (2d Cir. 1989) ("[S]upervisory liability may be imposed when an official has actual or constructive notice of unconstitutional practices and demonstrates 'gross negligence' or 'deliberate indifference' by failing to act."); ***Rascon v. Hardiman***, 803 F.2d 269, 274 (7th Cir. 1986) (supervisory liability requires showing that "official knowingly, willfully, or at least recklessly caused the alleged deprivation by his action or failure to act."); ***Salvador v. Brown***, No. Civ. 04-3908(JBS), 2005 WL 2086206, at *4 (D.N.J. Aug. 24, 2005) ("The Third Circuit Court of Appeals has articulated a standard for establishing supervisory liability which requires 'actual knowledge and acquiescence.' *Baker v. Monroe Township,* 50 F.3d 1186, 1194 & n. 5 (3d Cir.1995). . . . Plaintiff has not alleged that Defendants Brown or MacFarland had any direct participation in the alleged retaliation by corrections officers. It appears that Plaintiff bases Commissioner Brown and Administrator MacFarland's alleged liability solely on their respective job titles, rather than any specific action alleged to have been taken by them adverse to Plaintiff.").

In ***Greason v. Kemp***, 891 F.2d 829 (11th Cir. 1990), the court found the Supreme Court's analysis in ***City of Canton v. Harris***, 489 U.S. 378 (1989), provided a helpful analogy in determining whether a supervisory official was deliberately indifferent to an inmate's psychiatric needs. The court held that a three-prong test must be applied in determining a supervisor's liability: "(1) whether, in failing adequately to train and supervise subordinates, he was deliberately indifferent to an inmate's mental health care needs; (2) whether a reasonable person in the supervisor's position would know that his failure to train and supervise reflected deliberate indifference; and (3) whether his conduct was causally related to the constitutional infringement by his subordinate." 891 F.2d at 836-37.

See also ***Ontha v. Rutherford County, Tennessee***, 2007 WL 776898, at *5, *6 (6th Cir. Mar. 13, 2007) (not published)("Sheriff Jones acknowledged in his

affidavit that the Rutherford County Sheriff's Office 'does not have a written policy specifically prohibiting' the use of a patrol car to strike a person who is fleeing on foot. . . Plaintiffs posit that this lack of training served as implicit authorization of or knowing acquiescence in Deputy Emslie's allegedly inappropriate use of his patrol car to chase and strike Tommy Ontha as he attempted to flee. Yet, to establish supervisory liability, it is not enough to point after the fact to a particular sort of training which, if provided, might have prevented the harm suffered in a given case. Rather, such liability attaches only if a constitutional violation is 'part of a pattern' of misconduct, or 'where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable or would properly be characterized as substantially certain to occur.' . . . In this case, Plaintiffs do not contend that Deputy Emslie's purported misuse of his patrol car was part of a pattern of comparable violations, as opposed to an isolated occurrence. Neither have Plaintiffs suggested any basis for us to conclude that the tragic events of this case were an 'almost inevitable' or 'substantially certain' byproduct of a lack of training as to the proper operation of a patrol car when pursuing an individual traveling on foot. . . . Under this record, we find as a matter of law that Plaintiffs cannot sustain their § 1983 claims against Sheriff Jones in his individual capacity."); ***Vaughn v. Greene County, Arkansas***, 438 F.3d 845, 851 (8th Cir. 2006) ("Vaughn further contends Sheriff Langston's failure to train Jail personnel on providing care for ill inmates and his policy or custom of deliberately avoiding information regarding the medical conditions and needs of inmates evidences Sheriff Langston's deliberate indifference to Blount's serious medical needs. Again, we disagree. A supervisor 'may be held individually liable ... if a failure to properly supervise and train the offending employee caused a deprivation of constitutional rights.' . . Under this theory of liability, Vaughn must demonstrate Sheriff Langston 'was deliberately indifferent to or tacitly authorized the offending acts.'. . Vaughn fails to do so. We cannot say Sheriff Langston's practice of delegating to others such duties as reading mail and responding to communications regarding Jail inmates amounts to deliberate indifference. Moreover, there is no indication from the record Sheriff Langston had notice his policies, training procedures, or supervision 'were inadequate and likely to result in a constitutional violation.'"); ***Sargent v. City of Toledo Police Department***, No. 04-4143, 2005 WL 2470830, at *3 (6th Cir. Oct. 6, 2005) (not published) ("We disagree with Sargent's argument that Taylor is vicariously liable for all of Whatmore's allegedly illegal actions. Certainly, supervisory officers who order a subordinate officer to violate a person's constitutional rights and non-supervisory officers present during a violation of person's civil rights who fail to stop the violation can be liable under §1983. . .

Additionally, the supervising officer can neither encourage the specific act of misconduct nor otherwise directly participate in it. . . Whether Whatmore committed a Fourth Amendment violation when he entered Sargent's home, Taylor is not vicariously liable for any alleged violation because there is no indication either that Taylor ordered Whatmore to enter the house illegally or that Taylor knew that Whatmore entered the home without consent. Thus, Taylor never ordered nor participated in a violation of Sargent's rights."); ***Loy v. Sexton***, No. 04-3971, 2005 WL 1285705, at *2 (6th Cir. May 23, 2005) (unpublished) ("First, the Loys contend that Sexton ratified Elliott's unconstitutional behavior by failing to investigate or to take any remedial measures following Mr. Loy's arrest. . . Although the failure to investigate may give rise to § 1983 supervisory liability, . . . no sua sponte investigation by Sexton was warranted here. The reports describing the arrest, including statements by Deputy Elliott and the two Children's Services workers, do not indicate that Elliott used excessive force or unlawfully entered the Loy residence. . . In the absence of a 'strong' indication of unconstitutional conduct, Sexton's failure to conduct an investigation was reasonable and he cannot be liable as a supervisor under § 1983."); ***Mercado v. City of Orlando,*** 407 F.3d 1152, 1157, 1158 (11th Cir. 2005) ("All of the factors articulated in *Graham* weigh in favor of Mercado. Because he was not committing a crime, resisting arrest, or posing an immediate threat to the officers at the time he was shot in the head, if Padilla aimed for Mercado's head, he used excessive force when apprehending Mercado. At this point, we must assume that Padilla was aiming for Mercado's head based on the evidence that Padilla was trained to use the Sage Launcher, that the weapon accurately hit targets from distances up to five yards, and that Mercado suffered injuries to his head. Padilla was aware that the Sage Launcher was a lethal force if he shot at a subject from close range. The officers were also aware that alternative actions, such as utilizing a crisis negotiation team, were available means of resolving the situation. This is especially true in light of the fact that Mercado had not made any threatening moves toward himself or the officers. Thus, in the light most favorable to Mercado, Padilla violated his Fourth Amendment rights when he intentionally aimed at and shot Mercado in the head with the Sage Launcher. . .We further conclude, however, that Officer Rouse did not violate Mercado's Fourth Amendment rights. Although Officer Rouse did not fire the Sage Launcher, Mercado contends that she should be held responsible under a theory of supervisory liability. . . Officer Rouse was in another room during the incident, and did not see Padilla aim or fire the gun. She did not tell Padilla to fire the Sage Launcher at Mercado's head. Given that Padilla was trained in the proper use of the launcher, that the Department's guidelines prohibited firing the launcher at a suspect's head or neck except in deadly force situations, and that . . . there is no

evidence that Padilla has used similarly excessive force in the past-all of which are undisputed facts in the record-Rouse could not reasonably have anticipated that Padilla was likely to shoot Mercado in the head either intentionally or unintentionally. Even under the 'failure to stop' standard for supervisory liability, Rouse cannot be held liable."); ***Randall v. Prince George's County, Maryland,*** 302 F.3d 188, 207 (4th Cir. 2002) ("Because supervisors 'cannot be expected to promulgate rules and procedures covering every conceivable occurrence,' and because they may be powerless to prevent deliberate unlawful acts by subordinates, the courts have appropriately required proof of multiple instances of misconduct before permitting supervisory liability to attach."); ***Sutton v. Utah State School for the Deaf and Blind***, 173 F.3d 1226, 1240, 1241 (10th Cir. 1999) ("Where a superior's failure to train amounts to deliberate indifference to the rights of persons with whom his subordinates come into contact, the inadequacy of training may serve as the basis for § 1983 liability. . . . We are persuaded that plaintiff-appellant Sutton's allegations cannot be dismissed as inadequate in light of the repeated notification to Moore, as pled, of notice that James, with all his impairments, had been subjected to repeated sexual assaults by the much larger boy. In light of James's severe impairments, and the notification to Moore as alleged of danger to James, and the averment of Moore's failure to take action to prevent James being repeatedly molested, App. at 5, we are persuaded that a viable claim that would 'shock the conscience of federal judges' was stated."); ***Barreto-Rivera v. Medina-Vargas,*** 168 F.3d 42, 49 (1st Cir.1999) ("Officer Medina-Vargas's history in the police department was troubled at best. Despite failing the psychological component of the police academy entrance exam, he was admitted to the school. Over the course of his twenty- five year career, Officer Medina-Vargas was disciplined thirty times for abuse of power, unlawful use of physical force and/or physical assaults; six incidents led to recommendations that he be dismissed from the force. Toledo-Davila's first review of Officer Medina-Vargas's file came in 1992, when an investigating officer recommended his dismissal because he had an extensive record of physical assaults and there had been no apparent change in his behavior despite sanctions. Ignoring the recommendation, Toledo-Davila imposed a fifteen day suspension. Two weeks later, Toledo-Davila reviewed another disciplinary action taken against Officer Medina-Vargas for the improper use of his firearm three years earlier. Following this review, Toledo-Davila reduced Officer Medina-Vargas's sanction from a thirty day suspension imposed by the former superintendent to a two day suspension. There is clearly sufficient evidence in this record to allow a jury to reasonably conclude that Toledo-Davila displayed deliberate indifference to Officer Medina-Vargas's propensity toward violent conduct, and that there was a causal connection between

this deliberate indifference and Officer Medina- Vargas's fatal confrontation with Ortega-Barreto."); ***Spencer v. Doe***, 139 F.3d 107, 112 (2d Cir. 1998) ("We have long recognized that supervisors may be 'personally involved' in the constitutional torts of their supervisees if: (1) the supervisory official, after learning of the violation, failed to remedy the wrong; (2) the supervisory official created a policy or custom under which unconstitutional practices occurred or allowed such policy or custom to continue; or (3) the supervisory official was grossly negligent in managing subordinates who caused the unlawful condition or event."); ***Doe v. Taylor Independent School District***, 15 F.3d 443, 453 (5th Cir. 1994) (en banc) ("The most significant difference between *City of Canton* and this case is that the former dealt with a municipality's liability whereas the latter deals with an individual supervisor's liability. The legal elements of an individual's supervisory liability and a political subdivision's liability, however, are similar enough that the same standards of fault and causation should govern."), *cert. denied sub nom* ***Lankford v. Doe***, 115 S. Ct. 70 (1994); ***Shaw v. Stroud***, 13 F.3d 791, 798 (4th Cir. 1994) ("We have set forth three elements necessary to establish supervisory liability under § 1983: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices,' and (3) that there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff." citing *Miltier v. Beorn*, 896 F.2d 848, 854 (4th Cir. 1990)), *cert. denied*, 115 S. Ct. 68 (1994); ***Walker v. Norris***, 917 F.2d 1449, 1455-56 (1990) (applying ***City of Canton*** analysis to issue of supervisory liability); ***Sample v. Diecks***, 885 F.2d 1099, 1116-1117 (3d Cir. 1989) (same).

Compare ***Rosenberg v. Vangelo,*** No. 02-2176, 2004 WL 491864, at *5 (3d Cir. Mar. 12, 2004) (unpublished) ("[W]e respectfully disagree with the *Ricker* Court's decision to cite and rely on the 'direct and active' language from *Grabowski*. We also conclude that the deliberate indifference standard had been clearly established prior to 1999 and no reasonable official could claim a higher showing would be required to establish supervisory liability.") *with* ***Ricker v. Weston,*** No. 00-4322, 2002 WL 99807, at *5, *6 (3d Cir. Jan. 14, 2002) (unpublished) ("A supervisor may be liable under 42 U.S.C. § 1983 for his or her subordinate's unlawful conduct if he or she directed, encouraged, tolerated, or acquiesced in that conduct. . . . For liability to attach, however, there must exist a causal link between the supervisor's action or inaction and the plaintiff's injury. . . .[E]ven assuming,

arguendo, that the K-9 officers were not disciplined as a result of Zukasky's investigation, that investigation did not in any way cause Freeman's injuries. . . . We reach the same conclusion as to Palmer and Goldsmith. The undisputed facts indicate that they knew about Schlegel's prior misconduct but nonetheless promoted him to Captain of Field Services. They also knew of Remaley's violent episodes but permitted him to be a member of the K-9 Unit. These acts are, as a matter of law, insufficient to constitute the requisite direct involvement in appellees' injuries. . . . Importantly, neither Palmer nor Goldsmith were aware of the attacks in question until after they occurred. At that time, they ordered an investigation but ultimately chose not to discipline the officers involved, even though it appears that Zukasky had recommended that at least certain of the officers be disciplined. This decision not to discipline the officers does not amount to active involvement in appellees' injuries given that all of the injuries occurred before the decision. There is simply no causal link between those injuries and what Palmer and Goldsmith did or did not do.").

Compare ***Lynn v. City of Detroit,*** 98 Fed. Appx. 381, 386 (6th Cir. 2004) ("According to several witnesses from within the department, police supervisors in Detroit are neither trained nor instructed to look for evidence of criminality when reviewing officers' activities. Supervisors are expected to keep their eyes open for 'anything amiss,' but they focus on ensuring that reports are complete and accurate and that officers' time has been spent efficiently and productively. Discovery of criminal activity by subordinate officers is ordinarily made through the receipt of complaints from citizens. A supervisor's responsibility upon receiving a complaint is to report it to the Internal Affairs Division; Internal Affairs then handles the investigation. Investigation by Internal Affairs--not by supervisors--is the tool by which the Department attempts to uncover criminality on the part of its officers. Given these facts, we do not think the defendants' failure to investigate the corrupt officers amounts to acquiescence in the officers' misconduct or reflects indifference to violations of the plaintiffs' rights. The defendants were entitled to rely on Internal Affairs to perform its assigned function. The defendants' responsibility was to report specific complaints of criminality or misconduct that they themselves observed. None of the defendants personally observed any misconduct. Ferency and Tate received specific complaints and duly reported them. Ferency also reported generalized rumors of criminal activity. It was the reports to Internal Affairs that led, in time, to the officers' prosecution.") *with* ***Lynn v. City of Detroit,*** 98 Fed. Appx. 381, 388 (6th Cir. 2004) (Clay, J., dissenting) ("The majority opinion suggests that Defendants, based on the record in this case, had no duty to respond to the widespread, commonly known criminal conduct that permeated the walls of the City of Detroit's sixth police

precinct's third platoon, other than to sporadically report a few citizen complaints of police misconduct to either Internal Affairs or other officers. What is not disputed is that Defendants, who directly supervised the rogue officers responsible for violations of Plaintiffs' constitutional rights, acted with deliberate indifference when confronted with daily rumors and discussion of their subordinates' criminal behavior. By looking the other way, or by failing to act when faced with apparently reliable reports of police corruption, Defendants actually contributed to the lawlessness of the third platoon by permitting its officers to continue to violate citizens' rights with impunity.").

See also ***Tardiff v. Knox County,*** 397 F.Supp.2d 115, 141-43 (D.Me. 2005)("Unlike individual officer liability, the liability of supervisory officials does not depend on their personal participation in the acts of their subordinates which immediately brought about the violation of the plaintiff's constitutional rights. . . Liability can result from Sheriff Davey's acquiescence to Knox County Jail's ongoing practice of strip searching all detainees charged with misdemeanors. . . Some evidence in the record points to Sheriff Davey's actual knowledge of this ongoing practice. . . . However, Sheriff Davey disputes that he had actual knowledge of the unlawful custom and practice of strip searching detainees charged with misdemeanors without reasonable suspicion of concealing contraband or weapons. . . Regardless of his actual knowledge, the Court concludes that based on the undisputed evidence in the record he should have known that the practice was ongoing, and that, despite the change to the written policy in 1994 and the institution of new procedures in 2001, the practice had not been eliminated. The issue then becomes whether Plaintiffs have established that Sheriff Davey's conduct amounts to deliberate indifference or willful blindness to an unconstitutional practice of his subordinates. . . Finally, Plaintiffs must establish a causal connection between Sheriff Davey's conduct and the corrections officers' unconstitutional actions. . . . The widespread practice was sufficient to alert Sheriff Davey that the unlawful strip search practice persisted. On the evidence presented in the summary judgment record, the Court concludes that Sheriff Davey's failure to take any corrective action directed at eradicating this pervasive practice--even in the face of official Department of Corrections' reports and the incontrovertible record evidence that the practice persisted--amounts to a reckless indifference of the constitutional rights of class members arrested on misdemeanor charges. Sheriff Davey's reckless indifference allowed the practice to persist for years and caused the violation of the constitutional rights of Plaintiffs arrested on misdemeanor charges. For the foregoing reasons, the Court will grant Plaintiffs' Motion for Partial Summary Judgment with respect to that

part of Count II alleging that Sheriff Davey is responsible, in his personal capacity, for the Knox County Jail's unconstitutional custom and practice of strip searching detainees charged with misdemeanors."); ***McAllister v. City of Memphis***, No. 01-2925 DV, 2005 WL 948762, at *4, *5 (W.D. Tenn. Feb. 22, 2005) (not reported) ("Young conducted the hearing. However, Young did not consider the statements of the witnesses. He did not interview the three police officers who were present at the time the incident occurred. This is true despite the fact that Charnes had determined that Polk's statement deserved considerable weight because it is unusual for an officer to admit that he believes that another officer struck a citizen. Although the IAB is not permitted to consider previous complaints against the officer being investigated, a hearing officer is allowed to consider them. Thus, Young knew that Hunt had six prior complaints against him. Moreover, although Young was permitted to subpoena anyone he believed would be helpful, the only person he subpoenaed was Hunt. Young never spoke with Plaintiff, and Plaintiff was not allowed to attend the hearing. Additionally, the MPD's policy states that a presumption of guilt is established when the IAB sustains a charge against an officer. In spite of this seemingly overwhelming evidence against Hunt, Young dismissed the complaint. Following the hearing, the City sent Plaintiff a letter informing him that there was sufficient evidence to sustain Plaintiff's allegations and that the appropriate action had been taken. Deputy Chief Pilot admitted in her deposition that the tone of the letter was misleading. . . This could be evidence that Defendant's actions may have been a result of deliberate indifference to the Plaintiff's rights. Furthermore, as it is IAB's policy to send a letter to every complainant stating that appropriate action was taken, even when no action at all was taken, . . . such a practice may indicate Defendant's ratification of its officers' misconduct. . . . Therefore, the Court finds that a genuine issue of material fact exists as to whether a meaningful investigation was conducted. Additionally, based on the IAB investigation a genuine issue of material fact exists as to whether Defendant's decision not to discipline Officer Hunt indicates deliberate indifference on the part of the City, as envisioned by the Supreme Court in *City of Canton*....").

See also ***Otero v. Wood,*** 316 F.Supp.2d 612, 623-26 (S.D. Ohio 2004) ("The involvement of Zoretic, Wood, and Curmode . . . cannot be characterized as 'mere presence' or 'mere backup.' Zoretic was virtually looking over Brintlinger's shoulder when Brintlinger fired the gas gun. Wood was directing the firing of the knee knockers in a hands-on and immediate way. Curmode was the 'prime mover' of the entire operation, responsible for planning and initiating all action. None of these Defendants was a remote, desk-bound supervisor; rather, all three were direct participants in the firing of the knee knockers on April 29, 2001. Similarly, taking all

of Plaintiff's factual allegations as true, there is a direct causal connection between the supervision provided by Zoretic, Wood, and Curmode and the failure of any officers to provide medical assistance to Plaintiff. Indeed, Zoretic, Wood, and Curmode may all be said to have directly participated in this alleged constitutional violation since they were present in Plaintiff's immediate vicinity and they, too, failed to help and were arguably deliberately indifferent to her need. . . . A reasonable jury could find, based on the facts as presented by Plaintiff, that the use of wooden baton rounds here was objectively unreasonable and that Defendants Zoretic, Wood, and Curmode each played a significant role in this use of force and thus should be liable to Plaintiff under § 1983. While Defendants unquestionably had a legitimate interest in dispersing the crowd that had gathered along Norwich Avenue, a reasonable jury could find that they did so more harshly than was necessary"); ***McGrath v. Scott,*** 250 F. Supp.2d 1218, 1226 & n.4 (D.Ariz. 2003) ("[T]he Court finds that the deliberately indifferent standard adopted in *L.W.* applies generally to all supervisory liability claims under § 1983. A supervisor can be liable in his individual capacity for (1) his own culpable action or inaction in the training, supervision, or control of his subordinates; (2) for his acquiescence in the constitutional deprivation; or (3) for conduct that shows a *deliberate indifference* to the rights of others. Deliberate indifference encompasses recklessness. . . . The Court does not decide if the recklessness standard is objective or subjective, as in either case Plaintiffs Complaint adequately states a claim."); ***Classroom Teachers of Dallas/Texas State Teachers Ass'n/National Education Ass'n v. Dallas Independent School District,*** 164 F.Supp.2d 839, 851 (N.D. Tex. 2001) ("Deliberate indifference to violations of constitutional rights is sufficient for supervisory liability under §1983. There is no principle of superiors' liability, either in tort law generally or in the law of constitutional torts. To be held liable for conduct of their subordinates, supervisors must have been personally involved in that conduct. That is a vague standard. We can make it more precise by noting that supervisors who are merely negligent in failing to detect and prevent subordinates' misconduct are not liable, because negligence is no longer culpable under section 1983. Gross negligence is not enough either. The supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference."); ***Comfort v. Town of Pittsfield***, 924 F. Supp. 1219, 1231 (D. Me. 1996) ("Supervisory liability may attach despite any direct involvement by [police chief] in the unconstitutional activity. Lawrence, however, may only be held liable under § 1983 on the basis of his own acts or omissions. Supervisory personnel are liable under § 1983, upon a showing of a constitutional violation, when: (I) the supervisor's conduct or inaction amounts

to either deliberate, reckless or callous indifference to the constitutional rights of others, and (2) an affirmative link exists between the street-level constitutional violation and the acts or omissions of the supervisory officials." cites omitted).

Although the courts do not differ significantly as to the level of culpability required for supervisory liability, there is some split on the question of whether the requisite culpability for supervisory inaction can be established on the basis of a single incident of subordinates' misconduct or whether a pattern or practice of constitutional violations must be shown.

See ***International Action Center v. United States,*** 365 F.3d 20, 26-28 (D.C. Cir. 2004) ("The MPD supervisors do not seek a ruling on whether they enjoy qualified immunity from a supervisory inaction claim based on past transgressions under *Haynesworth*. . . . . What was being appealed, counsel explained, was any effort to base liability on a duty to actively supervise and to train without regard to anything, any other aspect, or any prior history. That merely because these four individuals are supervisors, they had an obligation to anticipate that constitutional torts were highly likely and to take steps to prevent them regardless of any other facts in the case. . . . Plaintiffs do wish to pursue such a theory of liability. At oral argument, they argued that the duty to supervise arose generally from the potential for constitutional violations, even absent proof that the MPD supervisors had knowledge of a pre-existing pattern of violations by either Cumba or Worrell. Plaintiffs contend that the general duty to supervise 'arises in the ordinary course of taking responsibility where the police intervene in the context of mass demonstration activity,'. . .because of the 'substantial risk' of constitutional violations. . . . Plaintiffs also contend that '[t]he duty to supervise does not require proof of a pre-existing pattern of violations.'. . Such a theory represents a significant expansion of *Haynesworth* -- one we are unwilling to adopt. The broad wording of the district court opinion, and its failure to focus on what 'circumstances' gave rise to a duty on the part of the supervisors to act, pose the prospect that a claim of the sort described by plaintiffs' counsel could proceed. The district court, in denying qualified immunity on the inaction claim, simply noted that 'it is undisputed that the MPD Supervisors were overseeing the activities of many uniformed and plain-clothes MPD officers present at the Navy Memorial for crowd control purposes during the Inaugural Parade and that those officers included ... Cumba and Worrell,' and that plaintiffs 'allege that in this context, there could be a substantial risk of violating protestors' free speech or Fourth Amendment rights.'. . Without focusing on which allegations sufficed to give rise to a claim for supervisory inaction, the court concluded that

immunity was not available because plaintiffs 'have sufficiently alleged a set of circumstances at the Navy Memorial on January 20, 2001, which did indeed make it 'highly likely' that MPD officers would violate citizens' constitutional rights.'. . The district court's analysis failed to link the likelihood of particular constitutional violations to any past transgressions, and failed to link these particular supervisors to those past practices or any familiarity with them. In the absence of any such 'affirmative links,' the supervisors cannot be shown to have the requisite 'direct responsibility' or to have given 'their authorization or approval of such misconduct,'. . . and the effort to hold them personally liable fades into respondeat superior or vicarious liability, clearly barred under Section 1983. . . . The question thus reduces to the personal liability of these four individuals for alleged inadequate training and supervision of Cumba and Worrell -- in the absence of any claim that these supervisors were responsible for the training received by Cumba and Worrell, or were aware of any demonstrated deficiencies in that training. That leaves inaction liability for supervision, apart from 'active participation' (defined to include failure to intervene upon allegedly becoming aware of the tortious conduct) and apart from any duty to act arising from past transgressions highly likely to continue in the absence of supervisory action. Keeping in mind that there can be no respondeat superior liability under Section 1983, what is left is plaintiffs' theory that the supervisors' duty to act here arose simply because of 'the context of mass demonstration activity.' . . . We accordingly reject plaintiffs' theory of liability for general inaction, mindful not only of the hazards of reducing the standard for pleading the deprivation of a constitutional right in the qualified immunity context, but also of the degree of fault necessary to implicate supervisory liability under Section 1983.").

Compare ***Braddy v. Florida Dep't of Labor and Employment Security***, 133 F.3d 797, 802 (11th Cir. 1998) ("The standard by which a supervisor is held liable in her individual capacity for the actions of a subordinate is extremely rigorous. The causal connection between Lynch's offensive behavior and Davis's liability as his supervisor for such behavior can only be established if the harassment was sufficiently widespread so as to put Davis on notice of the need to act and she failed to do so. A few isolated instances of harassment will not suffice, the 'deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration.'"); ***Howard v. Adikson***, 887 F.2d 134, 138 (8th Cir. 1989) ("A single incident, or a series of isolated incidents, usually provides an insufficient basis upon which to assign supervisory liability."); ***Meriwether v. Coughlin***, 879 F.2d 1037, 1048 (2d Cir. 1989) (impliedly accepting

defendants' argument that more than one incident is needed to impose supervisory liability); ***Garrett v. Unified Government of Athens-Clarke County,*** 246 F. Supp.2d 1262, 1283 (M.D. Ga. 2003) ("[T]he standard for imposing supervisory liability differs slightly from the standard for municipal liability. Specifically, an individual can be held liable on the basis of supervisory liability either 'when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between the actions of the supervising official and the alleged constitutional deprivation.' *Brown,* 906 F.2d at 671. Here, there are no allegations that Lumpkin personally participated in Irby's arrest. Thus, the Court turns to the question of whether there was a causal connection between Lumpkin's actions and the deprivation of Irby's constitutional rights. . . . [I]n the case at bar, a causal connection can only be established if the unconstitutional use of the hog-tie restraint was sufficiently widespread so as to put Lumpkin on notice of the need to act and he failed to do so. . . . The Court finds that Plaintiff has failed to present evidence of a history of unconstitutional, widespread abuse of the hog-tie restraint sufficient to put Lumpkin on notice. As the Court noted earlier, a finding that there was widespread use of the hog-tie restraint does not automatically equate with a finding of widespread abuse. Plaintiff has not presented any evidence of previous complaints or injuries resulting from suspects being hog-tied by Athens-Clarke County police officers. Simply put, Plaintiff has failed to present sufficient evidence of flagrant, rampant, and continued abuse of the hog-tie restraint so as to impose supervisory liability."), *reversed and remanded on other grounds,* 378 F.3d 1274 (11th Cir. 2004) *and* ***Williams v. Garrett***, 722 F. Supp. 254, 259 (W.D. Va. 1989) ("[P]laintiff. . . . may not rely on evidence of a single incident or isolated incidents to impose supervisory liability . . . must demonstrate 'continued inaction in the face of documented widespread abuses.'") *with* ***Gutierrez-Rodriguez v. Cartagena***, 882 F.2d 553, 567 (1st Cir. 1989) ("An inquiry into whether there has been a pattern of past abuses or official condonation thereof is only required when a plaintiff has sued a municipality. Where . . . plaintiff has brought suit against the defendants as individuals . . . plaintiff need only establish that the defendants' acts or omissions were the product of reckless or callous indifference to his constitutional rights and that they, in fact, caused his constitutional deprivations.").

See also ***Murphy v. New York Racing Ass'n, Inc.,*** 76 F. Supp.2d 489, 501 n.8 (S.D.N.Y. 1999) ("As Plaintiff's reliance on *Camilo-Robles*, a First Circuit opinion, indicates, the Second Circuit has yet to adopt this 'transitive' theory of deliberate indifference, whereby a supervisor's actual or constructive notice of constitutional torts against one plaintiff can serve as the basis of a finding of

deliberate indifference to the rights of a subsequent plaintiff. We note, however, that this theory is consistent with the holding of one of the Second Circuit's leading 'deliberate indifference' cases, *viz*., *Meriwether v. Coughlin*, 879 F.2d 1037 (1989).").

See also ***Poe v. Leonard,*** 282 F.3d 123, 144, 146 (2d Cir. 2002) ("One Circuit . . . found a supervisor ineligible for qualified immunity because he failed to conduct a background check on an applicant. *See Parker v. Williams,* 862 F.2d 1471, 1477, 1480 (11th Cir.1989) (finding that a sheriff was ineligible for qualified immunity because he failed to conduct a background check on a mentally unstable person he hired, who then kidnapped and raped a pre-trial detainee), *overruled on other grounds by Turquitt v. Jefferson County,* 137 F.3d 1285, 1291 (11th Cir.1998) (*en banc*). *Parker* is distinguishable because it involved a supervisor's failure to screen a job applicant with a problematic history, rather than his failure to re-screen a problematic officer who was part of a pre-existing staff. In the case at bar, Leonard did not hire Pearl, but instead began to supervise him as part of the staff Leonard inherited from his predecessor. It is not unreasonable for a subsequent supervisor to rely on his predecessor to inform him of subordinates with problematic behaviors or histories. Supervisors cannot be expected to reinvent the wheel with every decision, for that is administratively unfeasible; rather, they are entitled to rely upon the decisions of their predecessors or subordinates so long as those decisions do not appear to be obviously invalid, illegal or otherwise inadequate. . . . Reasonable supervisors confronted with the circumstances faced by Leonard could disagree as to the legality of his inaction. Indeed, even different circuits disagree about whether it is objectively reasonable for a supervisor, upon assuming his new post, to neglect to review his subordinates' personnel histories."); ***Watkins v. City of Oakland***, 145 F.3d 1087, 1093 (9th Cir. 1998) (denying qualified immunity to Chief of Police where he "signed an internal affairs report dismissing [Plaintiff's] complaint despite evidence of Officer Chew's use of excessive force contained in the report and evidence of Officer Chew's involvement in other police dog bite incidents, and apparently without ascertaining whether the circumstances of those cases required some ameliorative action to avoid or reduce serious injuries to individuals from dogs biting them[,]" and where the Chief "did not establish new procedures, such as including the use of police dogs within the OPD's policy governing the use of nonlethal force, despite evidence of numerous injuries to suspects apprehended by the use of police dogs."); ***Diaz v. Martinez***, 112 F.3d 1, 4 (1st Cir. 1997) (holding, in context of interlocutory appeal on question of qualified immunity, that "a reasonable police supervisor, charged with the duties that Vazquez bore, would have

understood that he could be held constitutionally liable for failing to identify and take remedial action concerning an officer with demonstrably dangerous predilections and a checkered history of grave disciplinary problems."); ***Wilson v. City Of Norwich***, 507 F.Supp.2d 199, 209, 210 (D. Conn. 2007) ("In this case, Wilson has shown only that Fusaro was aware of one set of photographs taken years earlier by Daigle of a consenting female colleague. Even drawing all reasonable inferences in Wilson's favor, this history was not enough to make it plainly obvious to Fusaro, or to Norwich, that Daigle might abuse his position of authority in running the liquor sting operation or in fabricating a child pornography 'investigation' to cause young women to pose for nude and semi-nude photographs. It thus fails the *Poe* test that the information known to the supervisor be sufficient to put a reasonable supervisor on notice that there was a high risk that the subordinate would violate another person's constitutional rights."); ***Sanchez v. Figueroa***, 996 F. Supp. 143, 148-49 (D.P.R. 1998) ("In the Court's estimation, where Plaintiff alleges failure to implement a satisfactory screening and/or supervision mechanism as a basis for supervisory liability, deliberate indifference encompasses three separate elements. . . First, Plaintiff must demonstrate that the current screening/supervision mechanisms utilized by the police department are deficient. . . . That is, Plaintiff must demonstrate that candidates whose reasonably observable qualities demonstrate an abnormal likelihood that they will violate the constitutional rights of citizens are being hired and/or active officers whose reasonably observable conduct demonstrates a similar likelihood are not being screened for dismissal or (re)training. . . . Second, in order to demonstrate deliberate indifference, Plaintiff will be required to demonstrate that Toledo knew or should have known that the above-discussed deficiencies exist. . . . Proving knowledge or wilful blindness will require the proffer of evidence that was known or should have been known to Toledo and that put him on notice or should have put him on notice that a problem existed. . . . Third, assuming Plaintiff can successfully demonstrate that a deficiency in the screening and/or supervision mechanisms used by the police existed and that Toledo knew of it, Plaintiff will then have to show that Toledo failed to reasonably address the problem. . . . Toledo can only have acted with deliberate indifference if he failed to address the known problem at all when he became aware of it (or should have become aware of it) or if he addressed it in a manner so unreasonable as to be reckless.").

See also ***Smith v. Gates,*** No. CV97-1286CBMRJGX, 2002 WL 226736, at **3-5 (C.D. Cal. Feb. 5, 2002) (not reported) ("Defendants argue that Police Commissioners cannot be held personally liable under § 1983 because they act by

majority rule and therefore have no authority to unilaterally control LAPD policy or supervise officers. . . . The Ninth Circuit has not directly addressed whether individual members of a police commission or other supervisory body may be held liable, pursuant to the authority granted to them, when they act by majority vote. However, the Ninth Circuit implicitly recognizes that members of a council or board, which acts by majority vote, may be held individually liable for their conduct. . . . The Court therefore rejects the Commissioners' argument that they have no individual liability as supervisors by virtue of the fact they act by majority vote.").

G. No Qualified Immunity From Compensatory Damages for Local Entities ; Absolute Immunity From Punitive Damages

Although certain individual officials may have a qualified immunity available to them in suits brought against them for damages, *see generally* ***Harlow v. Fitzgerald***, 457 U.S. 800 (1982) and ***Anderson v. Creighton***, 483 U.S. 635 (1987), the Court has held that a government defendant has no qualified immunity from compensatory damages liability. ***Owen v. City of Independence***, 445 U.S. 622 (1980). *See also* ***Beedle v. Wilson***, 422 F.3d 1059, 1068 (10th Cir. 2005) ("The Hospital nonetheless contends it is not liable because at the time it filed its state suit and opposed Mr. Beedle's various motions to dismiss, the Hospital had a good-faith basis for believing it was not a governmental entity for §1983 purposes and thus was not precluded from bringing a libel action. . . This contention approximates a qualified immunity defense in that the Hospital claims a reasonable official would not have known its actions violated a clearly established federal right. . . Such an argument is misplaced because a governmental entity may not assert qualified immunity from a suit for damages. . . A qualified immunity defense is only available to parties sued in their individual capacity."); ***Langford v. City of Atlantic City***, 235 F.3d 845, 850 (3d Cir. 2000) ("[W]e are satisfied and accordingly hold, as do *Monell* and *Carver*, that a municipality (in this case, Atlantic City) can be held liable for its unconstitutional acts in formulating and passing its annual budget."); ***Berkley v. Common Council of City of Charleston***, 63 F.3d 295, 302 (4th Cir. 1995) (en banc) (holding "that a municipality is not entitled to an absolute immunity for the actions of its legislature in suits brought under 42 U.S.C. § 1983."). *Accord* ***Carver v. Foerster***, 102 F.3d 96, 105 (3d Cir. 1996) ("We know of no circuit that currently accepts the doctrine of municipal legislative immunity under Section 1983."); ***Goldberg v. Town of Rocky Hill***, 973 F.2d 70, 74 (2d Cir.1992); ***Kessler v. City of Providence,*** 167 F. Supp.2d 482, 490, 491 (D.R.I. 2001) ("In this case, Plaintiff is not seeking damages against Defendants Prignano and Partington; instead she seeks

one day's wages from the Police Department that she lost from the suspension. Therefore, Defendants can not assert the doctrine of qualified immunity as an affirmative defense. For this reason, the individual Defendants' motion for summary judgment is denied; and therefore, the Defendant City of Providence's motion to dismiss, which is inexorably tied to Prignano and Parrington's motion for summary judgment, is also denied.").

On the other hand, while punitive damages may be awarded against individual defendants under § 1983, *see* ***Smith v. Wade***, 461 U.S. 30 (1983), local governments are immune from punitive damages. ***City of Newport v. Fact Concerts***, 453 U.S. 247 (1981). Note, however, that "***City of Newport*** does not establish a federal policy prohibiting a city from paying punitive damages when the city finds its employees to have acted without malice and when the city deems it in its own best interest to pay." ***Cornwell v. City of Riverside***, 896 F.2d 398, 399 (9th Cir. 1990), *cert. denied*, 497 U.S. 1026 (1990).. *See also* ***Trevino v. Gates***, 99 F.3d 911, 921 (9th Cir. 1996) ("Councilmembers' vote to pay punitive damages does not amount to ratification [of constitutional violation].").

See also ***Chestnut v. City of Lowell,*** 305 F.3d 18, 21, 22 (1st Cir. 2002) (en banc) (vacating award of punitive damages against City, remanding and giving plaintiff option of having new trial on issue of actual damages against City); ***Schultzen v. Woodbury Central Community School District***, 187 F. Supp.2d 1099, 1128 (N.D. Iowa 2002) (After an exhaustive survey of the case law and a comprehensive discussion of the issue, the court concludes : "In light of the well-settled presumption of municipal immunity from punitive damages and the absence of any indicia of congressional intent to the contrary, the court finds that punitive damages are unavailable against local governmental entities under Title IX."); ***Saldana-Sanchez v. Lopez-Gerena,*** 256 F.3d 1, 12, 13 (1st Cir. 2001) (discussing cases where waiver of *City of Newport* immunity has been found**).**

The Supreme Court had granted certiorari to address the following question: "Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, Section 6-5-410 (Ala. 1975), governs the recovery by the representative of the decedent's estate under 42 U.S.C. Section 1983?" In ***City of Tarrant v. Jefferson***, 682 So.2d 29 (Ala. 1996), *cert. dismissed*, 118 S. Ct. 481 (1997), plaintiff sued individually and as a personal representative for the estate of his mother, alleging that Tarrant firefighters, based upon a policy of selectively denying fire protection to minorities,

purposefully refused to attempt to rescue and revive his mother. On appeal from an interlocutory order in which the trial court held that the question of the survivability of Ms. Jefferson's cause of action for compensatory damages under section 1983 was governed by federal common law rather than by Alabama's Wrongful Death Act, the Supreme Court of Alabama reversed, holding that Alabama law governed plaintiff's claim. Under the Alabama wrongful death statute, compensatory damages are not available. The statute allows only punitive damages.

A municipality may still be subject to ***Monell*** liability where the individual officer is able to invoke qualified immunity. *See, e.g.,* ***Palmerin v. City of Riverside***, 794 F.2d 1409, 1415 (9th Cir. 1986).

Courts sometimes confuse the consequences that flow from two very different determinations. If the court concludes that there is no underlying constitutional violation, then ***City of Los Angeles v. Heller***, 475 U.S. 796 (1986), would dictate no liability on the part of any defendant. (See discussion of "Derivative Nature of Liability," *infra*) If, however, the determination is that there is no liability on the part of the individual official because of the applicability of qualified immunity, it does not necessarily follow that there has been no constitutional violation and that the municipality cannot be liable.

See, e.g., ***International Ground Transportation v. Mayor and City Council of Ocean City***, 475 F.3d 214, 220 (4th Cir. 2007) ("In this case, the verdict form shows that the jury found that the City deprived IGT of procedural and substantive due process but that the individual defendants did not. The City argues that these findings trigger application of the *Heller* rule and require that judgment as a matter of law be entered in its favor. However, the jury was instructed that it could find the individual defendants not liable based on qualified immunity. Thus, the jury could have found that constitutional violations were committed but that the individual defendants were entitled to immunity. Indeed, this is the only way the jury's verdict may be read consistently, and we must 'harmonize seemingly inconsistent verdicts if there is any reasonable way to do so.'. . The jury was specifically instructed that it could find the individual defendants not liable based on qualified immunity. However, the verdict form submitted to the jury allowed the jury to find that the individual defendants committed constitutional violations but were entitled to qualified immunity only by checking the 'No' answers to the questions asked regarding the individual defendants (e.g. 'Do you find that the following persons deprived White's Taxi of procedural due process?'). The City, in fact, conceded at

oral argument that there was no way for the jury to find that qualified immunity applied except by answering 'No' to the questions asking whether the individual defendants had committed constitutional violations. Moreover, because the jury made specific findings that the City had committed constitutional violations, the only way to read the jury's verdict consistently is to read the questions asked of the individual defendants as encompassing qualified immunity. As we are required 'to determine whether a jury verdict can be sustained, on any reasonable theory,'. . . we must conclude that the language of the verdict form permitted the jury to find that the individual defendants committed constitutional violations but were entitled to qualified immunity."); ***Roberts v. City of Shreveport,*** 397 F.3d 287, 292 (5th Cir. 2005) ("Plaintiffs allege that Chief Prator failed to train Officer Rivet sufficiently. Chief Prator responds that this issue is foreclosed in his favor because the jury verdict in Officer Rivet's trial found Rivet's conduct objectively reasonable. Chief Prator is incorrect. The jury, after all, found that Officer Rivet violated Carter's constitutional rights, even though it also accepted Officer Rivet's defense that his conduct was objectively reasonable. Under such circumstances, Chief Prator remains vulnerable to a failure to train claim because the plaintiffs may be able to demonstrate that by his failure to train or supervise adequately, he both caused Carter's injuries and acted deliberately indifferent to violations of Fourth Amendment rights by Shreveport police officers, including Officer Rivet. . . . Nevertheless, even assuming that lack of training 'caused' Carter's injuries, the plaintiffs have not provided sufficient evidence of either Prator's failure to train (the first requirement) or his deliberate indifference to Carter's constitutional rights (the third requirement) to create a triable fact issue. . . A plaintiff seeking recovery under a failure to train or supervise rationale must prove that the police chief failed to control an officer's 'known propensity for the improper use of force.' . . Moreover, to prove deliberate indifference, a plaintiff must demonstrate 'at least a pattern of similar violations arising from training that is so clearly inadequate as to be obviously likely to result in a constitutional violation.'"); ***Scott v. Clay County, Tenn***., 205 F.3d 867, 879 (6th Cir.2000) ("[I]f the legal requirements of *municipal* or *county* civil rights liability are satisfied, qualified immunity will *not* automatically excuse a municipality or county from constitutional liability, even where the municipal or county actors were personally absolved by qualified immunity, *if* those agents *in fact* had invaded the plaintiff's constitutional rights."[emphasis in original, footnote omitted]); ***Myers v. Oklahoma County Board of County Commissioners***, 151 F.3d 1313, 1317-18 (10th Cir. 1998) ("[I]f a jury returns a general verdict for an individual officer premised on qualified immunity, there is no inherent inconsistency in allowing suit against the municipality to proceed since the jury's verdict has not answered the question

whether the officer actually committed the alleged constitutional violation. . . In this case, the defendants moved for summary judgment on the basis of qualified immunity, but the district court denied that motion. . . The defendants may have attempted to raise the issue at trial as well. . . On the record before us, we are unable to determine the grounds for the jury's decision. The jury verdict form was a general one. The form instructed the jury only to declare the defendants 'liable' or 'not liable' on the use of excessive force claim. In addition, neither party placed a copy of the jury instruction in the record. Therefore, it is possible that the jury based its decision on qualified immunity. With that ambiguity lurking, the *Heller* rule does not foreclose the suit against the County."); ***Doe v. Sullivan County, Tenn.***, 956 F.2d 545, 554 (6th Cir. 1992) ("To read *Heller* as implying that a municipality is immune from liability regardless of whether the plaintiff suffered a constitutional deprivation simply because an officer was entitled to qualified immunity would . . . represent a misconstruction of its holding and rationale."); ***Sunn v. City & County of Honolulu***, 852 F. Supp. 903, 907 (D. Haw. 1994) ("[T]he circuits which have considered the issue have held that *Heller* is inapplicable to cases where police officers are exempt from suit on qualified immunity grounds." citing cases); ***Munz v. Ryan***, 752 F. Supp. 1537, 1551 (D. Kan. 1990) (no inconsistency in granting official qualified immunity, while holding municipality liable for constitutional violations if caused by final policymaker).

But see ***Jiron v. City of Lakewood,*** 392 F.3d 410, 419 n.8 (10th Cir. 2004) ("Plaintiff argues that dismissal of the claims against the remaining defendants was improper because summary judgment was granted to Officer Halpin on the basis of qualified immunity. Plaintiff is correct that some dismissals against the officer on the basis of qualified immunity do not preclude a suit against the municipality. . . However, when a finding of qualified immunity is based on a conclusion that the officer has committed no constitutional violation--i.e., the first step of the qualified immunity analysis--a finding of qualified immunity *does* preclude the imposition of municipal liability."); ***Turpin v. County of Rock,*** 262 F.3d 789, 794 (8th Cir. 2001) ("Having concluded that the district court properly granted Officer Svoboda and Deputy Anderson summary judgment on qualified-immunity grounds, we likewise conclude that the county was entitled to summary judgment. *See Abbott v. City of Crocker,* 30 F.3d 994, 998 (8th Cir.1994) (municipality cannot be liable unless officer is found liable on underlying substantive claim)."); ***Mattox v. City of Forest Park***, 183 F.3d 515, 523 (6th Cir. 1999) (exercising pendent appellate jurisdiction over City's interlocutory appeal on grounds that "[i]f the plaintiffs have failed to state a claim for violation of a constitutional right at all, then the City of Forest Park

cannot be held liable for violating that right any more than the individual defendants can."); ***Strain v. Borough of Sharpsburg, Pa.***, 2007 WL 1630363, at *7 n.9 (W.D. Pa. June 4, 2007) ("The Supreme Court has held that qualified immunity section 1983 does not extend to municipalities. . . This is true even where the individual officers of the municipality are entitled to qualified immunity because the law that they are alleged to have violated was not clearly established at the time. . . Where, however, qualified immunity is granted to individual officers on the ground that there was no constitutional violation, the grant of qualified immunity precludes municipal liability."); ***Martin v. City of Oceanside***, 205 F. Supp.2d 1142, 1154, 1155 (S.D.Cal. 2002) ("If a court finds the officers acted constitutionally, the city has no liability under §1983. Here, the Court has already concluded that the officers' conduct was not unconstitutional. It is true that the Court has answered the first *Saucier* question, whether plaintiff alleges facts that show a constitutional violation by the officers, in the affirmative. However, it is equally clear from the Court's analysis above that in answering the second *Saucier* question, in the course of which the Court is permitted to review both parties' summary judgment papers, rather than just plaintiff's complaint, the Court has determined that the uncontradicted facts show the officers did not violate plaintiff's constitutional rights. First, the Court has determined that the officers' entry into plaintiff's home was justified by the 'emergency aid' exception to the Fourth Amendment's warrant requirement. Second, the Court has found that the officers' alleged failure to announce their presence and purpose, even if true, did not make their search of plaintiff's home unreasonable under the Fourth Amendment. Third, the Court has determined that the officers' pointing guns at plaintiff did not constitute excessive force under the circumstances. Therefore, because the officers' conduct did not violate plaintiff's constitutional rights, there is no unconstitutional action which can be charged against the City, and plaintiff's *Monell* claim against the City fails."), *aff'd,* 360 F.3d 1078 (9th Cir. 2004); ***VanVorous v. Burmeister***, No. 2:01-CV-02, 2001 WL 1699200, at *10 (W.D. Mich. Dec. 26, 2001) (not reported) ("The Court has determined that the Individual Defendants, including Burmeister, are entitled to qualified immunity. Unlike the court in *Doe v. Sullivan County*, however, this conclusion was not based solely on the reasonableness of the officers' belief that their conduct was lawful. Under *Saucier*, the Court was first required to determine whether VanVorous suffered a constitutional violation at all before asking whether that right was clearly established. The Court concluded that the Individual Defendants acted reasonably in using deadly force and did not violate VanVorous' Fourth Amendment rights. More recent Sixth Circuit opinions have made clear that a determination that the individual defendants committed no constitutional violation, whether by a court on summary judgment or

by a jury, precludes municipal liability under §1983. [citing cases] When there is no underlying constitutional violation by individual officers, there can be no municipal liability either.Therefore, the Court will grant the City of Menominee's motion for summary judgment of Plaintiff's claims.").

In ***Hegarty v. Somerset County***, 53 F.3d 1367, 1380 (1st Cir. 1995), the court noted:

> The determination that a subordinate law enforcement officer is entitled to qualified immunity from suit under section 1983 is not necessarily dispositive of the supervisor's immunity claim. Nevertheless, it does increase the weight of the burden plaintiff must bear in demonstrating not only a deficiency in supervision but also the essential causal connection or "affirmative linkage" between any such deficiency in supervision and the alleged deprivation of rights.

H. No Eleventh Amendment Immunity for Local Entities/State Immunities Not Applicable

Political subdivisions of the state have no Eleventh Amendment protection from suit in federal court. ***Moor v. County of Alameda***, 411 U.S. 693, 717-21 (1973). *See also* ***Northern Ins. Co. of New York v. Chatham County, Ga.***, 126 S. Ct. 1689, 1693 (2006) ("A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law. . . Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties. [citing *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979); *Workman v. New York City*, 179 U.S. 552, 565 (1900); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890)] *See also Jinks v. Richland County*, 538 U.S. 456, 466, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit"). This is true even when, as respondent alleges here, 'such entities exercise a "slice of state power."' *Lake Country Estates*, *supra*, at 401, 99 S.Ct. 1171.").

Furthermore, a state court may not refuse to entertain a § 1983 action against a school board on the ground that common law sovereign immunity barred the suit. ***Howlett v. Rose***, 496 U.S. 356, 110 S. Ct. 2430 (1990). *See also* ***Martinez v. California***, 444 U.S. 277, 284 (1980) ("Conduct by persons acting under color of

state law which is wrongful under 42 U.S.C. § 1983 ... cannot be immunized by state law."). *But see* ***Haywood v. Drown***, 9 N.Y. 3d 481, 881 N.E.2d 180 (N.Y. 2007) (State Correction Law provision that precluded suits for damages, including § 1983 actions, against correction officers in their personal capacity, arising out of acts or failures to act within scope of their employment, did not violate Supremacy Clause; statute did not discriminate against § 1983 actions, but rather created neutral jurisdictional barrier to all such claims, state and federal), *cert. granted,* 128 S. Ct. 2938 (2008).

In ***Hess v. Port Authority Trans-Hudson Corp***., 115 S. Ct. 394 (1994), the Court held that injured railroad workers could assert a federal statutory right, under the FELA, to recover damages against the Port Authority and that concerns underlying the Eleventh Amendment-"the States' solvency and dignity"- were not touched. The Court explained, *id.* at 406:

> The proper focus is not on the use of profits or surplus, but rather is on losses and debts. If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is "No" . . . then the Eleventh Amendment's core concern is not implicated.

See also ***Cash v. Hamilton County Dept. of Adult Probation,*** 388 F.3d 539, 545 (6th Cir. 2004) ("The County argues that it is entitled to Eleventh Amendment immunity from suit because the Hamilton County Department of Adult Probation is an arm of the common pleas and municipal courts of the state of Ohio. To support this contention, the County cites a number of Ohio statutes. . . . The bald assertion that the Department is an arm of the common pleas and municipal courts is insufficient by itself to garner Eleventh Amendment immunity. . . Rather, this argument is one of many factors that must be considered by the district court. We have recognized that the most important factor is 'will a State pay if the defendant loses?' . . . The County raised the issue of Eleventh Amendment immunity in its motion for summary judgment. Although the district court granted the County's motion, the order provides no findings or analysis pertaining to the Eleventh Amendment. A final resolution of this issue will turn on factual findings regarding whether the Department of Adult Probation is part of the Ohio court system and whether the State or the County would pay damages for a constitutional violation perpetrated by the Department. We therefore remand this issue to the district court for further development."); ***Manders v. Lee,*** 338 F.3d 1304, 1328 n.51 (11th Cir.

2003) (en banc) ("*Hess* says that the state treasury factor is a 'core concern' of Eleventh Amendment jurisprudence. . . . It is true that the presence of a state treasury drain alone may trigger Eleventh Amendment immunity and make consideration of the other factors unnecessary. Thus, this is why some decisions focus on the treasury factor. If the State footed the entire bill here, there would be no issue to decide.The Eleventh Amendment, however, does not turn a blind eye to the state's sovereignty simply because the state treasury is not directly affected. Moreover, the United States Supreme Court has never said that the absence of the treasury factor alone defeats immunity and precludes consideration of other factors, such as how state law defines the entity or what degree of control the State has over the entity. As mentioned earlier, although the state treasury was not affected, the *Hess* Court spent considerable time pointing out how that lawsuit in federal court did not affect the dignity of the two States because they had ceded a part of their sovereignty to the federal government as one of the creator-controllers of the Compact Clause entity in issue. If the state-treasury-drain element were always determinative in itself, this discussion, as well as the other control discussion, would have been unnecessary."); ***Endres v. Indiana State Police,*** 334 F.3d 618, 627 (7th Cir. 2003) ("Sharing of authority among units of government complicates both practical administration and legal characterization. Even if as a matter of state law the counties act as agents of the state in raising and remitting revenues, it remains a matter of federal law whether this makes each county's department part of the state. . . The dispositive question is more 'who pays?' than 'who raised the money?'. . . . The combination of *J.A.W.* and the 2000 legislation leads us to conclude that county offices of family and children in Indiana now must be classified as part of the state for purposes of the eleventh amendment. This does not require the overruling of *Baxter,* which dealt with superseded legislation. It is enough to say that the statutes now in force make county offices part of the state, as *J.A.W.* held and as the formal organization chart now shows them."); ***Alkire v. Irving,*** 330 F.3d 802, 813 (6th Cir. 2003) ("Unfortunately, we find ourselves with virtually no evidence on the most important point--who is responsible for a monetary judgment against the Holmes County Court--as it was not briefed by the parties, who assumed *Mumford* [*v. Basinski,* 105 F.3d 264, 268 (6th Cir.), *cert. denied,* 522 U.S. 914 (1997)] was binding precedent. As we shall hold that a remand is in order in any event, we choose to remand this issue to the district court. The district court can make the initial determination whether Ohio would be legally liable for a judgment against the Holmes County Court, as well as an evaluation of the other factors that may bear on whether the Holmes County Court should receive sovereign immunity."); ***Hudson v. City of New Orleans***, 174 F.3d 677, 683 (5th Cir. 1999) ("Ultimately we are most

persuaded by the fact that the state treasury will in all likelihood be left untouched if damages were to be levied against the Orleans Parish District Attorney's office. It is well established that this . . . factor is crucial to our Eleventh Amendment arm of the state analysis. . . . In sum, we conclude that the Orleans Parish District Attorney's office is not protected from suit in federal court by the Eleventh Amendment."); ***Harter v. Vernon***, 101 F.3d 334, 340 (4th Cir. 1996) ("In sum, when determining if an officer or entity enjoys Eleventh Amendment immunity a court must first establish whether the state treasury will be affected by the law suit. If the answer is yes, the officer or entity is immune under the Eleventh Amendment."). *But see* ***Sales v. Grant***, 224 F.3d 293, 298 (4th Cir. 2000) (concluding that a promise of indemnification does not alter the non-immune status of state officers sued in their individual capacities).

See also ***Cash v. Granville County Bd. of Educ.***, 242 F.3d 219, 226, 227 (4th Cir. 2001) ("[W]e conclude that upon our consideration of each of the factors identified for determining whether a governmental entity is an arm of the State and therefore one of the United States within the meaning of the Eleventh Amendment, the Granville County Board of Education appears much more akin to a county in North Carolina than to an arm of the State. . . . . In reaching our conclusion in this case, we continue to follow our jurisprudence, as stated in *Harter*, *Gray, Bockes*, and *Ram Ditta*, and in doing so, we believe that we are faithfully applying the relevant Eleventh Amendment jurisprudence announced by the Supreme Court in *Regents*, *Hess*, *Lake Country Estates*, and *Mt. Healthy*. We therefore reject the district court's view that the Supreme Court's recent decisions in *Regents* and *McMillian* overruled our decisions in *Harter*, *Gray*, *Bockes*, and *Ram Ditta*."); ***Belanger v. Madera Unified School District,*** 963 F.2d 248, 251 (9th Cir. 1992) (holding school districts in California are state agencies for purposes of the Eleventh Amendment). *See generally* ***Eason v. Clark County School Dist.,*** 303 F.3d 1137, 1141 n.2, 1144 (9th Cir. 2002) (holding school district in Nevada is local or county agency, not state agency and collecting cases from circuits); ***Stevenson v. Owens State Community College***, 562 F.Supp.2d 965, 968 (N.D. Ohio 2008) ("With regard to how the state courts treat the entity for state sovereign immunity purposes, Ohio courts have held that state community colleges organized under Ohio Rev.Code Chapter 3358, like Owens, are state entities protected by Ohio's sovereign immunity.[collecting cases] This Court agrees with that analysis and accepts these cases as authority that Ohio courts treat community colleges as arms of the state.").

In ***Regents of the University of California v. Doe***, 117 S. Ct. 900, 905 (1997), the Court held that "[t]he Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party."

I. States: Section 1983 Does Not Abrogate 11th Amendment Immunity and States Are Not "Persons" Under Section 1983

In the absence of consent to suit or waiver of immunity, a state is shielded from suit in federal court by virtue of the Eleventh Amendment. The state may raise sovereign immunity as a defense to a federal claim in state court as well. *See* ***Alden v. Maine***, 527 U.S. 706 (1999). A damages action against a state official, in her official capacity, is tantamount to a suit against the state itself and, absent waiver or consent, would be barred by the Eleventh Amendment. A state may waive its 11th Amendment immunity by *removing* to federal court state law claims as to which it has surrendered its sovereign immunity in state courts. *See* ***Lapides v. Bd. of Regents***, 535 U.S. 613 (2002). Congress may expressly abrogate a state's sovereign immunity pursuant to its enforcement power under the Fourteenth Amendment. ***Pennhurst State School and Hospital v. Halderman***, 465 U.S. 89, 98-100 (1984). *See also* ***United States v. Georgia***, 126 S. Ct. 877 (2006); ***Tennessee v. Lane***, 124 S. Ct. 1978 (2004); ***Nevada Dep't of Human Resources v. Hibbs,*** 538 U.S. 721 (2003). The Court has held that Section 1983 does not abrogate Eleventh Amendment immunity of state governments. ***Quern v. Jordan,*** 440 U.S. 332, 345 (1979).

See also ***Wisconsin Dep't of Corrections v. Schacht***, 118 S. Ct. 2047, 2051-52 (1998) ("We now conclude, contrary to the Seventh Circuit, that the presence in an otherwise removable case of a claim that the Eleventh Amendment may bar does not destroy removal jurisdiction that would otherwise exist. . . . The Eleventh Amendment. . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. . . Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it."); ***Constantine v. Rectors and Visitors of George Mason University***, 411 F.3d 474, 482 (4th Cir. 2005) (noting that Eleventh Amendment immunity is not strictly an issue of subject-matter jurisdiction but that court should address issue promptly once the State asserts its immunity); ***Parella v. Retirement Board of the Rhode Island Employees' Retirement System***, 173 F.3d 46, 55 (1st Cir. 1999) ("[T]he

Supreme Court has now clearly stated that courts are free to ignore possible Eleventh Amendment concerns if a defendant chooses not to press them."). *Compare* ***David B. v. McDonald***, 156 F.3d 780, 783 (7th Cir. 1998) (With no reference to *Schacht*, holding "the eleventh amendment, extended in *Hans v. Louisiana* . . . to federal-question cases, deprives the court of jurisdiction.") *with* ***Endres v. Indiana State Police,*** 334 F.3d 618, 623 (7th Cir. 2003) ("Because the eleventh amendment does not curtail subject-matter jurisdiction (if it did, states could not consent to litigate in federal court, as *Lapides* holds that they may), a court is free to tackle the issues in this order, when it makes sense to do so, without violating the rule that jurisdictional issues must be resolved ahead of the merits.").

In ***Will v. Michigan Dep't of State Police***, 491 U.S. 58 (1989), the Court held that neither a state nor a state official in his official capacity is a "person" for purposes of a section 1983 damages action. Thus, even if a state is found to have waived its Eleventh Amendment immunity in federal court, or even if a § 1983 action is brought in state court, where the Eleventh Amendment has no applicability, ***Will*** precludes a damages action against the state governmental entity. This holding does not apply when a state official is sued in his official capacity for injunctive relief. 491 U.S. at 71 n. 10. *See also* ***Harper v. Colorado State Bd. of Land Commissioners***, 2007 WL 2430122, at *4 (10th Cir. Aug. 29, 2007) (not published) ("The Harpers maintain that '[t]he reason a state agency (or a state itself) is generally not a "person" for purposes of a suit for damages under [§ 1983] is because of the 11th Amendment ..., which immunizes states from federal court suits for damages.'. . This argument is not persuasive. The Supreme Court has recognized a distinction between the immunity afforded by the Eleventh Amendment and the limitations in the scope of § 1983 arising from the terms of the statute. . . Accordingly, because the § 1983 claims at issue in this appeal are asserted against the Land Board, an entity that is not a 'person' under that statute, the district court's grant of summary judgment was proper."); ***Manders v. Lee,*** 338 F.3d 1304, 1328 n.53 (11th Cir. 2003) (en banc) ("If sheriffs in their official capacity are arms of the state when exercising certain functions, then an issue arises whether Manders's § 1983 suit is subject to dismissal on the independent ground that they are not 'persons' for purposes of § 1983. [citing *Will*] This statutory issue, however, is not before us as it was neither briefed nor argued on appeal."); ***Gean v. Hattaway,*** 330 F.3d 758, 766 (6th Cir. 2003) ("[T]he need for this court to undertake a broad sovereign immunity analysis with respect to the § 1983 claims is obviated by the fact that the defendants in their official capacities are not recognized as 'persons' under § 1983. Even if Tennessee's sovereign immunity has been properly waived or abrogated for the purposes of the

federal statute the defendants allegedly violated, a § 1983 claim against the defendants in their official capacities cannot proceed because, by definition, those officials are not persons under the terms of § 1983."); ***Tower v. Leslie-Brown,*** 167 F. Supp.2d 399, 403 (D. Me. 2001) ("Defendants Peary and Leslie-Brown therefore enjoy the same immunity from suit in their official capacities that their employing agencies do.").

See also ***Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony***, 123 S. Ct. 1887, 1892 (2003) ("Although this case does not squarely present the question, the parties agree, and we will assume for purposes of this opinion, that Native American tribes, like States of the Union, are not subject to suit under § 1983.") *and* ***Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony***, 123 S. Ct. 1887, 1894 (2003) ("[W]e hold that the Tribe may not sue under § 1983 to vindicate the sovereign right it here claims.").

A state official sued in her individual capacity for damages is a "person" under § 1983. *See* ***Hafer v. Melo***, 502 U.S. 21 (1991). ***Hafer*** eliminates any ambiguity ***Will*** may have created by clarifying that "[T]he phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Id*. at 26.

See also ***Ritchie v. Wickstrom***, 938 F.2d 689, 692 (6th Cir. 1991) (Eleventh Amendment did not bar suit against individual sued as policymaker for state institution, even "[i]f the State should voluntarily pay the judgment or commit itself to pay as a result of a negotiated collective bargaining agreement...."); ***Kroll v. Bd. of Trustees of Univ. of Ill.***, 934 F.2d 904, 907 (7th Cir. 1991) ("Personal capacity suits raise no eleventh amendment issues."), *cert. denied*, 112 S. Ct. 377 (1991).

J. Sheriffs: State or Local Officials?

1. **Note on *McMillian v. Monroe County***

An official may be a state official for some purposes and a local government official for others.

In ***McMillian v. Monroe County***, 520 U.S. 781 (1997), a five member majority of the Supreme Court affirmed the decision of the Court of Appeals for the

Eleventh Circuit that a County Sheriff in Alabama is not a final policymaker for the County in the area of law enforcement, because Counties have no law enforcement authority under state law. *Id.* at 786.

The Court in ***McMillian*** noted that

> the question is not whether Sheriff Tate acts for Alabama or Monroe County in some categorical, 'all or nothing' manner. Our cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue. . . . Thus, we are not seeking to make a characterization of Alabama sheriffs that will hold true for every type of official action they engage in. We simply ask whether Sheriff Tate represents the State or the county when he acts in a law enforcement capacity.

520 U.S. at 785, 786. The Court found the following factors insufficient to tip the balance in favor of the petitioners: (1) the sheriff's salary is paid out of the county treasury; (2) the county provides the sheriff with equipment, including cruisers; (3) the sheriff's jurisdiction is limited to the borders of his county; and (4) the sheriff is elected locally by the voters in his county. *Id.* at 791.

In dissent, Justice Ginsburg wrote:

> A sheriff locally elected, paid, and equipped, who autonomously sets and implements law enforcement policies operative within the geographic confines of a county, is ordinarily just what he seems to be: a county official. . . . The Court does not appear to question that an Alabama sheriff may still be a county policymaker for some purposes, such as hiring the county's chief jailor. . . . And, as the Court acknowledges, under its approach sheriffs may be policymakers for certain purposes in some States and not in others. . . The Court's opinion does not call into question the numerous Court of Appeals decisions, some of them decades old, ranking sheriffs as county, not state, policymakers.

Id. at 804, 805 (Ginsburg, J., joined by Stevens, Souter, and Breyer, JJ., dissenting).

See generally Karen M. Blum, ***Support Your ~~Local~~ Sheriff: Suing Sheriffs Under Section 1983***, 34 Stet. L. Rev. 623 (Spring 2005)

2. Post-*McMillian* Cases by Circuit:

FIRST CIRCUIT

Massachusetts

Broner v. Flynn, 311 F.Supp.2d 227, 233 (D. Mass. 2004) ("Effective July 1, 1998, the government of Worcester County was abolished. Effective September 1, 1998, the Sheriff of Worcester County, who was then and continues to be, John M. Flynn, became an officer and employee of the Commonwealth of Massachusetts and all of the 'functions, duties and responsibilities for the operation and management of' the WCJHC were transferred to the Commonwealth. Mass. Gen. Laws ch. 34(B), §§ 1, 12 (2004). Therefore, a Section 1983 suit against Sheriff Flynn in his official capacity is deemed to be a suit against the Commonwealth. Since a state is not a 'person' for purposes, all claims against Sheriff Flynn in his official capacity are barred.")**.**

New Hampshire

Ramsay v. McCormack, No. CIV. 98-408-JD, 1999 WL 814366, at *6 (D.N.H. June 29, 1999) (not reported) ("The court concludes that New Hampshire Supreme Court precedent concerning the authority of the attorney general, establishing the county attorney as the deputy of the attorney general in local criminal proceedings, its expansive interpretation of section 7:11, and the second clause of section 7:6 which broadly states 'the attorney general shall enforce the criminal laws of the state,' compels the conclusion that the county attorney functions under the authority of the attorney general in criminal prosecution in the district courts. Therefore, the court rules that in fulfilling his criminal prosecutorial duties, the county attorney acts pursuant to authority vested by state law in the attorney general and under the control of the attorney general, and does not function as a final policy maker for the county. Moreover, it has previously been determined by this court that county attorneys, when fulfilling their criminal prosecutorial duties under the direction and control of the attorney general, do not act as final policymakers for section 1983 liability purposes.").

SECOND CIRCUIT

New York

Jeffes v. Barnes, 208 F.3d 49, 57, 58, 60, 61 (2d Cir. 2000) ("In sum, the question of whether a given official is the municipality's final policymaking official in a given area is a matter of law to be decided by the court. Where a plaintiff relies not on a formally declared or ratified policy, but rather on the theory that the conduct of a given official represents official policy, it is incumbent on the plaintiff to establish that element as a matter of law. We thus reject plaintiffs' contention that the district court erred in imposing that burden on them; and we turn to the question of whether, as to the particular area at issue here, the burden was met. . . . The principal area in question in this suit involves the duties and obligations of the sheriff's staff members toward each other with respect to their exercise of First Amendment rights in breach of the Jail's code of silence. The following review of New York State ("State") law leads us to the conclusion that the Schenectady County sheriff was the County's final policymaker with respect to most of the conduct that plaintiffs challenge. . . . In sum, State law requires that the Schenectady County sheriff be elected; County law provides that elected officials are not subject to supervision or control by the County's chief executive officer; there is only routine civil service supervision over the sheriff's appointments; State law places the sheriff in charge of the Jail; and the County's chief executive officer, advised by the County's attorneys, treats the sheriff, insofar as Jail operations are concerned, as "autonomous." . . . . The County has pointed us to no provision of State or local law that requires a sheriff to answer to any other entity in the management of his jail staff with respect to the existence or enforcement of a code of silence. We conclude that Sheriff Barnes was, as a matter of law, the County's final policymaking official with respect to the conduct of his staff members toward fellow officers who exercise their First Amendment rights to speak publicly or to inform government investigators of their co-workers' wrongdoing.")**.**

Walker v. City of New York, 974 F.2d 293, 301 (2d Cir. 1992) (explaining that when prosecuting a criminal matter, a district attorney represents the State not the county, but that in managing the district attorney's office, the district attorney acts as a county policymaker)**.**

Vermont

Huminski v. Corsones, 396 F.3d 53, 70-73 (2d Cir. 2005) (as amended on rehearing) ("Whether a defendant is a state or local official depends on whether the defendant represented a state or a local government entity when engaged in the events at issue. [citing *McMillian*] To answer that question here, we must determine, *inter alia,* whether it was the State of Vermont or Rutland County that controlled Elrick in his involvement in the events leading up to and culminating in his serving Huminski with the trespass notices. . . . We agree with the district court that an analysis of the relevant factors indicates that Sheriff Elrick was a state official with regard to his involvement in the events related to the issuance of the trespass notices. The Rutland County Sheriff's Department, for whom Elrick was employed, had a contract with the State of Vermont through the Vermont Court Administrator's Office to manage security at the Rutland District Court. We think that Elrick was acting as a state official while doing so and when he played a role in the issuance and service of the trespass notices. First, when Elrick was performing the contract, he was acting as a supervisory policymaker for the State of Vermont, irrespective of what his status was when he performed his other duties as a sheriff. Second, it is undisputed that Elrick acted as a state official when he signed the May 27 Notice as the agent of the Commissioner, himself a state official. Third, although it is not necessary to decide the broader issue, we think that in light of the statutory structure under which Elrick acted, he was likely a state official when he was performing his general duties for the sheriff's department, particularly when he was acting pursuant to state law, as he was with respect to the Huminski incident. State statute establishes the most important factor in this inquiry, *see McMillian,* 520 U.S. at 790: Elrick had the authority to investigate and enforce the State of Vermont's criminal law in Rutland County. He was therefore acting for the state when he engaged in the behavior that is at issue here. It follows that Elrick is immune in his official capacity from suit for retrospective relief. Because Elrick is entitled to sovereign immunity, we also affirm the district court's holding that the Rutland County Sheriff's Department is similarly immune." [footnotes omitted])

Poleo-Keefe v. Bergeron, No. 2:06-CV-221, 2008 WL 3992636, at *3 (D. Vt. Aug. 28, 2008) ("While Vermont sheriffs have been held to be state actors in other cases, their roles as state actors have been limited to law enforcement and security duties. . . Sheriff Bergeron's supervisory duties here were different in nature from his law enforcement duties. He was not performing the traditional state role of keeping the

peace; rather, he was acting as a employee supervisor. . . .Therefore, Sheriff Bergeron acted as a County official and sovereign immunity does not apply.”).

THIRD CIRCUIT

New Jersey

Coleman v. Kaye, 87 F.3d 1491, 1499-1506 (3d Cir.1996) (for § 1983 purposes, New Jersey county prosecutor made policy for county when refusing to promote investigator).

Pennsylvania

Benn v. First Judicial District of Pennsylvania, 426 F.3d 233, 240, 241 (3d Cir. 2005) (“Benn recognizes that neither cities nor counties partake of Pennsylvania's Eleventh Amendment immunity. He thus argues that the Judicial District is ‘merely a local entity undeserving of the protection of the Eleventh Amendment,’ . . . and notes that his paycheck was issued by the City of Philadelphia; the union to which he belonged negotiated its contracts with the City; he was required to live within Philadelphia city limits; and the car he was given for work assignments was owned by the City. . . . We noted in *Callahan* that the statutory funding scheme for state courts places considerable financial responsibility for the operation of the courts onto the counties. . . . What is significant in County of Allegheny, for the issue before us, is that under the Pennsylvania Supreme Court's interpretation of the state constitution, the Judicial District and its counterparts are state entities. That they are locally funded may be problematic for a variety of reasons, but it does not transform them into local entities for Eleventh Amendment purposes. Nor is it decisive of the Judicial District's entitlement to immunity that the City may have an agreement for indemnification with the Judicial District, as Benn asserts. That question was decisively answered by the Supreme Court in *Doe*, where the Court stated, ‘[t]he Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party.’. . The Pennsylvania constitution envisions a unified state judicial system, of which the Judicial District is an integral component. From a holistic analysis of the Judicial District's relationship with the state, it is undeniable that Pennsylvania is the real party in interest in Benn's suit and would be subjected to both indignity and an impermissible risk of legal liability if the suit were allowed to proceed. We agree with the District Court that the Judicial District has Eleventh Amendment immunity which functions

as an absolute bar to Benn's ADA claim. We therefore will affirm the order granting summary judgment.")**.**

Carter v. City of Philadelphia, 181 F.3d 339, 352 (3d Cir. 1999) (observing that other courts have noted the hybrid nature of the district attorney's office and concluding that "[t]he recurring theme that emerges from these cases is that county or municipal law enforcement officials may be State officials when they prosecute crimes or otherwise carry out policies established by the State, but serve as local policy makers when they manage or administer their own offices.").

Jakomas v. McFalls, 229 F. Supp.2d 412, 430 (W.D. Pa. 2002) ("We have no difficulty deciding, under Pennsylvania law, that Judge McFalls was not acting as a policymaker for the County when he discharged his staff. Judge McFalls' authority to hire, supervise, and discharge his personal employees came from the Pennsylvania Supreme Court. It did not--and could not--come from the County because the County has no policymaking authority over the Pennsylvania courts.").

Williams v. Fedor, 69 F. Supp.2d 649, 660, 663 (M.D. Pa. 1999) ("As in *McMillian*, there is some evidence in this case to support the proposition that a Pennsylvania district attorney is a county policy maker when engaged in his law enforcement capacity. Indeed, the constitutional designation of the Pennsylvania district attorney as a county officer is a factor not present in *McMillian* that supports Williams' position. But that factor does not tip the scales in Williams' favor. The historical foundation for the office of district attorney--serving as a replacement for state deputy attorneys' general, with the obligation to perform the duties that had been performed by those deputy attorney's general--coupled with the district attorneys' subordinate relationship to the state's chief law enforcement officer, the Attorney General, compel the conclusion that when engaged in his or her 'basic function--enforcement of the Commonwealth's penal statutes,' . . . a district attorney in Pennsylvania represents the interests of the Commonwealth and not the County. . . . [But] when the focus of the plaintiff's civil rights claims are on the administration of the district attorney's office, the district attorney is regarded as an official of the county so that the county may be held liable where the facts establish a failure to train or supervise that evidences a deliberate indifference to the rights of the plaintiff."), *aff'd*, 211 F.3d 1263 (3d Cir. 2000).

Morgan v. Rossi, No. Civ. A. 96-1536, 1998175604, **9-12 (E.D. Pa. Apr. 15, 1998) (not reported) ("The parties agree that Rossi has 'final policymaking authority'

with respect to his decisions regarding the employment of his deputies. The parties, however, disagree about whether he is a policymaker for the Commonwealth of Pennsylvania or for Lehigh County. . . . The question here is whether sheriffs in Pennsylvania act as county or state officials when they decide to dismiss deputies. In contrast to the Alabama Constitution, the Pennsylvania Constitution explicitly states that sheriffs are county officers. . . . Sheriffs and deputies are County employees paid by the County, and the sheriff's office (i.e., equipment, staffing, etc.) is also funded by the County. Sheriffs are elected locally and their jurisdiction is limited to the County in which they serve. . . . As to the actual hiring and firing of individual deputies, neither the Commonwealth nor the County have much input or control over the sheriff's decisions. Both the State and the County, however, have provisions concerning the employment of deputies. . . . [W]hile there are State and County provisions related to the hiring of deputies, there are no such provisions constraining sheriffs' discretion in dismissing deputy sheriffs. . . . After balancing the respective roles of Lehigh County and the Commonwealth of Pennsylvania in Rossi's decision to dismiss plaintiffs, as required by *McMillian*, I conclude that Rossi was acting as a policymaker for the County rather than the Commonwealth. The Pennsylvania Constitution explicitly lists sheriffs as County officials, and they act within their respective counties and on behalf of the County in all respects. They are elected by the County's citizens, and it is those citizens who pay their salaries, buy their patrol cars and fund their offices. In addition, it is the governing body of Lehigh County--the Board of Commissioners--which decides how many deputies are required and what their salaries will be. By contrast, the Commonwealth's connection to Sheriff Rossi is remote, and it has no proactive supervisory role whatsoever. The County contends that because it has no control over the sheriff's decision to dismiss deputies and because it had no policy about dismissing political opponents it cannot be held liable. This argument, however, misinterprets the teaching of *McMillian*. In *McMillian*, Alabama did not have a policy of intimidating witnesses or suppressing exculpatory evidence and it had no control over the sheriff's murder investigation, yet the Count concluded that the Monroe County Sheriff was a State policymaker. *McMillian* does not ask whether either the County or the State has a policy that plaintiff claims violated his constitutional rights or whether the County or State had control over the action alleged to have violated plaintiff's constitutional rights. Rather, it asks whether the policymaker's actions that are alleged to form the basis for plaintiff's claim are more fairly attributable to the State or to the County based on state law. I conclude, based on my review of Pennsylvania law, that Rossi's dismissal of plaintiffs is more fairly described as an action on behalf of the County rather than the State.").

FOURTH CIRCUIT

Maryland [decision by Delaware Supreme Court]]

Kent County v. Shepherd, 713 A.2d 290, 294, 295 (Del. 1998) (In accordance with *McMillian*, we have analyzed the law of Maryland with regard of the facts of this case. In *Rucker v. Harford County*, [558 A.2d 399, 405 (1989)] the highest court in the State of Maryland held unequivocally, as a matter of Maryland law, that county sheriffs and deputy sheriffs who are engaged in law enforcement activities are 'officials and/or employees of the State of Maryland,' rather than the county. . . . We have concluded that, under Maryland law, the State of Maryland alone is vicariously responsible for Kent County Deputy Sheriff Knapp's negligent conduct because it occurred during the course of his law enforcement duties, while he was operating a motor vehicle within the State of Delaware.")

Maryland [federal]

Dotson v. Chester, 937 F.2d 920 (4th Cir. 1991) (accepting plaintiff's argument that even if Sheriff was state officer in certain capacities, he was final policymaker for county when operating county jail).

Rossignol v. Voorhaar, 321 F.Supp.2d 642, 650, 651 (D. Md. May 5, 2004) ("Both Plaintiff and the County Defendants agree that for purposes of a *Monell* analysis, Sheriff Voorhaar is the final policymaker concerning law enforcement in St. Mary's County. The County Defendants assert, however, that Sheriff Voorhaar and Deputy Alioto are state, not county, officers. See Md.Code Ann., State Gov't S 12-101(a)(6) (defining county sheriffs and deputy sheriffs as state personnel for purposes of the Maryland Tort Claims Act). If the Court were to agree, then the §1983 claims against Voorhaar and Alioto in their official capacities would be barred by Eleventh Amendment immunity. . . . In concluding that the Monroe County sheriff was a state official when acting in his law enforcement capacity, the Supreme Court minimized the importance of state law provisions establishing that: (1) the sheriff's salary was paid out of the county treasury; (2) the county provided the sheriff with materials and reimbursed him for reasonable expenses; (3) the sheriff's jurisdiction was limited to the county's borders; and (4) the sheriff was elected by county voters. . . In contrast, heavy emphasis was placed on the fact that state officials maintained a degree of control over the Alabama sheriffs while the counties, lacking any law enforcement powers of their own, could not 'instruct the sheriff how

to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime.'. . Finally, the *McMillian* Court had the benefit of a persuasive Alabama Supreme Court opinion considering similar issues which held that sheriffs were state officers. . . Here, Maryland county sheriffs are also designated state constitutional officials for purposes of state law, Md. Const. art. IV S 44, with their salaries set by the state rather than the individual counties. . . Maryland's highest court has previously engaged in a detailed analysis of Maryland's Constitution and Code to conclude that a sheriff and his deputies are state employees. *Rucker v. Harford County*, 316 Md. 275 (1989). The same factors pointing toward the sheriff's status as a county official (compensation from country treasury, limitations on some aspects of their jurisdiction, election by county voters, etc.) may be present, but have already been all but discounted by the Supreme Court. The major difference propounded by Plaintiff between *McMillian* and the instant case is that St. Mary's County retains a degree of law enforcement power through its ability 'to provide for the appointment of county police and to prescribe their duties and fix their compensation.' . . This unexercised authority, however, does nothing to change the County's basic impotence to 'directly abridge the functions and duties of a sheriff under the common law and enactments of the General Assembly.' *Rucker*, 316 Md. at 288. Instead, direct control over the sheriff in St. Mary's and other Maryland counties remains solidly with the State General Assembly and the judiciary. . . Accordingly, this Court concludes that the St. Mary's County Sheriff and his Deputies are state officials when acting in their law enforcement capacities.").

McCauley v. Doe, No. Civ. L-02-684, 2002 WL 32325676, at *4 (D. Md. July 12, 2002) (not reported) ("Defendant Frederick County Sheriff's Office moves to dismiss on the grounds that it is not an entity capable of being sued. Suit must be filed against an entity capable of being sued. Fed.R.Civ.P. 17(b). The capacity of a governmental entity to sue or be sued is determined in accordance with the laws under which it is organized. *Id.* Maryland law did not establish an entity known as the 'Frederick County Sheriff's Office' that is capable of being sued. *See* Boyer v. State, 323 Md. 558, 594 A.2d 121, 128 n. 9 (1991). Accordingly, McCauley's suit against the Frederick County Sheriff's Office cannot be maintained and is hereby DISMISSED."), *aff'd.,* 56 Fed.Appx. 616, 2003 WL 932480 (4th Cir. March 10, 2003).

Mason v. Mayor and City Council of Baltimore, No. CIV. A. HAR 95-41, 1995 WL 168037, *3 (D.Md. March 24, 1995) (not reported) ("[T]he City argues that the designation of the Baltimore City Police Department as a state agency shields it from

suit. As the Maryland Court of Appeals itself recognized, however, the General Assembly's designation of the Baltimore City Police Department as a state agency would not be controlling for all purposes. For example, with regard to federal law liability under 42 U.S.C. § 1983, the state law classification of the Baltimore City Police Department would not be decisive, and the Baltimore City Police Department might well be regarded as a local government agency. [cite omitted] . . . . Based on the detailed factual analysis contained in [prior cases] over the involvement of the city in the conduct of the Baltimore City Police Department and its Commissioner, this Court concludes that the City maintains sufficient practical knowledge of and control over the Police Department to withstand dismissal of this § 1983 action.").

Kennedy v. Widdowson, 804 F. Supp. 737, 741, 742 (D. Md. 1992) ("Several federal courts have stated that a sheriff may be considered as a state or local official depending on whether his challenged actions arise out of his traditional law enforcement functions, which are considered statewide in nature." (citing cases)).

North Carolina [state]

Boyd v. Robeson County, 621 S.E.2d 1 (N.C. App. 2005) (impugning reasoning of *Buchanan* and holding "that a North Carolina sheriff is a 'person' subject to suit under 42 U.S.C. § 1983.")

Buchanan v. Hight, 515 S.E.2d 225, 229 (N.C.App. 1999) (Sheriff acting within his statutory authority in terminating employees was a "state official," not a "person" who could be sued for money damages under § 1983)

North Carolina [federal]

Henderson Amusement, Inc. v. Good, No. 01-2462, 2003 WL 932463, at *5 (4th Cir. Mar. 10, 2003) (unpublished) ("Because we conclude that Henderson Amusement's §1983 claim against Sheriff Good in his personal capacity fails because Henderson Amusement has not adequately alleged the deprivation of a constitutional right, it follows that the complaint does not state a claim against the sheriff in his official capacity. We therefore do not reach the issue of whether the Eleventh Amendment bars the claim against Sheriff Good in his official capacity.")

Cash v. Granville County Bd. of Educ., 242 F.3d 219, 226, 227 (4th Cir. 2001) ("[W]e conclude that upon our consideration of each of the factors identified for

determining whether a governmental entity is an arm of the State and therefore one of the United States within the meaning of the Eleventh Amendment, the Granville County Board of Education appears much more akin to a county in North Carolina than to an arm of the State. . . . . In reaching our conclusion in this case, we continue to follow our jurisprudence, as stated in *Harter*, *Gray, Bockes*, and *Ram Ditta*, and in doing so, we believe that we are faithfully applying the relevant Eleventh Amendment jurisprudence announced by the Supreme Court in *Regents*, *Hess*, *Lake Country Estates*, and *Mt. Healthy*. We therefore reject the district court's view that the Supreme Court's recent decisions in *Regents* and *McMillian* overruled our decisions in *Harter*, *Gray*, *Bockes*, and *Ram Ditta*.").

Carter v. Barker, 225 F.3d 653 (Table), 2000 WL 1008794, at *6 (4th Cir. 2000) (indicating that *Harter v. Vernon,* 101 F.3d 334 (4th Cir. 1996), holding North Carolina sheriff sued in official capacity is not entitled to Eleventh Amendment immunity, is still good law after *McMillian*).

Knight v. Vernon, 214 F.3d 544, 552, 553 (4th Cir. 2000) ("North Carolina law vests the sheriff, not the county, with authority over the personnel decisions of his office. Although the county board of commissioners may fix the number of salaried employees within the sheriff's office, the sheriff 'has the exclusive right' under N.C. Gen.Stat. § 153A-103 (1998) 'to hire, discharge, and supervise the employees in his office.' North Carolina courts interpret this statute to preclude county liability for personnel decisions made by sheriffs. . . . Because Sheriff Vernon, and not Rockingham County, had exclusive responsibility for discharging Ms. Knight, the district court properly granted summary judgment for the county on the §1983 claims.").

Worrell v. Bedsole, 110 F.3d 62 (Table), No. 95-2816, 1997 WL 153830, *5 (4th Cir. Apr. 3, 1997) ("In North Carolina, the Office of Sheriff is a legal entity separate and distinct from the Board of County Commissioners because a sheriff is elected by the people, not employed by the county. N.C. Gen.Stat. § 162-1. The sheriff, not the county, has final policymaking authority over the personnel decisions in his office. [cites omitted] N.C. Gen.Stat. § 153A-103 provides that each elected sheriff 'has the exclusive right to hire, discharge, and supervise the employees in his office.' This authority may not be delegated to another person or entity. N.C. Gen.Stat. § 162-24. We agree with the district court's conclusion that 'Bedsole's final policy-making authority over his personnel decisions in the Sheriff's Department is his alone and is not attributable to Cumberland County.'").

Parker v. Bladen County, No. 7:08-CV-69-D, 2008 WL 2597654, at **2-4 & n.2 (E.D.N.C. June 27, 2008) ("Data downloaded from the officers' tasers indicated that the officers triggered their tasers a total of 38 times. . . Additionally, the officers had recently been certified to use the tasers, and use of their tasers upon Cook was the first time any of the officers had used the tasers in a non-training situation. . . . Defendants Bladen County and the Bladen County Sheriff's Department move to dismiss the complaint against them pursuant to Federal Rule of Civil Procedure 12(b)(6). . . . Under North Carolina law, sheriffs have substantial independence from county government. Sheriffs are directly elected, hold office for four-year terms, and are not employed by the Board of County Commissioners. . . Each elected sheriff 'has the exclusive right to hire, discharge, and supervise the employees in his office.' . . The sheriff may not delegate this authority to another person or entity. . . Thus, under North Carolina law, the sheriff, not the county encompassing his jurisdiction, has final policymaking authority over hiring, supervising, and discharging personnel in the sheriff's office. . . . In other words, under North Carolina law, a sheriff's deputy 'is an employee of the sheriff, not the county,' . . . and 'the control of employees hired by the sheriff is vested exclusively in the sheriff.'. . Here, plaintiff alleges that Sergeant Edwards and Deputies Nelson and Smith of the Bladen County Sheriff's Department used excessive force in attempting to detain Cook. Plaintiff also alleges that Sheriff Bunn, Bladen County, and the Bladen County Sheriff's Department failed to train and supervise these employees and acted negligently and in violation of Cook's constitutional rights in failing to have a policy on the use of tasers. These allegations are employment- and training related, and constitute personnel decisions or other law enforcement polices over which the Bladen County Sheriff (not Bladen County) maintains exclusive authority. . . That authority (and any resulting liability) is not attributable to Bladen County. . . Accordingly, defendants' motion to dismiss the amended complaint as to Bladen County is granted. . . . Plaintiff's reliance on *Flood v. Hardy*, 868 F.Supp. 809 (E.D.N.C.1994), which in turn relies on *Dotson v. Chester*, 937 F.2d 920 (4th Cir.1991), is misplaced. *Dotson* and *Flood* held that where a county sheriff serves as the final county policymaker for operating the county-funded county jail, the county may be liable under section 1983. .v.vThis case, of course, is distinguishable. *See, e.g., Harter v. Vernon*, 953 F.Supp. 685, 693 & n. 8 (M.D.N.C.) (drawing distinction between county sheriff's policymaking authority over running a county-funded county jail and sheriff's policymaking authority over employment decisions within the sheriff's office), *aff'd*, 101 F.3d 334 (4th Cir.1996).")

Blair v. County of Davidson, No. 1:05CV00011, 2006 WL 1367420, at *7, *12, *13 (M.D.N.C. May 10, 2006) ("Under state law, it is the sheriff, not the county, that has final decision making authority over the law enforcement policies and personnel of his office, and the sheriff's deputies 'are appointed by and act for the sheriff, who alone is responsible for their conduct.' . . In addition, under North Carolina law, the sheriff has exclusive custody and control of the jail in his county. . . In the present case, all of Plaintiff's allegations relate to alleged conduct by the Sheriff or his Detention Officers while Plaintiff was in their custody at the Davidson County Detention Center. Neither the Sheriff nor his Detention Officers report to the County or County Manager Hyatt, and Plaintiff has not alleged any unconstitutional policy or conduct by the County or County Manager Hyatt. Therefore, the Motion to Dismiss as to Davidson County and County Manager Hyatt will be granted, and all of the claims against Davidson County and County Manager Hyatt will be dismissed. . . . In the present case, Plaintiff brings claims against Sheriff Hedrick in his official capacity based on, inter alia, his failure to adequately supervise and train his Detention Officers and failure to prevent known constitutional violations. As noted above, North Carolina law establishes that the Sheriff is the sole law-enforcement policymaker for the county, and no other individuals have policy-making or training authority over the Sheriff or his deputies. . . Thus, Sheriff Hedrick, as the Sheriff, is the responsible policymaker who could be held liable for adopting unconstitutional policies or for failing to adopt proper policies or training if that failure amounts to deliberate indifference to the rights of citizens. In this case, viewing the allegations in the Complaint in the light most favorable to Plaintiff, and taking the allegations in the Complaint as a whole, Plaintiff appears to allege that Sheriff Hedrick inadequately trained his deputies and sanctioned unconstitutional conduct with deliberate indifference to the rights of citizens, particularly with regard to the use of tasers and the use of strip searches. Plaintiff also alleges that Sheriff Hedrick was aware of the constitutional violations and refused to prevent them. It will be Plaintiff's burden to establish that this was actually the case, but, at this stage in the litigation, the Court concludes that Plaintiff has sufficiently alleged official capacity claims against Sheriff Hedrick, and those claims will not be dismissed. . . . Finally, with respect to the claims for punitive damages, the Sheriff's Office Defendants contend that Plaintiff's claims for punitive damages should be dismissed because punitive damages are not available from an official capacity or municipal defendant, such as the Sheriff's Office. Defendants also note that under state law, punitive damages may not be awarded against a municipality absent statutory authorization. Having reviewed these contentions, the Court finds that Plaintiff may not recover punitive damages on her 'official capacity' claims, because those claims are

analogous to a claim against a municipality or other local government unit, for which punitive damages are not available.").

Davis v. Durham Mental Health Developmental Disabilities Substance Abuse Area Authority, 320 F.Supp.2d 378, 398 n.16 (M.D.N.C. 2004) (In holding was not an arm of the state for Eleventh Amendment purposes, the court observed "that after the United States Supreme Court's decisions in *Regents of Univ. of Cal. v. Doe,* 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997), and *McMillian v. Monroe County,* 520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997), several district courts in this circuit suggested that the impact of a judgment on a State's treasury is no longer the dominant factor in determining Eleventh Amendment immunity. *See, e.g., Conlin v. Southwestern Cmty. College,* No. 2:99CV247-C, 2001 WL 1019918, at *1 (W.D.N.C. Jan. 24, 2001); *Sampson v. Maynor,* No. 7:99- CV-51-F (E.D.N.C. Oct. 6, 1999). In *Cash v. Granville County Board of Education,* however, this circuit's court of appeals expressly rejected the district courts' interpretation of *Regents* and *McMillian* and held that the impact of a judgment on a State treasury is still the dominant factor in determining Eleventh Amendment immunity. 242 F.3d 219, 223-24 (4th Cir.2001).").

Layman v. Alexander, 294 F.Supp.2d 784, 791, 792 (W.D.N.C. 2003) ("While the undersigned has held previously, and remains convinced, that the creation of the office of sheriff and the historical role of the sheriff in North Carolina in the exercise of his duties of governance and the enforcement of state law is more properly considered an office of the State of North Carolina, entitled to all of the privileges and immunities bestowed upon any office of the State, *see, e.g., Henderson Amusement, Inc. v. Good,* 172 F.Supp.2d 751 (W.D.N.C.2001), *aff'd,* 59 Fed.Appx. 536, 2003 WL 932463 (4th Cir.2003), as explained in two recent decisions, *see Harmon v. Buchanan,* No. 1:00cv28 (W.D.N.C. Aug. 27, 2003); *Jones v. Buchanan,* No. 1:00cv27 (W.D.N.C. Oct. 9, 2003), the Fourth Circuit held in 1996 and has since reaffirmed that 'the Eleventh Amendment does not bar a suit against a North Carolina sheriff in his official capacity,' *Harter v. Vernon,* 101 F.3d 334, 343 (4th Cir.1996); *see also Cash v. Granville County Bd. of Educ.,* 242 F.3d 219, 227 (4th Cir.2001). In light of the Fourth Circuit's decision in *Harter* and its clear and unequivocal reaffirmation of its *Harter* decision--both its analysis and its judgment--in *Cash,* this Court is bound to adhere to that decision and, therefore, concludes that North Carolina sheriffs are not entitled to immunity under the Eleventh Amendment, but rather, are subject to suit in federal court.")**.**

North Carolina ex rel Wellington v. Antonelli, No. 1:01CV01088, 2002 WL 31875504, at *3 (M.D.N.C. Dec. 20, 2002) (not reported) ("Where a local government does not have final authority over a particular policy carried out by a sheriff, it cannot be held liable under §1983 for alleged constitutional violations committed by the sheriff or his deputies. . . Because Guilford County did not have final policymaking authority in the area of law enforcement, it cannot be held liable for the conduct of Sheriff Barnes or Deputies Antonelli and Caliendo.").

Gantt v. Whitaker, 203 F. Supp.2d 503, 508, 509 (M.D. N.C. 2002) ("Defendants also raise the defense of sovereign immunity to the claim against Whitaker, asserting that North Carolina sheriffs are state officials and consequently immune from suit under the Eleventh Amendment. In support of this argument, Defendants offer the recently-decided case of *Henderson Amusement, Inc. v. Good,* 172 F.Supp.2d 751 (W.D.N.C.2001). While the *Henderson Amusement* court did grant immunity to a North Carolina sheriff, *see id.* at 763, it did so in spite of clear Fourth Circuit precedent affirming that North Carolina sheriffs are local, not state, officials and lack Eleventh Amendment immunity. *See Harter v. Vernon,* 101 F.3d 334, 343 (4th Cir.1996). The *Henderson Amusement* court justified its departure from this controlling precedent by citing two post-*Harter* Supreme Court decisions which it argued have overruled the immunity analysis employed by the Court of Appeals in *Harter*. [FN3] However, after examining these Supreme Court decisions in a subsequent case, *Cash v. Granville County Bd. of Educ.,* 242 F.3d 219 (4th Cir.2001), the Fourth Circuit reaffirmed the validity of *Harter* in no uncertain terms. . . . Therefore, in accordance with these controlling authorities, the court hereby finds that Sheriff Whitaker, as a local official, is not entitled to Eleventh Amendment immunity from Plaintiff's official capacity § 1983 claim."), *aff'd on other grounds,* 57 Fed.Appx. 141, 2003 WL 152856 (4th Cir. Jan. 23, 2003) (unpublished).

Henderson Amusement, Inc. v. Good, 172 F. Supp.2d 751, 763 (W.D.N.C. 2001) ("As this court can discern, a decisional rift is growing between state and federal courts in North Carolina in Section 1983 actions, which are actionable in either forum. The potential for inconsistency is most real in such circumstances, inasmuch as federal and state courts share Section 1983 jurisdiction. . . The difficulty arises when on one side of the street (in federal court) a Section 1983 claim against a sheriff is viable, while on the other side (in state court) it is not. Compounding this problem, there is no method in North Carolina for a federal court to certify an issue of state law (whether a sheriff is considered by the state to be a state official) so that a federal forum can determine the ultimate federal issue (whether eleventh-amendment

immunity can be extended to such official). With due deference and the utmost respect for decisions which have reached opposite conclusions in this district, *see Olvera v. Edmundson, supra,* and *Ramsey v. Schauble,* 141 F.Supp.2d 584 (W .D.N.C.2001) (Horn, M.J.), and based upon all the information and precedent available to this court, including the decision of the Supreme Court in *McMillian,* this court finds that the Section 1983 official-capacity claim lodged against the sheriff is not viable, inasmuch as it is a suit against the State of North Carolina, which enjoys eleventh-amendment immunity."), *aff'd on other grounds,* ***Henderson Amusement, Inc. v. Good***, No. 01-2462, 2003 WL 932463, at *5 (4th Cir. Mar. 10, 2003) (unpublished).

Harmon v. Buchanan, 164 F. Supp.2d 649, 656 (W.D.N.C. 2001) ("The court notes a growing dichotomy between federal and state jurisprudence in North Carolina concerning the role of a sheriff--the state courts find, with little explanation, that a sheriff and his deputies are state officials who enjoy the state's eleventh-amendment immunity in Section 1983 actions; however, federal courts, with much explanation, find that they are local officials, who enjoy no immunity. The parties have indicated to the court that they do not wish to enter the fray on such issue. The undersigned is on the record in a number of cases as finding that a North Carolina sheriff is, by mandate of the North Carolina Constitution, which has its origin in English common law, a representative of the state who is now elected locally. The dichotomy that is growing between the federal and state courts in North Carolina could lead to a lessening in the confidence of the judiciary for one reason--federal and state courts have concurrent jurisdiction over Section 1983 actions, and, as it now stands, a plaintiff cannot bring an action in state court against a sheriff under Section 1983, but can walk across the street and do so in the federal forum. Such issue needs resolution by either the highest state court or by legislative action. This court, therefore, does not reach such issue." [footnotes omitted]).

Wilkerson v. Hester, 114 F. Supp.2d 446, 464, 465 (W.D.N.C. 2000) ("Based upon all the information and law available, including the decision of the Supreme Court in *McMillian*, the undersigned must recommend that the official-capacity claims lodged against the sheriff and his deputy be dismissed, inasmuch as a suit against a North Carolina sheriff and/or his deputy is a suit against the State of North Carolina, which enjoys eleventh- amendment immunity.").

Little v. Smith, 114 F. Supp.2d 437, 446 (W.D.N.C. 2000) ("In North Carolina, the Office of Sheriff is a legal entity, established by the state constitution and state

statutes, separate and distinct from the Board of County Commissioners because a sheriff is elected by the people, not employed by the county. . . The sheriff, not the county, has final policymaking authority over the personnel decisions in his office. . . . [I]t is Sheriff Sellers, not Anson County, who has the final decision making authority over law enforcement policies of his office. Indeed, Anson County does not have the power to exercise supervision or control over the law enforcement officers who work for the sheriff who 'are appointed by and act for the sheriff, who alone is responsible for their conduct.' . . . . In short, Anson County has no authority to control law enforcement policies of the Anson County Sheriff's Office or to control its personnel.").

Flood v. Hardy, 868 F. Supp. 809, 812-13 (E.D.N.C. 1994)("[T]he parties in this action do not dispute that the Sheriff has . . . final policymaking authority. Thus the only question in dispute is whether the Sheriff's policymaking decisions can be imputed to the County. According to the *Dotson* court, where state law makes a county sheriff the final policymaker, with regard to some particular aspect of county operation, his actions can serve to bind the county. [cite omitted] In North Carolina, where the Sheriff is given exclusive control over the supervision of his employees, including deputies and jailers, the Sheriff may bind the county by his actions. The defendant asserts that since the Sheriff is an elected official, the County cannot be bound by his decisions. This assertion is without merit. The fact that the Sheriff is an elected official does not exonerate the County.").

South Carolina

Wall v. Sloan, 135 F.3d 771 (Table), 1998 WL 54938, *1 (4th Cir. Feb. 11, 1998) ("[A] South Carolina sheriff such as Sloan is a state official and therefore is not subject to suit for monetary damages in his official capacity. . . . Wall primarily contends on appeal that because he seeks monetary relief from the county rather than the state, Sloan should not be entitled to Eleventh Amendment immunity. We find this claim unavailing. While the extent of the state treasury's liability is the main consideration in determining immunity, a party cannot file suit under § 1983 and specifically seek money from the county and not the state in an effort to circumvent an official's entitlement to Eleventh Amendment protection. An individual who brings a § 1983 action under these circumstances cannot choose which entity will satisfy any resulting judgment. Accordingly, the district court properly concluded that Sloan is a state official entitled to immunity in his official capacity.").

Virginia

Grayson v. Peed, 195 F.3d 692, 697 (4th Cir. 1999) ("[T]here can be no county liability here because under Virginia law Fairfax County has no control over the internal administration of the ADC [Adult Detention Center]. . . Rather, the State Board of Corrections tells Sheriff Peed what he has to do in running the jail, and the State Department of Criminal Justice Services tells the Sheriff what he must do to train his employees. . . As the county has no control over policy within the jail, it bears no concomitant responsibility.").

Bockes v. Fields, 999 F.2d 788, 791 (4th Cir. 1993) ("In Virginia, neither the County nor the local boards have authority to set 'general goals and programs' for social services personnel; that authority is reserved for the State Board. . . . the Grayson County Board enjoyed its discretion to fire [plaintiff] at the prerogative of and within the constraints imposed by the Commonwealth. Such bounded, state-conferred discretion is not the 'policymaking authority' for which a county may be held responsible under § 1983.").

Strickler v. Waters, 989 F.2d 1375, 1390 (4th Cir.), *cert. denied*, 114 S. Ct. 393 (1993) ("The City of Portsmouth is not liable under section 1983 for the actions of its Sheriff in the administration of its jail, because under the law of Virginia those actions do not embody an official policy of the City of Portsmouth. That the city apparently is charged with keeping the jail 'in good order' in no way alters this conclusion. The cited statute at most obligates the city to provide for the jail's physical plant, not to oversee the activities within.").

Willis v. Oakes, No. 2:06CV00015, 2006 WL 1589600, at *2 (W.D. Va. June 9, 2006) ("In Virginia, contrary to the plaintiffs' assertions, it is well-established that sheriffs are state officers. Thus, a suit against a sheriff or his deputies in their official capacities is a suit against the state itself. . . . Likewise, the plaintiffs' claims against Wise County are barred. . . . Under Virginia law, sheriffs are independent constitutional officers whose duties and authorities are controlled by statute and who serve independently of the municipal government. . . . Accordingly, a county cannot be held liable for a sheriff's actions.")

Brown v. Mitchell, 308 F.Supp.2d 682, 698 & n.19 (E.D. Va. 2004) ("[A]s a constitutional officer, a Virginia sheriff is separate and distinct from the municipal or local government in which she may operate. . . . The question then becomes what

are Mitchell's statutory powers, obligations, and duties respecting the Jail. To begin, it appears that the design, the construction, and apparently the structural maintenance of local jails in Virginia are the responsibilities of local governments--in this case, the City. . . . In other words, those responsibilities are not statutorily allocated to the sheriff. By statute, however, the sheriff is 'the *keeper* of the local jail, and the *legal custodian* of those who are lawfully confined in it.' . . . Thus, 'the final policymaking decision maker in the [daily] operation of the jail' is the sheriff. . . . It is worth noting that even though a Virginia sheriff is a state employee, in the sheriff's operation of a local jail, 'the [locality] may be liable for [the sheriff's] policies where they violate constitutional standards.'"). The court, later in the opinion notes that "Whether, under the decision in *May v. Newhart*, 822 F.Supp. 1233 (E.D.Va.1993), the potential liability under Count I is that of the Sheriff or the City must await further factual development." 308 F.Supp.2d 682, 701 n.22 (E.D. Va. 2004).

Hussein v. Miller, 232 F. Supp.2d 653, 655 (E.D. Va. 2002) ("Upon consideration of the parties' pleadings, the relevant provisions of the Virginia Code and the Virginia Constitution, and binding case law, the Court holds that the Commissioner of the Revenue for the City of Falls Church is protected by sovereign immunity from claims against him in an official capacity, because any adverse judgment against the Commissioner would be paid in full by the State treasury, and because Commissioners of Revenue are not local officers; rather they are constitutional officers. As such, claims against constitutional officers are essentially claims against the Commonwealth of Virginia, and the Commonwealth has not waived Eleventh Amendment immunity.").

Keathley v. Vitale, 866 F. Supp. 272, 276 (E.D. Va. 1994) ("[W]hile [plaintiff] does provide a lengthy list of state statutes which demonstrate a relationship between local municipalities in Virginia and their respective sheriff departments, he offers no specific provisions of the Virginia Code which would support his contention that the hiring and firing of VBSD employees should be attributed to Virginia Beach . . . . Plaintiff proffers no authority to support the proposition that the electoral process is a sufficient basis upon which to attribute Drew's acts with respect to employment decisions to Virginia Beach. [footnote omitted] . . . . In essence, [Plaintiff] asks that this Court create a vast "elected official" exception to *Monell*. We decline any such expansion.").

Olivo v. Mapp, 838 F. Supp. 259, 261 (E.D. Va. 1993) ("[T]he employment practices of a sheriff do not involve the exercise of any policymaking authority on behalf of a locality.").

FIFTH CIRCUIT

Louisiana

Cozzo v. Tangipahoa-Parish Council-President Government, 279 F.3d 273, 281-83 (5th Cir. 2002) (concluding Sheriff in Louisiana is not an "arm of the state" and not entitled to Eleventh Amendment immunity).

Burge v. Parish of St. Tammany, 187 F.3d 452, 470 (5th Cir. 1999) (*Burge III*) ("Considering the Louisiana constitutional and statutory law and tort cases, we conclude that, in a suit against a district attorney in his official capacity under § 1983 for constitutional torts caused by the district attorney's policies regarding the acquisition, security, and disclosure of *Brady* material, a victory for the plaintiff imposes liability on the district attorney's office as an independent local entity. Accordingly, a district attorney cannot be held personally liable in an 'official capacity' suit, and any judgment against a district attorney in his official capacity must be recovered from his liability insurer or the public funds controlled by him or his successor in office.")**.**

Hebert v. Maxwell, No. CV-03-1739-A, 2005 WL 2429174, at *4 (W.D. La. Sept. 30, 2005) ("A sheriff's office is not a state agency under Louisiana state law. La. R.S. 13:5102. Rather, it is a political subdivision. La. R.S. 13:5102. Further, the Sheriff is an 'autonomous local government official separate and apart from the parish he serves.'. . Therefore, a suit against a sheriff is not a suit against the state, but a suit against a political subdivision, the sheriff's office. Because of the unusual treatment given to sheriffs and sheriffs' offices under Louisiana law, when a sheriff is sued in his official capacity, the judgment can only be recovered from the sheriff's liability insurer or the public funds controlled by the sheriff. . . The state of Louisiana is not liable for any damages arising from a sheriff's actions taken within the scope of his official duties. La. R.S. 42:1441. Additionally, a sheriff sued in his official capacity is not personally liable for any damages assessed.").

Porche v. St. Tammany Parish Sheriff's Office, 67 F. Supp.2d 631, 634, 636 (E.D. La. 1999) ("This case calls upon the court to assess whether the sheriffs of Louisiana

are arms of the state and thereby entitled to the protection of the Eleventh Amendment. Courts in several other states have resolved this issue with mixed results. [collecting cases] . . . . [A] sheriff in Louisiana may not be properly characterized as an arm of the state and, therefore, the Eleventh Amendment affords a sheriff in Louisiana no protection against being sued.”)**.**

Mississippi

Waltman v. Payne, 535 F.3d 342, 350 (5th Cir. 2008) (“The district court failed to recognize the single-incident exception to the general rule: a single decision by an individual with ‘final policy-making authority’ can in certain instances be grounds for liability under § 1983. . . In Mississippi, sheriffs are final policymakers for their respective department's law enforcement decisions made within their counties.”).

Hamilton v. Stafford, No. 1:96CV265- S-D, 1997 WL 786768, at *1 (N.D. Miss. Nov. 26, 1997) (not reported) ("The holding in *McMillian* is quite narrow and limited to Alabama sheriffs, as pointed out in the majority opinion, . . . and indeed, does not even apply to Alabama sheriffs in every instance. . . . In light of the narrow holding in *McMillian*, the validity of prior decisions within the Fifth Circuit regarding Mississippi sheriffs and their status as county officials under section 1983 remain unaffected. . . . Indeed, every court outside of the Eleventh Circuit to address the issue has determined that sheriffs, other than those in Alabama, remain county officials for section 1983 purposes.").

Texas

Williams v. Kaufman County, 352 F.3d 994, 1013, 1014 (5th Cir. 2003) (“We have. . . held that sheriffs in Texas are final policymakers in the area of law enforcement. Therefore, it is clear that the County can be held liable for Harris's intentional conduct, to the extent it constitutes the ‘moving force’ behind the alleged injury. Harris testified that he is the final policymaker for law enforcement matters in the County. Harris and others have testified as well that both the strip search and lengthy detention of the plaintiffs were conducted according to the Sheriff Department's unwritten policy for executing ‘hazardous’ warrants. As a result, Harris's actions as policymaker were undeniably the moving force behind, and the direct cause of, the violation of plaintiffs' constitutional rights, thereby establishing the County's municipal liability. Finally, we note that the County has not expressly contested its municipal liability, but rather argued only that it is not liable for actions that do not

amount to constitutional violations, a truism that none contests." [footnotes omitted]).

Skelton v. Camp, 234 F.3d 292, 296 (5th Cir. 2000) (concluding that in removal proceeding, alderman represented the municipality, not the State of Texas).

Brady v. Fort Bend County, 145 F.3d 691, 700, 702 (5th Cir. 1998) ("Sheriffs under Texas law are unlike the hypothetical sheriff discussed in *Pembaur* because a Texas sheriff is not merely granted 'discretion to hire and fire employees' by the commissioners court. . . Rather, the Texas legislature has vested sheriffs with such discretion, and the sheriff's exercise of that discretion is unreviewable by any other official or governmental body in the county. Texas sheriffs therefore exercise final policymaking authority with respect to the determination of how to fill employment positions in the county sheriff's department. . . . [T]he fact that under Texas law, no other official or governmental entity of the county exerts any control over the sheriff's discretion in filling available deputy positions is what indicates that the sheriff constitutes the county's final policymaker in this area.")**.**

Roach v. Bandera County, No. Civ.A.SA-02-CA-106XR, 2004 WL 1304952, at *9 (W.D. Tex. June 9, 2004) ("To the extent that the defendants sued in their official capacities assert immunity under the Eleventh Amendment, the Court concludes that the County and the Sheriff's Department are not arms of the state and thus are not entitled to Eleventh Amendment immunity from suit. . . .Sheriff MacMillan is the County's official policymaker with regard to county-related law enforcement. . . Thus, the County can be held liable for MacMillan's intentional conduct, to the extent it constitutes the 'moving force' behind the alleged injury. . . However, Plaintiff has offered no summary judgment evidence regarding any conduct or policy by Sheriff MacMillan, much less any conduct that was a moving force behind his injuries. Accordingly, summary judgment for Bandera County and the Bandera County Sheriff's Department is granted.").

SIXTH CIRCUIT

Kentucky

Johnson v. Karnes, 398 F.3d 868, 877 (6th Cir. 2005)("A suit against Sheriff Karnes in his official capacity is permissible under § 1983, and is equivalent to a suit against the entity on whose behalf he acts--Franklin County."[footnote omitted]).

Johnson v. Fink, No. 1:99-CV-35-R, 1999 WL 33603131, at *3 (W.D. Ky. Sept. 17, 1999) (not reported) ("Whether a public employee is a state or county government official is a matter of federal law, informed by provisions of state law involving sheriffs. . . The Court should look at several factors, including 'how state law defines the entity, what degree of control the state maintains over the entity, where funds for the entity are derived, and who is responsible for judgment against the entity.' . . Analyzing these factors, the Court concludes that the sheriffs act as local government officials rather than acting as an arm of the state in their daily operations. The Kentucky Constitution defines sheriffs as county officials. . . The sheriffs are elected by county residents. They act autonomously with little or no state oversight. The sheriffs' autonomy from the county does not preclude county liability. . . Because sheriffs receive most of their funding from the county and its residents, . . . the county presumably will bear financial responsibility for the judgment. . . . There is no evidence that a judgment would be paid from the state treasury. Furthermore, the sheriffs are not defended by attorneys from the state. Kentucky sheriffs are county officials. However, the particular actions at issue are attributable to the state, and thus, the sheriffs were acting as state officials when they were executing the search warrant. 'Where county officials are sued simply for complying with state mandates that afford no discretion, they act as an arm of the state.' *Brotherton* at 566. In this case, the sheriffs' deputies were executing a search warrant signed by a state judge which stated 'you are commanded to make immediate search of the premises.' . . By acting under the direct order of a state court, the sheriffs and their deputies in this case were acting as state officials. . . Since the deputies were acting as arms of the state, they are entitled to Eleventh Amendment immunity in their official capacities.").

Michigan

Beck v. Haik, 234 F.3d 1267, 2000 WL 1597942, at *4 (6th Cir. Oct. 17, 2000) (Table) ("As a matter of well-settled Michigan law, Sheriff Haik's policies are those of the County.").

Bergeron v. Fischer, No. 02-10298-BC, 2004 WL 350577, at *5 (E.D. Mich. Feb. 19, 2004) (not reported) ("The plaintiff here alleges that defendant Fischer, in his official capacity as sheriff of Iosco County and in his individual capacity, was deliberately indifferent to his needs as a diabetic, and that he 'almost died as a result thereof because of the acts and omissions of the jail Booking Officer, and indirectly as the result of Fischer's inaction.'. . The plaintiff also alleges that Fischer failed to

enforce county jail policies regarding medical treatment for prisoners and failed to properly supervise his jail staff. . . As the magistrate judge correctly stated, in an official-capacity suit against a local governmental official, the real party in interest is not the named official but the local government entity of which the official is an agent. . . Therefore, the claims asserted against Fischer in his official capacity are duplicative of the claims asserted against Iosco County and these claims will be dismissed. The Court also agrees with the magistrate judge that Fischer is entitled to summary judgment on the claims brought against him in his individual capacity. Fischer has submitted an affidavit in which he avers that not only was he not present at the Iosco County Jail on December 27, 2000, the day the plaintiff arrived, he was not even the county sheriff on that date.").

HRSS, Inc. v. Wayne County Treasurer, 279 F. Supp.2d 846, 857, 858 (E.D. Mich. 2003) ("The Sixth Circuit has looked at several factors to determine whether a local government and its officials acted as arms of the state, and are thus entitled to sovereign immunity from § 1983 claims. . . .These factors include: 'how state law defines the entity, what degree of control the state maintains over the entity, where funds for the entity are derived, and who is responsible for judgment against the entity.' . . The most important factor is whether the county or the state would be financially liable for any judgment that could result from the suit. . . Analyzing the above factors, the court finds that the County, including its Treasurer and Sheriff, acted as a local government in this case rather than an arm of the state. First, under the Michigan Constitution, the Sheriff and Treasurer are treated as elected officials for the county. . . Further, the Sheriff and Treasurer are to hold their principal offices in the county seat. . . Thus, Michigan law clearly contemplates that the county Sheriff and Treasurer are to be treated as local, rather than state, officials. Second, there is no evidence that the state maintained control over the Sheriff or Treasurer. Although the foreclosure sales are governed by state law, the Sheriff and Treasurer still can act autonomously under the law, just as any other local official that is bound and/or guided by state law. Further, as discussed above, state law is silent with respect to the interest earned on overbid surpluses. Thus, the county officials were not required by the statute to retain the interest. Third, the county pays the salary of the Sheriff and Treasurer from the county treasury. . . Finally, and most importantly, the county will presumably bear financial responsibility for any judgment that may result in this case. Inasmuch as the above factors weigh against treating the County or its officials as arms of the state, Defendants will not be granted sovereign immunity.").

Ohio

Petty v. County of Franklin, Ohio, 478 F.3d 341, 347 (6th Cir. 2007) ("Unlike a county sheriff's office, the sheriff himself may be considered a proper legal entity for purposes of suit under § 1983. In fact, that is exactly what the district court did in allowing Petty's suit against Sheriff Karnes to proceed at least to the summary judgment stage. There is no merit, therefore, to Petty's argument that the Franklin County Sheriff's Office be implicated as a separate legal entity in this suit. *See also Batchik v. Summit County Sheriff's Dep't*, No. 13783, 1989 WL 26084, at * 1 (Ohio Ct.App. Mar. 15, 1989) (unreported) (noting that the Summit County Sheriff, but not the Summit County Sheriff's Department, was an entity capable of being sued).")

Loy v. Sexton, No. 04-3971, 2005 WL 1285705, at *2 (6th Cir. May 23, 2005) (unpublished) ([U]nlike *Marchese*, 758 F.2d at 188, where we held that a sheriff, sued in his official capacity, had 'a duty to both know and act,' Sexton is being sued here in his individual capacity. . . Indeed, the Loys could not sue Sexton in his official capacity for money damages. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45, 58 (1989) (holding that state employees acting in their official capacities are insulated from liability for money damages). Accordingly, the Loys' claim against Sexton based on ratification fails.").

Brown v. Karnes, No. 2:05-CV-555, 2005 WL 2230206, at *3 (S.D. Ohio Sept. 13, 2005) (not reported) ("Ohio courts have determined that '[u]nder Ohio law, a county sheriff's office is not a legal entity that is capable of being sued .' [citing cases] The Court finds that Defendants have correctly stated the law and that dismissal of Plaintiff's §1983 claim against the Franklin County Sheriff's Office is appropriate.").

Tennessee [state]

Spurlock v. Sumner County, 42 S.W.3d 75, 80, 81 (Tenn. 2001) ("Because we find the legislature's statutory grant of law enforcement authority to the sheriff to be of limited significance, we conclude that this argument fails to outweigh the support found in the Tennessee Constitution, case law, and statutes in favor of the proposition that a sheriff acts as a county officer when enforcing the state's laws.")

Tennessee [federal]

Buchanan v. Williams, 434 F.Supp.2d 521, 531 (M.D. Tenn. 2006) ("Under Tennessee law, the county sheriff has the statutory duty to '[e]xecute and return according to law, the process and orders of the courts of record of this state and of officers of competent authority, with due diligence, when delivered to the Sheriff for that purpose.'. . Yet, this authority extends to execute writs 'within the county.' . . Any legal liability arising out of a deputy sheriff's performance of his duties is legally attributable to the County. Tenn.Code Ann. § 8-8- 302. . . As applied here, the writ of execution was issued to the Smith County Sheriff's Department. Williams, as a deputy sheriff, executed the writ and his subsequent seizure of Plaintiff's automobile and its contents was an act for the County. Thus, the Court concludes that under state law, Williams' acts were the acts of Smith County and qualify him as the County's decisionmaker in this instance. This single act of a sheriff is sufficient to represent a decision of the County under federal law.").

SEVENTH CIRCUIT

Illinois [State]

Carver v. Sheriff of La Salle County, 787 N.E.2d 127, 515, 516, 522 (Ill. 2003) ("[P]ursuant to section 9-102 of the Tort Immunity Act, a county sheriff, in his or her official capacity, is vested by the General Assembly with the authority to settle litigation filed against the sheriff's office and to direct the office to pay that settlement. However, the dilemma noted by the Seventh Circuit in its opinion in *Carver II* remains: although the sheriff has authority to settle claims filed against the sheriff's office pursuant to section 9-102, the statute is silent with respect to the specific mechanism for funding the judgment. As stated, although the office of sheriff is constitutionally created (Ill. Const.1970, art. VII, § 4(c)), and the sheriff is an independently elected county officer, the county sheriff lacks the authority to levy taxes or establish a budget. Instead, the General Assembly has determined that the sheriff's office is to be financed by public funds appropriated to it by the county board. See 55 ILCS 5/4-6003 (West 2000); 55 ILCS 5/5-1106 (West 2000). We conclude that, under this statutory scheme, the county is obligated to provide funds to the county sheriff to pay official capacity judgments entered against the sheriff's office. . . . For the foregoing reasons, we answer the question certified to us by the United States Court of Appeals for the Seventh Circuit as follows: we hold that under Illinois law a sheriff, in his or her official capacity, has the authority to settle

and compromise claims brought against the sheriff's office. Because the office of the sheriff is funded by the county, the county is therefore required to pay a judgment entered against a sheriff's office in an official capacity. We further hold that this conclusion is not affected by whether the case was settled or litigated.").

Alencastro v. Sheahan, 698 N.E.2d 1095, 1099, 1100 (Ill.App. 1998) (sheriff acts as an arm of the State of Illinois when engaged in nondiscretionary execution of court order for possession)

Illinois [Federal]

DeGenova v. Sheriff of DuPage County, 209 F.3d 973, 975-77 (7th Cir. 2000) ("In *Franklin*, we concluded that the Sheriff is not a State agent when he performs general law enforcement duties. But we have also recognized that sometimes the Sheriff may act on behalf of the State, as when he executes a judicial Writ of Assistance. *Scott*, 975 F.2d at 371. Here, we must decide whether the Sheriff is an officer for the State or a local entity when he manages the jail. . . . Illinois sheriffs have final policymaking authority over jail operations. . . . Illinois statutes make it clear . . . that when the Sheriff manages the jail, he is a county officer. . . . The Sheriff . . . argues that because we have held that Illinois sheriffs are not county employees, by default they must be agents of the State. We rejected this argument in *Franklin*, and do so again today. . . . In conclusion, since Illinois sheriffs are county officers when they manage the jail, the Eleventh Amendment does not bar this official capacity suit.").

Franklin v. Zaruba, 150 F.3d 682, 684-86 (7th Cir. 1998) ("The Sheriff asserted Eleventh Amendment immunity, which the district court refused to grant on the basis that sheriffs in Illinois are county officials, not state officials. The sole issue in this appeal is whether Sheriff Doria was acting as an agent of the state, in which case the Eleventh Amendment would bar the plaintiff's suit, or as the agent of some other governmental entity, in which case the Eleventh Amendment does not apply. . . . We have previously held that sheriffs in Illinois are county officials and therefore generally do not receive immunity under the Eleventh Amendment. . . . Eleventh Amendment immunity will extend to county sheriffs, however, when the sheriff (although a county officer) exercises duties on behalf of the state. . . . In this case, however, the Sheriff does not argue that the deputies who exercised custody over the plaintiffs were executing a state judicial order or performing any similar function for the state that would render them state agents for the limited purposes of that action. Nor does the Sheriff argue that formulating policies to govern the conduct of deputies

in their law enforcement functions is an action on behalf of the state akin to enforcing a judicial writ. Rather, the Sheriff contests the general proposition established by *Scott* that sheriffs in Illinois are county officers, not state officers, when performing law enforcement functions. . . . There are numerous differences between the law of Alabama and the law of Illinois, and we point to one that is particularly significant in distinguishing Alabama sheriffs from their Illinois counterparts: the treatment of those officials under the relevant state constitutions, as interpreted by the respective state supreme courts. . . . Indeed, as we noted in *Scott*, . . . a sheriff's status as a county officer is explicitly stated in the Illinois constitution. . . One wrinkle in this analysis is that the Illinois Supreme Court, like the Alabama Supreme Court in *Parker v. Amerson*, has held that counties may not be held liable under respondeat superior for the actions of their sheriffs even though Illinois sheriffs are county officers. See *Moy*, 203 Ill. Dec. 776, 640 N.E.2d at 931. According to the defendant, if sheriffs in Illinois are not agents of the county for purposes of holding the county liable under respondeat superior, then sheriffs must therefore be agents of the state. This argument overlooks a crucial third possibility that we have found to be dispositive in other cases--namely, that the sheriff is an agent of the county sheriff's department, an independently-elected office that is not subject to the control of the county in most respects. . . . Admittedly, sheriffs occupy a somewhat unique position under Illinois law. As *Moy* indicates, sheriffs are agents of the county, but they are separate from the county boards to such a degree that the county boards cannot be held liable for their actions under respondeat superior. Furthermore, as *Ryan* held, the lack of identity between the county sheriff's department and the general county government indicates that § 1983 suits against sheriffs in their official capacities are in reality suits against the county sheriff's department rather than the county board. Although the relationship between county boards and county sheriffs is a complicated one, the relevant feature of that relationship for purposes of this case is the lack of any suggestion that the sheriff is an agent of the state in performing general law enforcement duties.").

Ryan v. County of DuPage, 45 F.3d 1090, 1092 (7th Cir. 1995) (although sheriff was policymaker for the county sheriff's office, county was properly dismissed because "Illinois sheriffs are independently elected officials not subject to the control of the county.").

McGrath v. Gillis, 44 F.3d 567, 572 (7th Cir. 1995) ("Employees of the state government are not transformed into county employees simply because the county government participates in budgeting and paying of their salaries. . . . that State's

Attorneys are elected for and perform their duties within one county does not suggest that they are county employees.").

Ruehman v. Sheahan, 34 F.3d 525, 529 (7th Cir. 1994) ("Sheriff Sheahan contends that in designing and implementing the SPWA system [computer warrant-tracking system] he is equally an agent of Illinois. Well, would holding him liable for errors in the design and operation of the warrant-tracking system interfere with state policy (as opposed to county policy)? . . . . A county agency, under the president of the county board, specified the design of SPWA. The system, then, is designed and supervised from top to bottom by the Sheriff and the county government. State law requires the Sheriff to arrest the right people but says nothing about how he should do it. Design and auditing decisions have been left entirely to him. He could junk SPWA tomorrow, or alter its every detail, without thwarting any state policy or law . . . . It follows that in designing and implementing SPWA the Sheriff is not acting as the State of Illinois.").

Scott v. O'Grady, 975 F.2d 366, 371 (7th Cir. 1992) ("[W]hen a county sheriff in Illinois performs his duties as the principal executive officer or chief law enforcement officer of the county, he acts as a county official and does not get the benefit of the Eleventh Amendment. But this conclusion does not end our inquiry. . . . The county sheriff acts as an arm of the Illinois state judicial system in executing Writs of Assistance and other state court orders. When fulfilling this statutory duty, the sheriff and his deputies must be deemed state officials for the purposes of Eleventh Amendment immunity.").

Moore v. Sheahan, No. 06 C 5443, 2007 WL 461320, at *3, *4 (N.D. Ill. Feb. 8, 2007) ("Moore seeks to hold Cook County liable under §1983 as the public employer of Sheahan and the John Doe Sheriffs. However, Sheahan is independently elected and his office is not under the control of the Cook County Board of Commissioners. . . Cook County does not control Sheahan or his department, and because it has no authority to train or set policies for the department, it cannot be liable for the Cook County sheriffs' alleged constitutional wrongs. However, Cook County cannot entirely escape involvement in this lawsuit. The Seventh Circuit has held that, because under state law counties must pay damages or settlements entered into or levied against sheriffs' offices, a county in Illinois is a necessary party in any suit seeking damages from an independently elected county officer in an official capacity. . . Accordingly, although Cook County is not directly liable under 42 U.S.C. S 1983, we cannot dismiss it from this lawsuit.").

Knapp v. County of Jefferson, Ill., No. 06-cv-4028-JPG, 2006 WL 1663740, at *3 (S.D. Ill. June 13, 2006) ("As a matter of law, a sheriff in Illinois is not a policymaker for the county in which he works, so his decisions cannot be construed as decisions by the county that could subject the county to liability under *Monell*. . . . The Jefferson County Sheriff's Department, however, is a different story. First, because Mulch is a final policymaker for the Jefferson County Sheriff's Department, . . .the Jefferson County Sheriff's Department can be liable under *Monell* for Mulch's personal involvement discussed in the prior section of this order. Knapp has also alleged a set of facts under which he could prove that the Jefferson County Sheriff's Department had a policy or custom of not adequately investigating officers before hiring them and not adequately training and supervising them once they were hired. Such failures can amount to a constitutional violation. . . Thus, Knapp has stated a claim against the Jefferson County Sheriff's Department.").

Wallace v. Masterson, 345 F.Supp.2d 917, 925-27 (N.D. Ill. 2004) ("The question in this case, then, is whether the *Carver* cases mandate that the County must pay for a tort judgment entered against Masterson for which the Sheriff is directed to pay by § 9-102 or is found vicariously liable under the doctrine *respondeat superior.* If so, the County is a necessary party to the litigation and should not be dismissed from the suit. Defendants seek to distinguish the case at bar from the *Carver* cases because, rather than suing the Sheriff in his official capacity directly, Plaintiff sues Masterson in his personal capacity, seeking compensation by the Sheriff and the County under principles of indirect liability. Ultimately, . . . Plaintiff's argument that *Carver* should apply to this case prevails. Plaintiff urges the Court to apply *Carver* because a suit or theory imposing liability on the Sheriff for Masterson's actions (whether under § 9-102 or through *respondeat superior* as to the Sheriff) cannot be anything *other* than a suit or liability against the Sheriff in his official capacity. . . . . Once one concludes that Count V seeks recovery against the Sheriff in his official capacity, the Court cannot, with principle, distinguish *Carver.* The Illinois Supreme Court explicitly held that § 9-102 operates to require the county to pay for judgments entered against a sheriff in his official capacity. Indeed, other courts in this district have already held that *Carver* applies to *respondeat superior* suits against a sheriff. . . .[T]o the extent that Cook County remains in the lawsuit only for the purpose of paying any judgment that may be entered against the Sheriff in his official capacity, the Court grants the County's request that it not be subject to discovery.").

Cooper v. Office of the Sheriff of Will County, 333 F.Supp.2d 728, 736, 737 (N.D. Ill. 2004) ("Defendants argue that although Will County may be a named defendant

because it has a financial interest in the outcome of the judgment, it cannot be held liable for respondeat superior liability arising from claims against the Sheriff's Office or the Deputies. Defendants are correct that Will County is a proper defendant in the instant suit. In an answer to a certified question from the Seventh Circuit, the Illinois Supreme Court determined that, '[b]ecause the office of the sheriff is funded by the county, the county is therefore required to pay a judgment entered against a sheriff's office in an official capacity.' [citing *Carver I*] After the court's ruling, the Seventh Circuit additionally noted that the Supreme Court of Illinois' answer 'implie[d] an additional point of federal law: that a county in Illinois is a necessary party in any suit seeking damages from an independently elected county officer (sheriff, assessor, clerk of court, and so on) in an official capacity.'. . Based on *Carver I*, Will County will be obligated to provide funds to pay any judgments that may be entered against the Sheriff's Office. Because Will County has a financial interest in the outcome of the litigation, it is a necessary party to the litigation and must not be dismissed. . . . Although Will County must be a named party, it cannot be liable for claims against the Sheriff's Office on the basis of the respondeat superior doctrine, however.")

McRoy v. Sheahan, No. 03 C 4718, 2004 WL 1375527, at *6 (N.D. Ill. June 17, 2004) ("Under Illinois law, sheriffs are classified as county officials, and when the sheriff 'performs his duties as the principal executive officer or chief law enforcement officer of the county.' he is a suable entity under §1983.").

Fairley v. Andrews, 300 F.Supp.2d 660, 669, 670 (N.D. Ill. 2004) ("The Cook County Jail, and the Cook County Department of Corrections, are solely under the supervision and control of the Sheriff of Cook County. . . The Sheriff is an independently-elected constitutional officer who answers only to the electorate, not to the Cook County Board of Commissioners. . . . Thus, we find that *Thompson* remains controlling Seventh Circuit law and hold that Cook County cannot be directly liable because it has no authority over the Cook County Sheriff or his deputies.").

Horstman v. County of Dupage, 284 F.Supp.2d 1125, 1130 (N.D. Ill. 2003) ("Mr. Horstman alleges that his injuries came about because the sheriff and state's attorney followed a policy of harassing and arresting law-abiding gun owners. However, even if true, this would not render the county liable. While a sheriff is a county officer, a 'county is given no authority to control the office of the sheriff,' and the Illinois Supreme Court has ruled that the status of sheriffs in relation to their counties is analogous to that of an independent contractor. *Moy v. County of Cook,* 640 N.E.2d

926, 929 (Ill.1994). The Seventh Circuit has explicitly ruled that Illinois counties are not liable for their sheriffs' actions under *Monell,* stating that 'Illinois sheriffs are independently elected officials not subject to the control of the county.' [citing *Ryan v. County of DuPage*]").

Potochney v. Doe, No. 02 C 1484, 2002 WL 31628214, at *2 & n.3 (N.D. Ill. Nov. 21, 2002) (not reported) ("Plaintiffs allege that the County had a policy of failing to train (deputy) sheriffs. This argument fails to state a claim against the County because the Seventh Circuit has ruled that in most circumstances Illinois sheriffs, while agents of the county for which they work, are independently elected officials not subject to a county's respective control. . . . While there may be an argument for liability against the County, the court declines to construct it for the plaintiffs. Rather, it applies the established principle that the Sheriff's Department is a separate entity from the County for purposes of § 1983.").

DeGenova v. Sheriff of Dupage County, No. 97 C 7208, 2001 WL 1345991, at *8 n.8 (N.D. Ill. Oct. 31, 2001) (not reported) ("Plaintiff sues the Sheriff of DuPage County (Richard P. Doria was the sheriff at the time of the incidents in question) in his official capacity. Claims against government officers in their official capacities are actually claims against the government entity for which they work. . . Thus, a suit against the Sheriff of DuPage County in his official capacity is a suit against the Sheriff's Office. Defendant argues, however, that plaintiff cannot sue the Sheriff's Office because it is not a suable entity. As pointed out by plaintiff, though, the Seventh Circuit already held in this case that 'the Sheriff's office has a legal existence separate from the county and the State, and is thus a suable entity.' *DeGenova v. Sheriff of DuPage County,* 209 F.3d 973, 977 n. 2 (7th Cir.2000) . . . Defendant apparently confuses the Seventh Circuit's recognition that Illinois courts have not yet decided whether a judgment against the Sheriff's Office is collectible (which is a matter of first impression for Illinois courts), *see id.,* with whether the entity is suable. The question of whether a judgment is collectible has been certified to the Illinois Supreme Court. *See Carver v. Sheriff of LaSalle County, Illinois,* 243 F.3d 379, 386 (7 th Cir.2001).")

Stewart v. Rouse, No. 97 C 8141, 1999 WL 102774, at *7 (N.D. Ill. Feb. 22, 1999) (not reported) ("Together, *Ruehman* and *McCurdy* indicate that the Eleventh Amendment does not shield the sheriff from liability where a deputy exercising discretion in the execution of a state court warrant exceeds the scope of delegated state authority.")

Buckley v. County of DuPage, No. 88 C 1939, 1997 WL 587594, *5, *6 & n.4 (N.D. Ill. Sept. 17, 1997) (not reported) ("Given that sheriffs are the final policymakers for their counties with respect to their law enforcement functions, the next question is for whom is the sheriff the final policymaker--the state, the county, or the office of the sheriff? Stated differently, may an Illinois county be liable under § 1983 for actions of its sheriff? Two decisions of the Seventh Circuit Court of Appeals have concluded that they cannot. *See Ryan v. County of DuPage*, 45 F.3d 1090, 1092 (7th Cir.1995) (holding that county was properly dismissed from § 1983 complaint because it was not responsible for complained-of conduct of sheriff's employees); *Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir.1989) (holding that plaintiff could not maintain § 1983 action against Cook County for policies, practices, and customs of Sheriff of Cook County related to Cook County Jail), *cert. denied*, 495 U.S. 929, 110 S.Ct. 2167, 109 L.Ed.2d 496 (1990). . . . [A]fter consideration of the Supreme Court's recent decision in *McMillian v. Monroe County, Ala.*, --- U.S. ----, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997), the court concludes that the question of whether an Illinois sheriff is the final policymaker for the county must be subjected to a more searching analysis than was apparently applied in *Ryan* and *Thompson*. . . . In *McMillian*, it was undisputed that the sheriff was a 'policymaker' for purposes of § 1983; the question before the Court was whether he was a policymaker for the State of Alabama or for Monroe County. Based on an examination of Alabama law, the Court concluded that the sheriff represented the State of Alabama and was not a policymaker for the county. . . . Applying the *McMillian* Court's analysis to Illinois' treatment of the office of county sheriff, the court concludes that Illinois' sheriffs are county officials and that counties are therefore liable for the actions of those sheriffs and their departments. . . . While the court cannot say that Illinois counties exercise a great deal of control over county sheriffs, they clearly exercise more control over county sheriffs than do counties in Alabama. Moreover, the fact that the County Board has little or no direct control over an Illinois sheriff underscores the latter's role as final policymaker on law enforcement issues. It provides little help on answering the corollary question as to whether he is the final policymaker for the County or for some other entity. The overall organization of the county system in Illinois suggests that sheriffs, as county officials, make policy for the county and not for the State nor simply for their own departments. For these reasons, the court concludes that, based on Illinois law, a sheriff is the final policymaker (on law enforcement issues) for the county in which she is elected. . . . The court reads *McMillian* to hold that the proper analysis relates to whether the State or the County is the entity liable for the complained-of acts of the Sheriff, and not whether an independent third party (i.e., the Sheriff) is the proper *Monell* defendant.").

Woodget v. Cook County Department of Corrections, No. 94 C 3410, 1994 WL 695453, *5 (N.D. Ill. Dec. 10, 1994) (not reported) ("In *Ruehman v. Village of Palos Park*,. . . the court noted that, as the clerk of a circuit court is defined by state law as being an employee of the state, a damages suit against the Clerk of the Circuit Court in her official capacity is essentially a suit against the state despite the fact that Cook County may be required to pay any liability incurred. As the state is not a person suable under § 1983, [cite omitted], the *Ruehman* court concluded that the plaintiff's damages claim against the Circuit Court Clerk was not permitted. . . Given the reasoning of *Ruehman*, this Court grants Defendants' Motion to Dismiss the § 1983 claim for damages against Defendant Pucinski in her official capacity.").

Indiana

Kujawski v. Bd. Of Commissioners of Bartholomew County, 183 F.3d 734, 738 (7th Cir. 1999) ("[W]hen Officer Parker promulgated a policy about the confiscation of weapons from those detained at home, he was acting on authority delegated by the court which is part of the state government. By contrast, here, we must focus on Officer Parker's decisions relating to the employment of community corrections officers. Because the County has personnel authority over community corrections officers, we believe that the district court concluded correctly that, when Officer Parker made employment decisions concerning these employees, he acted as a decisionmaker for the County.").

Luck v. Rovenstine, 168 F.3d 323, 326 (7th Cir. 1999) ("We first address Luck's claim that Sheriff Rovenstine may be liable in his official capacity for the violation of Luck's constitutional rights. This is, in essence, a claim against the office of sheriff rather than a claim against Sheriff Rovenstine himself, and we therefore understand the claim to be directed against the county. . . . Indiana Code § 36-2-13-5(a) provides without further qualification that it is the sheriff's duty to take care of the jail and its prisoners. Thus, the sheriff's actions are not subject to any further scrutiny or ratification by the county, and the sheriff serves as the county's official decision-maker in matters involving the county jail.")

McCurdy v. Sheriff of Madison County, 128 F.3d 1144, 1145-46 (7th Cir. 1997) ("[T]he sheriff was acting as the agent of the state court system, which is, of course, a part of the state for purposes of the Eleventh Amendment. The warrant was issued by a state court, and merely served by the sheriff. It could as well have been served by a bailiff or other court employee, for the sheriff's duty to serve the warrant was

mandatory. . . so the county was not interposed as a decision-making body between the state and him. *Lancaster v. Monroe County*, 116 F.3d 1419, 1429-30 (11th Cir. 1997). As an agent of the state, though not an employee, the sheriff's office . . . was a part of state government rather than county government when serving the state court's warrant. . . . The added wrinkle here, however, is that by delaying the service of the arrest warrant for so long, the sheriff's office may have exceeded the scope of its delegated state authority, may have ceased, therefore, to be an arm of the state . . . . If that is what happened here, this suit would probably be against the deputy in his personal capacity; but it would be (also or instead) against the sheriff in his official capacity if the deputy had been acting pursuant to a policy of the sheriff. . . Conceivably, therefore, if improbably, the delay in serving the warrant on McCurdy was pursuant to official policy, and if so he would have an official-capacity suit that was not barred by the Eleventh Amendment.").

***Argandona v. Lake County Sheriff's Department*,** No. 2:06 cv 259, 2007 WL 518799, at *5, *6 (N.D. Ind. Feb. 13, 2007) ("The court concludes that the Lake County Sheriff's Department, when acting in its law enforcement capacity, is neither an arm of the State nor a mere extension of Lake County. Rather, the Department is a separate municipal entity and subject to suit under §1983. . . . In his response to Lake County's Motion to Dismiss, Argandona admits that Lake County is not liable for the actions of the Sheriff's Department. Rather, he argues that Lake County is a necessary party because it is responsible for paying any judgment awarded to the plaintiff pursuant to I.C. S 34-13-4-1. Argandona makes the argument without reference to Federal Rule of Civil Procedure 19 or any case applying the rule regarding necessary parties. The section of the Indiana Code cited by Argandona does not create obligations that require Lake County to remain a defendant in this matter. The section states in pertinent part that when a public employee is subject to civil liability, 'the governmental entity ... shall ... pay any judgment ... if ... the governing body of the political subdivision ... determines that paying the judgment ... is in the best interests of the governmental entity.' I.C. S 34-13-4-1 (2006) This section, formerly I.C. S 34-4-16.7-1, makes the grant of indemnity voluntary on the part of the governmental entity. . . Argandona's reliance on this statute is misplaced. First, the application of the statute regards only the indemnification of an individual employee. The liability that may arise from Mikulich in his official capacity, or any liability otherwise placed on the Sheriff's Department, is outside the scope of this provision. In addition, the statute requires that a decision to indemnify an employee must be made by the 'governing body of the political subdivision.' I.C. S 34-13-4-1(2) As the court already has discussed, the Sheriff's Department is a

separate entity. Any decision to indemnify Mikulich under this provision necessarily would be made by the governing body of the Sheriff's Department. Further, the provision regards indemnity for acts or omissions that violate the 'civil rights laws of the United States.' The statute creates no apparent obligation on any political subdivision to indemnify Mikulich from liability he may face under Argandona's state law claims. This indemnity, similar to that described under I .C. S 34-13-4-1, is a product of the Indiana Tort Claims Act and also leaves indemnity to the discretion of the governmental entity. . . Not only do these statutes have limited application to this matter, there is no evidence in the record that Lake County has agreed to indemnification. Because Argandona has admitted there is no other basis for leaving Lake County in this case, the county's motion to dismiss is GRANTED.")

Bibbs v. Newman, 997 F. Supp. 1174, 1176, 1181 (S.D. Ind. 1998) ("[W]hen an Indiana prosecuting attorney makes employment decisions concerning deputy prosecuting attorneys, the prosecuting attorney acts as a state official for purposes of the Eleventh Amendment to the United States Constitution and 42 U.S.C. § 1983. . . . In Indiana, a prosecuting attorney does not exercise county power and does not answer to county authorities except for seeking 'necessary' funds to operate the office. Weighing against the limited significance of the county appropriations for office operations are the prosecuting attorney's role as a state official under the state constitution, as well as the significant fact that any judgment in a lawsuit against a prosecutor would be paid by the State of Indiana. The decision to hire or fire a deputy prosecuting attorney is more of a state action than a county action. Although it is clear that a prosecuting attorney in Indiana does not act as a county official in this situation, it might be possible to argue that the prosecuting attorney holds neither a state nor a county office, but acts as a 'circuit official' for the relevant judicial circuit. A political subdivision cannot invoke a state's sovereign immunity under the Eleventh Amendment. A political subdivision, however, maintains a status independent of the state and generally has the power to levy taxes, pay judgments, and issue bonds. . . A judicial circuit in Indiana has none of these attributes. Plaintiff therefore cannot avoid the Eleventh Amendment problem here by treating the prosecutor as a 'circuit' official.").

Wisconsin

Aleman v. Milwaukee County, 35 F. Supp.2d 710, 717 n.7, 721 (E.D. Wis. 1999) ("The court notes that Judge Adelman of this district court, in a well- reasoned opinion, recently addressed the issue of Wisconsin sheriffs' immunity under the

Eleventh Amendment. *See Abraham v. Piechowski*, 13 F.Supp.2d 870 (E.D.Wis.1998). While this court concurs in much of Judge Adelman's reasoning, the sheriff's functions at issue here are distinct from those in *Abraham*, and thus require a separate analysis. . . . If plaintiffs prove their damages, Milwaukee County will have to pick up the Sheriff's share of the judgment. The County Defendants have not presented the court with any evidence that the State of Wisconsin may incur any financial liability for a judgment against the Sheriff. Accordingly, the court finds that the Sheriff is not entitled to Eleventh Amendment immunity for the claims in this action").

Abraham v. Piechowski, 13 F. Supp.2d 870, 871-79 (E.D. Wis. 1998) (concluding that "in view of Wisconsin constitutional and statutory changes, the Seventh Circuit's last pronouncement on the issue [in *Soderbeck v. Burnett County, Wis.*, 821 F.2d 446 (7th Cir.1987) (Soderbeck II)] [no longer] has continuing force[,]" and "that when sheriffs perform law enforcement functions they represent the county not the state, and that sovereign immunity, therefore, does not bar this lawsuit.").

EIGHTH CIRCUIT

Iowa

Shepard v. Wapello County, 303 F.Supp.2d 1004, 1017, 1018 (S.D. Iowa 2003) ("The Sheriff's statutory authority over the removal of sheriff's department employees, the comprehensive policies adopted by Sheriff Kirkendall with respect to the retention, discipline and discharge of employees of his department, and the testimony of Supervisor Parker and Sheriff Kirkendall establish that the Sheriff was the final policy maker for his department with respect to the discharge of employees. Consequently the retaliatory discharge in violation of Shepard's rights under the First Amendment was, in light of the jury's answer to the special interrogatory, the policy of Wapello County subjecting it to §1983 liability for the decision.")**.**

Minnesota

Butler v. Fletcher, 465 F.3d 340, 342 (8th Cir. 2006) ("Butler sued Sheriff Fletcher in his official capacity, so in essence, this is a suit against Ramsey County. 'A county is liable [under S 1983] if an action or policy itself violated federal law, or if the action or policy was lawful on its face but led an employee to violate a plaintiff's

rights and was taken with deliberate indifference as to its known or obvious consequences.'").

St. James v. City of Minneapolis, No. 05-2348 (DWF/JJG), 2006 WL 2591016, at *3, *4 (D. Minn. June 13, 2006) ("Whether HCAO's prosecutorial decisions represent official County policy for § 1983 purposes is a question of first impression in the District of Minnesota and Eighth Circuit. . . . Applying the *McMillian* framework to the facts of this case, the Court finds that the Hennepin County Attorney, when acting in its prosecutorial role, is a state actor and not a local government entity subject to §1983 liability. The office of the county attorney, although identified as a county office by statute, functions as an arm of the state when prosecuting felonies. Minnesota law supports this conclusion. . . . The prosecutorial role of the county attorney, which is independent from the county board, outweighs the fact that the county pays the salaries of the county attorney's employees. Additionally, the fact that the Minnesota constitution does not identify HCAO as a member of the executive department is not determinative of whether county attorneys are state actors when prosecuting cases. The Minnesota Supreme Court has held that the obligation of the county attorney to prosecute criminal cases does, indeed, arise from the Minnesota Constitution.").

Nebraska

Poor Bear v. Nesbitt, 300 F.Supp.2d 904, 916, 917 (D. Neb. 2004) ("Nebraska law does not grant authority to counties or county sheriffs like Robbins to set policy regarding apprehension of individuals who violate the state's criminal laws. Neb.Rev.Stat. Ann. §§ 23-103 to -145, 23-1701 to -1737 (LexisNexis 1999 & Cum Supp.2003). To the contrary, county sheriffs like defendant Robbins are bound by state law to exercise only those powers and duties 'conferred and imposed upon him or her by other statutes and by the common law,' including the duty to 'apprehend, on view or warrant, and bring to the court all felons and disturbers and violators of the criminal laws of this state, to suppress all riots, affrays, and unlawful assemblies which may come to his or her knowledge, and generally to keep the peace in his or her proper city.' Neb.Rev.Stat. Ann. §§ 23-1701.02 & 23-1701.03. *See also* Neb.Rev.Stat. Ann. § 23-1710 (sheriff has duty to preserve peace, ferret out crime, apprehend and arrest all criminals, secure evidence of crimes committed, present evidence to county attorney and grand jury, and file informations 'against all persons who he knows, or has reason to believe, have violated the laws of the state.') In this case, Poor Bear essentially alleges that Robbins violated Poor Bear's constitutional

rights when Robbins participated in issuing an order preventing Poor Bear and others from engaging in a protest march down the main street of Whiteclay after having observed violence and destruction during a similar protest just a week earlier, apprehending Poor Bear when he violated such order, and pursuing prosecution for violation of the order, yet failing to zealously pursue crimes that have been committed against the Lakota people. The policies Sheriff Robbins is charged with carrying out--keeping peace, apprehending and arresting violators of the law, and pursuing prosecution of those who have violated state law--are set by the state legislature, and the implementation of these policies by a municipal official does not constitute formulation by a final policy-making body sufficient to impose liability upon the municipality. . . . In short, a 'county sheriff acts pursuant to state-enacted restrictions in enforcing the criminal laws of Nebraska and is not himself a policy maker for the county for which he is sheriff.' *Branting v. Schneiderheinz,* 1996 WL 580457, at *3 (D.Neb.1996). Accordingly, I shall grant defendant Robbins' motion to dismiss the causes of action asserted against him for failure to state a claim.").

NINTH CIRCUIT

Arizona [state]

Flanders v. Maricopa County, 54 P.3d 837, 847 (Ariz.App.Div. 2002) ("The Sheriff set the conditions of Flanders' confinement by establishing policies in his role as chief administrator for County jails. That the Sheriff may also be individually liable for conditions he established at this facility does not negate the County's liability for his actions as the person who exercises the County's governmental authority. . . .Because the judgment against the Sheriff was for constitutional violations committed in his official capacity, the County is liable as a matter of law. . .Such a judgment imposes liability upon the public entity that the official represents, whether or not that entity is joined as a party, provided the public entity received notice and an opportunity to respond.")

California [state]

Venegas v. County of Los Angeles, 11 Cal.Rptr.3d 692, 717, 723 (2004) (Werdegar, J., concurring and dissenting) ("Today's decision creates a direct conflict between this court and the federal Court of Appeals on the immunity of California sheriffs from liability on a federal cause of action. [*citing Brewster v. Shasta County*, 275 F.3d 803 (9th Cir.2001)] Both positions have some support in precedent and

logic, suggesting that the anomaly of conflicting decisions is likely to endure until resolved by a higher authority. Although dependent on an understanding of sheriffs' functions under state law, immunity from section 1983 liability is of course a federal question. . . The conflict created today can, therefore, be resolved effectively only by the United States Supreme Court. . . .[T]he disputed point is the relevance and weight, under federal law, to be given a particular aspect of state law defining the relationship of California sheriffs to the state and county governments. Until this question is resolved, federal district courts in California will be required to follow one rule, permitting section 1983 suits against sheriffs' departments, while California superior courts will be required to follow the opposite rule, prohibiting such actions. I urge the United States Supreme Court to consider removing this anomaly by deciding the underlying issue of federal law.")

Venegas v. County of Los Angeles, 11 Cal.Rptr.3d 692, 716 (2004) (Kennard, J., concurring and dissenting) ("Because the Ninth Circuit considers California sheriffs performing law enforcement functions to be county officers, the majority's contrary conclusion here creates a split that results in immunizing sheriffs from section 1983 liability in actions brought in state court while exposing them to liability in identical actions filed in federal court. This effectively drives California civil rights plaintiffs with actions against a county sheriff out of our court system and into federal court. To ensure uniformity in the enforcement of federal civil rights law in both state and federal courts in California, the United States Supreme Court should decide which view is correct.")

California [federal]

Ceballos v. Garcetti, 361 F.3d 1168, 1182, 1183 (9th Cir. 2004) ("Ordinarily, an official designated as an official of a county--as is the District Attorney of the County of Los Angeles--is a county official for all purposes. Some officials, however, serve two masters. Among them are California's 58 district attorneys: While these officers are elected by and for the counties, they prosecute cases on behalf of the state. In such mixed circumstances, we determine whether the officer is a state or a county official by examining state law to determine whether the particular acts the official is alleged to have committed fall within the range of his state or county functions. [citing *McMillian*] The California Supreme Court has held that a district attorney is a state official when he acts as a public prosecutor, while in other functions he acts on behalf of the county . . . . Whether the District Attorney acted on behalf of the county or the state thus turns on whether the personnel actions alleged by Ceballos are part of the

District Attorney's prosecutorial functions or whether he was performing administrative or other non-prosecutorial duties. The California courts have not defined the precise characteristics that distinguish a district attorney's prosecutorial function from his other functions. As *Bishop Paiute Tribe* noted, however, a similar issue as to whether a prosecutor was acting in his prosecutorial capacity, as opposed to an administrative or investigative capacity, arises in determining whether he is entitled to absolute or qualified immunity under § 1983; we may look for guidance to cases addressing that issue. . . . The individual defendants, including Garcetti, do not seek dismissal on the basis of absolute immunity for the acts they allegedly took against Ceballos. Instead, they seek qualified immunity, implicitly acknowledging that the actions were not prosecutorial, but administrative. In sum, the District Attorney's Office and its thenhead, Garcetti, were carrying out their county functions when they allegedly engaged in the retaliatory acts Ceballos describes. Garcetti is, therefore, not entitled to Eleventh Amendment immunity, and thus the County may not seek summary adjudication on the ground that he was acting on behalf of the state."), *rev'd on other grounds and remanded,* 126 S. Ct. 1951 (2006).

Cortez v. County of Los Angeles, 294 F.3d 1186, 1191 (9th Cir. 2002) ("*Brewster* and *Bishop Paiute Tribe* demonstrate that California sheriffs are final policymakers for the county not only when managing the local jail, but also when performing some law enforcement functions. Therefore, even if we characterized the Sheriff's actions as taken in his law enforcement capacity to keep the peace, we could conclude that the County is subject to § 1983 liability for his actions. However, as previously discussed, we find that the Sheriff was acting in his administrative capacity, rather than as a law enforcement officer. Specifically, we find that the Sheriff's actions were taken pursuant to his policy of segregating inmates identified as gang members, which he established pursuant to his authority as the administrator of the county jail and custodian of the inmates within it. Accordingly, the County can be held liable for his decision to keep Avalos in the gang unit of the jail.").

Bishop Paiute Tribe v. County of Inyo, 291 F.3d 549, 564-66 (9th Cir. 2002) ("[T]o allow the Attorney General's supervisory role to be dispositive on the issue of whether a law enforcement officer acts as a state official would prove too much. The California Constitution grants the Attorney General supervisory authority over all 'other law enforcement officers as may be designated by law.' CAL. CONST. art. V, § 13. Under this provision, if taken to its logical extreme, *all* local law enforcement agencies in California would be immune from prosecution for civil rights violation, thereby rendering meaningless the decision in *Monell,* which preserves § 1983

actions against local governments. . . . Whether a district attorney engages in prosecutorial conduct when obtaining and executing a search warrant has not been addressed by this Circuit in the context of whether a district attorney is a state or county officer. However, the Ninth Circuit has addressed whether this constitutes prosecutorial conduct as opposed to investigatory conduct in the context of a prosecutor's absolute versus qualified immunity. By analogy, these cases inform our decision . . . . Relying on *Fletcher* and *Buckley,* and recognizing the significant factual distinctions between this case and *Pitts,* we find that the District Attorney was engaging in investigatory, and not prosecutorial, acts when he obtained and executed a search warrant over the Tribe. This conclusion compels our finding that the District Attorney acted as a county officer when obtaining and executing a search warrant against the Tribe. . . . [In addition] we conclude that the Sheriff acted as a county officer when obtaining and executing a search warrant against the Tribe."), *vacated and remanded,* 123 S. Ct. 1887 (2003).

Brewster v. Shasta County, 275 F.3d 803, 807, 808 (9th Cir. 2001) ("It requires little extension of *Streit* for us to conclude that the Shasta County Sheriff acts for the County, not the state, when investigating crime in the county. . . .[T]he fact that the state legislature has determined that all county officials are to be indemnified by the county government--including the sheriff and the sheriff's department employees, and without exception for their crime investigation functions--indicates that the sheriff is considered a county actor. Further, unlike in *McMillian,* where Alabama sheriffs were required to attend all courts in the state, California sheriffs are required to attend only those courts within their respective counties. . . . We also note that unlike in *McMillian*, in which the Alabama Constitution made a county sheriff subject to impeachment on the authority of the Alabama Supreme Court, not the county, . . . impeachment proceedings against a California county sheriff, as with other county officials, are initiated by a county grand jury, and the sheriff is not included among those officials identified in the California Constitution as subject to impeachment by the state Legislature . . . While this factor may be of somewhat limited weight because a state court appoints the prosecutor to conduct the impeachment proceedings, . . . it nonetheless weighs toward the conclusion that the sheriff acts for the county when investigating crime as well as when administering the jails.").

Streit v. County of Los Angeles, 236 F.3d 552, 564, 565 (9th Cir. 2001) (" Upon examining the precise function at issue in conjunction with the state constitution, codes, and case law, we conclude that the LASD [Los Angeles County Sheriff's Department] acts as the final policymaker for the county when administering the

County's release policy and not in its state law enforcement capacity. We therefore affirm the district court's holding that the LASD, when functioning as the administrator of the local jail, is a County actor, and that the County may therefore be subject to liability under 42 U.S.C. § 1983.")**.**

Weiner v. San Diego County, 210 F.3d 1025, 1030, 1031 (9th Cir. 2000) ("Balancing the foregoing constitutional and statutory factors leads us toward the conclusion that under California law a county district attorney acts as a state official when deciding whether to prosecute an individual. The fact that California statutory law lists district attorneys as county officers is not dispositive because, as discussed in *McMillian*, the function of the district attorney, including who can control the district attorney's conduct is the issue. . . . [T]he only significant differences between California law applicable in this case and Alabama law applicable in *McMillian* are that under California law the county sets the district attorney's salary and the district attorney can be removed from office in a fashion similar to other county employees. These differences are not sufficient to produce a result in this case different from the result in *McMillian*. . . . Although a California district attorney is a state officer when deciding whether to prosecute an individual, this is not to say that district attorneys in California are state officers for all purposes. To the contrary, California law suggests that a district attorney is a county officer for some purposes.").

Miller v. Butte County, No. 2:06-CV-0489 JAM KJM, 2008 WL 4287665, at *4 (E.D. Cal. Sept. 17, 2008) ("To the extent Defendants urge this Court to follow *Venegas* instead of Ninth Circuit precedent, the Court declines to do so. Federal, not state law, controls the ultimate issue of whether California sheriff's are subject to liability under § 1983. Accordingly, because under Ninth Circuit precedent Sheriff Reniff was acting on behalf of the County with respect to Miller's incarceration at the Butte County Jail, the County is subject to § 1983 liability for his actions.").

Galati v. County of San Mateo, 2008 WL 1886033, at *6 (N.D.Cal. 2008) ("[O]n this issue of federal law, the Court is bound by the decision of the Ninth Circuit in *Brewster*. Thus, the Court will not grant summary judgment on Plaintiff's claims against the County of San Mateo, the San Mateo County Sheriff's Department or the current and former Sheriffs of San Mateo County, in their official capacities, on the basis of Eleventh Amendment immunity.")

Armstrong v. Siskiyou County Sheriff's Dept., No. CIV-S-07-1046 GEB GGH PS, 2008 WL 686888, at *6 (E.D. Cal. Mar. 13, 2008) ("Notwithstanding their reliance

on *Venegas*, defendants acknowledge the Ninth Circuit earlier reached the opposite conclusion in *Brewster v. Shasta County*, 275 F.3d 803 (9th Cir.2001), which held that California sheriffs, their departments and deputies, act on behalf of the county when investigating crimes and enforcing state criminal statutes. . . . Defendants' argument that *Venegas* should control because decided after *Brewster* is without merit. Although the Ninth Circuit has not revisited this matter since *Venegas*, it is clear that federal claims must be ruled by federal law, i.e., that *Brewster* must control in this federal § 1983 action, thus rendering the Siskiyou County Sheriff's Department, its Sheriff and deputies, county actors without Eleventh Amendment immunity.").

Womack v. County of Amador, No. Civ. S-02-1063 RRB DAD, 2008 WL 669811, at *6, *7 (E.D. Cal. Mar. 7, 2008) ("In the present case, the County argues that it is immune from liability under the Eleventh Amendment on the basis that in California, a district attorney and his investigators act on behalf of the state rather than the county when engaged in investigating crime. Womack, for his part, maintains that the County is not immune from liability under the Eleventh Amendment because, under Ninth Circuit precedent, a district attorney (as a policymaker for the County with respect to obtaining and executing warrants) and/or his deputies and investigators (policymakers through delegation) act on behalf of the county rather than the state when investigating crime. Because the County does not dispute that the District Attorney has final policymaking authority over obtaining and executing warrants, . . . the County's § 1983 liability, turns, in part, on whether district attorneys and their investigators, when investigating crime, act on behalf of the state (which would immunize the County from § 1983 liability), or on behalf of the county (which would subject the County to § 1983 liability). Presently, as noted by the parties, there is a split in authority between the Ninth Circuit and the California Supreme Court with respect to whether a district attorney acts on behalf of the state or the county when investigating crime. . . . Following *Bishop*, the California Supreme Court clarified its holding in *Pitts* by explaining that a district attorney represents the state, and is not considered a policymaker for the county, when prosecuting crimes and when preparing to prosecute crimes, including investigating crimes in advance of prosecution. . . . In *Pitts*, *Bishop* and *Venegas*, both the Ninth Circuit and the California Supreme Court applied the analytical framework set forth in *McMillian*, but nonetheless reached conflicting conclusions. Thus, the question becomes which analysis the court should follow. In the present case, the court finds the Ninth Circuit's reasoning in *Bishop* to be persuasive. . . Although the Ninth Circuit's *McMillian* analysis in *Bishop* pre-dated the California Supreme Court's analysis in

Venegas, and therefore lacked the benefit of the analysis by the state's highest court, ultimately the holding in *Venegas* is only binding on state courts because the ultimate issue-whether or not California district attorney's are subject to liability under § 1983 when investigating crime-is a question of federal law even though it requires the application of some principles of state law to resolve it. . . Thus, while *Venegas* and *Pitts* are relevant in this court's 'analysis of state law' as required by *McMillian*, these cases do not overturn the Ninth Circuit's reasoning in *Bishop* on the ultimate question under the federal statute. Accordingly, until *Bishop* is overturned by a panel of the Ninth Circuit or the United States Supreme Court, the Ninth Circuit's reasoning in *Bishop* is persuasive authority for this court. Therefore, because the Ninth Circuit in *Bishop* squarely addressed the issue of whether a district attorney acts on behalf of the state rather than the county when investigating crimes, and concluded, after applying the *McMillian* analytical framework, that a district attorney acts for the county when engaging in investigatory acts, . . . the court concludes that the district attorneys and the district attorney investigator in this action are not immune from liability under the Eleventh Amendment and the doctrine of sovereign immunity for their acts in connection with obtaining and executing the search warrants at issue. . . As such, the County is not immune from § 1983 liability.")

Brown v. County of Kern, 2008 WL 544565, at *12 (E.D. Cal. Feb. 26, 2008) ('The *Venegas* decision does not overturn Ninth Circuit precedent on this issue regarding a federal statute and does not control on issues of federal law. . . . Until the Ninth Circuit addresses this issue and abrogates the *Brewster* decision, this Court is bound by Ninth Circuit precedent.").

McNeely v. County of Sacramento, 2008 WL 489893, *4-5 (E.D. Cal. Feb. 20, 2008) ("Whether or not local officials, like Sheriff Blanas, act for the locality of the state in a particular area or on a particular issue depends on an analysis of state law. . . California law deems elected sheriffs as state actors with respect to their law enforcement activities. [citing *Venegas*]While the Ninth Circuit has treated the sheriff as a county actor where his administrative or investigative responsibilities are under scrutiny, those cases are distinguishable from the present case, which concerns conduct arising from simply detaining Plaintiff in jail pending the outcome of ongoing criminal proceedings in Sacramento and Placer Counties. . . . Here, there can be no question that Sheriff Blanas, as well as Sheriff Bonner, were acting in accordance with both facially valid warrants as well as duly authorized criminal proceedings instituted by the District Attorneys of their respective counties and pending before their courts. . . . It follows that both Defendants Blanas and Bonner

are entitled to immunity, in their official capacities as Sheriffs of Sacramento County and Placer County, with respect to the issues raised by Plaintiff's lawsuit with regard to his incarceration. Moreover, because the Court has determined that those issues arise from the sheriffs' status as state, rather than county actors, neither the County of Sacramento or the County of Placer are proper parties to this lawsuit.")

Smith v. County of Los Angeles, 535 F.Supp.2d 1033, 1035-38 (C.D.Cal. 2008) ("On several occasions, after examining California constitutional and statutory authority, the Ninth Circuit has held that 'the Sheriff acts for the County' and not the State when he performs his functions of 'oversight and management of the local jail.'[citing *Streit* and *Cortez*] Oversight and management of a local jail, with respect specifically to the promulgation and application of policies regarding inmate medical care, are the practices challenged in this case. As this Court is bound by Ninth Circuit precedent, these holdings should end the inquiry. Defendant argues, however, that an intervening California Supreme Court decision reveals that the Ninth Circuit's interpretation of California law was incorrect. In *Venegas v. County of Los Angeles*, 32 Cal.4th 820, 839 (2004), the California Supreme Court held that 'California sheriffs act as state officers while performing state law enforcement duties such as investigating possible criminal activity.'. . . *Venegas* misconstrued federal constitutional law. Contrary to Defendant's contention, the question of whether the sheriff is a county or state official is not purely one of state law. Rather, at bottom the question is one of federal law regarding the meaning Eleventh Amendment immunity and section 1983. . . . In elucidating the standard for Eleventh Amendment immunity from section 1983 suits, the Supreme Court has emphasized that a State's financial liability for county torts is a critical factor in justifying an extension of the immunity to a county sheriff. . . . The importance of financial liability as an indicator supporting immunity is confirmed by a string of United States Supreme Court cases holding that protecting the state coffers is of paramount importance in the immunity analysis. . . . As a matter of federal law, this Court finds that California's lack of liability for county torts is dispositive, and rejects the *Venegas* opinion's contrary holding. . . . Accordingly, the Court finds that, under the correct federal framework, even after *Venegas*, California law reveals that sheriffs are county--not state--representatives. . . . There are practical as well as legal reasons for the California Supreme Court to reconsider Venegas. A State that claims Eleventh Amendment immunity for county officials may well reap what it sows. If sheriffs and their departments are state actors, then by all logic the state, not the county, should absorb the liability relating to these cases. In California, public entities . . . are often responsible through *respondeat superior* liability for actions which could otherwise

be charged as federal constitutional violations. There are many such cases. . . . Because *Venegas* misapplied federal law, the Court declines to follow its holding and finds instead that Plaintiffs' claims are not barred by the Eleventh Amendment. In so holding, the Court urges the California Supreme Court to reconsider *Venegas* to conform with the federal standard.").

Brockmeier v. Solano County Sheriff's Dep't., No. CIV-S-05-2090 MCE EFB PS, 2006 WL 3760276, at *5, *6, *9, *10 (E.D. Cal. Dec. 18, 2006) ("Defendants have identified Solano County Sheriff Stanton as having final policymaking authority over the actions at issue. . . Plaintiff does not dispute that contention. Thus, the issue of the county's section 1983 liability turns on whether the sheriff, when investigating crimes in that role as policymaker, acts on behalf of the state (which would immunize the county from section 1983 liability) or on behalf of the county (which would subject the county to section 1983 liability). While the question appears to have an intuitively obvious answer, the Ninth Circuit and the California Supreme Court have squarely addressed this issue and their decisions are in direct conflict. . . . In California, the issue of whether a sheriff is a state or county actor is less clear than in Alabama. There are several provisions, both under the California constitution and the California code, that lend themselves to dueling interpretations under the analytical framework established in *McMillian*. This is evidenced by the California Supreme Court's recent decision in *Venegas*, which directly conflicts with the Ninth Circuit's interpretation of California law in *Brewster*. The question reduces to which forum's law controls here. The Ninth Circuit's interpretation pre-dated the California Supreme Court's analysis in *Venegas*. Thus, it lacked the benefit of the analysis by the state's highest court on what superficially appears to be a question of state law. Although the holding in *Venegas* might be viewed as dispositive state law under *McMillian*, the decision concerns an issue that is ultimately federal in nature. That is, the ultimate issue is whether or not California sheriffs are subject to liability under 42 U.S.C. §1983 when executing their law enforcement duties. This is an ultimate question of federal law even though it requires the application of some principles of state law to resolve it. . . . Thus, while *Venegas* is relevant in this court's 'analysis of state law' as required by *McMillian*, it does not overturn Ninth Circuit precedent on the ultimate question under the federal statute. Unless overturned by a panel of the Ninth Circuit or the United States Supreme Court, the Ninth Circuit's holding in *Brewster* binds this court. Furthermore, an independent analysis of the issue reveals that the *Brewster* decision reflects a stricter adherence to the *McMillian* framework than the *Venegas* decision, whose holding is based largely on two state court decisions that the *Brewster* court rejected. . . . Even though the Ninth Circuit has yet

to reexamine the issue of a California sheriff's official capacity for purposes of section 1983 liability in light of *Venegas*, this court finds that *Brewster* is still controlling within the Ninth Circuit. Therefore, the court declines to follow the holding in *Walker v. County of Santa Clara*, 2005 U.S. Dist. LEXIS 42118 (N.D.Cal. Sept. 30, 2005), as defendants request. . . . This court has duly considered the *Venegas* decision, but finds that it does not militate in favor of a decision contrary to the holding in *Brewster*. . . . Accordingly, this court finds *Brewster* controlling on the issue of whether California sheriffs are subject to section 1983 liability. Consistent with the holding in that case, the court finds that the Solano County Sheriff's Department acts on behalf of the county when investigating crimes, and that the county is therefore subject to section 1983 liability.")**.**

Faulkner v. County of Kern, No. 1:04-CV-05964 OWWTAG, 2006 WL 1795107, at *15, *16 (E.D. Cal. June 28, 2006) ("The County argues that it cannot be liable for the allegedly unlawful official acts of those Defendants who are County Sheriffs, because, according to the County, County Sheriffs in California act on behalf of the State, not the County when investigating crime. The County's defense is based on a recent California Supreme Court case, *Venegas v. County of Los Angeles*, 32 Cal.4th 820, 11 Cal.Rptr.3d 692, 87 P.3d 1 (2004), which examined whether a county sheriff acted as an agent of the state when conducting a criminal investigation. The *Venegas* court examined applicable provisions of the California Constitution, several relevant California statutes, and prior California cases to reach the conclusion that 'sheriffs act on behalf of the state when performing law enforcement duties.' Application of this seemingly straightforward holding is complicated by the fact that Ninth Circuit decisions do not follow and squarely contradict *Venegas*. . . . *Weiner* cautions against the blind acceptance of the *Venegas* holding, given the existence of a contrary Ninth Circuit rule in *Brewster*, which is binding upon this court. . . .For purposes of this section 1983 case, a federal claim brought in a federal court within the Ninth Circuit, the County of Kern may be liable for the law enforcement-related acts of Sheriff Sparks. It remains to be determined, however, whether any official capacity claim against him (i.e., against the County) survives summary judgment.")**.**

Walker v. County of Santa Clara, No. C 04-02211 RMW, 2005 WL 2437037, at *4 (N.D. Cal. Sept. 30, 2005) ("Plaintiffs contend that the Ninth Circuit's holding in *Brewster v. Shasta County* controls, and therefore that the sheriff, when investigating crime, acts as a final policymaker for the County when investigating crime within the County. . . Defendants counter that *Venegas v. County of Los Angeles* is controlling. . . In *Venegas*, the California Supreme Court expressly disagreed with the Ninth

Circuit's decision in *Brewster*, and held that 'California sheriffs act as state officers while performing state law enforcement duties such as investigating possible criminal activity.'. . Thus, there appears to be a split of authority. . . . Here, the Ninth Circuit's decision in *Brewster* is directly at odds with the California Supreme Court's subsequent holding in *Venegas* that California sheriffs are state officers while performing law enforcement duties, and although this court need not 'blindly accept' the *Venegas* court's decision, . . . the California Supreme Court's decision comports with this court's understanding of the function of California sheriffs.").

Thomas v. Baca, No. CV 04-008448 DDP, 2005 WL 1030247, at *3, *4 (C.D. Cal. May 2, 2005) (not reported) ("The supervisors first argue that the Sheriff is a state actor under California law, and that he is thus removed from the supervisory authority of the County Board. They rely on a line of California cases culminating with *Venegas v. County of Los Angeles*, 32 Cal.4th 820, 11 Cal.Rptr.3d 692, 87 P.3d 1 (2004). In *Venegas*, the California Supreme Court held that, for § 1983 purposes, the Los Angeles County Sheriff is a state actor protected by the Eleventh Amendment when he acts in his law enforcement capacity. . . While this is contrary to prior Ninth Circuit holdings that a California county sheriff acts on behalf of the county, *see, e.g., Brewster v. Shasta County*, 275 F.3d 803 (9th Cir.2001), the supervisors point out that those federal court holdings were decided without the benefit of the California Supreme Court's decision in *Venegas*. The framework for determining whether an official qualifies for Eleventh Amendment immunity in §1983 claims was set forth by the United States Supreme Court in *McMillian v. Monroe County, Alabama*. . . . First, a court should 'ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue.' . . Second, the actual function of a governmental official, in a particular area, depends 'on the definition of the official's functions under relevant state law.' . . While state law serves as valuable evidence for this determination, federal courts need not blindly accept the California Supreme Court's 'balancing of the different provisions of state law in determining liability under § 1983.' *Weiner v. San Diego County*, 210 F.3d 1025, 1029 (9th Cir.2000). *McMillian* instructs that state law cannot 'answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy.' . . The federal analysis of state law to determine § 1983 liability includes an inquiry into the 'state's constitution, statutes, and case law.' . . Therefore, this Court is not bound by the California Supreme Court's recent interpretation of state law regarding §1983 liability. However, as relevant case law, it is an important part of the analysis. *McMillian* requires courts to inquire 'whether governmental officials are final policymakers for the local government in a particular

area or on a particular issue.'. . *McMillian* 'clearly instructs' that resolution of whether a sheriff acts as a state or county official depends on an 'analysis of the precise function at issue.' . . Applying the *McMillian* analysis, the Ninth Circuit held that when administering the county's policy for release from local jails, the Los Angeles County Sheriff acts as an official for the county. '[E]ven if we view the function more broadly as the oversight and management of the local jail, we are compelled to agree with the district court that the Sheriff acts for the County in this management function.' *Streit v. County of Los Angeles*, 236 F.3d 552, 561 (9th Cir.2001). While the California Supreme Court arrived at a different answer in *Venegas*, that case involved a search of the plaintiffs' home and vehicle, acts which clearly fall within the Sheriff's law enforcement authority. The facts in the instant case involve the Sheriff's release and housing practices at the county jails. Given this, the Court finds *Brewster* and *Streit* controlling, the Sheriff is not a state actor for purposes of this §1983 suit, and the supervisors cannot preclude the plaintiffs' theory of liability with this argument.").

Green v. Baca, 306 F.Supp.2d 903, 907 n.31 (C.D. Cal. 2004) ("Because a state is not amenable to suit under §1983, an official acting pursuant to a policy of the state government cannot be held liable under the statute. . . The Ninth Circuit has held that, in exercising control of the county jail, the Sheriff acts as an official policy-maker for the County of Los Angeles, not for the state of California. [*citing Streit* and *Cortez*] The California Court of Appeal has reached a contrary result, concluding that the sheriff is not a 'person' under §1983 because he acts as a state officer in exercising responsibility over the jail. [*citing County of Los Angeles v. Superior Court*, 68 Cal.App.4th 1166, 1176, 80 Cal.Rptr.2d 860 (1998)] The court, however, is bound by the Ninth Circuit's interpretation.")**.**

Benas v. Baca, No. CV-00-11507 LGB (SHX*),* 2001 WL 485168, at *7 (C.D. Cal. April 23, 2001) (not reported) ("While case law in this area is inconsistent, the Ninth Circuit, both before and after *McMillian,* has found a California sheriff to be a local law enforcement agent, and therefore subject to section 1983 liability.").

Montana

Eggar v. City of Livingston, 40 F.3d 312, 315 (9th Cir. 1994) ("Officials can act on behalf of more than one government entity. [cite omitted] That [municipal judge] allegedly performed his duty to advise indigents of their rights in a way that makes a mockery of those rights does not make that duty administrative. The Judge's failure

to follow state law or federal constitutional law does not transform his 'cattle-call' method of counseling into municipal policymaking. As state law makes clear, the Judge's obligation to address the rights of defendants arises from his membership in the state judiciary. It is lamentable, but irrelevant, that he failed miserably to meet this obligation under both state and federal standards: he simply is not a municipal decision maker in this context.").

Nevada

Botello v. Gammick, 413 F.3d 971, 979 (9th Cir. 2005) ("[T]he County claims that under Nevada law, when Gammick made the decision not to prosecute cases initiated by Botello, he was acting as a policymaker on behalf of the state and not the County. The County's argument is unavailing in two respects. First, it is foreclosed by our holding in *Webb v. Sloan* that, under Nevada law, 'principal district attorneys are final policymakers for the municipality with respect to the conduct of criminal prosecutions.'. . Accordingly, Gammick was a policymaker for the County when he decided not to prosecute Botello's cases. Second, Botello alleges that other than adopting the nonprosecution policy, Gammick's conduct was administrative, not judicial, in nature. The County offers no argument to rebut the proposition that a district attorney acting in his administrative and investigative capacity is a County policy-maker.")**.**

Webb v. Sloan, 330 F.3d 1158, 1165, 1166 (9th Cir. 2003) ("Nevada district attorneys are final policymakers in the particular area or particular issue relevant here: the decision to continue to imprison and to prosecute. The state attorney general exercises supervisory power over county district attorneys, but this does not remove final policymaking authority even from principal district attorneys. . . . Both this court and the Nevada Supreme Court, however, have emphasized the discretionary and permissive nature of that [supervisory power]. . . . and in the absence of any evidence in the record that the attorney general in fact ever exercises that supervisory power, we hold that principal district attorneys are final policymakers for the municipality with respect to the conduct of criminal prosecutions. . . . [T]he Nevada legislature confers the same final policymaking authority on deputy district attorneys. . . . Because of the distinctions between Nevada's deputy district attorneys and the Hawaiian deputy prosecutors in Christie, Christie does not control the outcome of this case. The district court correctly held that deputy district attorneys in Nevada are final policymakers whose actions can be the acts of the municipality for the purposes of attaching liability under § 1983.").

Oregon

Kleinman v.Multnomah County, No. 03-1723-KI, 2004 WL 2359959, at *5 (D. Ore. Oct. 15, 2004) ("In *Bishop*, the Circuit analyzed the California constitution, statutes and case law to determine whether the Inyo County District Attorney was a state or a county official. The court concluded that the district attorney is a county officer when doing certain activities. Notwithstanding the Ninth Circuit's ultimate conclusion in the case, there are several differences between California law and Oregon law that support defendants' position. For example, the California constitution and statutes designate district attorneys as local government officials. . .California district attorneys may not be removed by the legislature, as other California officials are. . . California law gives the counties the authority to supervise the district attorneys' conduct and the use of public funds. . . Under California law, the county sets the salaries for district attorneys. . .These factors cut the other way in Oregon. Plaintiff argues that the court must recognize the dual nature of the district attorneys' offices in both state and county affairs in Oregon and consider the nature of the suit here. Plaintiff contends that the District Attorney's Office in this case is being sued not for prosecutorial functions, but instead in its administrative role of supervising and training county employees. In other words, plaintiff argues that he brings claims against the District Attorney's office in its 'county capacity.' There is some validity to plaintiff's point in that the case law on state immunity and prosecutorial immunity often focuses on the acts at issue, not just on the entity being sued. However, I believe this argument is quite strained under Oregon law, particularly given the lack of authority for this proposition. I conclude that the Multnomah County District Attorney's Office is a state entity. As such, it is entitled to sovereign immunity. Defendants' motion to dismiss is granted and the Multnomah County District Attorney's Office is dismissed from this action. . . . If the District Attorney's office is deemed a state entity, plaintiff cannot sustain a claim for damages against District Attorney Schrunk in his official capacity.")

Washington [state]

Whatcom County v. State of Washington, 993 P.2d 273, 277, 278, 280 (Wash.App.Div. 2000) (involves county prosecutor, but relevant) ("The *McMillian* and *Pitts* decisions provide us with guidance in determining whether the State or the County is responsible for Graham's defense and indemnification. However, there are two notable differences between those cases and the case at bar. First, in *McMillian* and *Pitts*, the issue was whether counties could be held liable under §

1983 for the actions of certain government officials. Thus, the question of whether the officials acted with 'final policymaking authority' was relevant to the decision. Here, we are not concerned with the ultimate question of which government entity (if any) is liable for Graham's acts, but only with the narrow issue of whether Graham is a state officer or employee entitled to a state defense and indemnification. Second, in *McMillian* and *Pitts*, the question of how to properly characterize the officials' functions was not at issue. However, in this case the parties disagree sharply on whether Graham's actions constituted 'advice to a county official' or 'prosecution under state law.' . . . We conclude that (1) Graham was 'prosecuting state law' when he advised Weisenburger that Monroe could be released from jail, and, (2) county prosecutors in Washington represent the State, not their counties, when prosecuting violations of state law. Thus, we hold that Graham is a 'state officer' or 'state employee' employee" under RCW 4.92.060, .070, .075, and .130, entitling him to defense and indemnification from the State. . . . Lastly, we note that Graham should not be deprived of state defense and indemnification merely because there may be questions as to which state fund
should be used for that purpose.")

TENTH CIRCUIT

Colorado

Gonzales v. Martinez, 403 F.3d 1179, 1182 n.7 (10th Cir. 2005) ("Curiously, neither the district court nor defendants have challenged Ms. Gonzales' designating 'Huerfano County' as defendant. Under Colo.Rev.Stat. S 30-11-105, 'the name in which the county shall sue or be sued shall be, "The board of county commissioners of the county of ....."' This statutory provision provides the exclusive method by which jurisdiction over a county can be obtained. An action attempted to be brought under any other designation is a nullity, and no valid judgment can enter in such a case.' . . Were we to overlook this jurisdictional flaw, we are still guided by *Bristol v. Bd. of County Comm'rs of Clear Creek*, 312 F.3d 1213, 1215 (10th Cir.2002) (under the Colorado constitution, the County Sheriff is a distinct position, separate from the Board of County Commissioners). The only claims Plaintiff made against the County were based on a faulty premise. She asserted the County owed her a duty 'to employ competent law enforcement officers and to supervise the conduct of its sheriff and Chief Jail Administrator.' That is not a valid premise under Colorado law. . . Had Plaintiff claimed the Sheriff set official policy of the County or was following policy established by the County in the operation of the jail, we might have to reach

a different conclusion. *See id.* at 1221 ('counties can be held liable for the misdeeds of Sheriffs and their employees when the Sheriff is held to set 'official policy' for the county.'). Yet, whether because of the plain language of the statute or the Plaintiff's failure to state a valid claim, the action cannot lie against Huerfano County.").

Kansas

Wilson v. Sedgwick County Bd. of County Com's, No. 05-1210-MLB, 2006 WL 2850326, at *4 (D. Kan. Oct. 3, 2006) ("It is clear therefore, that only the sheriff, not the commissioners, has the power to set policy and train under Kansas law. . . Thus, plaintiff's claim against defendant based on an execution of policy by defendant that allegedly caused his injuries must fail. Defendant had no authority to make such a policy.")**.**

Gaston v. Ploeger, 399 F.Supp.2d 1211, 1224, 1225 (D. Kan. 2005) ("In conjunction with these allegations, Plaintiff contends the Commissioners are responsible for the funding of the Brown County Jail and its operations, and thus it is incumbent upon the Commissioners to see that the facilities and funding are proper to provide an environment where the inmates of the Brown County Jail are safe and secure. . .Relying on these allegations and contentions, Plaintiff ultimately argues the Commissioners failed to provide adequate funding for the Brown County Jail as demonstrated by the fact that on the day Belden committed suicide, the sole corrections officer at the Brown County Jail was by himself and thus unable to take appropriate action in removing the paper barrier from Belden's cell window for approximately two hours. The Court is not persuaded by Plaintiff's argument. As a preliminary matter, Plaintiff's reliance on K.S.A. 19-1919 to impose section 1983 liability on the County Commissioners is misplaced. This Kansas statute is simply the funding mechanism for the state's county jails. There is no evidence to demonstrate that the responsibility for funding includes any authority for the running of jails or that the County Commissioners have any connection with the operation of the jail other than with respect to funding. Simply put, Plaintiff identifies no evidence connecting the Brown County Commissioners with Belden's suicide or with any policy bearing on his suicide. Because Plaintiff fails to identify a legal or factual basis for imposing section 1983 liability on the Brown County Commissioners, the Court will enter summary judgment in favor of these Defendants in their official capacity on Plaintiff's section 1983 claims. . . . [T]he Court finds the suit against Shoemaker in his official capacity as Brown County Sheriff must be construed to be a suit against the governing body of Brown County: the Brown County

Commissioners. Because the Court already has determined that there is no legal or factual basis for imposing section 1983 liability on the Brown County Commissioners, the Court similarly will enter judgment on Plaintiff's section 1983 claim in favor of Defendant Shoemaker in his official capacity as Sheriff of Brown County.")**.**

Lowery v. County of Riley, No. 04-3101-JTM, 2005 WL 1242376, at **7-9 (D. Kan. May 25, 2005) (not reported) ("Although consolidated into one entity, the RCPD [Riley County Police Department] maintains some of the hallmarks of a city or county law enforcement department. Prior to the consolidation, the RCPD was three separate institutions--the Riley County Sheriff's Office, the Manhattan, Kansas Police Department and the Ogden County Police Department. By state statute, the individual sheriffs and deputies sheriff were relieved of all their powers and authorities, and these powers were vested in the RCPD and its director. . . In essence, the RCPD is the equivalent of a sheriff's department, and the director serves in a capacity commensurate with a sheriff. Since the director stands in the shoes of the sheriff, he or she assumes the sheriff's powers and responsibilities, which by implication includes the power to be sued. *See Sparks v. Reno County Sheriff's Department*, No. 04-3034, 2004 WL 1664007, at *4 (D.Kan. Jan. 26, 2004) (noting that a sheriff is an entity that is subject to suit though the Reno County Sheriff's Department was not subject to suit). Although the RCPD is a subordinate entity to the Law Board, the RCPD director has the implied power to sue based on his freedom to control and supervise the RCPD agents. As a result, plaintiff may not bring suit against the RCPD as a separate legal entity, thought it may bring suit against the director, who serves in a capacity equivalent to a sheriff. In the alternative, plaintiff argues that the RCPD is an unincorporated association that may be sued under Federal Rule of Civil Procedure 17(b). Since the court has already found that the RCPD is a subordinate agency to the Law Board, the RCPD is more appropriately classified as part of a greater municipal entity. Federal Rule of Civil Procedure 17(b) is not applicable here. . . . The Law Board and RCPD have complimentary roles, though structured hierarchically. As already noted, the Law Board is responsible for the adoption of rules and regulations. Yet, the RCPD 'shall be under the exclusive supervision and control of the director and no member of the agency shall interfere by individual action with the operation of the department or the conduct of any of the officers or other personnel of such department.'. . Although largely autonomous, the director is responsible to the agency for providing police protection 'in conformance with rules and regulations adopted by such agency.' . . The statutory structure simultaneously creates both autonomy and accountability in the RCPD. While the Law Board may

create the official policy, the RCPD director has exclusive supervision and control of its members and directs the customs and practices of the RCPD. The interrelation creates potential *Monell* liability for both the Law Board and the RCPD.").

Schroeder v. Kochanowski, 311 F.Supp.2d 1241, 1250 n.23 (D. Kan. 2004) ("The Court disagrees with the Saline County defendants' argument that a county sheriff is a 'state official' and thus plaintiff's claim is barred by the Eleventh Amendment. Defendants fail to cite, nor was the Court able to find, Tenth Circuit cases holding that a county sheriff was a state official.")

Wishom v. Hill, No. Civ.A. 01-3035-KHV, 2004 WL 303571, at *5 (D. Kan. Feb. 13, 2004) ("Defendants admit that plaintiff may sue former Sheriff Hill and current Sheriff Steed, but correctly note that plaintiff may not sue the SCDF because it is a subordinate governmental agency. *Fuguate v. Unified Gov't of Wyandotte County/Kan. City, Kan.,* 161 F.Supp.2d 1261, 1266 (D.Kan.2001) (absent specific statue, subordinate governmental agencies lack capacity to sue or be sued); *Wright v. Wyandotte County Sheriff's Dep't,* 963 F.Supp. 1029, 1034 (D.Kan.1997) (county sheriff's department is agency of county and not capable of being sued); *Murphy v. City of Topeka,* 6 Kan.App.2d 488, 491, 630 P.2d 186, 190 (1981) (absent express statutory or ordinance authority, agency does not have capacity to sue or be sued). The SCDF lacks the capacity to sue or be sued. The Court therefore sustains defendants' motion for summary judgment as to plaintiff's claims against the SCDF.")

Wishom v. Hill, No. Civ.A. 01-3035-KHV, 2004 WL 303571, at *8, *9 (D. Kan. Feb. 13, 2004) ("In seeking summary judgment on plaintiff's official capacity claims, defendant argues that at the time of plaintiff's arrest, the county had a policy and practice which afforded detainees a probable cause hearing within 48 hours of incarceration, as required by *McLaughlin,* 500 U.S. 44. As stated above, however, liability may also arise from the act of an ultimate county decision-maker. *Pembaur,* 475 U.S. at 480. Plaintiff's official capacity claims can therefore survive summary judgment if he can show a genuine issue of material fact that an ultimate county decision-maker caused the violation of his right to be free from unconstitutional detention under the Fourth Amendment. Under Kansas law, the sheriff is responsible for taking care of the jail of his county and its prisoners. K.S.A § 19-811. He therefore serves as an ultimate county decision-maker in matters involving the county jail. . . . To prevail on his official capacity claim, plaintiff must show a genuine issue of material fact whether Sheriff Hill caused him to be detained without a probable cause hearing. Viewing the evidence in the light most favorable to plaintiff, a

reasonable jury could so find. As stated above, the record indicates that Sheriff Hill incarcerated plaintiff for six days without a probable cause hearing or bond.").

Oklahoma

Winton v. Bd of Commissioners of Tulsa County, 88 F. Supp.2d 1247, 1268 (N.D. Okla. 2000) ("The Court finds that there is evidence in the record from which a reasonable jury could conclude that the County's action or inaction in response to the risk of harm present in the Jail was not reasonable. . . . There is evidence in the record from which a jury could conclude that the only practical way for the County to have significantly abated the risk of violence at the Jail was to build a new facility. There is also evidence in the record that the County was hampered in its efforts to build a new jail by the voters of Tulsa County, who refused to pass bond issues prior to September 1995. While the Court recognizes the plight of the County, '[t]he lack of funding is no excuse for depriving inmates of their constitutional rights.' *Ramos*, 639 F.2d at 573, n. 19 (citing several cases). The voters of Tulsa County had a choice. The County could pay on the front end to protect the constitutional rights of inmates by building a new jail, or the County could pay on the back end by satisfying judgments in meritorious civil rights actions based on unconstitutional conditions at the Jail. Until a new jail was built in 1999, the voters in Tulsa County had necessarily chosen the second of these options as the County's response to violence at the Jail. . . . A reasonable jury could find that the County's inaction or ineffective action was the moving force behind the conditions at the Jail which caused or permitted a serious risk of inmate harm to exist in the Jail. A jury could find that overcrowding, under-staffing, lack of adequate inmate supervision, lack of inmate segregation and classification, lack of inmate exercise time, dormitory-style housing, all of which existed over a long period of time, were all de facto policies of inaction by the County which created and or contributed to the conditions which created a serious risk of harm in the Jail.").

Reid v. Hamby, 124 F.3d 217 (Table), 1997 WL 537909, at *5 n.1, *6 (10th Cir. Sept. 2, 1997) ("We conclude, even under the *McMillian* standard, that an Oklahoma sheriff is the policymaker for his county for law enforcement purposes. . . .We now hold that an Oklahoma 'sheriff's department' is not a proper entity for purposes of a § 1983 suit.").

Buchanan v. Bd. of County Commissioners of Muskogee County, No. CV-05-356-JHP, 2006 WL 1705257, at *4 (E.D. Okla. June 16, 2006) ("It is well

settled in Oklahoma that the Board of County Commissioners and the Sheriff's office operate autonomously. . . Where the Board does not--and indeed, cannot--enact or enforce law enforcement policy, it cannot be held liable for violations of such policy.").

Beers v. Ballard, No. 04-CV-0860-CVE SAJ, 2005 WL 3578131, at *6 (N.D. Okla. Dec. 29, 2005) ("In his official capacity, Sheriff Ballard represents Washington County. *See Meade* [*v. Grubbs*, 841 F.2d 1512 (10th Cir.1988)] , 841 F.2d at 1529. It is well-settled law that a municipal entity, such as Sheriff Ballard in his official capacity, may be held responsible '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.'").

Wyoming

Ginest v. Bd. of County Commissioners of Carbon County, 333 F.Supp.2d 1190, 1195 (D. Wyo. 2004) ("Carbon County is a named defendant in this action for two reasons. First, although the Board's role regarding the jail is quite limited, it has fiscal obligations under state law to adequately fund the jail. . . In addition, Carbon County is a proper defendant whenever one of its policymakers, such as its sheriff, is alleged to have engaged in unconstitutional activity for which the county would bear responsibility. . . . In the present case, the sheriff of Carbon County is such a policymaker, and he is empowered to establish policies that are binding on the County. The Court persists in its conclusion that the Carbon County Board of Commissioners is a proper defendant in this action.")

ELEVENTH CIRCUIT

Alabama

Turquitt v. Jefferson County, 137 F.3d 1285, 1288, 1291 (11th Cir. 1998) (en banc) ("Alabama law provides that it is the sheriff who has the duty to ensure that inmates do not come to harm, to develop a policy of controlling inmate violence, and to staff the jail with appropriately trained jailors. . .Because the parties agree that the sheriff possesses the authority to make final policy with respect to these actions, the contested issue is whether the sheriff functions as the County's policymaker when he takes those actions. Our answer to this question turns on state law, including state and local positive law, as well as custom and usage having the force of law. . . . Our

review of Alabama law persuades us that an Alabama sheriff acts exclusively for the state rather than for the county in operating a county jail. . . . *Parker* is not in accord with controlling § 1983 jurisprudence, and we hereby overrule that decision, and any subsequent decisions following it, insofar as they held that Alabama sheriffs in their daily operation of county jails act as policymakers for the county.").

McClure v. Houston County, 306 F.Supp.2d 1160, 1163, 1166 (M.D. Ala. 2003) ("[T]he specific question in this case is whether the Houston County Sheriff and the Sheriff's Department are 'policymakers' for Houston County in the area of hiring, training, and supervising deputy sheriffs. Under Alabama law, sheriffs are state, and not county, officers. . . . McClure argues that, before granting summary judgment on Eleventh Amendment grounds, the court must determine whether the state or county would pay any damages awarded in this case. *See Carr v. City of Florence,* 916 F.2d 1521, 1527 (11th Cir.1990) (Clark, J., specially concurring). Even if the court were to find McClure's legal argument persuasive, however, summary judgment in Sheriff Glover's favor would still be appropriate because McClure has not offered any evidence to show that Houston County, and not the State, would be liable for any judgment against Sheriff Glover.").

Florida [state]

Jenne v. Maranto, 825 So.2d 409, 416 (Fla.App. 2002) ("Florida is divided into political subdivisions, the several Counties, and the Sheriff is a constitutional officer in each County. Art. VIII, S 1(a), (d), Fla. Const. The Counties are political subdivisions but they are not the State itself. The Florida Constitution names the Sheriff as a county official, not as an official of the State. Art. VIII, S 1(d), Fla. Const. Although the Sheriff performs many functions--e.g., the Sheriff is responsible for serving process within the County -his budget is made up by the County from taxes levied only within the County. Moreover, the Sheriff is authorized to purchase liability insurance for, among other things, 'claims arising out of the performance of the duties of the Sheriff....' Thus any money judgment in this case will be paid from the local county budget or by insurance purchased therefrom by the Sheriff. On balance therefore the Sheriff is an official of local government, rather than an arm of the State. We thus hold for purposes of this case that Sheriff Jenne is not an arm of the State and is not entitled to claim the constitutional immunity protected by the Eleventh Amendment." footnotes omitted)

Florida [federal]

Abusaid v. Hillsborough County Bd. of County Commissioners, 405 F.3d 1298, 1304 (11th Cir. 2005) (Florida sheriff acts for county and is not arm of the state when enforcing a county ordinance)

Cook v. Sheriff of Monroe County, 402 F.3d 1092, 1115 (11th Cir. 2005) ("When, as here, the defendant is the county sheriff, the suit is effectively an action against the governmental entity he represents--in this case, Monroe County.").

Brown v. Neumann, 188 F.3d 1289, 1290 n.2 (11th Cir. 1999) ("We recognize that our decisions have not been entirely consistent on whether the relevant entity in an official-capacity suit against a sheriff in Florida is the County or the Sheriff's Department (as a unit operating autonomously from the County). *Compare Lucas v. O'Loughlin*, 831 F.2d 232, 235 (11th Cir.1987) (County). . . *with Wright v. Sheppard*, 919 F.2d 665, 674 (11th Cir.1990) (implying that the Sheriff's Department would be the relevant entity). We do not address this point because our holding today is that whatever the relevant entity was, it is not liable under *Monell*.").

Hufford v. Rodgers, 912 F.2d 1338, 1341-42 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991) (suit against Florida sheriff not barred by Eleventh Amendment because the Florida state constitution designates the sheriff as a county officer and the sheriff's budget, salary and any judgment against him is paid by the county).

Gray v. Kohl, 568 F.Supp.2d 1378, 1393 & n.3, 1394 (S.D. Fla. 2008) ("A Deputy or Officer in one of Florida's county Sheriff departments does not constitute a final policymaking authority for the county because he does not stand in the shoes of the Sheriff and is under the chain of command of the Sheriff. . . Therefore, a discretionary act by a Deputy or Officer, of which the County Sheriff does not know about, ratify or consent to, cannot constitute a final policy of the county. . . Here, there is no evidence that Sheriff Roth directed Officer Perez to arrest the individuals handing out Bibles, or that Sheriff Roth knew about or consented to the arrests beforehand. In the absence of any such knowledge by Sheriff Roth, the arrests were a purely discretionary act of Officer Perez, and any chilling of Plaintiff's First Amendment rights must also be attributed to Officer Perez. As such, Officer Perez's decision to enforce the School Safety Zone Statute against the individuals handing out bibles does not constitute a policy of Monroe County. . . . The holding in *Abusaid* that a County Sheriff enforcing a county statute is not entitled to Eleventh

Amendment immunity applies with equal force to a County Sheriff enforcing a state statute. *Abusaid*'s application of the four-factor test in *Hufford* leaves no room for distinguishing between a County Sheriff's enforcement of a county versus a state statute. . . . However, Officer Perez's arrest of the Gideons could become an act attributable to the County if the arrests were ratified by Sheriff Roth after the fact. If an authorized policymaker ratifies a subordinate's decision and the reasons for making the decision, the decision is chargeable to the municipality. . . . Here, there is no evidence that Sheriff Roth, the final policymaking authority in matters of law enforcement for Monroe County , ratified Officer Perez's arrests of the Gideons based on the fact that they were distributing Bibles within the school safety zone. When Sheriff Roth was asked if he thought that handing out Bibles in the school safety zone constitutes 'legitimate business,' he responded that as long as traffic was not disrupted and there were no other safety issues, handing out Bibles would be 'legitimate business.'. . Hence, Monroe County cannot be said to have a policy of arresting citizens handing out Bibles within a school safety zone.").

Jones ex rel. Albert v. Lamberti, No. 07-60839-CIV, 2008 WL 4070293, at *5 (S.D. Fla. Aug. 28, 2008) ("The Sheriff is the final policymaker for the operation of the jails. The County does not control the Sheriff with respect to this function; therefore, the County cannot be liable under § 1983.")**.**

Jeffries v. Sullivan, No. 3:06cv344/MCR/MD, 2008 WL 703818, at *21 (N.D. Fla. Mar. 12, 2008) ("In summary, all four factors yield the conclusion that neither the Escambia County Sheriff nor PHS acts as an arm of the state in providing health care services to county jail inmates.")

White v. Polk County, No. 8:04-cv-1227-T-26EAJ, 2006 WL 1063336, at *4, *5 (M.D. Fla. Apr. 21, 2006) ("Generally, as set forth in great detail in *Abusaid*, Florida law gives sheriffs great independence and counties retain the 'substantial discretion over how to utilize that office' including the constitutional grant of power to the county to decide to abolish the office of sheriff if so desired. . . . If the sheriff, however, is carrying out any one of the enumerated functions listed under section 30.15 of the Florida Statutes, then the sheriff may be acting as an arm of the state, but '[t]he key question is not what arrest and force powers sheriffs have, but for whom sheriffs exercise that power.' . . A review of section 30.15 reveals that the sheriff acts on behalf of the county when executing process of county courts and the board of county commissioners and when maintaining 'the peace in their counties.'. . Nothing in section 30.15 or any other provision of Florida law dictates that the

training and supervising of deputies falls under a function required by the state, as opposed to the county. Thus, the actions complained of in this case do not fall under the category of law enforcement for the state, but rather fall under the category of policymaking for the county. . . . Having considered all four factors as dictated by *Abusaid*, the Court concludes at this juncture, that the Sheriff was about the business of the county government in the alleged inadequate training and supervision of his deputies with respect to pursuits, or 'surveillance' if that be the case. In other words, the aspects of policies regarding training and supervision may be considered more along the lines of local, administrative duties as opposed to broad state duties of law enforcement.").

Parilla v. Eslinger, No. 6:05-CV-850-ORL, 2005 WL 3288760, at *8, *9 (M.D.Fla. Dec. 5, 2005) ("The Plaintiffs allege that the County 'has delegated the management and operations of the Jail where the wrongs complained of herein occurred to the Defendant Sheriff of Seminole County.' . . Apparently in response to this alleged delegation, the County complains that the Sheriff is an independent constitutional officer, that he, his deputies, and the corrections officials at the Jail are not employees of the County, and that the County cannot be held responsible for their actions. However, the statutes cited by the County--which mostly deal with the Sheriff's authority to run his office and oversee his deputies--do nothing to establish that the Seminole County Sheriff is 'independent' of Seminole County, at least insofar as it comes to operation of the Seminole County Jail. The County also cites to a Supreme Court decision that found that an Alabama county was not liable under Section 1983 for the actions of the county sheriff. . . . However, *McMillian* was decided on the basis of various provisions of Alabama law, such as a constitutional provision stating that '[t]he executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county.' . . The County points to no similar constitutional or statutory provisions, instead simply reciting that 'under Florida's statutory framework, the Sheriff is a Constitutionally independent officer who acts independent of the County.'. . This is not sufficient. Moreover, a statutory provision cited by the County at the hearing in this matter-- Florida Statute S 951.061--suggests that Eslinger represents the County in regard to jail operations. The statute provides that a county commission may adopt an ordinance designating the sheriff to be the chief correctional officer of the county correctional system, . . .after which the sheriff would operate and maintain the county's jails. Fla. Stat. S 951.061(1). The statute strongly suggests that, at least in regard to jail operations, a Florida sheriff acts as a county decisionmaker, and his

decisions therefore establish the County's policy for purposes of Section 1983. Even in the absence of this statute, however, the County has not shown that, as a matter of law, it cannot be held liable for the actions of the Individual Defendants in operating the Jail.")

Samarco v. Neumann, 44 F. Supp.2d 1276, 1287 (S.D. Fla. 1999) ("In light of Florida statutory authority, which designates county sheriffs as independent constitutional officials, the Court finds that Sheriff Neumann, as the county's chief law enforcement officer, was the final policymaker for matters concerning the Palm Beach County Sheriff's Office. . . Thus, acts of Sheriff Neumann found violative of § 1983 are capable of imputing liability upon the Palm Beach County Sheriff's Office.").

Georgia (state)

Nichols v. Prather, 650 S.E.2d 380, 384, 385 (Ga. App. 2007) ("The appellants argue that, pursuant to *Brown* and the Eleventh Circuit cases, Georgia's sheriffs are always state actors, not county actors. *Brown* and the federal cases are inapplicable to the instant case, however, because they involved the issue of immunity from liability for a sheriff's violations of the federal civil rights statute, 42 USC § 1983 . In contrast, this case involves the sheriff's liability under the doctrine of *respondeat superior* for his deputy's negligence under Georgia's tort laws, as well as the county's liability under an agency theory. Further, contrary to the appellants' arguments, the cases upon which they rely do not hold that Georgia's sheriffs are always state officers, but stand for the proposition that, depending on the circumstances, sheriffs may be deemed state agents for the purpose of determining liability for constitutional violations under § 1983 . None of the cases hold that Georgia's sheriffs and their employees are 'state officer[s] or employee[s]' under the GTCA. Instead, under the plain language of the Georgia Constitution and the GTCA, sheriffs are county officials, not state officers or employees.")

Brown v. Dorsey, 625 S.E.2d 16, 20-23 (Ga. App.2005) ("No Georgia appellate court has squarely addressed the issue of whether the sheriff acts with final policymaking authority for the county or for the state in the context of a § 1983 action. However, in *Grech v. Clayton County*. . . an exhaustive 6-6 plurality opinion, the Eleventh Circuit Court of Appeals held that although Ga. Const. of 1983, Art. IX, Sec. I, Par. III(a)- (b) designates the sheriff as a 'county officer,' the same paragraph grants the state legislature the exclusive authority to establish and control a sheriff's powers,

duties, qualifications, and minimum salary. . . The court also noted that in interpreting this constitutional provision, the Georgia Supreme Court has stated that '[t]he sheriff is an elected, constitutional officer; he is subject to the charge of the General Assembly and is not an employee of the county commission.' . . .Although *Grech* is not binding precedent, we find its reasoning very persuasive. Moreover, the Georgia Supreme Court has recently reaffirmed that '[t]he sheriff is an elected constitutional county officer and not an employee of the county commission.'. . . Nevertheless, the question of whether the sheriff has final policymaking authority for the County for §1983 purposes must be examined in light of the particular function at issue. . . We thus reexamine the allegations in the complaint. Mrs. Brown asserts that Dorsey was the final policymaker for the county in matters concerning the use of deadly force by sheriff's department personnel, the direction and control of deputies and jailors, and the direction, control, and use of sheriff's department materials, equipment and resources. But, as noted above, the County has no control over the sheriff's department personnel, including its deputies and jailors. Therefore, the County cannot be held liable under § 1983 for Dorsey's use of those personnel in connection with his heinous plot to kill Derwin Brown. Finally, even though the County commission approves the sheriff's budget, . . .and the sheriff has the duty to preserve county property from injury or waste, . . . the county cannot control how the sheriff spends the budget. . . In the absence of the ability to control the funds after they have been allocated, the County cannot be held liable for the sheriff's use of departmental resources to commit a §1983 violation. It follows that the trial court did not err in dismissing the County as a party to Mrs. Brown's action for the reason that Dorsey was not a final policymaker for the County when he used departmental personnel and resources to kill her husband.. . . We agree with the dissent in *Pembaur v. City of Cincinnati* that the majority's reasoning in that decision is circular. . . *Pembaur* seems to hold that policy is what policymakers make and that policymakers are those who have the authority to make policy; therefore, any decision made by a policymaker is a policy. . . In the case at bar, Mrs. Brown argues that Dorsey was a policymaker for the County and, therefore, his *ad hoc* decision to murder his rival was a policy of the County. We would reject Mrs. Brown's assertion and affirm on this ground the trial court's dismissal of the claims against the County, but *Pembaur* is binding precedent and is squarely on point. . . . Because Sheriff Dorsey had final authority to make policy regarding the use of deadly force by his subordinates, we are prevented by *Pembaur* from affirming the dismissal on the ground that Dorsey's decision to murder Brown was one discrete decision and not a policy. As argued by the dissent in *Pembaur*, that controlling federal precedent in effect imposes *respondeat superior* liability on local governments for the intentional

acts of 'a certain category of employees, i.e., those with final authority to make policy.'. . If Dorsey had had the final authority to make policy on behalf of the County, then the pleadings filed by Mrs. Brown, including the amended complaint, would be sufficient to withstand a motion to dismiss brought by the County. . . However, as explained in Division 1 *infra*, Dorsey was a policymaker for the state and not for the County with regard to the particular functions at issue. For that reason, the trial court properly dismissed the claims against the County.")

Georgia (federal)

Gary v. Modena, No. 05-16973, 2006 WL 3741364, at *11 (11th Cir. Nov. 21, 2006) ("While the Georgia Constitution does indicate that a Sheriff occupies a separate constitutional office in the state's governmental hierarchy, Ga. CONST. art. IX, S 2, and that the Georgia legislature alone controls the Sheriff's Office, Ga. CONST. art IX, S 1, P 3(a)(b), Georgia statute requires that governmental units provide medical care to all inmates in their physical custody. O.C.G.A. S 42-5-2 (2006) . . . . Georgia statute imposes the same affirmative duty upon sheriffs, requiring that the sheriff take custody of all inmates in the jail of his county, O.C.G.A. S 42-4-4(a)(1) (2006), and furnish them with medical aid, heat and blankets, to be reimbursed if necessary from the county treasury. O.C.G.A. S 42-4-4(a)(2) (2006). Given that county governments have a statutory obligation to provide inmates in county jails with access to medical care, Bibb County cannot avoid liability under S 1983 simply by arguing that the Sheriff is subject to the exclusive control of the state. *See Manders*, 338 F.3d 1323 n. 43. If Gary could show that Bibb County implemented a policy which promoted deliberate indifference to the medical care of inmates, and that the policy caused Butts death, she could hold the County liable, and we stress the word 'if.' Gary has failed to articulate a County policy that promoted deliberate indifference, and as we have noted previously, she has not provided any evidence from which we could infer that Deputy Hilliard failed to note an obviously serious medical condition on Butts' screening form and that this omission led to Butts' death. Accordingly, we affirm the district court's decision to award Bibb County summary judgment.").

Purcell ex rel. Estate of Morgan v. Toombs County, 400 F.3d 1313, 1325 (11th Cir. 2005) ("Although we declined to determine that a Georgia sheriff wears a 'state hat' for all functions, we decided that a sheriff's 'authority and duty to administer the jail in his jurisdiction flows from the State, not [the] County.'. . Thus *Manders* controls our determination here; Sheriff Kight functions as an arm of the State--not of Toombs County--when promulgating policies and procedures governing

conditions of confinement at the Toombs County Jail. Accordingly, even if Purcell had established a constitutional violation, Sheriff Kight would be entitled to Eleventh Amendment immunity from suit in his official capacity.").

Manders v. Lee, 338 F.3d 1304, 1328 & n.54 (11th Cir. 2003) (en banc) ("Having applied the Eleventh Amendment factors, we conclude that Sheriff Peterson in his official capacity is an arm of the State, not Clinch County, in establishing use-of-force policy at the jail and in training and disciplining his deputies in that regard.[footnote omitted] Therefore, Sheriff Peterson is entitled to Eleventh Amendment immunity in this case. [footnote omitted] We need not answer, and do not answer, today whether Sheriff Peterson wears a 'state hat' for any other functions he performs. . . . It has been suggested that the sheriff's office is an independent, constitutional, elected office that is neither the State nor the county. . . Throughout this litigation the parties have briefed and framed the legal issue in this case *solely* as whether Sheriff Peterson in his official capacity acts on behalf of the State *or* Clinch County in the context of the Eleventh Amendment. Thus, we decide that controversy. No other issue is before us. In addition, while we agree that the sheriff's office is independent from and not controlled by the county, we conclude today only that the sheriff acts for the State in performing the particular functions at issue in this case.").

Manders v. Lee, 338 F.3d 1304, 1331, 1332 (11th Cir. 2003) (en banc) (Anderson, J., joined by Tjoflat, Birch and Wilson, J.J., dissenting)("I submit that the proper question is whether the sheriff has carried his burden of proving that he is an arm of the state. In other words, the issue is not the state versus the county; rather, the issue is whether the sheriff is an arm of the state *vel non.* The mere fact that the sheriff is not the policymaker for the county commission, is not controlled by the county commission, and the fact that the county has no *respondeat superior* liability for judgments against the sheriff, do not, either singly or in combination, go very far toward establishing that a Georgia sheriff is an arm of the state. The Seventh Circuit recognized this in *Franklin v. Zaruba,* 150 F.3d 682 (7 th Cir.1998).").

Manders v. Lee, 338 F.3d 1304, 1347, 1348 (11th Cir. 2003) (en banc) (Barkett, J., joined by Tjoflat, Birch and Wilson, J.J., and joined in part by Anderson, J.)("In this case, each of the factors we normally apply to determine whether a defendant is entitled to Eleventh Amendment immunity weighs against extending such protection to Sheriff Peterson. Georgia law clearly defines Sheriff Peterson as a county officer and jails as county institutions; the state's corrections authorities exercise no control

over Sheriff Peterson in his operation of the county jail; Clinch County appropriates Sheriff Peterson's operating budget and pays for the jail's construction and upkeep; and there is no indication that a judgment against Sheriff Peterson would operate against the state of Georgia. . . . A correct reading of Georgia law shows that county sheriffs operate county jails for the counties in which they serve. In every sense, a suit under 42 U.S.C. § 1983 against a county sheriff alleging mistreatment in a county jail is a suit against a local government. The Eleventh Amendment, which protects states, is inapplicable, and the decision of the district court should therefore be affirmed.").

Grech v. Clayton County, Georgia, 335 F.3d 1326, 1331, 1332, 1347 & n.46 (11th Cir. 2003) (en banc) (plurality opinion) ("[T]he appropriate § 1983 inquiry under federal law is whether defendant Clayton County, under Georgia law, has control over the Sheriff in his law enforcement function, particularly for the entry and validation of warrants on the CJIS systems and the training and supervision of his employees in that regard. . . . In Georgia, a county has no authority and control over the sheriff's law enforcement function. Clayton County does not, and cannot, direct the Sheriff how to arrest a criminal, how to hire, train, supervise, or discipline his deputies, what polices to adopt, or how to operate his office, much less how to record criminal information on, or remove it from, the CJIS systems involved in this case. Instead, the sheriff acts on behalf of the State in his function as a law enforcement officer and keeper of the peace in general and in relation to the CJIS systems in particular. . . . Judge Anderson's concurring opinion more narrowly concludes that as 'to the particular function at issue in this case, the Sheriff is acting on behalf of the state, and thus ... Clayton County is not liable in this case.' . . Because no opinion obtained a majority of the Court, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'").

Youngs v. Johnson, No. 4:06-CV-19 (CDL), 2008 WL 4816731, at *6 n.7 (M.D. Ga. Oct. 30, 2008) ("Plaintiff contends that the Muscogee County Sheriff traded his state hat for a county hat in the operation of the jail when he along with the County entered into an agreement in 1999 with the United States Department of Justice regarding conditions at MCJ. . . The Agreement provides that the 'City/County' shall, *inter alia*, 'develop and implement[ ] appropriate, comprehensive policies and procedures for Jail Operations.'. . Plaintiff argues that this provision establishes that the Sheriff is an 'arm of the county' because the agreement provides Muscogee County with the authority and obligation to promulgate jail policies and procedures-a

function that is normally reserved to the Sheriff acting under powers derived directly from the State. However, the Agreement also provides that the Sheriff in his official capacity is primarily responsible for developing MCJ policies and procedures. . . The Court finds that the Sheriff has not, through this Agreement, sufficiently relinquished to Muscogee County his state-derived authority for the operation of the jail to the extent that he loses his Eleventh Amendment immunity.")

Youngs v. Johnson, No. 4:06-CV-19 (CDL), 2008 WL 4816731, at **6-8 (M.D. Ga. Oct. 30, 2008) ("Sheriff Johnson contends that he is also entitled to Eleventh Amendment immunity as to Plaintiff's § 1983 claim regarding the diagnosis and treatment of Plaintiff's injury. The Eleventh Circuit has not addressed whether a Georgia sheriff wears a 'state hat' or a 'county hat' when providing medical services to county jail inmates. . . The Sheriff suggests that he wears a state for *all* functions at the jail. The Eleventh Circuit, however, has declined to find that a Georgia sheriff wears a 'state hat' for all functions. Therefore, it does not follow that just because the Sheriff acts as an arm of the State with respect to the placement and classification of inmates, he automatically also acts as an arm of the State with respect to the provision of medical care. Instead, the Court reads *Manders* to require it to analyze the four Manders factors to determine whether Sheriff Johnson is entitled to Eleventh Amendment immunity as to Plaintiff's § 1983 claim regarding the provision of medical care. . . . Although the sheriff's obligation to provide county inmates with medical services is directly derived from the State, the provision of medical care is directly delegated through the county entity. '[I]t shall be the responsibility of the governmental unit, subdivision, or agency having the physical custody of an inmate to maintain the inmate, furnishing him food, clothing, and any needed medical and hospital attention[.]' O.C.G.A. § 42-5-2(a) . . . . Thus, because the provision of medical care is directly delegated through the county entity, the Court concludes that the first factor favors a finding that the provision of medical care in county jails is a county function. . . . The second factor in the Eleventh Amendment analysis examines where Georgia law vests control. . . . Because of the county's direct involvement in and responsibility for providing medical care for county jail inmates, the Court concludes that this factor also weighs in favor of finding that the provision of medical care in county jails is a county function. . . . The third factor in the Eleventh Amendment analysis is the source of the entity's funds. The Eleventh Circuit, in *Manders*, noted that State funds were involved in the particular function of force policy in county jails because the State provided funding for training of sheriffs, funded the Governor's disciplinary procedure over sheriffs, and paid for certain state offenders assigned to the county jails under the sheriff's supervision. .

. However, in this case, examining the particular function of the provision of medical care in county jails, O.C.G.A. § 42-5-2(a) provides that the county has an obligation to provide funding for jail necessities. Although the Eleventh Circuit, in *Manders*, found that this statute was not dispositive on the issue of force policy, it stressed the fact that the case did not involve medical care. . . Therefore, given this caveat and the clear language of O.C.G.A. § 42-5-2, the Court concludes that this factor weighs in favor of a finding that the provision of medical care to county jail inmates is a county function. . . . The final factor in the Eleventh Amendment analysis is determining who is responsible for judgments against the entity. In *Manders*, the Eleventh Circuit determined that 'although the State and the county are not required to pay an adverse judgment against the sheriff, both county and state funds indirectly are implicated.' . . The Eleventh Circuit, however, determined that this factor did not defeat immunity presumably because the first three factors weighed in favor of immunity. . . Here, however, the first three factors weigh heavily in favor of finding that the sheriff is an arm of the county. Thus, the Court finds that the fourth factor does not defeat a finding that the sheriff is an arm of the county when providing medical care to inmates in county jails. Because the Court finds that the sheriff is an arm of the county in providing medical care in a county jail, Sheriff Johnson is not entitled to Eleventh Amendment immunity. . . Therefore, the Court denies his motion for summary judgment as to Plaintiff's § 1983 inadequate medical care claim.").

Youngs v. Johnson, No. 4:06-CV-19 (CDL), 2008 WL 4816731, at *9 (M.D. Ga. Oct. 30, 2008) ("As explained in the Court's previous Eleventh Amendment discussion, the relationship between the County and the Sheriff regarding inmate medical care is different from their relationship regarding inmate classification and placement. Although the Sheriff may be the 'final decisionmaker' at the jail for all aspects of the jail operation, he acts on behalf of the County when making decisions regarding medical care for the county inmates. Under Georgia law, the provision of medical care to county inmates is a county function. The County can certainly delegate that function to the Sheriff, which the record establishes was done here, but when it does so, it does not relinquish its ultimate responsibility for that function. The Sheriff simply becomes the final policymaker for the County regarding the promulgation of appropriate policies and procedures for providing adequate medical care to inmates at the county jail. . . Therefore, Muscogee County is not entitled to summary judgment as to Plaintiff's § 1983 inadequate medical care claim.")

Mia Luna, Inc. v. Hill, No. 1:08-CV-585-TWT, 2008 WL 4002964, at *2, *4 (N.D. Ga. Aug. 22, 2008) ("This case, although it also involves roadblocks, differs because

the Plaintiff alleges that the Defendant is not exercising authority derived from the state. The Georgia Constitution forbids any county from exercising the power of police protection within a municipality except by contract with that municipality. . . .The Plaintiff claims that the Defendant Hill has no such contract with the City of Forest Park--and therefore no written consent--allowing his department to conduct law enforcement activities in Forest Park. . . . I fail to see how the narrow holding of *Manders* does not compel immunity in this case. The *Manders* court cautioned against categorically granting Georgia sheriffs Eleventh Amendment immunity in their official capacities. In application, the analysis in *Manders* is so strong it forces a logical conclusion that Eleventh Amendment immunity almost automatically attaches for a Georgia sheriff (even where that sheriff's actions were allegedly *ultra vires*).").

Rylee v. Chapman, No. 2:06-CV-0158-RWS, 2008 WL 3538559, at *6 (N.D. Ga. Aug. 11, 2008) ("[T]he Court concludes that Sheriff Chapman acted as an arm of the State of Georgia--and not Banks County--in both his capacity as a law enforcement officer enacting policies applicable to Plaintiff's arrest and in his capacity as an administrator of the Banks County Jail.").

Bennett v. Chatham County Sheriff's Dept., 2008 WL 628908, at *5 n.2 (S.D. Ga. Mar. 5, 2008) ("Though the Court hesitates to hold that sheriffs and their employees always act as arms of the state, it is clear that in the context of employment decisions sheriffs and their employees are state officers.").

Lewis v. Wilcox, 2007 WL 3102189, at *9 (M.D. Ga. Oct. 23, 2007) ("[T]his Court finds that Defendant Chapman was acting as an 'arm of the State' when promulgating use-of-force and seizure policies in the context of ordinary law enforcement. States, and arms of States, are not 'persons' who can be sued under § 1983. . . . Moreover, while it appears that the Eleventh Circuit has not confirmed that deputy sheriffs in Georgia are immune from suit under Eleventh Amendment principles, a line of district court cases has 'determined that when a sheriff is acting as an arm of the state, his deputies are also entitled to Eleventh Amendment Immunity.'")

Hooks v. Brogdon, 2007 WL 2904009, at *2 (M.D. Ga .Sept. 29, 2007) ("The Northern District of Georgia's decision in *Dukes*, as well as the Eleventh Circuit's decision in *Manders*, suggest that in providing medical care for jail inmates, a sheriff acts as an arm of the county. . . Therefore, insofar as Plaintiff brings this action against Sheriff Brogdon in his official capacity as Sheriff of Lanier County, Plaintiff

must allege and establish that the alleged deprivations resulted from a custom or policy set by Lanier County. . . In making the determination of whether the deprivation resulted from a County's custom or policy, the Eleventh Circuit has held that a single act may be county policy if the action is performed by a county official who is 'the final policymaker ... with respect to the subject matter in question.'. . To determine whether an official is the 'final policymaker,' the court should look to the relevant positive law, including ordinances, rules, and regulations, as well as the relevant customs and practices having the force of law. . . Here, it is clear that under Georgia law Sheriff Brogdon was the final policymaker with respect to providing medical care to inmates at Lanier County Jail.")

Slaughter v. Dooly County, 2007 WL 2908648, at *6, *7 (M.D.Ga. Sept. 28, 2007) ("Here, Plaintiff contends the deprivation of her constitutional rights arising from her placement in the restraint chair was caused by the Jail's official Restraint Chair Policy. However, Dooly County neither adopted nor was permitted to adopt or implement policies concerning use of force or the restraint chair. Dooly County is constitutionally and legally prohibited from performing these law enforcement functions that are specifically delineated by Georgia law as duties of the sheriff . . . . Georgia sheriffs, when acting in the areas of law enforcement, duties in the courts, and corrections, are "state actors," not "county actors." . . Plaintiff also contends Dooly County violated her constitutional rights by failing to provide training and supervision to jail officials. . . . Because Plaintiff's claims against Dooly County involve the corrections/detentions function of the office of the sheriff , which are state, not county, functions, Plaintiff's § 1983 direct liability claims against Dooly County fail. . . . Plaintiff's claims that the County is liable for Plaintiff's inadequate medical treatment during her incarceration must also fail. The provision of medical treatment to inmates and detainees is a function of the sheriffs, not counties. . . . Because the sheriff's " authority and duty to administer the jail in his jurisdiction flows from the State, not [the] County," the County cannot be liable for Plaintiff's claim that she was provided inadequate medical treatment.")

Kicklighter v. Herrin, 2007 WL 2248089, at *8 (S.D.Ga. July 31, 2007) ("The *Manders* decision only considered the narrow function of 'establishing use-of-force policy at the jail,' and the Eleventh Circuit explicitly declined to decide whether county sheriffs are arms of the state for any of their other specific duties. . . The Eleventh Circuit has not extended *Manders* to all sheriff functions. . . The Georgia Constitution designates the sheriff as a 'county officer,' and the Georgia Supreme Court has held that a county sheriff is a separate constitutional entity. . . Therefore,

without clear guidance from the Eleventh Circuit, this Court is unwilling to extend *Manders* and hold that a Georgia Sheriff is an 'arm of the state' for the general law enforcement functions at issue in this case.")

Morgan v. Fulton County Sheriff's Dept., 2007 WL 1810217, at *6 (N.D. Ga. June 21, 2007) ([T]he court cannot simply assume that because a county sheriff acts as an arm of the State with respect to conditions of confinement at the jail, he necessarily acts as an arm of the State with respect to the provision of medical care at the jail as well. Indeed, the *Manders* court took great pains to limit its holding to the particular functions at issue in that case and to distinguish those functions from the provision of medical care . . . . In looking at the test set out in *Manders*, two district courts have determined that a Georgia sheriff acts as an arm of the county in providing medical care to inmates. *See Dukes v. Georgia*, 428 F.Supp.2d 1298, 1319-22 (N.D.Ga., 2006) (Forrester J.); *Green v. Glynn County*, 2006 WL 156873, *3 (S.D.Ga. Jan. 16, 2006) (Alaimo, J.). As a sheriff acts as an arm of the county in providing medical care to inmates, his deputies are also arms of the county with regard to medical care claims. Therefore, the court finds that Defendant King is not immune to suit in his official capacity under the Eleventh Amendment with regard to Plaintiff's medical care claim.").

United States v. Terrell County, No. 1:04-CV-76 (WLS 2006 WL 2850069, at *8 n.1 & n.3 (M.D. Ga. Sept. 30, 2006) ("Both sets of Defendants have illustrated the unique position that Georgia Counties and Sheriffs find themselves in when it comes to enforcing federal constitutional rights. According to the Eleventh Circuit, the two are separate distinct entities under state law and have no overlapping control over the actions of the other. . . It is argued by the Defendants that the result is that the County cannot enforce policy over the Sheriff and the Sheriff cannot secure funding, and neither takes responsibility for any alleged constitutional violations of the County Jail. The Court notes, however, that the Eleventh Circuit confined the *Manders* decision, and its progeny. It specifically limited the decision/holding to the issue of Eleventh Amendment immunity in the context of Sheriffs being sued for the alleged specific unconstitutional misconduct directed towards an individual or small group usually involving one incident. The *Manders*' court pointed out that it was not deciding the broader question of liability between a Sheriff and County when it came to certain issues such as jail conditions. Neither is the question specifically before the Court at this time, nor does this Court intimate or decide how or if *Manders* will effect [sic] such a question. . . . While funding of the Jail and control of policy are legitimate issues raised by all of the parties, Bowens ignores his responsibilities as

Sheriff and Jailor of Terrell County. See O.C.G.A. §§ 42-4-1 through 42-4-71 (statutory duties of sheriff as it relates to jails). For example, the Sheriff is responsible for staffing the jail in a manner to ensure the safety of the inmates. If he concludes it takes a POST certified officer to open a cell door, then he must adjust the scheduling of his POST officers to be on duty at the jail at all times. As argued correctly by the Government, there is no excuse for an inmate to suffer serious harm because the jailor on duty was not authorized to open a cell door to provide assistance. The Government's statement of facts contains a plethora of examples where Bowens could have exercised his duties irrespective of funding issues. . . . Accordingly, the Court finds that the Government has carried its burden of proof of showing (1) the existence of objectively serious and dangerous conditions; (2) that both sets of Defendants (Bowens and TCBOC) have subjective knowledge of these substantial risks to the inmates; and (3) that both sets of Defendants have disregarded these risks in more than a negligent manner. As such, the Court finds that there is no genuine issue of material fact concerning whether the conditions at the Terrell County Jail are unconstitutional and the Government is entitled to judgment as a matter of law. Therefore, the Government's motion for summary judgment for violation of the inmates' rights to be free from serious risks of harm while incarcerated at the Terrell County Jail (Doc. No. 46) is GRANTED. The Court by separate order, shall issue instructions to the parties concerning further proceedings, briefing and hearing on the issues of: (1) the Sheriff's and/or the TCBOC's liability or responsibility for the unconstitutional conduct; (2) the proper remedy; and (3) if necessary, the Sheriff's and/or the TOBOC responsibilities in implementing the Court's remedy, other subsequent necessary orders or appropriate relief.").

Scruggs v. Lee, No. 7:05-cv-95(HL), 2006 WL 2850427, *4, *5 (M.D. Ga. Sept. 30, 2006) ("In this case, Scruggs has not brought a challenge to the use-of-force policies at the Clinch County jail. Thus, the conclusion in *Manders*--that Sheriff Peterson was entitled to Eleventh Amendment immunity--is not directly applicable to this case. Nevertheless, in the Court's view, the same result obtains. Scruggs contends that law enforcement officials violated his rights when they unlawfully seized him at the roadblock, subjected him to a search without a warrant or probable cause and then unlawfully arrested and detained him without due process of the law. These allegations implicate Sheriff Peterson's policies concerning the execution of roadblocks, the use of canine units, and the arrest and booking procedures employed by his deputies at the scene and at the jail. This Court finds that the establishment of policies regarding each of these activities were undertaken by the Sheriff in his capacity as an arm of the state. . . . While the decision in Manders does not

conclusively compel this Court to find that Sheriff Peterson was acting as an arm of the state in implementing policies pertaining to roadblocks, canine units, searches, seizures, arrests, and detention, it appears to the Court that the policies at issue here flow from the powers granted to sheriffs under state law, rather than from any authority or control derived from Clinch County. Beginning with the policies that led to the initiation of the roadblock and concluding with the policies that resulted in Scruggs' continued detention following his arrest, Sheriff Peterson was acting as an arm of the state. Accordingly, as to any claims against Sheriff Peterson in his official capacity stemming from these activities, he would be entitled to Eleventh Amendment immunity.").

Beaulah v. Muscogee County Sheriff's Deputies, 447 F.Supp.2d 1342, 1356 (M.D. Ga. 2006) ("Plaintiffs have pointed to no evidence suggesting that the sheriff's law enforcement power is controlled by the Columbus Consolidated Government--or any entity other than the State--simply because the sheriff entered into an agreement to participate in a multi-jurisdictional task force or because some of his deputies were assigned to work on that task force. Moreover, there is no evidence that, in joining Metro, the sheriff was delegated law enforcement powers or duties beyond those delegated to him by the State. Rather, the record establishes that Metro provides a framework for exercising the sheriff's State-delegated law enforcement powers and duties in cooperation with law enforcement officers from other jurisdictions, who are deputized as Muscogee County deputy sheriffs. For these reasons, there is nothing in the record to distinguish this case from *Manders* and *Mladek*. Based upon the rationale of *Manders* and *Mladek*, the Court finds the Muscogee County sheriff's deputies were wearing a 'state hat' when they stopped the Yukon and detained its occupants. Therefore, the sheriff and his deputies are considered to be arms of the state and are thus entitled to Eleventh Amendment immunity in this case.").

Redding v. Tuggle, No. 1:05-cv-2899-WSD, 2006 WL 2166726, at **6-8 (N.D. Ga. July 31, 2006) ("In the instant case, Clayton County's § 1983 liability under federal law hinges on whether under state law Clayton County wields control over the sheriff and CCSO in their employment decision-making functions. . . The Court finds it does not. The Georgia Constitution has established the sheriff and CCSO as independent of the County itself. Structurally, the sheriff's office is not a division or subunit of the county in which it resides or of that county's governing body. . . .Although another provision, § 36-1-21, allows sheriffs to place their employees under the county civil service system, such a placement does not vest the county with such control over the employment decisions of the sheriff's office as to incur municipal liability. . . .

Indeed, civil service rules do not authorize Clayton County to hire, fire, or discipline employees. . . . Absent control over the employment decisions of the sheriff or CCSO, Clayton County cannot be said to be responsible for those decisions and actions and cannot be held liable under § 1983. Plaintiffs, nonetheless, argue that Clayton County is an indispensable party to this lawsuit, because a judgment against the sheriff would make the County financially liable. . . Georgia courts have concluded, however, that 'counties are not liable for, and not required to give sheriffs money to pay judgments against sheriffs in civil rights actions.' *Grech*, 335 F.3d at 1138 (*citing Wayne County Bd. of Comm'rs v.. Warren*, 223 S.E.2d 133, 134 (Ga.1976) . . . In *Warren*, the Georgia Supreme Court explained the county was not liable for the payment of a civil rights violation judgment against a county sheriff, because by state statute '[a] county is not liable to suit for any cause of action unless made so by statute.'. . The Georgia Supreme Court concluded that 'there is no duty of the county to furnish the sheriff with money to settle a civil rights judgment against him.' *Id.* Accordingly, Plaintiffs have failed to show that Clayton County is an indispensable party.").

Bell v. Houston County, Ga., No. 5:04-CV-390 (DF), 2006 WL 1804582, at *12 & n.14 (M.D. Ga. June 27, 2006) ("Consistent with the reasoning of *Manders*, the Court concludes that Sheriff Talton acts as an 'arm of the State' when he promulgates and administers the jail's intake procedures. . . . This Court has determined that, under the reasoning of *Manders*, Talton would be considered an 'arm of the State' for purposes of the Eleventh Amendment. Thus, Bell's official-capacity claim against Talton is in reality a claim against the State of Georgia, which, under the authority of *Will*, is not a 'person' within the meaning of § 1983 and is therefore not subject to suit for an alleged violation of the statute. . . . The Eleventh Circuit has never held that Georgia deputy sheriffs or jail officials are 'arms of the State' for Eleventh Amendment purposes, but the reasoning underlying Carr and *Lancaster*--that deputies and jailers should be viewed as such because the elected sheriff (himself an 'arm of the state') has the power to hire them, fire them, discipline them, and otherwise control their job duties--would appear to apply with equal force in Georgia, given the Eleventh Circuit's discussion in *Manders* about the relationship between Georgia sheriffs and their deputies.").

Dukes v. State of Georgia, No. Civ.A. 1:03-CV-0406J, 2006 WL 839403, at *18 (N.D. Ga. Mar. 30, 2006) ("Here, unlike the situation in *Manders*, the court finds that as to a sheriff's duty to provide medical necessities to inmates, the first three factors do not suggest that he is acting as an arm of the state. This court's application of all

four factors used to determine if an entity is an 'arm of the state' for Eleventh Amendment purposes, coupled with the *Manders* court's strong reservations regarding medical necessity cases, lead this court to conclude that Defendant Yeager was not acting as an 'arm of the state' when caring for the medical needs of Plaintiff. Therefore, the sheriff is not entitled to sovereign immunity in his official capacity.")

Sanders v. Langley, No. 1:03-CV-1631-WSD, 2006 WL 826399, at *9, *10 (N.D. Ga. Mar. 29, 2006) ("The Individual Defendants argue dismissal of Plaintiff's claims against Defendant Langley in his official capacity is warranted because, as in *Manders* and *Purcell*, his claims are based on Defendant Langley's and his deputies' exercise of their law enforcement authority derived from the State of Georgia, not Carroll County. . . With respect to Plaintiff's allegations concerning overcrowding at the Carroll County Jail and his physical assault at the hands of other inmates, the Court agrees. This claim relates to conditions of confinement at the Carroll County Jail. In performing his duties related to conditions of confinement at the jail, Defendant Langley acted as an arm of the State, not of Carroll County. Accordingly, Plaintiff's claim against Defendant Langley in his official capacity regarding conditions of confinement at the jail are barred by the Eleventh Amendment. With respect to Plaintiff's claim for deliberate indifference to serious medical needs, however, the Court is not persuaded that Defendant Langley is entitled to Eleventh Amendment immunity. . . . [A]t least one court has addressed this precise issue under *Manders* and determined that a Georgia sheriff acts as an arm of the county in providing medical care to pre-trial detainees and training jail deputies with respect to medical care. [citing *Green v. Glynn County*]In view of the incomplete record before the Court regarding the four factors identified in *Manders*, and the existing case law adverse to the Individual Defendants' position, the Court cannot conclude that Eleventh Amendment immunity bars Plaintiff's Section 1983 claim against Defendant Langley for deliberate indifference to serious medical needs.")**.**

Green v. Glynn County, No. Civ.A. CV201-52, 2006 WL 156873, at *3 (S.D. Ga. Jan. 19, 2006)("Glynn County contends that the relevant inquiry is control and urges the Court to extend the holdings in *Grech* and *Manders* to the administering of medical care to pretrial detainees. Were the court to adopt the position urged by Glynn County, however, a county sheriff would wear a 'state hat' when performing virtually all functions. Such a position is not supported by the Eleventh Circuit decisions. The *Manders* court specifically rejected this position in noting that it 'need not, and d[id] not, decide today whether Georgia sheriffs wear a "state hat" for Eleventh Amendment purposes for all of the many specific duties assigned directly

by the State.' . . . The Eleventh Circuit's en banc decision in *Manders* and the Supreme Court's related decision in *McMillian* make clear that the arm of the state determination must be made on a function-by-function basis. . . The relevant 'function' in the instant case is the duty to provide medical care to pretrial detainees and train jail personnel in that regard. Although the sheriff has a duty to provide an inmate with access to medical aid pursuant to O.C.G.A. S 42-4-4, ' O.C.G.A. S 42-5-2(a) imposes the duty and the cost for medical care of inmates in the custody of a county upon the county.'. . Thus, as recognized by the *Manders* decision, the function in the instant case is distinguishable from the law enforcement functions at issue in *Grech* and *Manders*. In light of the county's statutory obligation with regard to providing medical care to inmates in the custody of the county, the Court concludes that, unlike the functions in *Grech* and *Manders*, Sheriff Bennett was acting on behalf of Glynn County with regard to providing medical care to pretrial detainees and training to jail personnel in regard to such care.").

Young v. Graham, No. CV 304-066, 2005 WL 2237634, at *7 (S.D. Ga. Aug. 11, 2005) (concluding "that the Sheriff of Dodge County acts as an agent of the State in establishing and implementing policy and procedure respecting pretrial detention and conditions of confinement. Thus, Sheriff Lawton in his official capacity is entitled to Eleventh Amendment immunity.").

2025 Emery Highway, L.L.C. v. Bibb County, Georgia, 377 F.Supp.2d 1310, 1360, 1361 (M.D. Ga. 2005) (In this suit, Sheriff Modena is named as a defendant solely in his official capacity; as such, all claims against Sheriff Modena are in actuality claims against the Bibb County Sheriff's Office. . . Such claims would not necessarily implicate Bibb County; in many instances, a county sheriff is deemed to actually be acting as an arm of the State. . . Moreover, in *Manders*, the Eleventh Circuit Court of Appeals held that a county sheriff is entitled to Eleventh Amendment sovereign immunity when sued in his official capacity for acting as an 'arm of the state.' . . Here, evidence before the Court suggests that Sheriff's Modena's decision to conduct the raid and warrantless search of Club Exotica's premises arose not out of his duty to enforce the County's ordinances but out of his power to enforce state law. . . All dancers arrested were in fact charged with violations of the Georgia criminal code; none were issued ordinance citations. . . . This indicates that Sheriff Modena may have been acting as an 'arm of the State' rather than an agent of the County at the time the raid and search were conducted and that he and the State would therefore be entitled to immunity for claims arising out this conduct.").

Bunyon v. Burke County, 306 F.Supp.2d 1240, 1251-55 (S.D. Ga. 2004) ("Even if Burke County may be directly liable for its practice of failing to bring detainees before a judicial officer within three days and of not accepting bail from detainees in violation of Bunyon's constitutional rights, it may be immune from suit under the Eleventh Amendment for Sheriff Coursey's and his deputies' actions. . . . In this case, the relevant inquiry is whether Sheriff Coursey and his deputies and jailers were acting as agents of the State in establishing and implementing bail and release procedures for inmates being held on charges pending in a municipality . . . .Whether a defendant is an 'arm of the state' is determined by examining his or her function in a particular context. *Id.* This entails analyzing four factors: 1) how state law defines the entity; 2) what degree of control the state maintains over the entity; 3) where the entity derives its funds; and 4) who is responsible for judgments against the entity. *Id.* (citations omitted). After a lengthy review of these factors, the Eleventh Circuit has recently held that Georgia sheriffs act as 'state officers' in a variety of functions. *Id.* In this case, the relevant inquiry is whether Sheriff Coursey and his deputies and jailers were acting as agents of the State in establishing and implementing bail and release procedures for inmates being held on charges pending in a municipality. . . . Based on the fact that Sheriff Coursey's authority over inmates such as Bunyon flow from the State and not Burke County, and those functions and duties pertain chiefly to affairs of the State, *see Manders,* 338 F.3d at 1319 n. 35, I conclude that this first factor weighs strongly in favor of Eleventh Amendment immunity. . . . Because of Georgia's direct control over Sheriff Coursey's duty to accept bail and bring a detainee before a judicial officer within seventy-two hours, and Burke County's total lack thereof, this control factor weighs heavily in favor of Eleventh Amendment immunity. . . . In this case, Bunyon was not a convicted state offender, so state funds would not have been directly involved. Instead, he was a pre-trial offender and detained pursuant to an agreement with the City of Midville whereby Midville paid Burke County a per diem rate for his incarceration. . . . As Burke County has failed to show whether it actually spent any of its own funds on Bunyon's incarceration, as mandated by the state, I am hesitant to find any state involvement as it pertains to this aspect of the *Manders* analysis. . . . The final factor in the Eleventh Amendment analysis is the source of funds that will pay any adverse judgment against Sheriff Coursey or his deputies in their official capacities. . . . Apparently, Sheriff Coursey would have to pay any adverse judgment out of the sheriff's office budget, and as a result, both county and state funds would be implicated by an adverse judgment. Sheriff Coursey would need an increased budget from the county for his office and an increased daily per diem rate for convicted detainees held in the Burke County Jail from Georgia. . . When faced with this dual

county/state obligation, the Eleventh Circuit noted that the State's sovereignty and integrity are affected when lawsuits interfere with a state function, and therefore, 'at a minimum, the liability-for-adverse-judgment factor does not defeat [Sheriff Coursey's] immunity claim.'. . . Although not a bright line decision, weighing all of the factors discussed above, I find that Sheriff Coursey is entitled to Eleventh Amendment immunity. His authority over Bunyon flowed directly from the state, his functions and duties pertained chiefly to affairs of the state, and the state directly controlled his duty to accept bail and release prisoners within seventy-two hours of arrest. That the state may not have provided funds for Bunyon's incarceration and may not provide much money for a judgment against him does not preclude this finding. Sheriff Coursey, in his official capacity, was acting as an arm of the state in establishing bail and release policies at the jail, and is therefore entitled to Eleventh Amendment immunity. Like Sheriff Coursey, his deputies are also entitled to Eleventh Amendment immunity. Although *Manders* involved only the immunity of the Sheriff in his official capacity, its factors are similarly applicable to deputy sheriffs as well. . . . Based upon the foregoing, Sheriff Coursey and his deputies are entitled to Eleventh Amendment immunity. Even if Burke County is directly liable for its unconstitutional policy and practice of denying bail and release to detainees, it is not liable for any constitutional violations related to these policies committed by Sheriff Coursey and the other Burke County defendants.")

Bunyon v. Burke County, 285 F.Supp.2d 1310, 1328, 1329 & n.12 (S.D. Ga. 2003) ("Federal Rule of Civil Procedure 17 states, in pertinent part, the following: **(b) Capacity to Sue or Be Sued.** The capacity of an individual, other than one acting in a representative capacity, to sue or be sued should be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held.... Fed.R.Civ.P. 17(b). In *Georgia Insurers Insolvency Pool v. Elbert County,* 368 S.E.2d 500 (Ga.1988), the Georgia Supreme Court set forth the following explanation of which entities could sue and be sued in Georgia courts: '[T]his court [has] said, in every suit there must be a legal entity as the real plaintiff and the real defendant. This state recognizes only three classes as legal entities, namely: (1) natural persons; (2) an artificial person (a corporation); and (3) such quasi-artificial persons as the law recognizes as being capable to sue.' *Georgia Insurers Insolvency Pool,* 368 S.E.2d at 502 (quoting *Cravey v. Southeastern Underwriters Ass'n,* 105 S.E.2d 497, 500 (Ga.1958)). The Eleventh Circuit has advised that '[s]heriff's departments and police departments are not usually considered legal entities subject

to suit....' *Dean v. Barber,* 951 F.2d 1210, 1214 (11th Cir.1992). In *Shelby v. City of Atlanta,* the Northern District of Georgia stated that a claim could not be brought against a police department: Plaintiff cannot state a claim against the City of Atlanta Police Department because the Department is not a proper party defendant. The Department is an integral part of the City of Atlanta government and is merely the vehicle through which the City government fulfills its policing functions. For this reason, the Department is not an entity subject to suit and plaintiff's claim against it is hereby dismissed. . .Based upon Georgia law and cases from this circuit, the Court can find no basis for allowing Plaintiff to sue the Midville Police Department. Therefore, it is DISMISSED. . . . . The Court dismissed the Burke County Sheriff's Department on June 6, 2002 because it is not a legal entity amenable to suit.").

Mladek v. Day, 293 F.Supp.2d 1297, 1304 (M.D. Ga. 2003) ("The Eleventh Circuit has recently held in a divided decision that Georgia sheriffs and their deputies are entitled to official immunity under the Eleventh Amendment to the Constitution for claims arising from their use of 'force policies' in the operation of county jails. *Manders v. Lee,* 338 F.3d 1304 (11th Cir.2003). The Eleventh Circuit's ruling, however, is clearly not limited to the operation of jails. Based upon an exhaustive review of Georgia law, the Eleventh Circuit found that Georgia sheriffs act as 'state officers' in a variety of functions and when they 'wear these state hats,' they are entitled to official immunity. The Eleventh Circuit explained that the proper inquiry is whether the Sheriff (or his deputy) acted for the state in the particular function at issue in the case. *Id.* at 1308-09. Although the precise function at issue in *Manders* was the implementation of a force policy in the operation of a county jail, the Eleventh Circuit made it clear that it found no distinction between that function and the law enforcement function performed by sheriffs when they arrest citizens for violations of the law. *Id.* at 1310, 1313. Therefore, the Court finds in this case that, based upon the rationale of *Manders,* Defendant Day was wearing a 'state hat' at the time of Mr. Mladek's arrest and subsequent detention. The Court further finds that, insofar as Plaintiffs allege that Sheriff Yarbrough is liable for the manner in which Mr. Mladek was treated by Deputy Day, Sheriff Yarbrough was likewise wearing a 'state hat.' Therefore, both Day and Yarbrough are entitled to official immunity under the Eleventh Amendment for any claims brought against them in their official capacity. Moreover, the Court finds that Walton County is likewise entitled to such immunity based upon the rationale expressed in *Manders.* 338 F.3d at 1308-09. Accordingly, Defendant Walton County's motion to dismiss Plaintiff Michael Mladek's Fourth Amendment claim against it is granted. Plaintiff Michael Mladek's

Fourth Amendment claims against Deputy Day and Sheriff Yarbrough in their official capacities are likewise dismissed.").

Neville v. Classic Gardens, 141 F. Supp.2d 1377, 1382 (S.D. Ga. 2001) ("Engaging in a prosecutorial function is the act of a *State,* not a county, official. . . . Accordingly, Neville's claims against Higgins in her official capacity, and thus, the county, face dismissal.").

Frazier v. Smith, 12 F. Supp.2d 1362, 1369 (S.D. Ga. 1998) ("Under Georgia law, sheriffs are vested with ultimate authority in employment decisions. . . . There is no evidence before the Court to support the conclusion that Sheriff Smith is an agent of Camden County, or that the County ultimately is liable for his misconduct. Construing the facts in the light most favorable to Plaintiff, the actions brought against Sheriff Smith, in his official capacity, and the Camden County Board of Commissioners are not redundant, and both should proceed.").

II. METHODS OF ESTABLISHING LOCAL GOVERNMENT LIABILITY AFTER *MONELL*

A. Liability Based on Policy Statements, Ordinances, Regulations or Decisions Formally Adopted and Promulgated by Government Rulemakers

The clearest case for government liability under ***Monell*** is the case like ***Monell*** itself, where an unconstitutional policy statement, ordinance, regulation or decision is formally adopted and promulgated by the governing body or a department or agency thereof. In ***Monell***, the Department of Social Services and the Board of Education had officially adopted a policy requiring pregnant employees to take unpaid maternity leaves before medically necessary. *See also* ***City of Newport v. Fact Concerts, Inc.***, 453 U.S. 247 (1981) (vote of City Council to cancel license for rock concert); ***Owen v. City of Independence***, 445 U.S. 622 (1980) (personnel decision made by City Council constitutes official city policy). Note that in both ***Fact Concerts*** and ***Owen***, decisions officially adopted by the government body itself need not have general or recurring application to constitute official "policy."

1. Examples of "Official Policy" Cases

Lanier v. City of Woodburn, 518 F.3d 1147, 1148 (9th Cir. 2008) ("This appeal requires us to decide whether the City of Woodburn's policy requiring candidates of

choice for city positions to pass a pre-employment drug test as a condition of the job offer is constitutional, facially or as applied to Janet Lynn Lanier, the preferred applicant for a part-time position as a page at the Woodburn Library. The district court held that it was not. We agree that Woodburn's policy is unconstitutional as applied because the City failed to demonstrate a special need to screen a prospective page for drugs, and affirm on this basis. By the same token, Lanier did not show that the policy could never be constitutionally applied to any City position. We reverse the district court's order to the extent it implies otherwise, and remand for its declaratory judgment to be clarified so that it is consistent with our holding.").

Maddux v. Officer One, No. 01-20881, 2004 WL 436000, at *19 (5th Cir. Mar. 9, 2004) (unpublished) ("The written policy condoned forcible entry of a third-party premises despite the absence of the *Steagald* exceptions, and certain testimony in the record causes us to question whether the City in practice went any further in protecting the privacy interests of third parties caught in the melee.")

O'Brien v. City of Grand Rapids, 23 F.3d 990, 1004 (6th Cir. 1994) ("Grand Rapids followed the routine practice of not securing warrants during the management of critical incidents. The trouble is that this policy was illegal.")

Luke v. Brown, No. 1:05-CV-264-CAP, 2007 WL 4730648, at **14-16 (N.D.Ga. Feb. 23, 2007) ("[T]he court concludes that DeKalb County's policy of training its officers to shoot twice in rapid succession when confronted with a suspect who is wielding an edged weapon in a threatening manner and the suspect is approaching the officer at a distance of 21 feet or less from the officer is not facially unconstitutional. . . . Luke has cited no binding precedent establishing that the firing of a second shot immediately after the first shot renders the second shot unconstitutional under the circumstances described in DeKalb County's policy. . . . In support of her deliberate indifference argument, Luke has presented expert testimony from Tate that the generally accepted standard in contemporary law enforcement is for police departments to train officers to 'Evaluate and Shoot, Evaluate and Shoot.'. . Luke contends that the lack of evaluation between shots constituted deliberate indifference by DeKalb County. However, 'an expert's conclusory testimony does not control this court's legal analysis of whether any need to train and/or supervise was obvious enough to trigger municipal liability without any evidence of prior incidents putting the municipality on notice of that need.'. . Likewise, Luke's presentation of an expert's conclusory testimony cannot control the court's legal analysis of whether the alleged inadequacies of DeKalb County's policy

was obvious enough to trigger municipal liability. The Eleventh Circuit has repeatedly held 'that without notice of a need to train or supervise in a particular area, a municipality is not liable as a matter of law for any failure to train or supervise.'. . Although there is clearly a need to train officers with respect to the constitutional limitations regarding the use of deadly force, . . . it is undisputed that DeKalb County does provide training with respect to the use of deadly force. Luke, moreover, has failed to present any evidence that DeKalb County's decision to train its officers to use the double-tap method when a suspect is advancing on them from a distance of 21 feet or less wielding a knife in a threatening manner has led to prior constitutional violations or illegal use of excessive force. Aside from Bates' experience, Luke presented no evidence of a single prior incident in which a DeKalb County police officer caused an injury by excessive force because of the double-tap method. Although Bates' circumstances are unfortunate, Luke has failed to present any evidence from which the jury could find that the DeKalb County created a municipal policy with deliberate indifference as to Luke's constitutional rights. For this reason, DeKalb County is entitled to summary judgment on Luke's § 1983 claim.")

Richards v. Janis, 2007 WL 3046252, at *7 (E.D.Wash. Oct. 17, 2007) ("Plaintiffs presented sufficient evidence to establish a genuine issue of material fact as to whether the City of Yakima had a policy or custom serving as the moving force behind Officer Cavin's taser usage. As stated earlier, the Yakima Police Department's taser policy provides in pertinent part: 'Extra caution shall be given when considering use of a Taser on the following individuals: juveniles under 16 years of age, pregnant females, elderly subjects, handcuffed persons, and persons in elevated positions.' . . Chief Granato interpreted the Department's taser policy as allowing tasering suspects who are handcuffed as long as they are not standing. . . Officer Cavin cannot recall any YPD restrictions on tasering handcuffed individuals . . . By contrast, the National Law Enforcement Policy Center's model policy prohibits tasering a handcuffed prisoner 'absent overtly assaultive behavior.' . . . Based on Officer Cavin's taser usage history, the Department's apparent acquiescence to Officer Cavin's taser usage, and the Department's broad taser policy, the Court concludes a genuine issue of material fact exists regarding whether the Department had a well-settled policy serving as the moving force behind Officer Cavin's taser use. There is also evidence the City of Yakima ratified the officers' conduct toward Mr. Richards. Yakima Detective Feuhrer received statements of eye witnesses Mick Edvalson, Carli Edvalson, Jennifer Sharp, Sherrie Mathers, Tammie West, and Mike Fairbairn. Declarations of these witnesses to this Court stated Mr. Richards never resisted arrest and the officers' conduct was generally abhorrent. Nevertheless,

Detective Fueherer did not request an internal investigation and did not give the witness statements to the prosecuting attorney. . . Failure to conduct an internal investigation demonstrates the Department may condone or has ratified the officers' conduct. . . For this reason, the Court also concludes a genuine issue of material fact exists regarding whether the Department has ratified the officers' conduct.").

Platte v. Thomas Tp., 504 F.Supp.2d 227, 241 (E.D.Mich. 2007) ("[T]here is a sufficient connection between the conduct described in the complaint and the State's policy encouraging the use of PBTs upon minors in the absence of a warrant or an excuse for not obtaining one to subject the state defendants to the prospective relief sought against them by the plaintiffs.")

Meir v. McCormick, 2007 WL 1725701, at *9 (D. Minn. June 15, 2007) ("Policy No. 1.01.22.09 sets forth specific characteristics to help an officer to limit his or her exposure to liability. . . The specific characteristics include 'prepare all official reports with your legal risks in mind,' 'provide information that counters the tactics of adversarial attorneys,' 'articulate details and perceptions that defend your position,' and 'do and say things that will make you win on the street and in court.'. . The Court concludes that, accepting the facts alleged by Meir as true, a reasonable jury could find that McCormick's use of unreasonable force and subsequent 'cover-up' that included naming Derouin as a victim, omitting Koons as a witness, including untruths in an official report, and overcharging Meir with criminal offenses flowed directly from the City's unconstitutional policy. The City's argument that another portion of the policy directs officers not to violate the constitutional rights of citizens does not cure the deficiencies of the policy directives clearly placing officer liability concerns above accuracy in report writing.")

Rauen v. City of Miami, No. 06-21182-CIV, 2007 WL 686609, at *10 (S.D. Fla. Mar. 2, 2007) (written and unwritten "plans and agreements, the purpose of which was to stifle protest at the FTAA.")

Tardiff v. Knox County, 397 F.Supp.2d 115, 131 (D.Me. 2005) (holding unconstitutional written policy of strip searching all felony detainees charged with non-violent, non-weapon, or non-drug offenses)

Rose v. Saginaw County, 353 F.Supp.2d 900, 923 (E.D. Mich. 2005) ("The Court finds, therefore, that the plaintiffs have shown that the defendants' policy of taking all the clothing from detainees confined in administrative segregation violates the

Fourth and Fourteenth Amendments of the Constitution based on the undisputed facts.")

Hanno v. Sheahan, No. 01 C 4677, 2004 WL 2967442, at *11, *12 (N.D. Ill. Nov. 29, 2004) ("[D]epartment policy of conducting warrantless searches during evictions is sufficient to establish municipal liability under section 1983 in regard to the Fourth Amendment unreasonable search claims.").

But see

Johannes v. Alameda County Sheriff Dept., No. 06-16739, 2008 WL 740305 (9th Cir. Mar. 18, 2008) ((upholding blanket strip search policy of jail "providing for visual strip searches of 'inmates who have been ... outside of the secured facility ... upon return to the facility or housing unit.'")

Campbell v. Miller, 499 F.3d 711, 720 (7th Cir. 2007) ("There is nothing in this record indicating that the decision to strip-search Campbell in public was influenced in any way by the City's policy or practice. That decision appears to have been made by Officers Miller and Lamle alone, which precludes finding the City liable under § 1983.")

Szabla v. City of Brooklyn Park, 486 F.3d 385, 395, 396 (8th Cir. 2007) (en banc)("[A] claim for municipal liability premised on actions taken pursuant to an official municipal policy must demonstrate that the policy itself is unconstitutional")

Mitchell v. McNeil, 487 F.3d 374, 378 (6th Cir. 2007) (policy of allowing informants to drive an officer's private vehicle is not unconstitutional)

Victoria W. v. Larpenter, 369 F.3d 475, 477-79, 489 (5th Cir. 2004) ("prison's policy of requiring an inmate to obtain a court order to receive an elective medical procedure" not unconstitutional)

Burrell v. Hampshire County, 307 F.3d 1, 10 (1st Cir. 2002) ("Hampshire Jail's policy of not screening and then segregating potentially violent prisoners from non-violent prisoners is not itself a facial violation of the Eighth Amendment.")

Ruvalcaba v. City of Los Angeles, 167 F.3d 514, 523 (9th Cir. 1999) (Plaintiff alleged as unconstitutional the LAPD's dog-bite policy")

Sharp v. Fisher, 2007 WL 2177123, at *3 (S.D.Ga July 26, 2007) ("Whether a policy encouraged or discouraged PIT maneuvers, it simply does not matter in this context. *See Abney v. Coe,* --- F.3d ----, 2007 WL 1893378 at * 7 (4th Cir.7/3/07). A policy that leaves individual officers the discretion to perform PIT maneuvers does not violate the Fourth Amendment because whether such a maneuver can legally be performed depends on the circumstances surrounding a given chase, *Scott,* 127 S.Ct. at 1777-78, which will only be known by the officer involved in the chase.")

Ott v. City of Mobile, 169 F. Supp.2d 1301, 1313 (S.D.Ala. 2001) ("The City has a formal policy requiring off duty officers to carry a firearm. . . The City has another formal policy prohibiting off duty officers subject to department recall or mobilization from consuming alcohol to an extent that would render them incapable of proper performance if called to duty. . . The plaintiffs argue that these policies allow off duty police officers to drink and require them to carry firearms while doing so. The plaintiffs further argue that these policies were the 'moving force' behind Gamble's allegedly unconstitutional actions. . . . The plaintiffs have not asserted, much less established, that the City's firearms and alcohol policies, separately or in tandem, are themselves unconstitutional.")

2. **Whose Policy is It?**

a. Local Officials Enforcing State Law

It is important that the challenged policy statement, ordinance, regulation, or decision be adopted or promulgated by the local entity. A local government's *mere enforcement* of state law, as opposed to express incorporation or adoption of state law into local regulations or codes, has been found insufficient to establish ***Monell*** liability. ***Surplus Store and Exchange, Inc. v. City of Delphi***, 928 F.2d 788, 793 (7th Cir. 1991). *See also* ***Gottfried v. Medical Planning Services, Inc.,*** 280 F.3d 684, 693 (6th Cir. 2002) ("Sheriff Alexander's obligations under the state court injunction clearly flow from the State. He did not have any discretionary authority regarding the state court injunction. Rather, he was bound to enforce it by its terms and there is no evidence that it was ever enforced otherwise. As such, any action taken in connection with the injunction would be action taken as an arm of the State for which Sheriff Alexander would be entitled to Eleventh Amendment immunity. . . . Indeed, it is the state court injunction that allegedly caused [Plaintiff's] injury, not any 'policy' or 'custom' of the state, city or county, and the Sheriff acted as an arm of the state in enforcing it."); ***Bethesda Lutheran Homes and Services, Inc. v. Leean***, 154 F.3d

716, 718 (7th Cir. 1998) ("When the municipality is acting under compulsion of state or federal law, it is the policy contained in that state or federal law, rather than anything devised or adopted by the municipality, that is responsible for the injury. Apart from this rather formalistic point, our position has the virtue of minimizing the occasions on which federal constitutional law, enforced through section 1983, puts local government at war with state government. . . . [T]he state of mind of local officials who enforce or comply with state or federal regulations is immaterial to whether the local government is violating the Constitution if the local officials could not act otherwise without violating state or federal law. The spirit, the mindset, the joy or grief of local officials has no consequences for the plaintiffs if these officials have no discretion that they could exercise in the plaintiffs' favor."); ***Pusey v. City of Youngstown***, 11 F.3d 652, 657 (6th Cir. 1993) ("City prosecutors are responsible for prosecuting state criminal charges ... Clearly, state criminal laws and state victim impact laws represent the policy of the state. Thus, a city official pursues her duties as a state agent when enforcing state law or policy."), *cert. denied*, 114 S. Ct. 2742 (1994); ***Woods v. City of Michigan City, Indiana***, 940 F.2d 275, 279 (7th Cir. 1991) (state judge's bond directive was not policy of City or County); ***Echols v. Parker***, 909 F.2d 795, 801 (5th Cir. 1990) ("county official pursues his duties as a state agent when he is enforcing state law or policy"); ***Lui v. Commission on Adult Entertainment Establishments of the State of Delaware,*** 213 F.R.D. 166, 174, 175 (D. Del. 2003) ("Under Delaware constitutional, statutory, and decisional law, the County acts only as an agency of the State in exercising its zoning authority. . . . The County simply has no alternative but to maintain and enforce the State's policy in this regard. It would be a strange and unfair result, then, to hold that the State is immune from suit for imposing the 2,800 foot restriction but to simultaneously allow the County to be sued for following a State mandate that requires the same restriction."), *aff'd on other grounds,* 369 F.3d 319 (3d Cir. 2004); ***Johnson v. Fink,*** No. 1:99-CV-35-R, 1999 WL 33603131, at *3 (W.D. Ky. Sept. 17, 1999) (not reported) ("Kentucky sheriffs are county officials. However, the particular actions at issue are attributable to the state, and thus, the sheriffs were acting as state officials when they were executing the search warrant."); ***West v. Congemi***, 28 F. Supp.2d 385, 394, 395 (E.D. La. 1998) ("The Fifth Circuit has long recognized that simply following the mandatory dictates of state law cannot form a predicate for *Monell* liability. . . . Chief Congemi was enforcing a constitutional Louisiana state statute, the terms of which mandate termination in the situation at issue. Once it was found that the actions of the plaintiff fell under the definition of proscribed 'direct or indirect' political activity, then the plaintiffs' § 1983 claims against the City of Kenner must necessarily fail."); ***Hill v. Franklin County, Ky.***, 757 F. Supp. 29, 32 (E.D. Ky. 1991) (decision

to release intoxicated arrestee was not result of county policy where arrest and release policy was governed by state statutes), *aff'd*, 948 F.2d 1289 (6th Cir. 1991) (Table).

b. Local Government Liability Where Local Entity Exercises Discretion or Control Over Enforcement of State Law

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See ***Cooper v. Dillon,*** 403 F.3d 1208, 1222, 1223 (11th Cir. 2005) ("Similarly, we reject Dillon's argument that, based on the reasoning in *Surplus Store & Exchange, Inc. v. City of Delphi*, 928 F.2d 788, 791 (7th Cir.1991), Key West cannot be liable for enforcing an unconstitutional state statute which the municipality did not promulgate or adopt. First,§ 1983 liability is appropriate because Key West did adopt the unconstitutional proscriptions in Fla. Stat. ch. 112.533(4) as its own. *See* Key West, Fla., Code of Ordinances §42-1 ('It shall be unlawful for any person to commit, within the city limits, any act which is or shall be recognized by the laws of the state as an offense.'). Second, *Surplus Store* is inapposite because it involved the enforcement of a state statute by a municipal police officer who was not in a policymaking position. . . In this case, by contrast, Dillon was clothed with final policymaking authority for law enforcement matters in Key West and in this capacity he chose to enforce the statute against Cooper. While the unconstitutional statute authorized Dillon to act, it was his deliberate decision to enforce the statute that ultimately deprived Cooper of constitutional rights and therefore triggered municipal liability. . . Thus, Dillon's decision to enforce an unconstitutional statute against Cooper constituted a 'deliberate choice to follow a course of action ... made from among various alternatives by the official or officials responsible for establishing final policy.' . . Accordingly, we find that the City of Key West, through the actions of Dillon, adopted a policy that caused the deprivation of Cooper's constitutional rights which rendered the municipality liable under §1983."); ***Denton v. Bedinghaus,*** No. 00-4072, 2002 WL 1611472, at *4 (6th Cir. July 19, 2002) (unpublished) ("Whether a local government official or entity acts as an alter ego of the state for Eleventh Amendment purposes depends on the state-law definition of that official's or entity's functions. . . .Here, defendants argue that when they were enforcing the orders of a state court, they acted as alter egos of the state and were entitled to Eleventh Amendment immunity. Defendants' argument comes undone before we can fully address the merits of their Eleventh Amendment defense. The amended complaint alleges that defendants initiated and carried out the confiscation policy at issue. As explained above, based on those allegations, defendants were acting independently of a state-court order."); ***Richman v. Sheahan,***270 F.3d 430, 439, 440 (7th Cir. 2001) ("In determining whether the sheriff is an agent of Illinois

government when performing particular functions, we have looked to the degree of control exercised by Illinois over the conduct at issue and whether the Eleventh Amendment policy of avoiding interference with state (as opposed to county) policy is offended by the lawsuit. . . . Richman's claim against the sheriff's office is based on its alleged unconstitutional policy (its failure adequately to train and supervise the deputies in deliberate indifference to the plaintiff's rights) regarding the use of force when arresting persons in the courtroom pursuant to a judge's order. Therefore, we must determine whether that alleged policy represents state policy or instead county policy. . . . The sheriff has no discretion in whether to obey a judge's orders, but we are aware of no state policy directing the sheriff's actions regarding the training and supervision of deputies in the use of force in carrying out state court orders. The evidence may show otherwise, but at this stage of the proceedings, we cannot conclude as a matter of law that the alleged unconstitutional policy represents state policy."); ***DePiero v. City of Macedonia***, 180 F.3d 770, 786, 787 (6th Cir. 1999) ("Municipalities that meet the requirements of Ohio Rev.Code § 1905.01 are authorized to convene mayor's courts. The statute does not, however, require a municipal corporation or its mayor to establish or maintain a mayor's court. . . . In this case, the Mayor of Macedonia is undeniably vested with the authority to make official policy regarding whether to hold and how to structure a mayor's court. . . . A mayor's decision whether to hold a mayor's court at all, and if so, whether to preside over it one's self, appoint a magistrate, or perhaps do both, are policy decisions addressing the administration of the municipality. We therefore hold that the City of Macedonia is not immune from liability for plaintiff's deprivation of due process."); ***Brotherton v. Cleveland***, 173 F.3d 552, 563-67 (6th Cir. 1999) ("Ohio law permitted Dr. Cleveland to harvest corneas, but it did not prescribe a specific policy, especially not one which sought to prevent eye bank technicians from inquiring about objections to corneal removal. [footnote omitted] We see this case as controlled more by our decision in *Garner v. Memphis Police Department*. . . than by *Pusey*. . . .Ohio law allowed Dr. Cleveland to harvest corneas in the course of his actions as a county coroner, but it did not dictate a method. Dr. Cleveland, acting without state compulsion, chose to harvest corneas, and he selected a policy for Hamilton County; he thus acted as an agent of Hamilton County, not of Ohio."); ***Doby v. DeCrescenzo***, 171 F.3d 858, 868, 869 (3d Cir. 1999) ("The Dobys' suggestion that the enforcement procedures should be considered a municipal or county, rather than a state, policy has merit; because the statute itself does not specify how the county delegate is to receive information and issue warrants, LVF and the county presumably have some discretion in deciding how to implement the warrant application procedure. The *Garner* court found the existence of such discretion

determinative in deciding that a municipality could be held liable for enforcing the use of deadly force by its police officers. Ultimately, however, we believe that we need not decide whether a county or state policy is at issue because we conclude that the enforcement policy adopted by LVF and the county is constitutional."); ***McKusick v. City of Melbourne***, 96 F.3d 478, 484 (11th Cir. 1996) ("We agree with McKusick that the development and implementation of an administrative enforcement procedure, going beyond the terms of the [state court] injunction itself, leading to the arrest of all antiabortion protestors found within the buffer zone, including persons not named in the injunction nor shown by probable cause to be acting in concert with named parties, would amount to a cognizable policy choice.");***Garner v. Memphis Police Dep't***, 8 F.3d 358, 364 (6th Cir. 1993) (court rejects defendants' argument that they had no choice but to follow state fleeing felon policy, holding that "[d]efendants' decision to authorize use of deadly force to apprehend nondangerous fleeing burglary suspects was, . . . a deliberate choice from among various alternatives...."), *cert. denied*, 114 S. Ct. 1219 (1994); ***O'Donnell v. Brown***, 335 F.Supp.2d 787, 816, 817 (W.D. Mich. 2004) ("The City Defendants inaptly depict the policies or customs that the police followed in entering the O'Donnell home and removing the children as those of Child Protective Services (a state agency), not of the Police Department (an entity of the City of Lansing). They contend that no Police Department policies or customs were the moving force behind the alleged violations of Plaintiff's constitutional rights. Rather, they argue, they acted based on the CPS policy that verbal authorization by a referee was adequate for entry and removal of the children. The Court rejects this characterization. There can be no question that the Lansing Police Department officers worked according to and under the authority of the Lansing Police Department's policies, and not CPS's. It is true that the family court issued orders relating to the removal of children and that CPS workers took children into custody. But it was police officers who actually performed the act of forcibly entering the home to assist in executing the court order. In fact, CPS social workers, as they themselves acknowledge, cannot go into a home to remove children unless the police lead them in. The family court may have had a 'policy' of issuing verbal orders, but it was the Police Department's 'policy' to assist CPS in carrying out those orders--and it was that departmental policy that resulted in constitutional harms to Plaintiffs in this case and thus implicates the City Defendants."); ***Laurie Q. v. Contra Costa County,*** 304 F.Supp.2d 1185, 1199-1202 (N.D. Cal. 2004) ("Defendant has failed to recognize the distinction between a government actor who *correctly and faithfully* carries out a policy set by the state, and one who commits *non-state-sanctioned violations* of law in the course of her duties under a state program. When the County *accurately* applies the state's

mandatory foster care payment schedule (or when a law enforcement officer serves a warrant pursuant to a mandate from a state court), it acts as the former, and a plaintiff may seek recourse only against the state for establishing the policy. However, if the County *incorrectly* calculates benefits or embezzles funds from foster children (or when a law enforcement officer *unlawfully assaults* a suspect taken into custody pursuant to a mandate from state court), it acts as the latter, and a plaintiff may seek recourse against the County. . . . The court finds that the County acts as an independent policymaker (rather than a state instrumentality) for the purposes of section 1983 when it misapplies, miscalculates, or otherwise fails to distribute foster care benefits in violation of state and federal law."); ***Hale O Kaula Church v. Maui Planning Commission,*** 229 F.3d 1056, 1069 (D. Haw.2002) ("The State of Hawaii has delegated its discretionary power to grant or deny special use permits for small lots. Nothing, however, indicates it will pay or indemnify for money judgments against counties for damages for the counties' unconstitutional exercise of such discretion. The government function at issue is a County function, even if done pursuant to the State Land Use Law."); ***Allen v. Leis,*** 154 F. Supp.2d 1240, 1263, 1264 (S.D. Ohio 2001) ("Where county officials are sued simply for complying with state mandates that afford no discretion, they act as an arm of the State. . . . In contrast, this case implicates Sheriff Leis and the Commissioners in their official policymaking capacity. . . Rather than merely enforcing prescribed Ohio law, the County Defendants voluntarily implemented a Pay-for-Stay Program and they chose the means of enforcing this Program using the Book-in-Fee guidelines. . . Therefore, all of the named Defendants acted as agents of Hamilton County, not of the State of Ohio."); ***Community Health Care Association of New York v. DeParle,*** 69 F. Supp.2d 463, 475, 476 (S.D.N.Y. 1999) ("The question posed on this motion is whether the County can be held responsible for the violation of federal law where its RFP [request for proposal] was approved by the HCFA [Health Care Financing Administration]. . . . Our Court of Appeals has not addressed the issue of what effect, if any, the federal government's mandate or authorization of a municipal policy has on that municipality's liability for the policy under § 1983. The Court in *Caminero*, however, conducted an extensive examination of this issue to hold that in cases in which a plaintiff alleges that a municipality violated a constitutional right by adopting an unconstitutional policy that was in some way authorized or mandated by state law, the municipality can be held liable under § 1983. . . . Likewise, where, as here, the County is responsible for administration of the Medicaid managed care program, a finding of liability on the part of the County is not inappropriate despite the Federal government's supervisory role. Here, County defendant adopted a policy, authorized by the HCFA, which did not guarantee reasonable cost reimbursement in

Medicaid managed care contracts and did not allow for its election."); ***Smith v. City of Dayton***, 68 F. Supp.2d 911, 917, 918 (S.D. Ohio 1999) ("In *Kallstrom*, the Sixth Circuit held the City of Columbus could be liable despite the fact that it, like the City of Dayton here, was carrying out an unconstitutional state-created policy, rather than its own policy. While it seems anomalous to hold a city liable for following a mandatory state law which had not yet been declared unconstitutional, the Sixth Circuit did not pause on this question. This Court accordingly assumes a municipality may be held liable under § 1983 for carrying out an unconstitutional state law, even though the law has not yet been held unconstitutional."); ***Rossi v. Town of Pelham***, No. CIV. 96-139-SD, 1997 WL 816160, *20 (D.N.H. Sept. 29, 1997) (not reported) ("Rossi claims that Pelham officials enforced New Hampshire Revised Statutes Annotated (RSA) 41:36, which requires the outgoing tax collector's documents to be surrendered to the board of selectmen, in an unconstitutional manner by deploying Officer Cunha to perform a warrantless search of Rossi's office. Thus, the 'policy' is constituted by the unconstitutional manner that Pelham officials chose to enforce state law, rather than, as in *Surplus Store*, the 'innocuous' act of enforcing state law. This Pelham policy was the moving force behind the constitutional violation, not the otherwise lawful RSA 41:36."); ***Davis v. City of Camden***, 657 F.Supp. 396, 402-04 (D.N.J.1987) (defendant county could be held liable under Section 1983 for its official adoption of an unconstitutional policy of strip searching persons in county jail even though that policy was mandated by state law).

See generally ***Caminero v. Rand***, 882 F. Supp. 1319, 1325 (S.D.N.Y. 1995) (reviewing cases in this area and concluding that cases "suggest a reasoned distinction between (1) cases in which a plaintiff alleges that a municipality inflicted a constitutional deprivation by adopting an unconstitutional policy that was in some way authorized or mandated by state law and (2) cases in which a plaintiff alleges that a municipality, which adopted no specific policy in the area at issue, caused a constitutional deprivation by simply enforcing state law. While allegations of the former type have been found to provide a basis for Section 1983 liability, [cites omitted] allegations of the latter variety may not [footnote omitted] provide a remedy against the municipality[. cites omitted]").

See also ***Vives v. City of New York***, 524 F.3d 346, 349-58 (2d Cir. 2008) ("Where a plaintiff claims a constitutional violation as a consequence of the decision of a municipality to enforce an unconstitutional state statute, blame could theoretically be allocated three ways: first, to the state that enacted the unconstitutional statute; second, to the municipality that chose to enforce it; and

third, to the individual employees who directly violated plaintiff's rights. As a practical matter, however, damages are not available against the state because it is not a person within the meaning of Section 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989). Moreover, like the individual defendants in this case, individual employees will often be able to successfully assert qualified immunity. Thus, the plaintiff will often be left to assert his damages claim only against the municipality. . . . The crux of the City's argument is that although it has a 'policy in fact' of enforcing the Penal Law, it is the State's enactment of Section 240.30(1) that caused Vives's constitutional violation. The City contends that '[a] municipality does not implement or execute a policy officially adopted and promulgated by its officers when it merely enforces the Penal Law of the State that created it.'. . . The issue of whether--and under what circumstances--a municipality can be liable for enforcing a state law is one of first impression in this circuit. It is also one of great significance both to injured citizens, who may be able to recover against a municipality when other avenues of recovery are cut off if we rule in favor of Vives, and to municipalities, which may incur significant and unanticipated liability in the same event. Like the district court, we look to the decisions of other circuits for guidance, but we bear in mind that these decisions are useful only insofar as they illuminate the foundational question of whether a municipal policymaker has made a meaningful and conscious choice that caused a constitutional injury. Three circuits--the Sixth, Ninth, and Eleventh--have issued decisions that, to varying degrees, support plaintiff's contention that a municipality engages in policy making when it determines to enforce a state law that authorizes it to perform certain actions but does not mandate that it do so. . . . While these decisions can be read to suggest that a distinction should be made between a state law mandating municipal action and one that merely authorizes it, in each case the policymaker was alleged to have gone beyond merely enforcing the state statute. . . . The City's position is supported--again to varying degrees--by Fourth, Seventh, and Tenth Circuit authority. . . . As with the cases supporting plaintiff's position, none of these decisions is squarely on point. . . . Freedom to act is inherent in the concept of 'choice.' Therefore, in addressing the conscious choice requirement, we agree with all circuits to address state laws mandating enforcement by municipal police officers that a municipality's decision to honor this obligation is not a conscious choice. As a result, the municipality cannot be liable under *Monell* in this circumstance. . . On the other hand, if a municipality decides to enforce a statute that it is authorized, but not required, to enforce, it may have created a municipal policy. However, we do not believe that a mere municipal directive to enforce all state and municipal laws constitutes a city policy to enforce a particular unconstitutional statute. In our view, the 'conscious' portion of the

'conscious choice' requirement may be lacking in these circumstances. While it is not required that a municipality know that the statute it decides to enforce as a matter of municipal policy is an unconstitutional statute, . . . it is necessary, at a minimum, that a municipal policymaker have focused on the particular statute in question. We, therefore, hold that there must have been conscious decision making by the City's policymakers before the City can be held to have made a conscious choice. . . Evidence of a conscious choice may, of course, be direct or circumstantial. . . These conclusions lead us to two subsidiary questions, neither of which can be resolved on the record before us: (1) whether the City had a meaningful choice as to whether it would enforce Section 240.30(1); and (2) if so, whether the City adopted a discrete policy to enforce Section 240.30(1) that represented a conscious choice by a municipal policymaker. . . . Among the questions on remand is whether the City had the power to instruct its officers not to enforce a portion of Section 240.30(1) because it was unconstitutional or a waste of resources, or for some other reason. . . . We found no precedent addressing the issue we believe to be controlling: whether the Police Department's policy makers can instruct its officers not to enforce a given section-or portion thereof--of the penal law. . . . In an effort to resolve our uncertainty concerning the existence of a state mandate to enforce state penal law, we directed the parties to consider whether New York City Charter § 435(a) constitutes such a mandate. It provides: The police department and force shall have the power and it shall be their duty to ... enforce and prevent the violation of all laws and ordinances in force in the city; and for these purposes to arrest all persons guilty of violating any law or ordinance for the suppression or punishment of crimes or offenses. . . . The City argues that because Section 435(a) derives from state-enacted Section 315, it 'is ... a generalized State policy, not a municipal enactment.'. . However, the City also steadfastly refuses to deny that it lacks case-by-case discretion in determining whether to enforce any particular penal statute and suggests that it can make policy decisions about which statutes to enforce in the course of allocating its resources. Focusing on the charter provision as it exists today and not on its history, Vives contends that it cannot be viewed as a mandate from the state because it was adopted by the voters of the City. . . . In light of the unclear case law and the parties' differing positions on Section 435(a), the central question of whether the City is mandated by New York State to enforce all penal laws remains unresolved. We would benefit--and we believe the district court would as well--from the New York Solicitor General's view of the obligation of the New York Police Department to enforce the Penal Law. Further, the state has an interest in this question that is not adequately represented by either of the parties. Vives, of course, seeks to maximize the City's permissible discretion. And, while it may be in the City's interest in this

case to claim that it has an overall duty to enforce the penal law, it might not be in its interest generally to argue that its discretion is constrained. Since the City's apparent concession on this point may not be definitive, we expect on remand that the district court as well as the parties would welcome the views of the New York Solicitor General on this issue. . . . We have held today that a municipality cannot be held liable simply for choosing to enforce the entire Penal Law. . . In light of that holding, we must know whether the City went beyond a general policy of enforcing the Penal Law to focus on Section 240.30(1). Section 435(a) on its face establishes that the City has a general policy of enforcing state penal law. This is not enough. However, there is some evidence--albeit not conclusive evidence--that the City did make a conscious choice to enforce Section 240.30(1) in an unconstitutional manner. This evidence is in the form of examples of how an individual can violate Section 240.30(1) that are contained in police department training manuals issued to prospective police officers. . . . Resolution of the policy issue should also resolve the issue of causation. Relying principally on *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), the City urges that the violation of Vives's constitutional rights was not caused by its intentional act. Rather, the City contends, the injury to Vives was a result of actions taken by the actors who have immunity in this case--the state, which enacted Section 240.30, and the individual officers. While we agree that *Bryan County* sets out the appropriate test for determining whether a municipal action caused a constitutional injury, we disagree with the City's claim that application of the *Bryan County* test to the facts of this case does not allow a finding that the City's policy caused Vives's injury. . . . In light of *Bryan County* and *Amnesty America*, the answer to the causation inquiry must flow from the district court's unappealed holding that Section 240.30 is unconstitutional, and the determination--yet to be definitively made--of whether a City policymaker made a conscious choice to instruct officers to enforce Section 240.30(1) when the City was not required to do so.").

c. Inter-Governmental Agreements/ Task Forces

Willis v. Neal, 2007 WL 2616918, at *9 n.9 (6th Cir. 2007) (Dowd, J., dissenting) ("[T]he Interlocal Cooperation and Mutual Aid Agreement, under which the Twelfth Judicial District Drug Task Force had enlisted the aid of the officers of these various governmental entities for this takedown, recognizes that officers do not relinquish any responsibility simply by participating in the Task Force activities. The Agreement provides, in part, as follows: 12. LIABILITIES. Officers Assigned to the Drug Task Force Remain Employees of Their Hiring Agency. Each law enforcement

officer assigned to the Drug Task Force will remain an employee of the local government by which the officer was employed prior to the assignment. The conduct and actions of such officer will remain the responsibility of the local government employing the officer. Any civil liability arising from the actions of a law enforcement officer engaged in Drug Task Force activities will be assumed by the employing local government in the same manner and to the same extent as if the actions were committed within the jurisdiction of the employing local government during the normal course of the officer's employment, independent of the Drug Task Force...."); ***Johnson v. Deep East Texas Regional Narcotics Trafficking Task Force***, 379 F.3d 293, 310, 311 (5th Cir. 2004) (" What happened at 419 Otis Street starting at about 9 a.m. on March 9, 2001, was entirely determined by DEA agent Marshall, who was in charge and whose directions all officers present were required to and did follow. . . . Marshall's decision to force entry, rather than seek entry by consent, and to do so without further information, was entirely his own decision. There is no evidence suggesting that Marshall made that decision for any reason related to any County policy or any understanding thereof which he may have had, or for any reason other than that he thought that decision to be appropriate in the light of his *own* training and experience as a DEA agent and DEA policy and procedures. Indeed the uncontradicted evidenced is that Marshall's decision in this respect was contrary to County policy and practice. If there was causative fault on the part of the authorities, the fault was Marshall's and/or the DEA's, not the County's." (footnotes omitted)); ***Young v. City of Little Rock,*** 249 F.3d 730, 736 (8th Cir. 2001) ("As the City points out, it does not operate the jail. The City of Little Rock has no jail of its own. It contracts with the County for the housing of City prisoners. What the County does with prisoners, therefore, the City says, is not its problem, and there is no vicarious liability under § 1983. Although this line of argument has some surface appeal, we do not believe that the jury had to accept it. City employees were aware of the custom of chaining prisoners, and they knew that Ms. Young was being taken back to the jail. Strip searching of prisoners is routine procedure, and the jury could reasonably infer that the City knew that a person entering the jail, in jail clothing with a group of other detainees, would be strip searched. In these circumstances, it is far from unfair to attribute to the City the policies routinely used by the County jail in the housing and processing of City prisoners."); ***Eversole v. Steele***, 59 F.3d 710, 716, 717 (7th Cir. 1995) ("The law enforcement officers involved in the RUFF Drug Task Force, including Detectives McQuinley and Sherck, were acting pursuant to the rules and regulations of their respective law enforcement agencies, in this instance the Fayette County Sheriff's Department and the Connersville Police Department but were not acting pursuant to any policies established by the RUFF Drug Task Force.

The RUFF Drug Task Force was simply a multi-jurisdictional effort of law enforcement agencies joined together in a coordinated effort to stop or at least control drug activity in the four-county area. Each participant in the Task Force remained obliged to follow the rules and regulations of his or her respective law enforcement agency. . . . Because the Task Force was nothing more than a joint effort of four counties in the State of Indiana to implement existing law enforcement policies, no new or unique policies were needed."); ***Cutter v. Metro Fugitive Squad***, No. CIV-06-1158-GKF, 2008 WL 4068188, at *12 (W.D. Okla. Aug. 29, 2008) ("[A]n intergovernmental task force made up of various local, county and state agencies may be subject to suit under § 1983 if the parties that created it intended to create a separate legal entity. . .It is premature to determine at this stage of the proceedings whether MFS is subject to suit under § 1983. There is no record evidence regarding the creation of MFS, whether the creators of MFS intended to establish a separate legal entity subject to suit, whether there is a joint operating agreement among the government entities, whether MFS has an independent operating budget, whether its member entities retain responsibility for the employment, salary, benefits, and terms and conditions of all employees, whether MFS is vested with policymaking authority or has promulgated any rules or regulations for the law enforcement activities of its members, or whether the MFS participants remain obliged to follow the rules and regulations of his or her respective law enforcement agency. . . Thus, MFS's motion to dismiss on the basis that it is not an entity subject to suit under § 1983 is denied without prejudice to reassertion in a motion for summary judgment."); ***Pettiford v. City of Greensboro***, No. 1:06cv1057, 2008 WL 2276962, at *13, *17, *23 (M.D.N.C. May 30, 2008) ("The City argues that Plaintiffs could not 'establish that the municipality actually caused the alleged constitutional deprivation' because any harm suffered by Plaintiffs occurred at the direction of the Federal Parties rather than pursuant to its own official policy or custom. . . . At oral argument, the City was hard-pressed to identify a legal framework for analyzing whether its employees acted as federal agents during the underlying investigation of the Pettifords and whether such a determination, if found, compels dismissal for want of subject matter jurisdiction based on derivative federal immunity. . . . The court has conducted independent research, which demonstrates that other courts have articulated at least four frameworks to determine whether a local law enforcement officer or official may be deemed a federal agent for purposes of tort liability: (1) statutory cross-deputation; (2) totality of the circumstances; (3) borrowed servant doctrine; and (4) government contractor defense. Although these frameworks arise in different contexts, they share common principles, especially the emphasis on day-to-day control or supervision of the employee(s) in question. [The court engages is a lengthy discussion of each.] . .

. . In sum, on the present record the City continues to face legal and factual hurdles in its quest to benefit from derivative federal sovereign immunity. Cooperation between federal and local authorities is critical to effective law enforcement, and the court is sensitive to the need to encourage, not hinder, such efforts. It is for this reason that the court engaged in the lengthy analysis above based on research independent from the parties' briefing. . . . The above analysis reveals that the City's motion as styled is misdirected. The question is not whether the City, the sole defendant, is immune because it was acting as a federal agent. Rather, because no liability lies under section 1983 for actions taken under color of federal law, . . . the real issue for the City is whether it can show that Plaintiffs cannot prove an element of their section 1983 claim--that the City acted under 'color of state law'--because all the GSO PD officers involved were allegedly acting as federal agents. The City's motion, therefore, is more properly made on summary judgment, after discovery and based on a more fully developed record. Accordingly, the City's motion to dismiss the section 1983 claim for want of subject matter and personal jurisdiction based on derivative sovereign and prosecutorial immunities is DENIED, without prejudice to its being raised on summary judgment."); ***Arias v. U.S. Immigration and Customs Enforcement Div. of Dept. of Homeland Sec***, Civ. No. 07-1959 ADM/JSM, 2008 WL 1827604, at *13-*15 (D. Minn. Apr. 23, 2008) ("The City Defendants contend that Plaintiffs' individual-capacity § 1983 claims against them must be dismissed. As a threshold matter, the Court must consider whether § 1983 even applies in this case. The City Defendants assert they were assisting ICE agents in enforcing the immigration laws. . . Congress has addressed this situation in 8 U.S.C. § 1357, which 'specifically empower[s] the Attorney General ... to contract with state and local agencies for assistance in enforcing immigration laws and incarcerating illegal aliens.' . . A formal agreement is unnecessary for a state or local officer 'to communicate with the Attorney General regarding the immigration status of any individual ... or otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.' 8 U.S.C. § 1357(g)(10). 'In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.' 8 U.S.C. § 1357(g)(3). Significantly, Congress has provided that '[a]n officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.' 8 U.S.C. § 1357(g)(8). The Second Amended Complaint

alleges that the City Defendants assisted in the planning and execution of Operation Cross Check, which is a DHS operation implemented by ICE. Although the City Defendants apparently assume that § 1983 applies, it is difficult to discern how their participation in Operation Cross Check occurred under color of state law. Instead, it appears from Plaintiffs' allegations that the City Defendants acted under color of federal authority pursuant to 8 U.S.C. § 1357(g)(8). If so, then Plaintiffs' § 1983 claims should be construed as *Bivens* claims. . . . Although the parties have not briefed the issue, Congress's statutory directive in § 1357(g)(8) is clear. Accordingly, assuming Plaintiffs' allegations are true, the Court finds that the City Defendants were acting under color of federal authority . . . . [T]o the extent Plaintiffs are asserting that Kulset and Reed Schmidt are liable as supervisors, the Court finds Plaintiffs' allegations fail to state a claim. Under 8 U.S.C. § 1357(g)(3), any Willmar or Atwater officers who assisted ICE in executing Operation Cross Check did so under 'the direction and supervision of the Attorney General.' Because officers of the federal government supervised the Willmar and Atwater police officers during Operation Cross Check, Kulset and Reed Schmidt cannot be liable as supervisors. . . . Although the City Defendants do not address the full implication of 8 U.S.C. § 1357(g), the Court finds that the statute bars Plaintiffs' *Monell* claims against the City Defendants in their official capacities. Plaintiffs seek to hold the City Defendants liable in their official capacities for assisting ICE in implementing Operation Cross Check, which is a federal immigration initiative executed pursuant to federal policy. The City Defendants' assistance falls squarely within the ambit of § 1357(g). Accordingly, the City Defendants are considered to be acting under color of federal authority and under the supervision of the Attorney General and the DHS Secretary. . . Therefore, Plaintiffs cannot assert a 42 U.S.C. § 1983 *Monell* claim because the City Defendants were not acting under color of state law, and they were not the final policymakers regarding Operation Cross Check. Alternatively, even if § 1357(g) does not apply, Plaintiffs have still failed to allege a city policy that was the moving force behind the alleged constitutional violations. Plaintiffs' claims arise from the federal policies embodied in the planning and implementation of Operation Cross Check, and not from any city or county policies. . . The Court grants the City Defendants' motion to dismiss the official-capacity *Bivens* claims against them."); ***Howell v. Polk***, No. 04-CV-2280-PHX-FJM, 2006 WL 463192, at *1, *8 & n.8, *14 (D. Ariz. Feb. 24, 2006) ("The Prescott Area Narcotics Task Force ("PANT") is an intergovernmental organization comprised of Yavapai County area municipalities and aimed to reduce unlawful narcotics activities. . . . The PANT Board governs the PANT. . . Plaintiffs claim that the PANT Board is responsible for training all PANT officers, and that all Board Defendants are liable for failing to adequately train all

PANT Defendants with regard to the execution of search warrants. There is no evidence to show that PANT Board members were only responsible for the functioning of the PANT with regard to PANT officers employed by a common municipality. . . .The intergovernmental agreement which established the PANT states that "each [municipality] shall be solely responsible for its own acts or omission and those of its officers and employees by reason of its operations under this agreement." . . . While this provision may affect the distribution of ultimate liability among the parties to the agreement, it cannot supplant federal constitutional law with regard to supervisor liability. . . . Therefore, with regard to this claim, it is irrelevant whether Board Defendants and PANT Defendants are employed by the same municipality. . . . Plaintiffs also claim that all defendants are liable in their official capacities, by which plaintiffs claim that the municipalities for which each defendant works failed to properly train PANT defendants with regard to the execution of search warrants. . . . As with regard to plaintiffs' claims against Board Defendants, there is insufficient evidence from which to conclude that the need for more or different training was so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the municipalities for which each defendant worked were deliberately indifferent to the need for training."); ***Johnson v. Bd. of Police Commissioners,*** 370 F.Supp.2d 892, 902 (E.D. Mo. 2005) ("Plaintiffs allege that Defendants City of St. Louis and Police Board acted in concert pursuant to a 'policy or persistent, common, and well-settled practice and custom of intimidating and driving homeless and homeless appearing people from downtown St. Louis,' which has resulted in a pattern of misconduct by Defendant City of St. Louis and its employees. . . . Defendant City of St. Louis claims it has no legal authority to create policy for Defendant Police Board. Without legal authority, the City of St. Louis argues that there is no 'legal tie' between Defendants City of St. Louis and Police Board, and Defendant City of St. Louis cannot be liable for alleged actions taken by police officers. Notwithstanding this assertion, the Court finds that the fact that the Defendants are separate legal entities does not prevent them from acting in concert to deprive constitutional rights pursuant to a joint policy or custom, as alleged in the Complaint. . . Plaintiffs have alleged that Defendant City of St. Louis developed, and acted together with Defendant Board of Police, to implement the policies responsible for the alleged unconstitutional conduct at issue in this case. The fact that Defendant Police Board and Defendant City of St. Louis are separate legal entities does not warrant dismissal. Plaintiffs have adequately alleged the elements of municipal liability.); ***Pond v. Bd. of Trustees,*** No. 1:03-CV-755-LJM-VSS, 2003 WL 23220730, at *4 (S.D. Ind. Nov. 25, 2003) ("Because the Muncie Police Department did not have the authority to set policy for the Ball State officers, Pond cannot argue

that action pursuant to a Muncie Police Department policy caused the Fourth Amendment violation. In addition, the jurisdiction extension Agreement between the Muncie Police Department and Ball State did not give Muncie policymaking authority over Ball State's Police Department. Indiana law limits the jurisdiction of university police officers to a university's real property, but allows municipal police chiefs like Chief Winkle to grant them additional jurisdiction. . . In accordance with § 20-12-3.5-2, Chief Winkle granted the Ball State police officers jurisdiction throughout Muncie. The additional jurisdiction provision is contained in the same chapter of the Indiana Code that grants the board of trustees the ability to appoint and set policy for university police officers, and nothing in the chapter indicates that a grant of additional jurisdiction by the relevant law enforcement agency would divest the board of trustees of policymaking authority over the university officers."); ***Tyson v. Willauer,*** No. 301CV01917(GLG), 2003 WL 22519876, at *2 n.4 (D.Conn. Nov. 1, 2003)(not reported) ("[A]t all times relevant to plaintiffs' complaint, Willauer was acting in his capacity as a deputized DEA Task Force Agent, not as a Bloomfield police officer. It is highly questionable as to whether plaintiffs could establish any causal link between any policy of the Town and the actions of Willauer that resulted in their alleged constitutional deprivations."); ***Silberberg v. Lynberg,*** 186 F.Supp.2d 157, 170 n.11 (D. Conn. 2002) ("The court notes that the town defendants can be liable, in cases such as this, as the 'real parties in interest' behind the VSCU [Valley Street Crime Unit]. . . As the court indicated when it dismissed the VSCU as a party, the formation of an interlocal agreement does not create an independent legal entity capable of being sued. . . But that does not mean that simply by acting jointly, the towns can escape all liability for their actions. Several of the town defendants have argued that because no officer from that particular town was involved in the arrest or prosecution of Silberberg, the town can not be liable. However, the towns, as the 'real parties in interest', may be liable for any unlawful actions taken by the VSCU."); ***Ford v. City of Boston,*** 154 F. Supp.2d 131, 148-50 (D. Mass. 2001) ("City liability for the Jail searches of BPD arrestees poses an interesting question of institutional responsibility. . . . The plaintiffs point to an express agreement between the City and the County Sheriff, under which the County agreed to 'take custody of and house' BPD arrestees at the Jail. This case is thus best analyzed as involving a subcontract between the City and the County, under which Jail employees, acting as agents of the City, supervised and cared for City arrestees. . . As such, the City had an affirmative obligation--as is present in the more standard models for municipal liability--to ensure that the policy of the Jail officials did not lead to widespread violation of BPD arrestees' constitutional rights. . . . Having established that the City had an affirmative obligation to monitor conditions for BPD

arrestees housed at the Jail, I must next assess whether the City failed to meet that obligation. In so doing, I find the 'deliberate indifference' standard of *City of Canton* readily applicable. . . . [T]he City effectively used the County Jail as its own facility for almost a decade. To permit the City to escape liability in this case would be to sanction willful disregard of municipal obligations. The City presumably could have chosen to build a municipal facility for women, or to hold arrestees in one of the ten existing City police station lockups. . . That it chose instead to contract with the County to house female arrestees did not entitle it to bury its head in the sand and ignore the manner in which the County treated those arrestees. . . . Under these circumstances, there can be no question that the City's liability in damages for Jail violations of BPD arrestees' Fourth Amendment rights is coextensive with that of the County.").

But see ***Deaton v. Montgomery County, Ohio***, 989 F.2d 885, 888-90 (6th Cir.1993) ("The duty to manage and operate the facility belongs to the City and the custom or policy it chooses to implement does not become that of the County because the City has separate statutory authority to house prisoners. Therefore, any constitutional violations of the plaintiffs' rights were the result of City, not County, policy. . . . The interdependence in this instance does not make the County a joint participant since each governmental entity is required to be in compliance with Ohio law. Moreover, because each entity is required to be in compliance with Ohio law, we do not believe the County adopts the City's policy by default absent a showing of deliberate indifference. . . . We do not believe that the Sheriff of Montgomery County has an affirmative duty to discover whether the city is following state law. There are no facts presented indicating that the sheriff knew or should have known that strip searches were conducted in violation of state law. In other cases where deliberate indifference has been found, the county was held liable for its own action or inaction, or that of a private entity. The instant case deals with another governmental entity governed by the same laws as the County. The City has independent statutory authority to house prisoners and in doing so was required to comply with Ohio law. It is for this reason that we find that Montgomery County is not liable."); ***Hinckley v. Thurston County***, No. C05-5458 RJB, 2006 WL 1705897, at *4(W.D. Wash. June 14, 2006) ("Plaintiff's argument is insufficient because Thurston County's policy of transferring inmates to another jail governed by the same constitutional, statutory, and regulatory standards it faces has no causal relationship with Plaintiff's injuries. Since the record is devoid of any evidence that Thurston County should have known Yakima County ran a constitutionally deficient jail, if indeed that is determined at

another stage of this case, the simple decision to transfer an inmate under a contract sanctioned by State law cannot be said to establish direct liability.").

d. Government Entity/Private Prison Management Agreements

Sumlin v. Gibson, 2008 WL 150687, at *4 (N.D.Ga. Jan. 8, 2008) ("Because the Fulton County Jail relied on the contracted medical provider, the Defendants argue, they never had a duty or responsibility to see that the Plaintiff's medical care was handled appropriately. However, the government's duty to ensure that a prisoner receives appropriate medical care is non-delegable. *Ancata*, 769 F.2d at 705. Liability may still attach for non-medical defendants even though § 1983 does not allow claims based on *respondeat superior*. . .For instance, a governmental body could be liable in the event that it or the private health care provider (because it operates under color of state law) adopted a policy or custom of improper treatment of prisoners. . . .Additionally, government defendants could be liable if the private health care provider makes final decisions regarding medical treatment. . . At that point, 'their acts, policies and customs become official policy.'"); ***Daniels v. Prison Health Services, Inc.,*** No. 8:05CV1392T30TBM, 2006 WL 319260, at *4 (M.D. Fla. Feb. 10, 2006) ("Although Prison Health Services has contracted to perform an obligation owed by the county, the county itself remains liable for any constitutional deprivations caused by the policies or customs of a health service company. . . In this sense, the county's duty is non-delegable"); ***Martin v. Corrections Corporation of America***, No. 05-2181 M1/P, 2006 WL 181966, at *4 (W.D. Tenn. Jan. 17, 2006) ("[T]he parties dispute whether Defendant Shelby County may be held liable for actions that occurred at the Shelby Training Center while it was operated by CCA. . . . A municipality is not relieved of its obligations to provide adequate medical care simply by contracting out its duties."); ; ***Herrera v. County of Santa Fe,*** 213 F. Supp.2d 1288, 1291, 1292 (D.N.M. 2002) ("Very few, if any, courts have addressed the specific issue of municipal or county liability, under § 1983, for the actions of a private company operating a jail or detention center. The Court was able to locate only one case suggesting an appropriate analysis. In *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700 (11th Cir.1985), the estate of a deceased county jail prisoner filed a § 1983 action against the county and a private health care provider, among others. The Eleventh Circuit, while holding that the plaintiff had adequately alleged the possibility that the county's own actions or policies contributed to the prisoner's death, made the following observations: (1) if a constitutional tort committed by an eployee of the private health care provider was not a result of the policy or custom

of that private entity, the county would not be liable for the constitutional tort; to hold the county liable would require application of the respondeat superior doctrine, which is not permitted under § 1983; (2) however, where the county has delegated final authority to make decisions to a private entity such as the health care provider in that case, the policies and customs of the private entity become the policies and customs of the county; and (3) if the county, expressly or by default, permitted others to determine policy, the county is liable for their actions if the policy proves unconstitutional. . . The *Ancata* court based these observations on the fact that, where a county turns over final decision-making or policymaking authority to a certain employee, the county is liable for any decisions or policies of that employee. Similarly, the court reasoned, where the county turns over a government function such as providing inmate health care to a private company, and also grants that company the authority to make decisions concerning the level of care to be provided, the county has in effect delegated final policymaking authority to the private company and is liable for any policies established by the company. . . . This Court need not resolve the conflict between *Deaton* and *Ford*, since this case does not involve one governmental entity contracting with another. [footnote omitted] Instead, this case presents the type of case as to which *Ancata*, *Deaton*, and *Ford* all appear to agree--under the rationales of all three of these cases, the county may be held liable for a custom or policy established by Cornell, because the county has contracted with Cornell to perform a significant public function. Furthermore, this conclusion makes sense under traditional municipal-liability analysis. As noted in *Ancata*, if a local government delegates final policy-making authority to a particular employee, any custom or policy created by that employee is the custom or policy of the local government as well. Here, by contracting with Cornell to take over management and operation of the detention center, the county delegated final policy-making authority for the operation of the detention center to Cornell. [footnote omitted] Any custom or policy established by Cornell with respect to such operation, therefore, constitutes a custom or policy of the county for purposes of § 1983 liability.").

B. Liability Based on "Custom or Usage"

Monell allows the imposition of government liability not only when the challenged conduct executes or implements a formally adopted policy, but also when that conduct reflects "practices of state officials so permanent and well settled as to constitute a 'custom or usage' with the force of law." 436 U.S. at 691. *Compare* ***Bouman v. Block***, 940 F.2d 1211 (9th Cir. 1991) ("If a practice is so permanent and

well settled as to constitute a 'custom or usage' with the force of law, a plaintiff may proceed. . .despite the absence of written authorization or express municipal policy.") *and* ***Denno v. School Board of Volusia County***, 218 F.3d 1267, 1278 (11th Cir. 2000) ("Given the lack of evidence with respect to the prohibition of the Confederate flag at Pine Ridge or at other schools within the district, we agree with the district court that Denno failed to adduce evidence creating a genuine issue of fact as to a pervasive and well-settled custom of banning the Confederate flag so as to make the Board potentially liable under *Monell*.").

The 'custom or usage' in question will be attributed to the government body when the "duration and frequency of the practices warrants a finding of either actual or constructive knowledge by the...governing body [or policymaker with responsibility for oversight and supervision] that the practices have become customary among its employees." ***Spell v. McDaniel***, 824 F.2d 1380. 1387 (4th Cir. 1987). *See also* ***Britton v. Maloney***, 901 F. Supp. 444, 450 (D. Mass. 1995) ("Unlike a 'policy', which comes into existence because of the top-down affirmative decision of a policymaker, a custom develops from the bottom-up. Thus, the liability of the municipality for customary constitutional violations derives not from its creation of the custom, but from its tolerance of or acquiescence in it.").

Compare ***Brass v. County of Los Angeles***, 328 F.3d 1192, 1201, 1202 (9th Cir. 2003) ("To the extent Brass's claim rests on the County's policy or custom of not starting to process a particular day's releases until it has received all information, including wants and holds, relating to the prisoners scheduled for release, we cannot say the County thereby violated Brass's constitutional rights. To the contrary, we think that that aspect of the County's release program was justified and reasonable in light of the County's problems and responsibilities in processing the large number of prisoner releases it handles. . . . It is unclear, however, whether the 48-hour period applied to probable cause determinations is appropriate for effectuating the release of prisoners whose basis for confinement has ended. One might conclude that when a court orders a prisoner released--or when, for example, a prisoner's sentence has been completed--the outer bounds for releasing the prisoner should be less than 48 hours. We need not determine that question here, however, since we have concluded that in the circumstances of this case, the 39-hour delay in releasing Brass was reasonable and did not violate his constitutional rights.") *with* ***Berry v. Baca***, 379 F.3d 764, 768, 770, 771 (9th Cir. 2004) ("Here, in contrast to *Brass*, the plaintiffs do not limit their challenge to the County's specific policies. Rather, as argued in their briefs to this Court, they challenge the policy 'in toto ... that simply delays all releases

until the system, in its sweet time, and with the resources it chooses ... is ready to make releases.' Stated another way, the plaintiffs in this case challenge the implementation of the County's policies, rather than the specific policies themselves. They claim that the County's unreasonably inefficient implementation of its administrative policies amounts to a policy of deliberate indifference to their constitutional rights. . . . [T]he plaintiffs here contend that they were over-detained for twenty-six to twenty-nine hours because the County's policies are being implemented in a manner that is deliberately indifferent to their right to freedom from incarceration. We cannot determine whether the County's implementation of its policies is in fact reasonably efficient based solely on the defendants' self-serving declarations. This would be an improper basis for summary judgment, as the County's explanations and defenses 'depend on disputed facts and inferences' that are proper for jury determination. . . Based on the County's declarations, a juror could find that its explanations reasonably justify a twenty-nine hour delay in release from jail. On the other hand, a juror could also find that the time each necessary administrative task reasonably requires simply does not add up to twenty-nine hours. . . . While the County in both *Brass* and the instant cases has provided some explanation of the steps necessary prior to release, its declarations offer only general assertions as to why these steps would reasonably take up to forty-eight hours. In order to determine if this length of time is, in fact, reasonable, the jury must be presented with the administrative processes, the volume of bookings and releases, as well as other considerations that affect the County's ability to process releases. It may very well be that a reasonable juror would conclude that, given the necessary administrative tasks and voluminous demands on the county, the delays at issue were justified. However, we conclude that this is a factual determination that is appropriately left to the jury to decide.").

Compare ***Price v. Sery***, 513 F.3d 962, 971, 973-74 (9th Cir. 2008) ("We are satisfied that our case law does not support Price's contention that 'reasonable belief' is a lesser standard than 'probable cause' as a matter of law. Both standards are objective and turn upon the circumstances confronting the officer rather than on the officer's mere subjective beliefs or intentions, however sincere. Our case law requires that a reasonable officer under the circumstances believe herself or others to face a threat of serious physical harm before using deadly force. Moreover, as the Supreme Court clarified in *Scott*, the touchstone of the inquiry is 'reasonableness,' which does not admit of an 'easy-to-apply legal test.'. . The City's policy requires that an officer have a reasonable belief in an 'immediate threat of death or serious physical injury' and thus comports with the requirement. Accordingly, the district court correctly

concluded that the City's policy governing the use of deadly force was not, as written, contrary to the requirements of the Fourth Amendment. . . . [W]e agree with the district court that the City's official policy concerning the use of deadly force, as written, does not violate the requirements of the Constitution. Further, we agree with the district court that Price has not made a sufficient showing of a failure to train on the part of the City to survive summary judgment. We conclude, however, that a genuine issue of material fact exists as to whether a 'longstanding' practice or custom of the City might in fact have deprived Perez of his constitutional rights.") *with* ***Price v. Sery***, 513 F.3d 962, 981(9th Cir. 2008) (Fisher, J., concurring in part, dissenting in part and concurring in the judgment) ("A reasonable jury could conclude on the basis of this evidence, viewed in the light most favorable to Price, that the City 'disregarded a known or obvious consequence' of its training practices. . . The Streed Declaration reasonably supports the inference that, quite apart from the letter of the City's deadly force policy, officers were being instilled with a 'shoot first' mindset that foreseeably would result in unjustified applications of deadly force. . . In addition, a logical inference from Chief Foxworth's admission--as the City's highest ranking police officer and head of the Portland Police Bureau-- that he erroneously thought that reasonable belief embodied a lesser standard than probable cause within the context of the City's deadly force policy is that the training of the police force also reflected this mistaken understanding. A reasonable jury could conclude training based on this misconception constituted a failure to train. Therefore, I would permit Price also to pursue that theory of liability on remand.").

See also ***Gregory v. City of Louisville,*** 444 F.3d 725, 754, 755, 757 (6th Cir. 2006) ("Plaintiff also alleges that the City had a custom of using overly suggestive show-ups and that the City failed to train its officers in proper identification techniques. The district court dismissed this claim, finding that Plaintiff had failed to make a showing of other complaints about the City's use of show-ups. In so holding, the district court overlooked both facts in this case and a significant prong of this Court's jurisprudence. First, Plaintiff need not present evidence of a pattern of complaints consistent with his own if he presents evidence of a written policy unconstitutional on its face. . . The facts of this case show that the City's written line-up 'waiver' form is direct evidence of a custom or practice, obviating the need for circumstantial evidence a court might otherwise seek. . . Second, Plaintiff need not present evidence of other complaints if he can show that the City failed to train its officers in proper identification techniques, and that such failure to train had the 'obvious consequences' of leading to constitutional violations of the sort experienced by Plaintiff. . . . The remaining question for this Court is whether the evidence, when

viewed in the light most favorable to Plaintiff, is such that a reasonable jury could conclude that the City had a custom or practice of using show-ups without consideration of the circumstances, and that pursuant to this custom, Tarter employed a show-up with Plaintiff without consideration of Plaintiff's due process rights. Plaintiff puts forth evidence that the City had a custom of using show-ups in lieu of line-ups in non-exigent circumstances. Plaintiff's evidence includes affidavits from two police practice experts who opined that there existed systematic deficiencies in police officer training; that supervising LDP officers found it 'perfectly acceptable' to conduct non-exigent show-ups days after a crime if an officer could get a suspect to sign a 'waiver;' and that it was established practice to ask suspects in for a line-up, fail to take affirmative actions to constitute a line-up, and request consent to a show-up. . . Plaintiff presents further evidence that using such show-ups was expressly approved through the existence of pre-printed waiver forms. . . Such forms are evidence of established practice. . . Given this evidence, we cannot say that a reasonable jury could not conclude that the City had a custom or practice of conducting show-ups without consideration of the constitutional implications of such show-ups, and thus that the City was 'deliberately indifferent' to the due process rights of its citizens. Accordingly, we reverse the district court's grant of summary judgment to the City."); ***Baron v. Suffolk County Sheriff's Dep't,*** 402 F.3d 225, 239 (1st Cir. 2005) ("This is not a case, then, of attributing liability to the municipality based on a single incident of isolated employee conduct. Rather, the record demonstrates a pattern of ongoing harassment that the jury could have found high-ranking Department officials were aware of and did not stop. . . .The Department was therefore not entitled to judgment as a matter of law or a new trial on the basis of insufficient evidence of the code of silence."); ***Monistere v. City of Memphis,*** 115 Fed. Appx. 845, 2004 WL 2913348, at *4 (6th Cir. Dec. 17, 2004) (City's practice of allowing its police investigators to conduct administrative investigations into complaints against its police officers without any defined parameters was a "custom" that had the "force of law" for purpose of establishing city's liability under § 1983 for investigator's conduct in ordering strip search of two officers, in response to a motorist's complaint that officers stole from him during a traffic stop"); ***Cash v. Hamilton County Dept. of Adult Probation,*** 388 F.3d 539, 543, 544 (6th Cir. 2004) ("Contrary to the declaration of the district court that the supervising police officers' testimony was 'undisputed,' the plaintiffs presented substantial evidence suggesting that the City [of Cincinnati] and County had a custom and practice of hauling to the dump all unattended property found at the sites in question. . . . Smith [Field Supervisor for the Hamilton County Adult Probation Department] testified that the standard cleanup procedure was that a Cincinnati

police officer would direct the probationers to put all of the items in bags and then place the bags into a sanitation truck. In direct opposition to the testimony that the district court relied upon, Smith testified that he never observed a Cincinnati police officer segregating any of the items and saying that some should be saved. Smith stated that the items are all 'hauled off to the trash, to the dump.' Testimony from Cincinnati Police Officer Thomas J. Branigan also supports the plaintiffs' contention that the City had a custom of destroying homeless individuals' property without notice or the right to reclaim the items taken. . . . [A] genuine issue of material fact exists as to whether the property of homeless persons like the plaintiffs was being discarded as part of the City's official policy. The district court therefore erred in granting summary judgment to the City and County on the basis that the relevant testimony was uncontested. A genuine issue of material fact also exists over whether adequate notice was provided to homeless individuals like the plaintiffs. The established precedent is that individuals whose property interests are at stake are entitled to a 'notice and opportunity to be heard.'. . The key inquiry in such circumstances is whether the notice is 'reasonably calculated, in all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections.' . . The City submits that it published a notice in the local newspaper, which was available for anyone in the Cincinnati area to pick up and read. By contrast, the plaintiffs contend that such a notice is per se insufficient, particularly when the educational and financial restraints of the homeless community are considered. This is an issue for the district court to resolve on remand."); ***Alkire v. Irving,*** 330 F.3d 802, 815 (6th Cir. 2003) ("Alkire asserts that, after the new Holmes County jail opened in 1994, Sheriff Zimmerly established a policy of detaining persons who could not post immediate bail until their initial appearance, because they now had adequate jail space. The record also reflects that, as a matter of course or custom, because the Holmes County Court is a part-time court, the first- available court date was often not until Tuesday mornings; court was never held on weekends or holidays. . . . Thus, the record reflects that, after 1994, any warrantless arrest from late afternoon Friday through Sunday morning, where the defendant did not post bond, would very likely run afoul of the forty-eight hour time limit established in *Riverside.* These policies or customs of the Holmes County Jail are the very sort of 'policy or custom' referred to by *Monell.* It is not necessary that Holmes County officially endorsed these policies or customs through legislative action for it to carry its *imprimatur.*"); ***In the Matter of Foust v. McNeill,*** 310 F.3d 849, 862 (5th Cir. 2002) ("Thigpen and McNeill testified that the sheriff's office routinely seized a debtor's entire premises to secure personal property and fixtures. Neither the bankruptcy court nor the district court mentioned this testimony, and the

defendants do not address it. If the department repeatedly went beyond the scope of the writs to seize real property, its policy may have violated the Fourth and Fourteenth Amendments. The department was deliberately indifferent to those results, *i.e.,* the seizure of the real property and exceeding the scope of the writ, even if unaware of the unlawfulness of the actions. The Fousts have created a fact question about whether the department's policy of seizing the premises violated the Fourth and Fourteenth Amendments, so this portion of the district court opinion is reversed."); ***Daskalea v. District of Columbia***, 227 F.3d 433, 442, 443 (D.C. Cir. 2000) ("[A] 'paper' policy [against sexual harassment] cannot insulate a municipality from liability where there is evidence, as there was here, that the municipality was deliberately indifferent to the policy's violation. . . That evidence included not only the continued blatant violation of the policy, but also the fact that the policy was never posted, that some guards did not recall receiving it, that inmates never received it, and that there was no evidence of the training that was supposed to accompany it."); ***Stauch v. City of Columbia Heights***, 212 F.3d 425, 432 (8th Cir. 2000) ("The City argues that the Stauches cannot prove that a municipal policy or custom caused their injury. Specifically, it asserts that the Stauches' allegation that city officials failed to follow the procedures set forth in the Code for license renewal is tantamount to saying that the officials acted contrary to City policy. We disagree. The City argued at trial and in its brief on appeal that the Stauches could not claim a protected property interest in license renewal because they knew that the City's practice was to require property to pass inspection prior to renewal. . .The City cannot simultaneously argue that it required a property to pass inspection prior to license renewal but yet characterize the actions of its officials in implementing this requirement as being 'contrary to City policy.'"); ***Blair v. City of Pomona***, 223 F.3d 1074, 1080, 1081 (9th Cir. 2000) (as amended) ("Th[e] evidence, if believed by the jury, would be sufficient to establish that the Department had the custom of chastising whistleblowers. It would also be sufficient to establish that the Department had failed to train its members not to retaliate against whistleblowers and/or that the Department had failed to discipline those members of the Department who retaliated against whistleblowers. It would be open to the jury to conclude that one or more of these customs or policies was made by those in charge of the Department who were aware of the police code of silence; that the custom or policy amounted to at least deliberate indifference to Blair's right to speak; and that the policy was the moving force resulting in the constitutional deprivation suffered by Blair. . . . The evidence presented to the district court, if believed at trial, and the inferences if drawn by the jury, would justify the conclusion that the Department had a custom, approved by its policy-makers, of at the very least deliberate indifference to the right of a member of

the Department to report to a superior the misconduct of a fellow officer. The seriousness of such a custom and the need of a civil rights remedy for it is underlined by what has been observed around the country as to the code of silence in police departments."); ***Sharp v. City of Houston***, 164 F.3d 923, 935 (5th Cir. 1999) ("Sharp relies on retaliations for violations of the 'code of silence' as the city's custom and practice. She presented ample evidence that a code of silence exists. . . . Furthermore, the code can be perpetuated only if there is retaliation for violations of it. The jury instructions, to which the city did not object, included retaliation as part of what defines a code of silence. The city argues that it does not condone the code of silence and has taken actions to discourage it. Based on the evidence presented at trial, however, the jury could have decided that the HPD tolerated and even fostered an attitude of fierce loyalty and protectiveness within its ranks, to the point that officers refused to address or report each others' misconduct. A jury further could conclude that the city's steps to eliminate the code were merely cosmetic or came too slowly and too late to rebut tacit encouragement. The jury could have surmised that Sharp's co-workers and supervisors enforced this HPD-wide 'code of silence' by retaliatory acts. As we have noted, any officer who violated the code would suffer such a pattern of social ostracism and professional disapprobation that he or she likely would sacrifice a career in HPD. . . . Furthermore, the failure of Sharp's supervisors all the way up the chain of command, including Nuchia, to take any real action when made aware of the retaliation supports a conclusion by the jury that the HPD had a policy, custom, or practice of enforcing the code of silence."); ***Ware v. Jackson County***, 150 F.3d 873, 886 (8th Cir. 1998) ("The jury was entitled to infer that a pattern of unconstitutional conduct existed from the evidence of CO Toomer's sexual misconduct, which spanned five months and involved extortion, deception, and repeated sexual acts with an inmate of limited mental capacity, culminating in the rape of Ware. The pattern is also evidenced by the Stone, White, and Jackson incidents. That there was a gap of three years between CO Toomer's misconduct and that of other officers does not amount to a series of isolated incidents so far apart in time that CO Toomer's misconduct may be considered a single act upon which custom or usage cannot be based."); ***McNabola v. Chicago Transit Authority***, 10 F.3d 501, 510-11 (7th Cir. 1993) (jury could reasonably conclude that "the CTA had a custom or policy of terminating white *per diems*" and replacing them with African-Americans); ***Gentile v. County of Suffolk***, 926 F.2d 142, 152 & n. 5, 153 (2d Cir. 1991) (malicious prosecution causally linked to County's long history of negligent disciplinary practices and cover-ups as to law enforcement personnel); ***Bordanaro v. McLeod***, 871 F.2d 1151, 1155-58 (1st Cir. 1989) (City police department had longstanding, wide-spread, unconstitutional practice of breaking down doors without

a warrant when arresting a felon); ***Watson v. City of Kansas City, Kansas***, 857 F.2d 690, 695-96 (10th Cir. 1988) (reversing grant of summary judgment in favor of City where plaintiff alleged policy or custom of affording less protection to victims of domestic violence than to victims of nondomestic attacks); ***Jones v. City of Chicago***, 856 F.2d 985, 995-96 (7th Cir. 1988) (custom of keeping "street files" was department wide and long standing, entitling jury "to conclude that it had been consciously approved at the highest policymaking level for decisions involving the police department..."); ***Portis v. City of Chicago***, No. 02 C 3139, 2008 WL 4211558, at *1 (N.D. Ill. Sept. 9, 2008) (summary judgment on liability issue for Plaintiffs challenging practice and custom of City of detaining persons arrested for non-jailable ordinance violations "for more than two hours (and in some cases for as long as 16 hours or more) after it completed all of the administrative steps necessary to determine that they were eligible for release."); ***Brazier v. Oxford County***, No. 07-CV-54-B-W, 2008 WL 2065842, at *8, *9 (D. Me. May 13, 2008) ("Other courts have concluded that a well-settled, widespread custom cannot be established on the basis of two or three incidents involving a solitary officer. . . . [W]hen a particular officer engages in misconduct in the field, on his or her own, the inference that there is an underlying custom giving rise to the conduct is not logically drawn based exclusively on the incident itself, unless and until it is shown that the conduct is participated in by multiple officers or by the same officer on multiple occasions that have come to the attention of policymakers who have not addressed the misconduct through training or discipline. On the other hand, when a particular officer repeatedly engages in unlawful conduct during a routine procedure like processing a misdemeanor arrestee who fails to make bail or a misdemeanor detainee returning from court in shackles who is entitled to immediate release by court order, it is relatively difficult to understand how it would happen, or why any rational corrections officer would wish to perform such a search, in the absence of a customary practice that has somehow endured despite the existence of a contrary written policy. . . . Ultimately, my recommendation is to deny summary judgment to Oxford County on count I due, essentially, to the fact that the processing that resulted in the alleged strip searches presumably followed a routine jail procedure, because Arlene Kerr's alleged conduct was similar under two separate and distinct scenarios, neither of which should have resulted in a strip search, and because of the potential finding that Arlene Kerr admitted to Brazier that her conduct conformed to the Jail's practice. This evidence appears minimally sufficient to support a finding that Brazier was subjected to unconstitutional strip searches arising from an established custom that could not or should not have gone unnoticed and would not have existed without the acquiescence of policymaking officials and, by extension,

without an awareness of an obvious need for additional or different training."); ***Estate of Fields v. Nawotka***, No. 03-CV-1450, 2008 WL 746704, at *8, *9 (E.D. Wis. Mar. 18, 2008) ("The plaintiffs set forth that their claims are *not* based upon a failure to train; rather, they are based upon the failure of the Milwaukee Police Department's policy makers to formulate and execute an internal administrative review of officer shootings and discipline those that have been found to unreasonably use deadly force. . . The court determines that, based upon this theory, there is a genuine issue of material fact that precludes summary judgment. Viewing the evidence in the light most favorable to the plaintiffs, the court determines that there is a material factual issue regarding the police department customs. Unlike this court's previous decisions relating to *Monell* claims for a failure to investigate, the plaintiffs articulate and present evidence about Milwaukee Police Department's investigation practices that could establish their inadequacy. [relying on statements in Lou Reiter's expert affidavit]. . . . [T]he court finds that the plaintiffs' record evidence and supporting affidavits create genuine issues of material fact as to whether or not the investigation process did create a de facto policy of ratifying officer use of deadly force; the court further finds that the plaintiffs' submissions create a genuine issue for trial regarding the causal link between the review process and the fatal shootings."); ***Lopez v. City of Houston***, 2008 WL 437056, at *9, *10 (S.D.Tex. Feb. 14, 2008) ("In light of the severity, duration, and frequency of the alleged violations, as well as 'other evidence,' . . . the Court concludes there is a genuine fact issue as to the existence of an HPD custom in 2002 of using mass detention without individualized suspicion as a law enforcement tool. The following, viewed in the light most favorable to Plaintiffs, support this conclusion: (1) mass detentions without individualized suspicion occurred on three nights over a two month period; . . . . (2) HPD was focused on street racing during the summer of 2002, and created and vetted several plans to combat the racing, with the last plans (the Jackson and Game Plans) expressly incorporating mass detentions into the operation; . . . . (3) the operations on August 16 and 17 were extensively pre-planned by HPD; and (4) the HPD officers assigned to carry out Operation ERACER believed that mass detentions were acceptable and had been approved by high-ranking HPD officials. . . . Viewed together, and drawing all inferences in Plaintiffs' favor, the incidents within the summer of 2002 are sufficient to demonstrate a fact question as to whether HPD had a custom of mass detention without individualized reasonable suspicion. . . . When this evidence is viewed in the light most favorable to Plaintiffs, a jury could reasonably conclude that Chief Bradford had actual or constructive knowledge of an HPD custom of mass detention without individualized reasonable suspicion."); ***Monaco v. City of Camden***, 2008 WL 408423, at *14, *15 (D.N.J.

Feb. 13, 2008) ("[A] reasonable jury could find, based on the evidence in the record, that it was the 'well settled' custom of the City and the Police Department not only to fail to conduct timely investigations into allegations of excessive force, . . . but that when such investigations were ultimately performed, they were directed less toward detecting and correcting misconduct than toward shoring up the Department's and the officers' defenses. A jury could reasonably find that such inattention to the question of whether police misconduct actually occurred was 'so likely to result in the violation of constitutional rights' as to evidence the City's deliberate indifference to its officers' use of excessive force. There is, moreover, a strong 'connection between the ... [allegedly inadequate policy identified] and the specific constitutional violation' Plaintiff alleges took place. . . That is, Plaintiff's evidence, if proved at trial, indicates that the City was indifferent to the risk that its officers would use excessive force, which is, according to Plaintiff, precisely what allegedly took place on May 31, 2002."); ***Henderson v. City and County of San Francisco,*** 2007 WL 2778682, at *2 n.2 (N.D. Cal. Sept.21, 2007) ("Defendant contends that, in addition to proving that the custom was the moving force behind their injuries, Plaintiffs must also show that it constitutes deliberate indifference on the part of the government entity in order to establish municipal liability. . . Not so. A plaintiff must demonstrate deliberate indifference when it seeks to hold a municipality liable for 'failing to prevent a deprivation of federal rights.'. . Here, by contrast, Plaintiffs argue that an affirmative custom exists of requiring pre-trial and post-conviction detainees to sleep on the floor. 'Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, ... [s]ection 1983 itself contains no state-of-mind requirement independent of that necessary to state a violation of the underlying federal right.'. . Therefore, Plaintiffs need not show deliberate indifference to establish a threshold of potential liability under *Monell*. However, Plaintiffs must nonetheless 'establish the state of mind required to prove the underlying violation.'"); ***Thomas v. Baca***, 514 F.3d 1201, 1215, 1218, 1219 (C.D. Cal. 2007) ("Plaintiffs seek summary adjudication of whether this custom of floor sleeping is unconstitutional. . . The Court finds that the practice of requiring inmates to sleep on the floor of LASD jails violates the Eighth Amendment. . . . Allowing a cost defense to neutralize constitutional requirements would permit jails to maintain the most objectively abhorrent and inhumane conditions simply because eliminating them would require additional resources. Of course, any inquiry into conditions of confinement 'spring[s] from constitutional requirements and ... judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility.'. . Los Angeles County Jail is the largest jail in the country. Providing the basic necessities of 19,500 inmates spread across eight custody facilities, numerous

patrol stations, and at least 40 courthouses, as well as addressing serious medical, mental health, and security issues, is a complicated enterprise. Therefore, the Court understands that in the case of exigent circumstances, such as a 'genuine emergency situation, like a fire or a riot,'. . . providing each inmate with a bed may be impossible. . . However, while the Court has no desire to inject itself in the management of the jail, ' "federal courts [must nonetheless] discharge their duty to protect constitutional rights."'. . Accordingly, the Court holds as follows:In the absence of exigent circumstances, the objective prong of the Eighth Amendment requires LASD facilities to assign and provide each inmate with a bunk for the night immediately following the inmate's initial processing within the facility or transfer to a medical center or other place of screening or treatment, and for every night thereafter. Inmates must be processed within a reasonable amount of time. . . A sudden, extreme rise in inmate population caused by an acute event, such as a civil disturbance, may affect the length of time that is reasonable for processing. . . However, overcrowding or regular classification considerations do not constitute exigent circumstances that would justify floor-sleeping. In general, the Court expects that processing, including any initial medical evaluation, should not take more than twenty-four hours, and, as technology improves, the time should decrease."); ***Mitchell v. CCA of Tennessee, Inc.***, No. 04-1031-A, 2007 WL 837293, at *6 (W.D. La. Mar. 15, 2007) ("In the present case, Plaintiff alleges that CCA has a 'custom' of ignoring inmates' complaints directed toward their employees. . . . Warden Todd and Chief Maxwell's failure to report or investigate Mitchell's complaint of sexual harassment, if true, creates a genuine issue of material fact as to whether CCA maintained an official custom of ignoring prisoner complaints against their employees. Moreover, proof of such a custom would suffice to show a direct causal link between CCA's policy and the deprivation of Plaintiff's federal rights. That is, absent CCA's failure to report or investigate Mitchell's allegation of sexual harassment in April of 2003, the sexual assault on Plaintiff in May 2003 would not have likely occurred."); ***Marcavage v. City of Chicago***, 467 F.Supp.2d 823, 829 (N.D. Ill. 2006) ("To establish as a matter of law that Chicago could not possibly have any such official policy that ran afoul of the First Amendment, Chicago points to the decades-old consent decree ('Decree') entered into by Chicago as reported in *Alliance To End Repression v. City of Chicago*, 561 F.Supp. 537 (N.D.Ill.1982). That Decree, which generally forbids Chicago officials from infringing First Amendment rights, has been recognized by various courts (including this one) as reflecting official Chicago policy . . . .Given that Decree's prohibitions, Chicago argues that any Chicago police officer (or even Mayor Daley) who did anything that could be construed as violating plaintiffs' First Amendment rights would necessarily

be acting in violation--not in furtherance--of Chicago policy, so that Chicago cannot be liable for those actions under *Monell*. That argument goes too far. Simply having that prohibition on the books cannot shield Chicago from the possibility that it has adopted other official policies that in fact violate an individual's First Amendment rights and would thus be actionable under *Monell*."); ***Hogan v. City of Easton***, No. 04-759, 2006 WL 3702637, at *9, *10 (E.D. Pa. Dec. 12, 2006) (" The City argues that the Hogans have presented absolutely no evidence of a pattern of similar prior violations, which, as stated, they seek to limit to 'complaints or lawsuits in the prior ten years in which an EPD officer unjustifiably fired his weapon and/or was permitted to do so by EPD officials,' . . so as to support a policy or custom. Citing several decisions applying Eleventh Circuit law, they contend that the law requires evidence be 'of a specific nature and of prior incidents of similar alleged misconduct' to support the finding of a policy or custom. . . . There is no basis in our own Circuit law to limit the 'similar alleged conduct' in this case to only shooting incidents, when the Hogans' complaint alleges a more general policy and custom claim on the use of excessive force. It is clear that when a plaintiff alleges that an officer violated his constitutional rights by using excessive force, municipal liability may be imposed under S 1983 if that same officer has a history of excessive force conduct.[citing *Beck*] To establish deliberate indifference on the part of supervisors and the municipality, a plaintiff also may point to evidence of deficient treatment of prior, similar complaints against that officer. . . . Even without consideration of the Chiefs' Evaluation and the Keystone Study, the Hogans have come forward with sufficient evidence that, if believed, would establish a claim of deliberate indifference by the City Defendants to the use of excessive force by the officers involved in the Hogan shooting. They have shown that Defendant Beitler was involved in three excessive force incidents before the Hogan standoff, but was appointed to the SWAT Team and later to the Criminal Investigation Division. Defendant Marraccini was involved in two excessive force incidents before the Hogan standoff, but was appointed to the SWAT Team, and was involved in other incidents thereafter. Captain Mazzeo allegedly has an extensive record of excessive force complaints filed against him during his career, resulting in substantial monetary settlements. The Hogans have identified at least 12 incidents of excessive force involving Mazzeo, 22 incidents of excessive force involving defendant Michael Orchulli, 6 incidents involving defendant Lawrence Palmer, and 2 involving defendant John Remaley. Combined with the Grand Jury Report--which found that, at the time of the Hogan incident, the City had no Code of Conduct, written safety rules, or recognized manual of policies, and that the command structure failed to identify and remedy obvious safety deficiencies--and the report of plaintiffs' expert Clark--who opined that the use of

force here was excessive--the Hogans have satisfied their summary judgment burden of coming forward with sufficient evidence to establish the existence of a policy or custom of deliberate indifference to the use of excessive force by EPD members."); ***Mayes v. City of Hammond***, No. 2:03-CV-379-PRC, 2006 WL 1876979, 2006 WL 1876979, at *53 (N.D. Ind. July 5, 2006) (Plaintiff offered sufficient evidence that the HPD had a widespread policy or custom of failing to train its detectives in minimally acceptable police practices and of failing to supervise such that the City had not adopted an adequate policy regarding the preservation and production of exculpatory evidence."); ***Marriott v. County of Montgomery***, 426 F.Supp.2d 1, 9 (N.D.N.Y. 2006) ("Defendants' argument is seriously flawed. First, constitutional analysis of a procedure does not stop with analysis of the written policy. Both parties here have provided ample evidence that whatever the written policy stated, the procedure that was followed in fact by the COs required all admittees to remove their clothes, submit to a visual examination by the CO conducting the 'change out,' and shower, without the CO making any individual determination that the arrestee possessed contraband. Constitutional words cannot erase unconstitutional conduct."); ***Fairley v. Andrews***, No. 03 C 5207, 2006 WL 1215405, at **14-16 (N.D. Ill. May 4, 2006) ("There are two routes Plaintiffs may take to establish that the code of silence has the force of law. . . First, municipal customs have the force of law if the custom itself is unconstitutional. . . Second, Plaintiffs may indirectly establish that the custom or policy has the force of law 'by showing a series of bad acts and inviting the court to infer from them that the policymaking level of government was bound to have noticed what was going on and by failing to do anything must have encouraged or at least condoned, thus in either event adopting, the misconduct of subordinate officers.' . . Plaintiffs choose the second route, and therefore, must establish that Sheriff Sheahan was deliberately indifferent to the fact that the code of silence's known or obvious consequences would result in the deprivation of a constitutional right. . . In other words, this 'culpability' standard requires a showing of the Sheriff's conscious disregard of the policy's known or obvious dangers. . . . Plaintiffs need not show that Sheriff Sheahan had actual knowledge of the danger concerning the code of silence to establish their claim under *Monell*. . . . Viewing the facts and all reasonable inferences in favor of Plaintiffs, there is a genuine issue of material fact that Sheriff Sheahan was deliberately indifferent that the code of silence's known or obvious consequences would result in the deprivation of a constitutional right based on the inadequacy of the reporting mechanisms within the CCDOC."); ***Castillo v. City and County of San Francisco,*** No. C 05-00284 WHA, 2006 WL 194709, at *9 (N.D. Cal. Jan. 23, 2006) ("Given the facts of this case, the thrust of the inquiry is whether it was likely that arrestees would be hurt

unnecessarily because the city told its officers to handcuff them behind their backs unless the prisoners needed immediate medical care, even if they were otherwise complaining of pain. . . . San Francisco's policy, when seen in the light most favorable to plaintiff, is to refuse to adjust handcuffs for anyone who does not have an immediate need for medical attention. As in *Alexander*, there was no appearance in the instant case of an immediate need for medical attention at the time plaintiff asked to have the handcuffs adjusted. The Ninth Circuit held that, in those circumstances, police had used excessive force. A reasonable jury, fully crediting plaintiff's evidence, similarly could conclude that San Francisco's policy obviously was inadequate to prevent such a tort and that the city thereby exhibited deliberate indifference. This Court therefore cannot hold that the City and County of San Francisco is entitled to summary judgment on the *Monell* excessive-force claim."); ***Hare v. Zitek***, No. 02 C 3973, 2005 WL 3470307, at *25 (N.D. Ill. Dec. 15, 2005) ("In an effort to show that the Village's retaliation was inflicted consistent with the Village's widespread practice of retaliation, Mr. Hare has presented testimony from numerous Stickney Police officers, who cooperated with the SAO [State's Attorney's Office]. These officers all testified that they were passed over for promotions, reprimanded, or terminated as a result of their cooperation. This testimony is sufficient to establish a series of violations and create a factual dispute on the issue of whether the Village had a widespread practice of retaliation against those who spoke against the alleged Village corruption."); ***Jackson v. Marion County Sheriff's Dep't.***, No. 103CV0879 DFHTAB, 2005 WL 3358876, at *8 (S.D. Ind. Dec. 9, 2005) ("On the overcrowding issue, however, there is sufficient evidence to present to a jury. Jackson has come forward with evidence of extreme overcrowding of the Lock-Up that was so prolonged as to amount to a government custom or policy reflecting deliberate indifference to likely violations of the constitutional rights of detainees. A jury could reasonably find on this record that the overcrowding presented a substantial risk of serious injury to detainees, that the Sheriff failed to take appropriate steps to protect inmates in this situation, and that the failure caused the beating of Jackson. The Sheriff is not entitled to summary judgment on this claim. Jackson has put forth evidence showing that at least as of May 1999 (27 years after the lead lawsuit was filed), the Sheriff was on notice that the overcrowded conditions of the Lock-Up led directly to inmate-on-inmate violence in violation of constitutional protections. In May 1999, for example, Judge Dillin found that due to overcrowding in the Lock-Up, 'fights in the cellblocks are commonplace, supervision within the cellblocks is minimal, fortuitous, or nonexistent, and injuries from the conflicts are an everyday occurrence.... These are conditions of 'current and ongoing' constitutional violations, and in this court's view are the result of the overcrowding

in the Lockup.'. . .Three days before Jackson was beaten, the Sheriff was served with a Verified Petition for Contempt asserting that the overcrowding continued. The Sheriff responded to this petition by moving for a continuance of the contempt proceedings to determine if interim measures would resolve 'the overpopulation problems in the Marion County Lockup.'. . The Sheriff points to some of these interim measures as evidence of his efforts to alleviate the overcrowding and to improve conditions in the Lock-Up. However, Jackson has put forth evidence that on the day he was beaten, the Lock-Up was packed far beyond its 213 detainee population cap, and that the specific cell block where Jackson was kept was filled far beyond its capacity as well. Though evidence of Jackson's mental illness is incapable of supporting an independent claim for relief, it is still relevant to the issue of whether the overcrowding presented a substantial risk of serious injury to Jackson. Likewise, the Sheriff's intake and segregation policies may indeed be relevant to determining whether the Sheriff took appropriate steps to protect detainees from the substantial risk of serious harm posed by overcrowding."); ***Tardiff v. Knox County,*** 397 F.Supp.2d 115, 131, 132 , 135, 136 (D.Me. 2005)("While Knox County Policies C-120 and D-220 have clearly stated, since October 1994, that misdemeanor detainees are not to be strip searched without reasonable suspicion, the record presents undisputed evidence that substantial numbers of persons arrested for misdemeanor offenses were routinely strip searched without reasonable suspicion at the Knox County Jail. The reports generated by the Department of Corrections following the 1994 Jail Inspection and the 2000 Jail Inspection find, based on staff statements made at those times, that corrections officers at the jail were strip searching all detainees charged with misdemeanors. . . . Based on the undisputed evidence presented in the summary judgment record, the record shows, without cavil, that the practice by corrections officers of strip searching misdemeanor detainees was so widespread that the policymaking officials of the municipality had constructive knowledge of it. Moreover, the Court concludes that Knox County personnel with policy-making authority had actual notice that the corrections officers were unlawfully strip searching misdemeanor detainees without reasonable suspicion. . . . Even though it failed to promulgate new written procedures to eliminate the unconstitutional practice, Knox County could have employed a training regime directed at correcting the unconstitutional practice. . . . However, even if new officers' initial training on strip searches was conducted in accord with the written policy, such training was not aimed at stopping the corrections officers who were engaged in institutionally entrenched unconstitutional practice of strip searching all misdemeanor detainees brought to the Knox County Jail. The result was an ongoing practice that was far removed from the written policy. . . .The record before the Court

contains no evidence that any official from Knox County directed, by way of written policy or procedure, training, or other means, that the unconstitutional practice stop. It could be argued that the direction to stop strip searching all misdemeanor detainees was implicit in the new procedures and training. Given the strong evidence of the persistence of the unconstitutional practice even after the 2001 procedural changes, no reasonable person could conclude that the actions of Knox County were directed at stopping the practice. At some point, it must have been evident to Knox County officials that the corrections staff had not gotten the message. Yet, there is no evidence that, even after the 2000 Jail Inspection Report indicated that the practice of strip searching all misdemeanor detainees who were housed continued, Sheriff Davey or any other official from Knox County promulgated any procedures, conducted any training, or engaged in any closer oversight, directed at eliminating the unconstitutional misdemeanor search practices of the corrections officers at the Knox County Jail. . . .The Court will, therefore, grant Plaintiffs' Motion for Partial Summary Judgment against Knox County on that part of Count I as to liability alleging that Plaintiffs' constitutional rights were violated as a result of the custom and practice of strip searching all misdemeanor detainees without reasonable suspicion."); ***Santiago v. Feeney***, 379 F.Supp.2d 150, 159 (D. Mass. 2005) ("Plaintiff does not argue that the City's strip search policy is unconstitutional. Plaintiff contends that the City promotes a custom of illegal strip searches because its policy is ambiguous regarding how non-custodial strip searches must be authorized and conducted. . . While it can be argued that the City's strip search policy is ambiguous concerning whether a warrant must expressly authorize a strip search, it cannot be said that the City promoted a custom of *unconstitutional* strip searches.");***Lingenfelter v. Bd. of County Commissioners of Reno County,*** 359 F.Supp.2d 1163, 1170, 1171 (D. Kan. 2005) ("Although he acknowledges his status as a county decision-maker and the jail's caretaker, Sheriff Rovenstine contends that he has no duty to ensure that detainees arrested without a warrant receive a probable cause hearing or gain release. Sheriff Rovenstine believes that someone else, perhaps the arresting officer or the prosecutor, is responsible for the period of confinement between a warrantless arrest and a judicial determination of probable cause. We find unconvincing the sheriff's attempt to shrug off his federal constitutional responsibilities toward detainees confined in the Kosciusko County Jail who have not yet had a probable cause hearing. . . . In the final analysis, the sheriff is the custodian of the persons incarcerated in the jail, and as such, it is he who is answerable for the legality of their custody. . . . Although it is true that the custodian of an arrestee does not have authority to force a judge to make a determination of probable cause, the custodian does have the power to release an arrestee if no timely probable cause

finding has been made. Moreover, a failure by a custodian to notify a court of the need for a probable cause determination or a failure to ascertain whether a judicial determination of probable cause has been made are situations in which a custodian's actions could be found to be a proximate cause of a *Gerstein* violation. And if such actions are the result of a municipal policy or custom, as is alleged here, the municipality itself could be liable for having caused the violation."); ***Gremo v. Karlin***, 363 F.Supp.2d 771, 792 (E.D. Pa. 2005) ("In the present case, plaintiff has sufficiently alleged that Gremo's harm was caused by a constitutional violation and that the municipal defendants, the City of Philadelphia and the School District of Philadelphia, may be held responsible for that constitutional violation because of their policies and/or customs. The municipal defendants' policies and/or customs alleged in the amended complaint included concealing information about violence, failing to address safety concerns, failing to train employees to avoid violations of constitutional rights, and cultivating an atmosphere where employees of the municipal defendants would fail to report incidents of violence. Gremo has satisfactorily stated a claim that defendants the City of Philadelphia and the School District of Philadelphia can be held constitutionally liable under 42 U.S.C. § 1983 for violating plaintiff's substantive due process right to bodily integrity secured by the Fourteenth Amendments to the United States Constitution."); ***Panaderia La Diana, Inc. v. Salt Lake City Corp.,*** 342 F.Supp.2d 1013, 1036 (D. Utah 2004) ("A city cannot shield itself from all liability for potential constitutional violations by the simple expedient of enacting a general policy statement that it is the city's policy to not violate constitutional rights."); ***Otero v. Wood,*** 316 F.Supp.2d 612, 627 (S.D. Ohio 2004) ("There are two distinct bases that support municipal liability in this case. First, liability may be based on the City policy that allows the use of wooden baton rounds as a 'first resort'--before the use of less dangerous alternatives. Plaintiff has presented evidence that the City has a policy of discouraging the use of tear gas. Curmode testified that she was ordered by the Deputy Chief of the CDP to discourage the SWAT unit's use of tear gas. This order originated from the policy level of the City and therefore represents City policy, even though it is an unwritten policy. This order was a moving force behind the decision to use wooden baton rounds, or at least to use wooden baton rounds as the first resort, so soon after providing a warning. The Court has already held that the mere use of knee knocker rounds under the circumstances here was excessive force, at least under the facts as presented by Plaintiff. Whatever policy the City had regarding the use of riot guns loaded with wooden baton rounds allowed those guns to be used before extensive warnings, warning shots, or tear gas--all of which would have decreased the risk of serious bodily injury. The City therefore had a policy that caused the excessive force, thereby

causing Plaintiff's injury. The second ground for municipal liability here is based on the City's ratification of the unlawful conduct. Defendants are correct that, generally speaking, evidence of later events cannot establish that a given violation was caused by an official custom or policy. . . A municipality may, however, ratify its employees' acts--thereby subjecting itself to § 1983 liability--by failing meaningfully to investigate those acts. . . Viewed in this light, evidence that a municipality inadequately investigated an alleged constitutional violation can be seen as evidence of a policy that would condone the conduct at issue."); ***Barry v. New York City Police Department,*** No. 01 Civ.10627 CBM, 2004 WL 758299, at *13 (S.D.N.Y. Apr. 7, 2004) (not reported) ("Unlike other cases in which courts have found insufficient evidence of a custom of retaliation, plaintiff's witnesses speak from firsthand experience about the blue wall of silence and plaintiff alleges to have suffered a wide range of retaliatory acts as opposed to one discrete instance of retaliation. . . . Moreover, in contradistinction to the cases defendants cite in defense of their claim that the court should disregard the factual findings of the Mollen Report, here, plaintiff complains of acts that are of the precise nature as the customs and practices described in the Report. As such, the Report is admissible with regard to its factual findings. . . . On balance, in light of the evidence before the court, a reasonable jury could find that a widespread custom of retaliating against officers who expose police misconduct, with officials willfully ignoring if not facilitating the practice, pervades the NYPD."); ***Fairley v. Andrews,*** 300 F. Supp.2d 660, 668 (N.D. Ill. 2004) (complaint withstood motion to dismiss where it alleged "a policy, custom, or final policymaking decision to harass and retaliate against correctional officers who speak out against the excessive use of force."); ***Leisure v. City of Cincinnati,*** 267 F. Supp.2d 848, 857, 858 (S.D. Ohio 2003) ("Though the City runs through a laundry list of 'constitutionally adequate policies and procedures' it has on the books, Plaintiffs' Second Amended Complaint, as explained above, can be read to attack an unwritten custom articulated by the Chief of Police. That unwritten custom, Plaintiffs allege, makes a game of pursuits, that 'cops like a good foot pursuit...the thrill of victory the agony of defeat' . . Defendant correctly cites to *Doe v. Tennessee,* 103 F.3d 495 (6th Cir.1996) for authority on unconstitutional custom, including the proposition that such custom 'must be so permanent and well settled as to constitute a custom or usage with the force of law' . . . Plaintiffs' Second Amended Complaint alleges that an unwritten custom has persisted for many years, citing to events and history that Defendant challenged as 'unrelated' and 'irrelevant' to Plaintiffs' injury. The Court finds that Plaintiffs' Second Amended Complaint adequately pleads that the City has had unconstitutional customs so permanent and well settled as to meet the Sixth Circuit's definition in *Doe.*"); ***Garcia v. City of Chicago,*** No. 01 C 8945,

2003 WL 1845397, at **3-5 (N.D. Ill. Apr. 8, 2003) (not reported) ("The relevant question is whether Garcia's injury would have been avoided had the City adequately investigated, disciplined, and prosecuted its police officer employees, instead of protecting them from taking responsibility for their misconduct. . . . In *Latuszkin,* after concluding that there was no basis to find that any city policymakers' were directly involved in the acts at issue, which is a finding under the third method of establishing a municipal policy, the Seventh Circuit went on to find that furthermore, 'nothing in Mr. Latuszkin's complaint suggests that a few parties held in a police department parking lot should have come to the attention of City policymakers.'. . This determination constitutes a finding under to the second method of proving a municipal policy existed, whether there was a widespread practice. In this case, it is true that Garcia did not present evidence that the final policymaker for the City of Chicago, the City Council, directly participated in the failure to investigate and discipline Chicago Police officers who allegedly committed acts of excessive force. Instead, this court's denial of summary judgment was based upon Garcia's presentation of evidence that the failure to investigate and discipline was 'so persistent and widespread that the City policymakers *should have known* about the behavior.' . . . evaluating all the facts in the light most favorable to Garcia, and drawing all reasonable inferences in Garcia's favor, a reasonable juror could conclude that a custom or policy of not investigating alleged misconduct of police officers, whether they are acting under color of law or as private citizens, would result in police officers, such as Oshana, believing they could use excessive force against civilians, such as Garcia, with impunity."); ***Garrett v. Unified Government of Athens-Clarke County,*** 246 F. Supp.2d 1262, 1279, 1280 (M.D. Ga. 2003) ("[T]he Unified Government had no formal, written policy instructing officers to hog-tie suspects in a manner that would violate their constitutional rights. Therefore, the Court must now determine whether the Unified Government had informally adopted a custom of unconstitutionally hog-tying suspects . . . .The Court finds that Plaintiff has presented sufficient evidence to show that the Unified Government had a widespread custom of using the hog-tie restraint on suspects. . . . However, a finding that there was widespread use of the hog-tie restraint does not automatically equate to a finding that there was widespread *unconstitutional* use of the hog-tie restraint so as to impose municipal liability. . . . Although Plaintiff has presented evidence that Athens-Clarke County officers regularly used the hog-tie restraint, she has not presented any evidence from which a reasonable jury could infer that the hog-tie restraint was persistently employed in an unconstitutional manner so as to constitute a custom of the Unified Government."), *reversed and remanded on other grounds,* 378 F.3d 1274 (11th Cir. 2004); ***Sarnicola v. County of Westchester,*** 229 F.

Supp.2d 259, 276 (S.D.N.Y. 2002) (“Sgt. McGurn's actions did not accord with the written strip search/body cavity search policy of Westchester County, which requires reasonable suspicion based on the circumstances of the case. . . However, while the search was a violation of the written policy of Westchester County, it may have been undertaken pursuant to the actual practices and usual customs of the Westchester County police. The deposition testimony of both Sgt. McGurn and Officer Beckley suggest that stip searching all felony narcotics arrestees (possibly including a visual body cavity search) was a routine practice of the County Police. . . The potential contradiction between the policy and the practices of the Westchester County Police preclude summary judgement.”); ***Williams v. Payne***, 73 F. Supp.2d 785, 798 (E.D. Mich. 1999) (“One clear and reasonable conclusion that can be drawn from these admissions is that the City of Pontiac, through its police department, maintained a widespread practice to take suspects whom they believed to have ingested narcotic evidence to a hospital for a stomach pumping procedure. These admissions also suggest that one of the ordinary, foreseeable tasks of a police officer is to confront people who are suspected of engaging in the illicit drug market, and that such people commonly ingest drug-related evidence. The facts, when taken in the light most favorable to the opponent of the motion, are sufficient to create a genuine issue of a material fact as to whether a claimed unconstitutional police practice was so widespread as to evince deliberate indifference on the part of the City which resulted in a violation of Williams' constitutional rights.”); ***Flores v. City of Mount Vernon***, 41 F. Supp.2d 439, 446 (S.D.N.Y. 1999) (“No *Monell* motion has been made by the municipal defendants here, and none would lie, since the search was conducted pursuant to an admitted policy of strip searching everyone who was arrested for narcotics activity.”); ***Open Inns, Ltd. v. Chester County Sheriff's Dep't***, 24 F. Supp.2d 410, 429, 430 (E.D. Pa. 1998) ("[W]e find that the Chester County Sheriff's Department has an admitted unconstitutional custom or practice of authorizing its officers, at any hour of the day or night, to be hired by private parties to accompany and assist them in serving process in civil actions and then to remain on the premises at the behest (and expense) of the private parties while those private parties carry out seizures, without any inquiry into the legality of such actions, such as whether the seizures are taken pursuant to an antecedent court order or writ."); ***Gary v. Sheahan***, No. 96 C 7294, 1998 WL 547116, *6 (N.D. Ill. Aug. 20, 1998) (not reported) ("[T]his court finds that there is no issue of material fact regarding whether a municipal policy existed that required the routine strip searching of women while men were not routinely subjected to such a strip search in the receiving room upon returning from court. The fact that such a policy is not a written policy or, indeed conflicts with a written statement of policy, does not defeat the plaintiffs' claim that

such a policy existed. This court finds that the practice under review was so widespread so as to constitute a de facto policy."); ***Brown v. City of Margate***, 842 F. Supp. 515, 518 (S.D. Fla. 1993) ("[A] smaller number of incidents where the investigation and resulting disciplinary actions were inadequate may be more indicative of a pattern than a larger number of incidents where the department fully and satisfactorily addressed the matter and responded appropriately. . . . While the six incidents of alleged excessive use of force in *Carter [v. District of Columbia*] may not have been statistically significant in Washington, D.C., three such incidents may be sufficient to establish a pattern in Margate."), *aff'd*, 56 F.3d 1390 (11th Cir. 1995); ***Pottinger v. City of Miami***, 810 F. Supp. 1551, 1561 (S.D. Fla. 1992) (Class of homeless persons established that unconstitutional arrests and property seizures by city police were executed pursuant to city custom or policy, so as to make city liable under section 1983.); ***Gomez v. Metro Dade County, Fla.***, 801 F. Supp. 674, 679 (S.D. Fla. 1992) ("In order to impose liability under a 'custom or usage' theory of municipal liability, [plaintiff] must prove a longstanding and widespread practice that is deemed authorized by policymaking officials because they must have known about it and failed to stop it."); ***McDonald v. Dunning***, 760 F. Supp. 1156, 1170 (E.D. Va. 1991) (policy of incarcerating persons arrested on warrant for failure to appear to serve sentence previously imposed without permitting such persons appearance before judicial officer).

See also ***McDowell v. District of Columbia***, 233 F.R.D. 192, 200, 201, 204 (D.D.C. 2006) ("Plaintiff's theory of the case is that Officer S. Williams ('Williams') of the Metropolitan Police Department violated her rights by conducting an illegal strip search and body cavity search. Plaintiff is suing both the District of Columbia and Williams, in her individual capacity. As a result of the difficulties faced by plaintiff in trying to obtain discovery in this case, plaintiff seeks an order granting summary judgment against the District as to the 'practice of allowing in the field strip searches or searches that involve viewing or touching inside the clothes searches' as well as costs and attorneys' fees incurred by plaintiff as a result of defendants' failure to produce the requested discovery materials, namely, the spreadsheet and PD 163's. . . Plaintiff moves under Rule 37 of the Federal Rules of Civil Procedure. . . . By requesting that the court granted summary judgment as to her claim that defendants engage in a practice of allowing improper strip searches, plaintiff is in essence seeking a default judgment. In general, courts favor disposing of cases on their merits. . . Thus, courts must take care, especially when contemplating a litigation-ending sanction, to ensure that it is proportional to the underlying conduct. . .This care requires consideration of three factors: 1) the resulting prejudice to the

opposing party, 2) the resulting prejudice to the judicial system, and 3) the need to deter such behavior in the future. . . . As in *Caldwell*, an award of attorneys fees is indeed warranted here. But for the inefficiencies in defendants' filing system, taken as a whole, discovery in this case would never have dragged on as it has. Such an award, therefore, coupled with a carefully worded instruction to the jury, explaining that a negative inference may be drawn from defendants' inability to locate information within its possession, will more than suffice. . . . Defendants' conduct in this case, while exasperating, in no way suggests any underlying bad faith. The resulting prejudice to the court is not as great as it could have been, because trial dates have not yet been set. On the other hand, the resulting prejudice to plaintiff, the probable inability to obtain the discovery necessary to make out her *Monell* claim, is significant. However, this resulting prejudice, coupled with the need to deter such behavior in the future, can be adequately remedied by the imposition of attorneys' fees and costs against defendants and the possibility of a jury instruction that addresses plaintiff's lack of evidence as to her *Monell* claim.").

Note that liability is attributed to the government unit in custom type cases through a policymaker's actual or constructive knowledge of and acquiescence in the unconstitutional custom or practice. *See, e.g.,* ***Baron v. Suffolk County Sheriff's Dep't,*** 402 F.3d 225, 240-43(1st Cir. 2005) (The Department assigns error to the district court's identification of 'the Department' as the relevant policymaker, arguing that the failure to identify a specific final policymaker within the Department was erroneous because it allowed the jury to find municipal liability if any Department employee knew of Baron's harassment claims. . . Although the district court's instruction would be error if understood this way, . . . it must be read as qualified by the court's later statement that liability could be imposed only if 'Department policymakers' were aware of the custom of retaliation and Baron's situation. It is highly unlikely that the jury interpreted the phrase 'Department policymakers' to mean 'any Department employee,' particularly in light of evidence that the Department superintendent, not just 'any' employee, was aware of Baron's complaints. Yet, even this qualified version of the court's statement might be too broad under the case law because it is only a policy made by the final policymaker that exposes a municipality to liability . . . . Therefore, in a case alleging an affirmative wrongful policy (as opposed to a custom acquiesced in), the court would have to identify an individual or body as the final policymaker, and the jury would have to determine whether the policy at issue could be attributed to that policymaker. . . However, Baron claims not that an individual or body adopted an unconstitutional policy but that the Department had a custom tolerated by policymakers who should

have intervened to correct it. In this custom context, our past language has sometimes referred to policymakers in the plural, rather than to a final policymaker. . . The requirement in the affirmative policy cases that the district court identify a final policymaker may therefore not apply in those cases based on custom. . . . We need not resolve this question here; under the plain error standard, it is enough that any error in the district court's reference to 'Department policymakers' without identification of a specific final policymaker is not clear. Moreover, even if the district court should have identified a final policymaker in this custom case, the Department is not entitled to a new trial because it cannot show prejudice resulting from the error. In a post-trial ruling, the district court concluded without explanation that the superintendent and deputy superintendent set policy for the jail in the relevant areas, implying that it believed Feeney was the relevant policymaker. . . If Feeney did set final policy for the House of Correction, the Department was not prejudiced by the verdict because he admitted that he knew that the code of silence existed, that there could be consequences for violating it, and that Baron had complained of harassment. In other words, the jury could have found that Feeney had knowledge of the custom that resulted in a deprivation of Baron's constitutional rights and that he acquiesced in the custom by failing to take actions to stop it. The Department asserts, however, that Sheriff Rouse, not Feeney, was the final policymaker under state law. Although there is no evidence on this issue in the record, it seems self-evident that the sheriff is the final policymaker within the Department as a matter of law. . . Emphasizing that Baron did not present any evidence regarding the Sheriff's actual knowledge of the code of silence and retaliatory harassment, the Department contends that a legal determination that the Sheriff was the final policymaker conclusively establishes prejudice. On this point, the Department is wrong. It is true that Baron did not demonstrate that the Sheriff actually knew of the custom that led to his constructive discharge. Although Rouse may not have had actual knowledge of the custom, however, municipal liability can also be based on a policymaker's constructive knowledge -- that is, if the custom is so widespread that municipal policymakers should have known of it. . . If the jury had been instructed that Rouse was the policymaker, it might have agreed that there was insufficient evidence to establish that he acquiesced in or condoned enforcement of the code of silence. On the other hand, the jury might also have concluded that if Superintendent Feeney was aware of the code of silence as third-in-command in the Department, constructive knowledge was also attributable to Rouse. . . . In short, the code of silence charged by Baron was real and pervasive. Viewing the verdict against this background, we conclude that the jury instruction's failure to identify a policymaker was not an error (if an error at all) that 'seriously affect[s] the fairness,

integrity, or public reputation of judicial proceedings.'"); ***Jeffes v. Barnes***, 208 F.3d 49, 64 (2d Cir. 2000)("In sum, a jury could permissibly find that the code of silence was part of Barnes's standard operating procedure at the Jail and that his affirmative actions were a direct cause of the violations of plaintiffs' First Amendment rights. In light of the scope, duration, openness, and pervasiveness of the retaliation against officers who broke the code of silence, the jury could find that Barnes was well aware of the existence and thrust of those acts of retaliation. Based on his failure to make any effort to forestall, halt, or redress the retaliatory conduct, the jury could well find that, even if Barnes did not directly cause the retaliation, he either acquiesced in it or was deliberately indifferent to the reprisals against officers who exercised their First Amendment rights in breach of the code of silence. Given our conclusion as a matter of law that Barnes was the County's final policymaker with respect to the conduct of his staff members toward one another in this area, any of these findings would suffice for the imposition of liability on the County."); ***McNabola v. Chicago Transit Authority***, 10 F.3d 501, 511 (7th Cir. 1993) ("A municipal 'custom' may be established by proof of the knowledge of policymaking officials and their acquiescence in the established practice."); ***Sorlucco v. New York City Police Department***, 971 F.2d 864, 871 (2d Cir. 1992) ("[A] § 1983 plaintiff may establish a municipality's liability by demonstrating that the actions of subordinate officers are sufficiently widespread to constitute the constructive acquiescence of senior policymakers."); ***Brown v. City of Fort Lauderdale***, 923 F.2d 1474 (11th Cir. 1991) ("[A] longstanding and widespread practice is deemed authorized by the policymaking officials because they must have known about it but failed to stop it."); ***M.N.O. v. Magana***Nos. Civ. 03-6393-TC, Civ. 04-1021-TC, Civ. 04-6017-TC, Civ. 04-6018-TC, Civ.04-6183-TC, Civ. 04-6443-TC, 2006 WL 559214, at *11, *12 (D. Ore. Mar. 6, 2006) ("When the Chief learned in April 2002 of Magana's stop of Dean, and everyone from the IA investigator, to the auditor, to the Chief himself believed Magana was probably lying about what happened, the need for more or different action was obvious, as the existent policy of dealing with the supervision of officers and the handling of reports of sexual misconduct was clearly likely to result in the violation of someone's constitutional rights. Although defendant alleges that the Chief could not have known from the Dean report the ultimate extent of Magana and Lara's activities, and that they were going to deprive women of their rights to be free from sexual assault from officers, it is quite clear that the Chief was aware that Magana was likely stopping Dean without a reasonable basis to do so, which is a constitutional violation itself. Further, a factfinder could reasonably conclude that an obvious possible conclusion of these sorts of stops would carry into the realm of sexual assault. A police officer who 'hits' on women he encounters

while on duty and lies about his conduct is a flagrant and transparent concern. At a minimum, the incident should have alerted the Chief to the need for greater supervision of Magana's contacts with women while on patrol. In sum, a factfinder could find that the Chiefs' collective failure to do anything, even after Buchanan learned of the Dean incident, constituted deliberate indifference. Finally, it is an easy call that whether such deliberate indifference was a causal factor in causing plaintiffs' constitutional injuries is a jury question. If the jury concludes that policymakers were deliberately indifferent in their failure to act to protect plaintiffs' constitutional rights and that such amounted to an official policy or custom of inaction, that jury could conclude that such policy of inaction was a direct causal link in causing the injuries. For the above reasons, defendant's motion for summary judgment on plaintiffs' claims alleging *Monell* liability against the City is denied."); ***Brown v. Mitchell***, 327 F.Supp.2d 615, 634, 635, 646 (E.D. Va. 2004) ("In sum, therefore, at least as respects capital improvements and the Jail, as a matter of local law, although the City Manager certainly has the duty to advise and to make recommendations, Dr. Jamison's office is not the repository of final policymaking authority. . . Rather, the City Charter vests that role in the City Council. As a matter of law, the Court holds that, as respects Brown's Section 1983 suit against the City, the City Council constitutes the final policymaking entity. That holding, however, is not fatal to Brown's Section 1983 case against the City because the record contains substantial evidence that, when construed in the light most favorable to the nonmoving party, would permit the jury to conclude that the City Council itself had knowledge of the conditions at the Jail and engaged in an official policy or custom of inaction towards the Jail in the period leading up to Stevenson's death. . . And, because the City Council constitutes the final policymaking authority respecting the Jail, this evidence is sufficient for purposes of summary judgment and the *Monell* 'custom or policy' requirement. . . . Taken as a whole, the record would permit a reasonable jury to find that the City Council, and hence the City, was aware of the long history of overcrowding, poor ventilation, and structural defects at the Jail and the risks that those conditions posed, including the risk of spreading infectious disease. Moreover, a jury could conclude that the Jail's conditions violated established federal constitutional rights. And, the record clearly would permit a reasonable jury to conclude that the well-established custom and policy of the City was to be deliberately indifferent to the rights allegedly violated. . . . Simply put, the record here would support a finding that Mitchell, who is statutorily responsible for the safe housing of the City's inmates, knowingly maintained a dangerously overcrowded facility. And, when construed in the light most favorable to the nonmoving party, the fact that Mitchell, by bringing the overcrowding issue to the attention of various City

officials, took some steps to alleviate this serious problem does not eliminate the prospect that a jury would so conclude. To be sure, Mitchell can offer that evidence to establish her state of mind. But, that evidence, considered with the record as a whole, merely creates a disputed issue of fact. It does not keep the case from the jury."); ***Blair v. City of Cleveland,*** 148 F. Supp.2d 894, 915 (N.D. Ohio 2000)("Plaintiffs in the case *sub judice* cannot establish that there was a persistent, pervasive practice, attributable to a course deliberately pursued by official policy-makers, which caused the deprivation of Pipkins' constitutional rights. Absent such a course of conduct on the part of the City of Cleveland, to hold the City liable under a failure to investigate theory would be to hold the City liable solely for the actions of its employees. Accordingly, with regard to Plaintiffs' failure to investigate theory, the City of Cleveland is entitled to judgment as a matter of law."); ***Smith v. Blue***, 67 F. Supp.2d 686, 689 (S.D. Tex. 1999) ("Throughout the Complaint, Plaintiffs specifically allege that the practice of pre-recording and then avoiding visual checks was so pervasive as to constitute a custom or policy, and that such a practice was the result of inadequate training. While municipal liability based on inadequate training is difficult to establish, Plaintiffs have alleged facts that support such a theory. Specifically, individual Defendants' admission that it was a routine practice to fill out inspection records beforehand, to save time on paperwork, and evidence that Defendants had lied about the visual checks even after the discovery of Justin's death provide support for that theory."); ***Culberson v. Doan***, 65 F. Supp.2d 701, 716 (S.D. Ohio 1999) ("[W]e conclude that Plaintiffs sufficiently allege in their Complaint that Defendants intentionally engaged in the activity of 'selective enforcement' in violation of § 1983 by failing to act upon her reports of abuse and beatings by Defendant Doan. Such actions of 'selective enforcement' based on race, nationality, religion, or gender can give rise to a claim under § 1983. . . Plaintiffs also sufficiently allege in their Complaint that Defendant Payton, the Chief of the Blanchester Police Department, acted under a policy or custom of the Blanchester Police Department to engage in 'selective enforcement' in this case."); ***Bielevicz v. Dubinon***, 915 F.2d 845, 854 (3d Cir. 1990) (jury could infer that policymakers knew of custom of using charge of public drunkenness to incarcerate individuals who were not intoxicated); ***Jones v. Thompson***, 818 F. Supp. 1263, 1269 (S.D. Ind. 1993) ("Defendants' actions and inaction were the result of both policymakers of Madison County . . . and of the custom and practice to apply restraints without medical consultations and keep them on for extended and undocumented periods without review."); ***McLin v. City of Chicago***, 742 F. Supp. 994, 1002 (N.D. Ill. 1990) (plaintiffs' allegations "that the code of silence is widespread and that policymaking individuals knew of the code of silence but failed to take steps to eliminate it...are

sufficient to state a claim against the City for a policy or custom."). *Accord* ***Myatt v. City of Chicago***, 1991 WL 94036 (N.D. Ill. May 23, 1991) (not reported) (finding significant the alleged admission of high-ranking police officials that a code of silence exists).

See also ***Myers v. County of Orange***, 157 F.3d 66, 69, 77 (2d Cir. 1998) ("We hold that a policy by a police department or district attorney's ("DA") office favoring an initial complainant over a later one without giving primary regard to the particular facts involved in the case violates the Equal Protection Clause of the Fourteenth Amendment. We also hold that, where a district attorney in New York implements a policy directing a police department and assistant district attorneys not to entertain cross-complaints, that policy is imputed to the county, not the State of New York, for purposes of 42 U.S.C. § 1983 liability. . . . In the instant case, the County was found liable not for ADA Brock's decision to prosecute Myers, but for a DA policy that directed the Port Jervis police and county ADAs to engage in investigative procedures that violated Myers' equal protection rights. Orange County's liability for the DA's managerial decision to implement the cross-complaint policy is on a par with a DA's 'direct[ion to] the police to arrest and detain [plaintiff] without a warrant,' *Claude H.*, 626 N.Y.S.2d at 935-36, a DA's 'long practice of ignoring evidence of police misconduct and sanctioning and covering up wrongdoing,' *Walker*, 974 F.2d at 301 (citing *Gentile*, 926 F.2d at 152 n. 5), and a DA's 'decision not to supervise or train ADAs on *Brady* and perjury issues,' *id.*, all of which would result in county liability. Thus, Orange County was properly found liable.").

See also ***Grieveson v. Anderson***, 538 F.3d 763, 773-75 (7th Cir. 2008) ("Grieveson has not presented any evidence showing that the Marion County Jail's grievance procedure--the formal policy itself and the allegedly 'sham' manner in which it was carried out--caused his injuries. . . . Likewise, Grieveson's evidence of four incidents that he alone experienced 'fails to meet the test of a widespread unconstitutional practice by the Jail's staff that is so well settled that it constitutes a custom or usage with the force of law.'. . This simply is not enough to foster a genuine issue of material fact that the practice was widespread--from that evidence alone an inference does not arise that the *county itself* approved, acquiesced, or encouraged the disbursement of entire prescriptions at once."); ***Gates v. Texas Dept. Of Protective And Regulatory Services***, 537 F.3d 404, 437 (5th Cir. 2008) ("Although there was testimony from several TDPRS employees that they never obtain court orders before removing children from their homes, there was a lack of

corresponding evidence that those prior entries and removals were not made on the basis of parental consent or exigent circumstances. Therefore, the only case in which we can say with certainty that a constitutional violation may have occurred is the present one--when the TDPRS employees and Fort Bend deputies allegedly entered the Gateses' home without consent. . . . . Because it is permissible in some circumstances to remove a child from his home without a court order, the Gateses needed to present evidence that the prior removals were not based on consent or exigency before an unconstitutional custom can be shown. Therefore, the Gateses have failed to present evidence of a policy or custom that caused their alleged constitutional deprivation with respect to the entry into their home. The analysis regarding the seizure of Travis and Alexis from their schools is similar. The Gateses present no evidence that children were routinely or customarily removed from school in the absence of a court order or a reasonable belief of abuse. Thus, we are left with two instances of unconstitutional conduct. We conclude that this is not sufficient to support a finding that TDPRS customarily and unconstitutionally seized children from their schools in order to interview them at a central location. Therefore, the Gateses' claim fails on this count as well."); ***Alexander v. City of South Bend***, 433 F.3d 550, 557, 558 (7th Cir.2006) ("The sum total of Alexander's accusations is that South Bend's police manual had no information on how to conduct proper witness interviews, photo arrays, or lineups, and that South Bend made several errors handling his case. Allegations about what is not in the manual hardly establish that South Bend adopted a policy or had a custom of suggestive interviews, photo arrays, or lineups, or that it was indifferent to people's rights. In addition, the shortcomings in this investigation are not indicative of a custom or policy; rather, they are indicative of one flawed investigation. Alexander cites to no other suggestive lineups or photo arrays, no other conspiracies against blacks, and no other incidents of destroyed evidence. Alexander's *Monell* claim fails for a complete absence of evidentiary support."); ***Thomas v. City of Chattanooga***, 398 F.3d 426, 433, 434 (6th Cir. 2005) ("Appellants' best argument is that the Department has a custom of mishandling investigations of excessive force complaints. . . . All this aside, appellants must show not only that the investigation was inadequate, but that the flaws in this particular investigation were representative of (1) a clear and persistent pattern of illegal activity, (2) which the Department knew or should have known about, (3) yet remained deliberately indifferent about, and (4) that the Department's custom was the cause of the shooting here. . . . As this Court noted in *Doe*, deliberate indifference 'does not mean a collection of sloppy, or even reckless oversights; it means evidence showing an obvious, deliberate indifference' to the alleged violation. . . The *Doe* Court found that even where a school board had some information that

one of its teachers may have sexually abused students in the past and the board failed to remove him before he abused the plaintiff, the school board could not be found liable for having a policy, custom, or practice of condoning such abuse because there was no evidence that the school board failed to act regarding other teachers in similar circumstances; thus there was no evidence of any deliberate pattern. . .*Doe* makes clear that the plaintiff bears a heavy burden in proving municipal liability, and he cannot rely solely on a single instance to infer a policy of deliberate indifference. Despite the extreme circumstances here, appellants have not met their burden of showing that there is a genuine issue of whether an illegal Police Department policy exists. Appellants' expert inferred an illegal municipal policy from the Department's potentially insufficient investigation of Thomas's case, just as the plaintiff in *Doe* attempted to infer an illegal municipal policy from the school board's failure to remove the dangerous teacher at issue. Appellants' expert did not reach beyond the facts of this case to show any possibility of a pattern. Appellants point to this Court's finding in *Leach v. Sheriff of Shelby County*, 891 F.2d 1241 (6th Cir.1989), in support of the notion that deliberate indifference can be demonstrated by a municipality's failure to adequately investigate claims. However, in *Leach*, this Court was convinced that the municipality had a policy of deliberate indifference to prisoners' medical needs based on the fact that there were several separate instances where the prison failed to investigate prisoner mistreatment. . . Unlike the plaintiffs in *Leach*, appellants have failed to show several separate instances of the alleged rights violation. Furthermore, the fact that Crumley stated that she would find officer Abernathy 'justified' in his shooting if she had to make the same decision again, does not show a pattern of deliberate indifference that goes beyond the facts of appellants' own case. Rather, Crumley's statement was about a hypothetical situation that was based entirely on the facts of Thomas's own case. Therefore, appellants' argument falls prey to the problem of collapsing the municipal liability standard into a *respondeat superior* standard."); ***Milam v. Ctiy of San Antonio,*** Nos. 03-50862, 03-50937, 2004 WL 2469572, at *1, *2, *5 (5th Cir. Nov. 3, 2004) (unpublished) ("Milam sought to hold the City liable for its employees' illegal conduct by introducing evidence that City policymakers were aware of and were indifferent to a pattern of illegal arrests by park rangers, that the rangers were inadequately trained and supervised, and that the City failed to respond meaningfully to Milam's complaints. The City moved for judgment as a matter of law at the close of Milam's case and again at the close of the evidence, but the court denied the motions and sent the case to the jury. The jury found that the arrest was illegal, and the City does not challenge that finding. For purposes of the present appeal, two of the questions on the verdict form--both relating to municipal liability for the illegal arrest--are relevant.

In Question 2, the jury was asked the following:Do you find from a preponderance of the evidence that the city of San Antonio was consciously and deliberately indifferent to intentional and illegal arrests of individuals without probable cause by its park rangers, condoning a pattern or practice of such arrests by its park rangers? In Question 3, the jury was asked the following:Do you find from a preponderance of the evidence that the City's policy-making authority, ratified the wrongful conduct of its officers in violation of Mr. Milam's constitutional rights? The jury answered 'no' to Question 2 and 'yes' to Question 3. Pursuant to the verdict form's directive that the jury should proceed to consider damages if it answered 'yes' to either Question 2 or Question 3, the jury awarded $100,000. The evidence adduced at trial might have provided a legally sufficient basis for the jury to determine that the City's policymakers had tolerated a pattern of illegal arrests that rose to the level of customary policy. The jury, though, specifically rejected a pattern-and-practice theory in its negative answer to Question 2. Milam is therefore left with the task of trying to hang the evidence presented at trial onto the doctrinal hooks of the ratification theory. It is not an easy fit because, at least facially, an illegal arrest that is completed without the involvement of any policymaker does not look like the typical situation in which a policymaker could 'approve[ ] [the employee's] decision and the basis for it' such that municipal policy can be said to have caused the harm. . . Milam attempts in a few different ways to provide evidentiary support for the ratification verdict, but we conclude that the evidence does not support this theory of liability. . . . Milam's primary argument is that his ratification theory is aimed at situations in which policymakers have tacitly permitted informal practices to rise to the level of official municipal policy. It is certainly true, as we discussed above, that *Monell* recognizes that informal customs and usages, no less than formally promulgated pronouncements and ordinances, can come to represent a type of municipal policy. . . Actions taken pursuant to such a customary policy can then subject the municipality to § 1983 liability. Nonetheless, this does not help Milam's case. If Question 2 on the verdict form had limited the jury to considering whether the City had a policy of the formal-pronouncement type, then perhaps Milam's evidence that the City had allowed a pattern of illegal arrests could be shoe-horned into Question 3, the ratification interrogatory. But Question 2 was not so limited; rather, it fully contemplated the possibility that the City had tacitly adopted a customary policy. It did not ask the jury whether the City had promulgated ordinances or the like, but it instead asked them whether the City had 'condon[ed] a pattern and practice' of illegal arrests. The jury answered that it had not. Milam's attempt to equate ratification with liability for customary policy strips the ratification theory of any independent content within the circumstances of this case. . . . To be clear, we do not say that lackluster

disciplinary responses are never relevant in a *Monell* case and can never cause constitutional injuries. First, municipal policymakers who fail to supervise and to discipline their police officers, acting with deliberate indifference to the citizens' rights, could create municipal liability if the lack of supervision then caused a deprivation. . . Second, even though a policymaker's response to a particular incident may not cause the injury, the response might provide evidence of the content of a municipality's policies. That is, the failure to take disciplinary action in response to an illegal arrest, when combined with other evidence, could tend to support an inference that there was a preexisting de facto policy of making illegal arrests: the policymaker did not discipline the employee because, in the policymakers' eyes, the employee's illegal conduct actually conformed with municipal policy."); ***Burge v. St. Tammany Parish,*** 336 F.3d 363, 369, 370 (5th Cir. 2003) (*Burge IV*) ("Burge maintains that the constitutional violation he suffered resulted from two claimed deficiencies in the St. Tammany Parish Sheriff's Office, namely: (1) an alleged longstanding practice of failing to deliver all material information uncovered during the course of an investigation to the District Attorney; and (2) assertedly inadequate training in the maintenance and transfer of sheriff's records. . . . Knowledge on the part of a policymaker that a constitutional violation will most likely result from a given official custom or policy is a *sine qua non* of municipal liability under section 1983. . . . The knowledge requirement applies with equal force where a section 1983 claim is premised on a failure to train or to act affirmatively. . . . Both of Burge's theories, therefore, required proof of deliberate indifference. . . . There is no question in this case that the Sheriff of St. Tammany Parish is a final policymaker or that Burge suffered a *Brady* violation in his original trial and conviction for the 1980 murder of Douglas Frierson. . . . The issue on appeal is thus narrowed to whether Burge presented sufficient evidence to establish knowledge or deliberate indifference to the likelihood of a constitutional violation on the part of the Sheriff. We conclude that he did not."); ***Pineda v. City of Houston,*** 291 F.3d 325, 329-331 (5th Cir. 2002) ("Eleven incidents each ultimately offering equivocal evidence of compliance with the Fourth Amendment cannot support a pattern of illegality in one of the Nation's largest cities and police forces. The extrapolation fails both because the inference of illegality is truly uncompelling--giving presumptive weight as it does to the absence of a warrant--and because the sample of alleged unconstitutional events is just too small. Opinion evidence resting heavily on this data added little if anything. Left without legs, the opinions were little more than suspicion, albeit by informed persons. The weakness in the approach is apparent in its practical effects. It requires the City to defend 'cases within cases' from historical records to justify searches conduced without a warrant. . . . . Even if this proof was, contrary to our view,

sufficient to create a disputed issue of fact on custom, there remains the burden of demonstrating actual or constructive knowledge of the policy-making official for the municipality. . . . The plaintiffs do not allege that the policymakers for the City, the Police Chief and his Assistant Chiefs, had actual knowledge of the pattern of unconstitutional searches relied upon by the district court. Instead they argue that the pattern of unconstitutional searches by the SWGTF [Southwest Gang Task Force] is sufficient to survive summary judgment because it was widespread enough to impute constructive knowledge to the policymakers. We are not persuaded. First, the weakness in proof of any pattern of illegalities aside, the plaintiffs provided no evidence that the incidents were the 'subject of prolonged public discussion or of a high degree of publicity.' Rather they urge that any municipality that collects numerous offense reports, a small proportion of which include warrantless searches ostensibly, from the investigating officer's perspective, within an exception to the Fourth Amendment's warrant requirement, maintains not only a custom of unconstitutional searches, but that knowledge of this should be imputed to the municipal policymakers. This is functionally the *respondeat superior* regime the Supreme Court has repeatedly rejected. . . Second, the plaintiffs provide opinion evidence that the offense reports and number of warrantless searches performed by the SWGTF sent a clear signal to supervisors and policymakers that a pattern of unconstitutional behavior existed within the SWGTF. Such opinions as to whether or not policymakers had constructive knowledge do not create a fact issue, as the 'experts' were unable to muster more than vague attributions of knowledge to unidentified individuals in 'management' or the 'chain of command.' In fact, the offense reports were summarized and presented in digest form and the plaintiffs' experts failed to demonstrate how the unconstitutionality of the reported searches could be gleaned from these summary reports. All of this assumes that policymakers may not rely on the representations of police officers as to the existence of an exception to the warrant requirement. These offense reports are insufficient to establish *actual* knowledge of a pattern even in the hypothetical case that the plaintiffs provided proof that the policymakers had read the *individual* reports. It follows, then, that there can be no constructive knowledge of an unconstitutional custom from the reports passing through the 'chain of command' in summary form. [footnotes omitted]); ***Latuszkin v. City of Chicago,*** 250 F.3d 502, 505 (7th Cir. 2001) ("Mr. Latuszkin's complaint must be dismissed . . . because he claimed no more than a policy or custom of the CPD [Chicago Police Department]. Nowhere did he claim a policy or custom of the City. A municipality may only be held liable where it is the moving force behind the injury because some policymaker made a deliberate choice to act or not act in a certain way. . . The City correctly notes that the

complaint only alleges that the CPD and its supervisory officials turned a blind eye to the parties. The complaint does not allege any facts tending to show that City policymakers were aware of the behavior of the officers, or that the activity was so persistent and widespread that City policymakers should have known about the behavior."); ***Gregory v. Shelby County***, 220 F.3d 433, 440-42 (6th Cir. 2000) ("No one disputes that the written policy for J-Pod was that only one cell door could be opened at a time. . . . While any rational trier of fact could find that the written policy was not followed on more than one occasion, Appellant has wholly failed to point to evidence in the record suggesting that this lapse of compliance with the written policy was so well settled as to constitute a custom thereby attaching liability to Shelby County. . . Appellant contends that the County's responsibility is embodied in its toleration of the custom of leaving cell doors randomly open. Appellant's argument that the custom was tolerated suggests that the County must have either actual or constructive notice of that alleged custom. There is no evidence, however, that the County or any authorized decisionmaker was on notice that two or more cell doors were open at the same time."); ***Floyd v. Waiters***, 133 F.3d 786, 795 (11th Cir. 1998) ("[Plaintiffs] contend that the longstanding and widespread custom was that male security guards transported female students from school campuses to the 'Playhouse,' which was operated by the security department for the purposes of engaging in illicit sex. [footnote omitted] We conclude, however, that this conduct does not constitute a school district 'custom' that could support section 1983 liability. . . . [A] 'custom' requires that policymaking officials knew about the widespread practice but failed to stop it. . . Here, Plaintiffs have provided no evidence that policymaking officials--the BOE [Board of Public Education and Orphanage for Bibb County]--knew about the Playhouse or the activities that occurred there."); ***Jane Doe A v. Special School District***, 901 F.2d 642, 646 (8th Cir. 1990) (no liability on the basis of custom could be attributed to school district where individual defendants had no notice of pattern of unconstitutional acts and did not display deliberate indifference to or tacitly authorize the violation of plaintiffs' constitutional rights); ***Johnson v. City of Atlanta***, No. 1:06-CV-1706-AJB, 2007 WL 4580027, at *14 (N.D.Ga. Dec. 20, 2008) ("[E]ven if Plaintiff's evidence concerning the inadequacies in the excessive force investigation was sufficient to identify a pattern of improper training or investigation, Plaintiff has not shown that the City was aware of these inadequacies in training. For instance, Plaintiff has not identified a history of widespread prior abuse by APD officers to put the City on notice. . . Plaintiff identifies seven complaints against Payne, but none of these complaints were sustained . . . . As the City notes, the mere accusation of misconduct is not necessarily relevant. . . Also, Plaintiff has not identified the specific factual

allegations concerning these complaints, so he has not shown that these other incidents involved similar facts to place Atlanta on notice of deficiencies in its use of force training. . . As a result, the Court concludes that Plaintiff cannot hold the City liable for Payne's excessive force because there was no policy or custom that would have permitted Payne to engage in excessive force and caused Plaintiff's injury.")***; Washburn v. Fagan,*** No. C 03-0869 MJJ, C 03-1194 MJJ, 2006 WL 1072057, at *6 (N.D. Cal. Apr. 21, 2006) ("The Court finds that Plaintiffs' ratification theory fails for the simple reason that Plaintiffs have produced no evidence demonstrating which municipal officers have final policymaking authority for the City. . . In Plaintiffs' opposition brief, they contend that Sergeant Stansberry, Officer Kristal, and Assistant Police Chief Alex Fagan Sr. were aware of Fagan's alleged misconduct. Plaintiffs also assert that 'Fagan's conduct was widely known to other members of the SFPD.'. . However, there is no evidence to support the conclusion that any of these individuals were authorized policymakers for the City. Accordingly, Plaintiffs have not established a genuine issue of material fact as to the question of whether City policymakers ratified Fagan's actions."); ***Barnett v. City of Columbus***, No. 2:04-CV-1113, 2006 WL 406614, at *11 (S.D. Ohio Feb. 17, 2006) ("In the Court's view, the evidence proffered with respect to allegations of a pattern or policy of use of excessive force by Columbus police officers falls far short of the foregoing standard. The incidents do not serve to show that the City of Columbus condoned conduct amounting to excessive force or that it acted with deliberate indifference so as to amount to the City having an official policy of inaction.'. . All of the thirteen incidents cited by Plaintiff were investigated and found to be without merit. While these incidents involved differing versions of the facts, this Court has no record or factual basis from which to conclude that the Internal Affairs Bureau acted illegally or otherwise condoned unconstitutional behavior.")**;** ***Martin v. City of Columbus,*** No. 2:03CV161, 2005 WL 2671372, at *4, *5 (S.D. Ohio Oct. 19, 2005) ("Here, there was an investigation of Martin's allegations against Officer Haas. However, because Martin's allegations were brought more than sixty days after the incident, the Internal Affairs Bureau determined that Martin's allegations were unfounded. . .Under Article 8.12 of the collective bargaining agreement between the City and the Fraternal Order of Police a citizen complaint must be received by the City within sixty days after the date of the alleged event giving rise to the complaint. The exceptions to this rule are: (1) allegations of conduct which is criminal on its face; (2) allegations of conduct that could reasonably lead to criminal prosecution; and (3) allegations of non-criminal conduct that is the same or similar to conduct that resulted in the recent termination of a member, and the termination was upheld by an arbitrator or the Civil Service Commission. This provision of the CBA has come

under this Court's scrutiny before. In *Otero v. Wood,* 316 F.Supp.2d 612, 629 (S.D.Ohio 2004) (Marbley, J.), the officer who took the plaintiff's complaint filled out an 'incident report' (used to inform the police of any unlawful incident) instead of a 'citizen complaint' (used to complain to the police department about the conduct of an officer). The incident report was not converted to a citizen complaint until after the 60-day time period had already run. . . The plaintiff alleged that the use of an incident report rather than a citizen complaint was not an accident, but was deliberately done as a part of the City's policy to insulate officers from discipline. . .This Court found that if the plaintiff's claims were true, the City had a policy of dealing with citizen complaints in such a way as to virtually ensure that offending officers will not be disciplined for their misconduct. . . Here, Martin states that he did not file his citizen complaint because there were criminal charges pending against him. Martin filed his complaint on May 15, 2002. Yet, Martin's charges were not dismissed until December 30, 2002. Regardless of the reason for the delay, this case is factually distinguishable from *Otero*. It was Martin himself who caused the complaint to be filed outside the 60-day time period, not the City. As this Court has previously recognized, in general, one does not have a constitutional right to have a police investigation conducted in a particular manner, or to have one conducted at all. . . The CBA provision does not preclude all investigation, it only precludes investigation of complaints which are brought outside the 60-day time period and do not meet one of the listed exceptions."); ***Perrin v. City of Elberton, Georgia***, No. 3:03-CV-106(CDL), 2005 WL 1563530, at *10 (M.D. Ga. July 1, 2005) ("In this case, the evidence viewed in the light most favorable to Plaintiff establishes that City of Elberton police officers regularly applied for arrest warrants without providing a sworn statement to the issuing judge. Instead, the officers submitted unsworn warrant applications and unsworn police reports and expected the judge to make a probable cause determination based solely upon these documents. As discussed *supra*, a probable cause determination cannot legally be predicated upon unsworn statements, so this process is not constitutionally sound. The officers followed this process hundreds of times over a period of at least eight years. This history of widespread use of the unsworn warrant application process was sufficient to notify Welsh of the need to take corrective action. Furthermore, there is evidence that Welsh had firsthand knowledge of the process. However, Welsh failed to correct it. Genuine issues of material fact exist as to whether Welsh's supervisory conduct violated Plaintiff's constitutional rights. . . . [I]t is reasonable to conclude that Welsh, the City's Chief of Police, authorized the unsworn warrant application process. It is also reasonable to conclude that Welsh knew of a need to train the City's officers in this area and made a deliberate choice not to take any action to train the officers differently. . . For

these reasons, the City of Elberton is not entitled to summary judgment with regard to its alleged unsworn warrant application process."); ***Mosser v. Haney***, No. Civ.A.3:03CV2260-B, 2005 WL 1421440, at *4 (N.D. Tex. June 17, 2005) (not reported) ("Here, the Dallas City Charter states that, while the Chief of Police has immediate control over the police department, the Chief of Police is still subject to the supervision of the City Manager. . . Thus, the Chief of Police is not the policymaker for Dallas's police department, as he remains subject to the rules and supervision of the City Manager. . . . Because the General Orders were not issued by a policymaker, the Court cannot find that the General Orders constitute the policy of the City of Dallas. For the same reason, the Court also finds that the General Orders do not constitute a custom of the City of Dallas. As noted above, proof of a custom requires the plaintiff to demonstrate actual or constructive knowledge of the custom to the governing body or a policymaker. . . Mosser has not produced any evidence connecting the General Orders with the City Manager or City Council or even showing that the City Manager or City Council were aware of the General Orders. As such, the Court finds that Mosser has failed to demonstrate that the General Orders of the Dallas Police Department are a policy or custom of the City."); ***Lewis v. City of Chicago,*** No. 04 C 3904, 2005 WL 1026692, at *8 (N.D. Ill. Apr. 26, 2005) (not reported) ("Lewis argues CPD intentionally covered up Hicks' homicide. He points to obvious omissions in Detective Galbreth's report, and OPS' failure to conduct a thorough investigation. . . . He presents no evidence that the city was deliberately indifferent to excessive force complaints prior to Hicks' death. He relies exclusively on evidence relating to CPD's and OPS' deficiencies in investigating Hicks' death. His evidence falls far short of a practice, custom or policy with respect to investigations or discipline. . . Lewis presents no evidence that CPD's alleged failure to investigate excessive force allegations and discipline officers proximately caused Hicks' constitutional injury. Absent evidence of a causal link between the alleged failure to investigate and discipline and Hicks' death, Lewis' § 1983 claim cannot stand."); ***Allen v. York County Jail,*** Nos. Civ. 01-224-P-C, Civ. 02-158-P-C, 2003 WL 221842, at *9 (D. Me. Jan. 30, 2003)("In order for a 'custom or usage' to become the basis of municipal liability, the duration and frequency of the practice must be so widespread and longstanding that the decision making officials' actual or constructive knowledge of the custom can be established. . . . Applying this analysis to Allen's two complaints, it becomes apparent that the serious constitutional deprivations that he alleges were committed by corrections officers who took pains to engage in schemes and conspiracies to keep their conduct hidden. Allen does not actually allege that pretrial detainees were routinely raped and abused by fellow inmates at the behest of correctional officers. He describes in detail a series of events

that happened to him personally and a number of corrections officers, some named and some unnamed, who acted improperly vis-a-vis his detention. The apparent theory is that a number of officers intentionally conspired together to deprive an individual of his constitutional rights and they then devised schemes to keep their conduct secret, pursuant to an established 'custom' that was known or should have been known by York county's official decision makers (presumptively Sheriff Cote). While this complaint alleges a significant number of officers conspired to deprive Allen of his rights, it simply does not allege that sort of behavior was so widespread that the official decision maker can be said to have acquiesced in it . . . ."); ***Burns v. Goodman,*** No. CIV. A. 3:99CV0313-L, 2001 WL 498231, at *6, *7, *9 (N.D. Tex. May 8, 2001)(not reported) ("A pervasive, widespread practice . . . is insufficient to constitute official policy for purposes of imposing municipal liability under § 1983 unless policymakers had actual or constructive knowledge of the practice. . . . The court concludes that Burns has not established a genuine issue of material fact as to the City's constructive knowledge of a pervasive, widespread practice of illegal strip searches on the night shift at the Garland jail. . . . Because of a lack of evidence as to constructive notice of the alleged practices, the City has dodged a bullet. . . . Although the City escapes liability in this case, it is now on notice. If there are any future incidents under such circumstances, the City will not be able to shield itself from liability by asserting lack of notice."); ***Samarco v. Neumann***, 44 F. Supp.2d 1276, 1289 (S.D. Fla. 1999) ("Like the policy issue, Samarco has not presented any evidence of a widespread custom of using its canine force in an unconstitutional manner, and which was known and ratified by Sheriff Neumann, the final policymaker for the Sheriff's Office. Moreover, Samarco has not shown the existence of an illicit custom that was so widespread as to constitute the force of law. He merely points to some incidents where other fleeing felony suspects were injured. Such isolated episodes, dispersed over several years, are insufficient to substantiate the existence of a widespread custom violative of § 1983."); ***Doe v. New Philadelphia Public Schools Bd. of Ed.***, 996 F. Supp. 741, 747 (N.D. Ohio 1998) ("[I]n the present case, the court is not of the opinion that Plaintiffs have established a custom on the part of New Philadelphia regarding the intentional, deliberate, or even reckless dismissal of allegations of sexual misconduct on behalf of its employees. To be sure, with the clarity of 20-20 hindsight it can be said that Ms. Banks and Ms. Potosky's investigative and preventative measures in response to the allegations against Ms. McCune were grossly insufficient. It can even be said in light of J.T. Milius' prior allegations that Ms. Banks was reckless for not raising an antenna when she heard that Ms. McCune was leaving the building with a minor student. These two incidents of neglectful conduct on the part of two New

Philadelphia officials are troubling, but they do not rise to the level of a custom within the district, and certainly do not implicate the School Board in any way. Plaintiff is therefore unable to make out a crucial element of a 1983 claim under these circumstances, and summary judgment must be awarded to Defendant New Philadelphia.").

Acts of omission may serve as the predicate for a finding of municipal liability based on deliberate indifference to violations of constitutional rights. *See, e.g.,* ***Johnson v. Holmes***, 455 F.3d 1133, 1145 (10th Cir. 2006) ("Villareal argues that extreme short-staffing at the Department is the cause of any failures on her part during this period. Undisputed testimony shows that Villareal was both covering the large number of cases Perez left behind and serving as a supervisor to other social workers. . . . However, Villareal does not present evidence that budgetary problems at the Department caused her complete failure to investigate. Existence of budgetary problems is not an automatic free pass for unprofessional behavior, and the record is not clear about whether Villareal's workload, and not some less benign explanation, made her unable to investigate the questionable situation in Bogey's home. Summary judgment on this issue was therefore inappropriate."); ***Long v. County of Los Angeles***, 442 F.3d 1178, 1187, 1188, 1190 (9th Cir.2006) ("The County argues that, as a matter of law, a policy of reliance upon the trained professional doctors and nurses who worked in the MSB [Medical Services Bureau] cannot amount to deliberate indifference because the alleged deficiencies identified by Appellant fall within the province of medical and nursing schools, and nothing in the record suggests that the County had reason to believe the professional medical training received by the MSB doctors and nurses was deficient. This argument is contrary to this court's case law, which holds that, even where trained professionals are involved, a plaintiff is not foreclosed from raising a genuine issue of triable fact regarding municipal liability when evidence is presented which shows that the municipality's failure to train its employees amounts to deliberate indifference. Indeed, the County's argument would allow municipalities to insulate themselves from liability for failing to adopt needed policies by delegating to trained personnel the authority to decide all such matters on a case by case basis, and would absolve the governmental agencies of any responsibility for providing their licensed or certified teachers, nurses, police officers and other professionals with the necessary additional training required to perform their particular assignments or to implement the agency's specific policies. . . . The evidence creates a triable issue of fact regarding whether the County's policy of relying on medical professionals without training them how to implement proper procedures for documenting, monitoring and

assessing patients for medical instability within the confines of the MSB amounted to deliberate indifference. . . . We conclude that Appellant has presented evidence that creates a triable issue regarding whether the County's failure to implement a policy for responding to the fall of a medically unstable patient, a policy providing for prompt medical assessment if an MSB patient refuses necessary treatment, and a transfer policy, directing MSB staff immediately to transfer patients no longer medically stable, amounted to deliberate indifference to Mr. Idlet's constitutional rights."); ***Calhoun v. Ramsey,*** 408 F.3d 375, 379-81 (7th Cir. 2005) ("The express policy theory applies, as the name suggests, where a policy explicitly violates a constitutional right when enforced. . . . A second way of complaining about an express policy is to object to omissions in the policy. This, as we understand the argument, is what Calhoun is doing. In fact, we think that it is more confusing than useful to distinguish between claims about express policies that fail to address certain issues, and claims about widespread practices that are not tethered to a particular written policy. In both of these situations, the claim requires more evidence than a single incident to establish liability. . . This is because it is necessary to understand what the omission means. No government has, or could have, policies about virtually everything that might happen. The absence of a policy might thus mean only that the government sees no need to address the point at all, or that it believes that case-by-case decisions are best, or that it wants to accumulate some experience before selecting a regular course of action. At times, the absence of a policy might reflect a decision to act unconstitutionally, but the Supreme Court has repeatedly told us to be cautious about drawing that inference. . . Both in the 'widespread practice' implicit policy cases and in the cases attacking gaps in express policies, what is needed is evidence that there is a true municipal policy at issue, not a random event. If the same problem has arisen many times and the municipality has acquiesced in the outcome, it is possible (though not necessary) to infer that there is a policy at work, not the kind of isolated incident that *Brown* held cannot support municipal liability. . . . Whether we look at this case as one in which Calhoun was complaining about the failure of the County's express policy to make provision for advance verification of medications, or if we look at it as one in which Calhoun is arguing that the County has an implicit policy reflected in an alleged widespread practice of impeding detainee access to medication (a distinction Calhoun has discussed at length), the result is the same. Because he cannot point to any language in the jail's policy that is constitutionally suspect, he must provide enough evidence of custom and practice to permit an inference that the County has chosen an impermissible way of operating. . . . Having argued that the jail had a 'practice of refusing' to pre-verify medication, Calhoun cannot now turn around and argue that the district court erred by instructing

the jury on a custom or usage theory. Indeed, the instructions were consistent with Calhoun's proposed instructions and provided an alternative theory for his claim. His effort to hold Kane County liable on the basis of this single incident is inconsistent with *Brown*, and the district court was correct to reject instructions that would have misstated the law."); ***Garretson v. City of Madison Heights***, 407 F.3d 789, 796 (6th Cir. 2005) ("Garretson argues that Madison Heights's conduct, and that of its police officers, was premised on an unwritten custom of not providing medical attention to pre-trial detainees prior to arraignment[,] a policy or custom of inaction. She refers to the 'Madison Heights Policy on Medical Care while in Custody' to support her position. Such an alleged policy of inaction 'must reflect some degree of fault before it may be considered a policy upon which §1983 liability may be based.' . . . Garretson must show: (1) a clear and persistent pattern of mishandled medical emergencies for pre-arraignment detainees; (2) notice, or constructive notice of such pattern, to Madison Heights; (3) tacit approval of the deliberate indifference and failure to act amounting to an official policy of inaction; and (4) that the custom or policy of inaction was the 'moving force,' or direct causal link, behind the constitutional injury. . . Here, there is no evidence that Madison Heights, or its Police Department, had a custom of denying medical treatment to pre-arraignment detainees. Nor is there evidence that Madison Heights had notice of a 'clear and persistent pattern' of such treatment demonstrating the existence of a policy of inaction. Nor, as the district court noted, is there evidence that Madison Heights was the 'moving force' behind Garretson's injuries. Therefore, the decision of the district court that the City, and its Police Department, are entitled to summary judgment on the§1983 claims is AFFIRMED."); ***Williams v. Paint Valley Local School District***, 400 F.3d 360, 369 (6th Cir. 2005) ("To state a municipal liability claim under an 'inaction' theory, Doe must establish: (1) the existence of a clear and persistent pattern of sexual abuse by school employees; (2) notice or constructive notice on the part of the School Board; (3) the School Board's tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and (4) that the School Board's custom was the 'moving force' or direct causal link in the constitutional deprivation. . . The *Monell* custom requirement is an essential element of this claim. The *evidence must show that the need to act is so obvious that the School Board's 'conscious' decision not to act can be said to amount to a 'policy' of deliberate indifference to Doe's constitutional rights*." emphasis original); ***Blackmore v. Kalamazoo,*** 390 F.3d 890, 900 (6th Cir. 2004) ("A review of the record reveals that Blackmore presented evidence that the County did not have a formal written policy on how to deal with prisoner illnesses, and that the jail's practice was not to provide

a substitute nurse if the on-duty nurse calls in sick, resulting in times when a nurse is not on duty. Because we hold that verifying medical evidence is not required to state a claim for deliberate indifference where, as here, the seriousness of prisoner's need for medical care is obvious, and because the record presents an issue of fact regarding the total lack of any County policies, practices, and adequate training for this type of constitutional claim, and regarding whether the harm complained of resulted from the County policies, or lack thereof, we reverse the district court's grant of summary judgment for the County."); ***Hayes v. Faulkner County, Arkansas***, 388 F.3d 669, 674 (8th Cir. 2004) ("The County's policy was to submit the names of confinees to the court and then wait for the court to schedule a hearing. That policy attempts to delegate the responsibility of taking arrestees promptly before a court. In *Oviatt v. Pearce*, 954 F.2d 1470 (9th Cir.1992), a policy was deliberately indifferent where the jail had no internal procedures to track whether inmates had been arraigned. . . Because the County's policy here attempts to delegate the responsibility of bringing detainees to court for a first appearance and ignores the jail's authority for long-term confinement, the policy is deliberately indifferent to detainees' due process rights."); ***A.M. v. Luzerne County Juvenile Detention Center,*** 372 F.3d 572, 583 (3d Cir. 2004) ("Although this issue presents a close question on whether the Center's failure to establish a written policy and procedure for reviewing and following up on incident reports amounts to deliberate indifference, we conclude that a reasonable jury could conclude from the evidence that by failing to establish such a policy the Center disregarded an obvious consequence of its action, namely, that residents of the Center could be at risk if information gleaned from the incident reports was not reviewed and acted upon."); ***Natale v. Camden County Correctional Facilitiy,*** 318 F.3d 575, 585 (3d Cir. 2003) ("A reasonable jury could conclude that the failure to establish a policy to address the immediate medication needs of inmates with serious medical conditions creates a risk that is sufficiently obvious as to constitute deliberate indifference to those inmates' medical needs. The failure to establish such a policy is a 'particular[ly] glaring omission' in a program of medical care . . . PHS [Prison Health Services] 'disregarded a known or obvious' consequence of its actions, i.e., the likelihood that the medical conditions of some inmates may require that medication be administered within the first 72 hours of their incarceration."); ***Gibson v. County of Washoe,*** 290 F.3d 1175, 1195, 1196 (9th Cir. 2002) ("County officials actually knew that some detainees who arrived at the jail would have urgent medical and mental health needs requiring immediate hospitalization. The policymakers also knew that people suffering from mental illness are sometimes combative. In addition, the County had created a mental health screening position, so policymakers knew that jail employees needed to identify and address mental

illnesses in order not to neglect the medical needs of prisoners. Given that the County policymakers actually knew that the jail staff would regularly have to respond to detainee mental health needs, it should have been obvious that the County's omission could well result in a constitutional violation. . . Because county policy forbids medical evaluations on incoming detainees who are combative and uncooperative, it was obvious that someone who had a mental illness that made them combative and uncooperative would not be evaluated. If, however, a combative detainee arrives with prescription psychotropic medication in their own name, there is an alternative way to identify those with medical needs. Although a jury could conclude that the nurse actually did identify Gibson as a person in need of mental health treatment, the County's medication policy did not instruct her to act upon this realization. When policymakers know that their medical staff members will encounter those with urgent mental health needs yet fail to provide for the identification of those needs, it is obvious that a constitutional violation could well result"); ***Fairley v. Luman,*** 281 F.3d 913, 918 (9th Cir. 2002) (per curiam) ("John presented evidence sufficient to establish the City's warrant procedures constituted a 'policy.' Chief Luman testified at trial that he was 'the chief policymaker for law enforcement matters for the City of Long Beach.' His decision not to instigate any procedures to alleviate the problem of detaining individuals on the wrong warrant could constitute a policy in light of his testimony he knew it was 'not uncommon' that individuals were arrested on the wrong warrant, and that the problem was particularly acute where twins were involved. As in *Oviatt,* where the city failed to implement internal procedures for tracking inmate arraignments, the policy was one of inaction: wait and see if someone complains."); ***Griffin v. City of Opa-Locka,*** 261 F.3d 1295, 1308, 1314 (11th Cir. 2001) ("After reviewing the record in full and taking all inferences in favor of Griffin, the evidence establishes without any question that sexual harassment was the on-going, accepted practice at the City and that the City Commission, Mayor, and other high ranking City officials knew of, ignored, and tolerated the harassment. As such, we are persuaded that the jury's conclusion that sexual harassment was so persistent and widespread as to amount to a unconstitutional policy or custom is amply supported by the evidence. . . . We believe it fair to say that the City's tolerance of gross sexual harassment, its failure to take remedial action despite actual and constructive knowledge of the problem and its complete lack of any sexual harassment policy or complaint procedure taken together clearly constitute a 'moving force' behind the rampant sexual harassment at the City. As such, we uphold the jury's conclusion that the City had a policy or custom of ignoring or tolerating gross sexual harassment."); ***Munger v. City of Glasgow Police Dep't***, 227 F.3d 1082, 1088 (9th Cir. 2000) ("The unconstitutional policy or custom the Mungers allege. .

. is not the failure to offer assistance to intoxicated persons, but rather the failure to train officers regarding appropriate assistance and treatment of intoxicated persons. In our view, a custom and policy of helping intoxicated individuals could be in place and yet the departments could have failed to implement the policy because they did not train their officers adequately."); ***Arias v. Allegretti***, No. 05 C 5940, 2008 WL 191185, at *4, *5 (N.D.Ill. Jan. 22, 2008) ("Whether the City's actions in 1997 and 1998 requiring simply a contract change without taking any legislative action shows a lack of deliberate indifference should be left for the trier of fact. The evidence in the instant case shows that in January 2000 Alderman Beavers submitted an official resolution recognizing that 'Chicago police officers who do not carry out their responsibility in a professional manner have ample reason to believe that they will not be held accountable, even in instances of egregious misconduct.' A committee hearing was held, but nothing was done. In 2003, a jury returned a $1 million verdict against the City, finding a plaintiff's injuries were directly caused by the City's custom and practice of not adequately investigating, disciplining or prosecuting off duty police officers who used excessive force. *Garcia v. City of Chicago*, 2003 WL 22175618 (N.D.Ill.2003). Although that $1 million damage award was later reduced by remittitur, the City Council was certainly made aware that its so-called efforts to correct the problems of inadequate investigation and discipline was failing. Yet, nothing more was done at that time. Finally, in 2005 a proposal to amend the Municipal Code was introduced that would have addressed many of the issues raised by Alderman Beavers. The proposal called for sweeping changes in the investigation process. That proposal failed to pass the City Council, and the Chicago Police Department's disciplinary system remains unchanged to date. Based on the evidence plaintiffs have presented, they are entitled to argue to a jury that the City Council has been deliberately indifferent to the problem of police sexual misconduct, resulting in plaintiffs' injuries. Accordingly, the City's motion for summary judgment on Count I is denied."); ***Samples v. Logan County, Ohio***, No. C2-03-847, 2006 WL 39265, at *10 & n.6 (S.D. Ohio Jan. 6, 2006) ("As a matter of law, the Court cannot say one way or another whether the outcome would have been different had the jail's screening policy involved asking questions about alcohol history. . . However, it is not unreasonable to think that, considering the symptoms Susan was exhibiting in the night, and considering the special precautions the jail takes when an inmate has a known risk of withdrawal, placing Susan in a special observation cell could have made a difference. The Court therefore finds plaintiffs have alleged sufficient facts to establish that the accident happened because of the County's policy. Accordingly, defendants' motion is denied on this claim. . . . The jail has since changed its policy to now include questions about alcohol use. . . Plaintiff's expert, Dr. Gottula,

testified that it is common practice at other prisons to ask specific questions at intake about the risk of alcohol withdrawal. These questions have been routinely asked since the late 1990s."); ***Brown v. Mitchell***, 327 F.Supp.2d 615, 631(E.D. Va. 2004) ("In sum, on this record, a reasonable jury could find a pattern or practice for purposes of *Monell* by finding that the City Manager's Office, in its long-standing failure to act in the face of the known conditions at the Jail, acted with deliberate indifference to a known constitutional deprivation."); ***Solis v. City of Columbus,*** 319 F.Supp.2d 797, 809-11 (S.D. Ohio 2004) ("Because, under a no-knock warrant, a citizen loses the protection that would prevent the wrong house from being raided, the city should provide the citizen with the alternative protection of greater care being taken to ensure that the targeted address is correct before the warrant issues. The governmental interest in *not* having in place some sort of procedural safeguards to prevent terrifying and potentially tragic invasions of the wrong homes seems to this Court to be slight. When compared with the interest of innocent citizens in not undergoing the sort of ordeal experienced by Nicole and Carmen Solis, . . . the Court has no problem in concluding that a jury could find the City to have been deliberately indifferent to the rights of its inhabitants by failing to have such a policy. . . . The evidence reveals that Cox simply was not, in several small ways, as careful as he could have been. But why should he have been more careful, when there was no City policy requiring it? A reasonable jury also could find that, had such a policy been in place, Cox would have given the additional attention to accuracy that would have led to a different result. For the foregoing reasons, Defendants' Motion for Summary Judgment is DENIED as to the City and the individual Defendants in their official capacities based on the City's failure to have in place an operational policy that would require more than usual care to be taken in the interests of obtaining an accurate address for the no-knock search warrant that led to the violation of Plaintiffs' rights."); ***Brown v. Mitchell,*** 308 F.Supp.2d 682, 693, 694 (E.D. Va. 2004) ("[T]he housing of inmates in a grossly overcrowded, poorly ventilated, and unsanitary jail facility such as is described in the Complaint is so likely to result in inmate sickness and suffering that there is an obvious likelihood of constitutional deprivations to an identifiable group of persons having a special relationship to the municipality. And, that likelihood of deprivation to those persons is so apparent and obvious that, under *Milligan*, municipal inaction, even standing alone and without a pattern of actual sickness or disease transmissions, can constitute a cognizable 'official policy or custom' for purposes of *Monell*."); ***Kelsay v. Hamilton County, Tennessee***, No. 1:02-CV-054, 2003 WL 23721334, at *11 (E.D. Tenn. Dec. 9, 2003) ("Kelsay contends that the Hamilton County Sheriff's Department has a higher than normal use of force at the jail against prisoners and there is a history or pattern of ignoring

complaints by prisoners of excessive force. There is a dispute whether the Sheriff's Department conducted a meaningful investigation of the incident involving Kelsay, even though Kelsay's mother made jail supervisors aware of his serious injuries. According to Kelsay, no officer submitted an incident report about his injuries even though the Sheriff's Department's manual required an officer to notify the nurse and prepare an incident report upon learning that a prisoner has been injured. Kelsay also asserts that Coppinger had been named in two or three other civil suits involving assaults at the jail but Hamilton County had not conducted an investigation of Coppinger. Furthermore, Kelsay asserts that officers who use excessive force in the jail are not investigated and disciplined. Other jail officers who witness the use of excessive force against prisoners are not disciplined for failing to report it to the proper authorities. Kelsay argues that this lack of training, supervision and control over corrections officers adds up to and constitutes a policy or custom of deliberate indifference toward the constitutional rights of prisoners at the jail, and that this policy or custom of allowing excessive force at the jail was a proximate cause of the violation of Kelsay's constitutional rights. There are genuine issues of material fact in dispute concerning whether Hamilton County can be held liable under 42 U.S.C. § 1983 for the assault committed upon Kelsay in his jail cell. . . . Kelsay may proceed to trial on his claim that Hamilton County failed to adequately train and supervise its corrections officers."); ***Murvin v. Jennings***, 259 F. Supp.2d 180, 186, 187 (D. Conn. 2003) ("Murvin contends that the Town is liable for its police officers' failure to insure that the exculpatory information pertaining to the charges against him was actually transmitted to the prosecuting authority. Murvin claims that the Town's liability can be based on its failure to have an official policy that insures that exculpatory material is properly transmitted to prosecuting authorities as required by state statute. The court agrees. . . . Here, the Town cannot avoid liability as a matter of law merely because it does not have a policy, custom or practice that governs the transmittal of exculpatory material to prosecuting officials. To the contrary, as the foregoing case law clearly establishes, the Town may be liable under § 1983 for its failure to take action to insure that the constitutional rights of criminal suspects are not violated and that its police officers abide by the statutorily-imposed duty to disclose exculpatory information to prosecuting authorities."); ***Terry v. Rice,*** No. IP 00-0600-C H/K, 2003 WL 1921818, at *20, *22, *23 (S.D. Ind. Apr. 18, 2003) (not reported) ("Plaintiff does not argue that there was an application of a policy that resulted in a constitutional violation or that as a policymaker, Sheriff Rice made a decision concerning Donald's treatment that resulted in a constitutional violation. Rather, plaintiff argues that the relevant policy was the absence of a policy--the failure to implement proper procedures for dealing with inmates who are mentally

ill or suicidal, as well as a failure to implement proper procedures for obtaining inmates' medical records who were transferred to the jail from RDC. . . . The Montgomery County Jail had no official suicide watch policy. . .The policy for dealing with mentally ill inmates that was in place during the relevant time period dealt only with inmates as they were booked into the jail and did not provide any kind of screening mechanism or address the needs of established inmates, such as Donald. . . . Furthermore, there is little to no evidence concerning what training, if any, the jail officers received as a part of their job. The record evidence does indicate that, at a minimum, jailers were supposed to receive first-aid and CPR training. . . However, there is no indication that any of the jail officers, who would have had the most opportunity to observe the inmates, were ever 'trained regarding recognition of symptoms of mental illness' pursuant to 210 Ind. Admin. Code S 3-1-11(j) (1998) . . . Not having such policies concerning mentally ill inmates effectively allows jail officers to remain blissfully ignorant to a known and serious threat, and can lead directly to the harm of inmates. A reasonable juror could conclude that whatever procedures were in place concerning a suicide watch option were so inadequate as to amount to deliberate indifference."); ***McDermott v. Town of Windham,*** 204 F. Supp.2d 54, 67-69 (D. Me. 2002) ("The Court finds sufficient evidence in the summary judgment record to demonstrate that Chief Lewsen established a policy or custom of encouraging officers to handcuff all suspects in the course of arresting them. Nevertheless, Plaintiff has not established that this policy is violative of any clearly established federal right. Plaintiff has not shown that she had a clearly established right *not to be handcuffed* incident to her arrest. . . . The fact that the police department had no specific written policy dictating precisely when the use of handcuffs is justified does not amount to a deliberate choice to follow a course of action likely to lead to a constitutional violation or to deliberate indifference on Lewsen's part. To the contrary, Lewsen and the Town provided guidance to officers in effectuating arrests, including with regard to the use of force. Accordingly, the Court will grant summary judgment on the basis of qualified immunity to Defendant Lewsen on Plaintiff's claim of excessive force. . . . The Windham police department's custom, encouraged by Chief Lewsen, to handcuff suspects in the ordinary course of an arrest is not such as to condone constitutional violations."); ***Booker v. City of Boston,*** No. CIV.A.97-CV-12534MEL, CIV.A.97-CV-12675MEL, CIV.A.97-CV-12691MEL, 2000 WL 1868180, at *3 (D. Mass. Dec. 12, 2000) ("The city policy in question is its policy for dealing with allegations of sexual molestation. In a school setting such a policy is of course of vital importance . . . .Under the circumstances, the city enacted what appeared to be a constitutional policy. The crux of the plaintiffs' allegations is that the city utterly failed to distribute copies of the policy to its

employees or to train them as to the action the policy required. They have provided evidence which could support a finding that the city did little more than develop the policy, distribute it to its principals in the middle of almost 1000 pages of other documents, and assume that from these actions its employees would understand their mandatory reporting obligations under § 51A. Not surprisingly, this expectation was not met when the girls complained in the Spring of 1995. As would be expected, under such a 'paper tiger' system, all four school employees (three of whom were administrators) who should have reported the incidents under § 51A failed to do so. As a result, a jury could conclude that the city was a 'moving force' behind any violation occurring after the girls first reported the incident to Hill."); ***Connors v. Town of Brunswick***, No. 99-331-P-C, 2000 WL 1175641, at *9, *10 (D. Me. Aug. 16, 2000) ("[T]he fact that the Town considered batons important enough to mandate that they be carried but then failed to enforce that policy could support a conclusion that the Town was deliberately indifferent to the need to ensure that its officers were adequately equipped to avoid the usage of unnecessary deadly force. . . . In view of the plaintiff's evidence that failure to carry an impact weapon deprives an officer of a necessary weapon in the continuum of force and that Cap-Stun is an inadequate substitute, one could also infer that Hinton acted recklessly, taking the risk that lack of an impact weapon or an adequate substitute would result in his officers' use of unjustified deadly force. Such an omission by Hinton could, in turn, be linked to what a jury could find to have been the unreasonable use of deadly force against Weymouth."); ***Andrews v. Camden County***, 95 F. Supp.2d 217, 229, 230 (D.N.J. 2000) ("It is well established that in § 1983 suits, a municipality may be held liable for not having in place a policy that is necessary to safeguard the rights of its citizens, or for failure to act where inaction amounts to deliberate indifference to the rights of persons affected. . . . [I]if defendants knowingly failed to enforce the requirements that a Medical Director be in place and that medical rounds be conducted daily to visit segregated prisoners, this is evidence of reckless disregard of a condition creating an unreasonable risk of violation of inmates' Eighth Amendment rights . . . ."); ***Winton v. Bd of Commissioners of Tulsa County,*** 88 F. Supp.2d 1247, 1268 (N.D. Okla. 2000) ("The Court finds that there is evidence in the record from which a reasonable jury could conclude that the County's action or inaction in response to the risk of harm present in the Jail was not reasonable. . . . There is evidence in the record from which a jury could conclude that the only practical way for the County to have significantly abated the risk of violence at the Jail was to build a new facility. There is also evidence in the record that the County was hampered in its efforts to build a new jail by the voters of Tulsa County, who refused to pass bond issues prior to September 1995. While the Court recognizes the plight of the County, '[t]he lack

of funding is no excuse for depriving inmates of their constitutional rights.' *Ramos*, 639 F.2d at 573, n. 19 (citing several cases). The voters of Tulsa County had a choice. The County could pay on the front end to protect the constitutional rights of inmates by building a new jail, or the County could pay on the back end by satisfying judgments in meritorious civil rights actions based on unconstitutional conditions at the Jail. Until a new jail was built in 1999, the voters in Tulsa County had necessarily chosen the second of these options as the County's response to violence at the Jail. . . . A reasonable jury could find that the County's inaction or ineffective action was the moving force behind the conditions at the Jail which caused or permitted a serious risk of inmate harm to exist in the Jail. A jury could find that overcrowding, under-staffing, lack of adequate inmate supervision, lack of inmate segregation and classification, lack of inmate exercise time, dormitory-style housing, all of which existed over a long period of time, were all de facto policies of inaction by the County which created and or contributed to the conditions which created a serious risk of harm in the Jail."); ***Simmons v. Justice***, 87 F. Supp.2d 524, 533 n.11 (W.D.N.C. 2000) ("Defendants cite *City of Canton v. Harris* . . . in support of their argument that Plaintiff has not shown any 'deliberate indifference' on the part of the City of Spindale as is required to show a viable § 1983 claim. . . However, this requirement applies only to a 'failure to train' allegation. . . . Because Plaintiff is not alleging 'failure to train,' this authority is not applicable to his § 1983 claim. For liability to attach to the City of Spindale, Plaintiff will have to prove the city irresponsibly failed 'to put a stop to or correct a widespread pattern of unconstitutional conduct by police officers of which the specific violation is simply an example.' *Kopf*, at 262."); ***Massey v. Akron City Bd. of Education***, 82 F. Supp.2d 735, 746, 747 (N.D. Ohio 2000) ("The plaintiffs do not say that the Defendant Akron Board of Education had an explicit policy of condoning sexual abuse. No school board could have such a policy. Because the plaintiffs do not claim that the Akron Board adopted an official policy, they must show that a 'custom' was adopted through the decision making process that led to Bennett abusing them. . . The plaintiffs say the Board of Education had a custom of failing to prevent sexual abuse by teachers after repeated notice of trouble with the teacher that should have suggested the teacher was a pedophile. . . . Here, a reasonable jury could find the Akron Board of Education manifested a 'policy' of deliberate indifference to sexual abuse of students by teachers or counselors. . . There are facts sufficient to support a jury in finding a deliberate indifference to Bennett's sexual abuse and harassment of students. These facts are sufficient to support a jury finding that such deliberate indifference reflects a custom of inaction that was a 'moving force' in the constitutional deprivation. The plaintiffs show evidence that the Defendant Akron

Board of Education tolerated a pervasive custom, which directly caused the deprivation at issue."); ***Oviatt v. Pearce***, 954 F.2d 1470, 1477 (9th Cir. 1992) (decision not to take any action to alleviate the problem of detecting missed arraignments constitutes a policy for purposes of § 1983 municipal liability); ***Rivas v. Freeman***, 940 F.2d 1491, 1495 (11th Cir. 1991) (liability for failure to establish sufficient and appropriate procedures and policies regarding identification of arrestees, warrantless searches, and computer checks for information); ***Leach v. Shelby County Sheriff***, 891 F.2d 1241, 1247 (6th Cir. 1989) (policy of deliberate indifference to medical needs of paraplegic and physically incapacitated prisoners), *cert. denied*, 495 U.S. 932 (1990); ***Wright v. City of Canton,*** 138 F. Supp.2d 955, 966 (N.D. Ohio 2001) ("Based on *Marchese* and *Leach,* Wright can establish his municipal liability claim by showing (1) a final municipal policymaker approved an investigation into Jackson and Vinesky's conduct (2) that was so inadequate as to constitute a ratification of their alleged use of excessive force. Wright offers sufficient evidence to make this showing. The parties do not dispute that Canton Police Chief Thomas Wyatt approved the internal affairs investigation into the incident that led to Wright's injuries. Under Ohio Revised Code § 737.12, the chief of police is the final policymaker with regard to investigations that do not result in disciplinary action. Because the investigation into Jackson and Vinesky's conduct did not result in their discipline, Wyatt's approval of the investigation constitutes municipal policy."); ***Weaver v. Tipton County***, 41 F. Supp.2d 779, 789 (W.D. Tenn. 1999) ("In general, to state a municipal liability claim under an 'inaction' theory, Weaver must establish the existence of a clear and persistent pattern of unconstitutional conduct by municipal employees and notice or constructive notice of that pattern on the part of the municipality. . . Weaver must then demonstrate that the municipality's inaction reflected deliberate indifference such that its failure to act reflects an official policy of inaction, and that this policy is the moving force behind the constitutional violation at issue."); ***Cox v. District of Columbia***, 821 F. Supp. 1, 13 (D.D.C. 1993) ("[T]he District of Columbia's maintenance of a patently inadequate system of investigation of excessive force complaints constitutes a custom or practice of deliberate indifference to the rights of persons who come in contact with District police officers."), *aff'd,* 40 F.3d 475 (D.C. Cir. 1994); ***Rubeck v. Sheriff of Wabash County***, 824 F. Supp. 1291, 1301, 1302 (N.D. Ind. 1993) ("[I]n situations that call for procedures, rules, or regulations, the failure to make a policy itself may be actionable."); ***Timberlake by Timberlake v. Benton***, 786 F. Supp. 676, 696 (M.D. Tenn. 1992) ("A local governing body does not shield itself from liability by acting through omission. Thus, when a city provides no guidance to its officers

regarding such intrusive actions as strip searches, it must face the consequences of its inaction by being subject to suit.").

See also ***Linthicum v. Johnson***, No. 1:02-CV-480, 2006 WL 1489616, at *29, **32-34 (S.D. Ohio May 26, 2006) ("Linthicum argues that the City's disciplinary code must be evaluated not in the abstract, but rather as applied . . . in the Officers' arbitrations. . . She reasons that as such, the City must be held accountable for the arbitrators' decisions to reinstate the Officers with (in Johnson's case) a non-disciplinary corrective action and (in Kidd's case) three days' unpaid leave. . . She also suggests the City had--but failed to use--ultimate authority over whether to let the Officers return to work, because the City did not 'exercise its right to appeal' the arbitrators' reinstatements. . . . Because Linthicum's allegations that Kidd and Johnson were inadequately disciplined hinge largely on the Officers' reinstatements by arbitrators after their terminations, an important threshold issue is the extent to which the City may be held liable, under§ 1983, for the arbitrators' applications of the police disciplinary code. . .Unfortunately, neither party offers any specific legal authority on this point. The City reasons that it should not be bound by interpretations of the disciplinary code that are 'poorly reasoned' and in conflict with the police department's own interpretations during the Officers' initial disciplinary proceedings. . . Linthicum responds that the City must be held accountable for the arbitrators' applications of the code as a matter of contract law or general public policy, because the City should not able to shield itself from liability for police misconduct 'simply by negotiating and delegating away its authority to terminate' police officers in a collective bargaining agreement. . .While Linthicum's contractual privity theory has considerable logical appeal, the Supreme Court has suggested that it applies in the§ 1983 context only to the extent that a defendant municipality has delegated its authority to make disciplinary policy along with its authority to terminate individual employees pursuant to that policy. . . . Linthicum has not set forth any facts which suggest that the independent arbitrators who reinstated Officers Kidd and Johnson under the City's official disciplinary code were delegated responsibility for promulgating that code in the first instance. . . The Court is sympathetic to Linthicum's argument that constructions of §1983 like the one cited above may allow municipalities to limit their § 1983 liability for inadequate discipline by contracting their enforcement authority, under facially constitutional policies, to independent entities. Nonetheless, on the facts of this case, the Court feels itself bound by the authority above. The Court thus concludes that the City cannot be liable for the arbitrators' applications of the police disciplinary code, because Linthicum has not established a genuine dispute of material fact as to whether the

arbitrators actually made or adopted that code--as opposed to simply applying it in individual disciplinary appeals. . . . While the City is not accountable under § 1983 for the arbitrators' direct applications of the disciplinary code to reinstate Officers Kidd and Johnson, it remains accountable for failing to exercise any discretion it retained to override or otherwise challenge those reinstatements. As Linthicum observes in her papers, it appears 'the City did not even exercise its right to appeal' the arbitrators' decisions reinstating Kidd and Johnson. . . A reasonable jury could construe this apparent neglect of an opportunity to keep the Officers off the police force as evidence of the City's indifference to police discipline. However, because the failure to appeal concerns only Officers Kidd and Johnson, it is not independently sufficient to establish 'deliberate indifference' under§ 1983. . . Therefore, the Court must consider whether Linthicum has shown at least a genuine dispute of material fact as to whether the City has inadequately disciplined other officers. . . .While the City emphasizes that it initially terminated Underwood and Ewing for their misconduct, it also does not dispute Linthicum's assertion that it did not attempt to preserve those terminations by appealing Underwood and Ewing's reinstatements by arbitrators--or sixteen of the seventeen other reinstatements between 1994 and 2004--to a court of law. The Cincinnati Police Chief has testified that in his experience, '100 percent' of police terminations are appealed to arbitration. . . The Chief has also testified that the City Manager and legal department decide--with input from the Chief--whether to appeal arbitrators' reinstatements of terminated officers like Kidd and Johnson. . . These facts could reasonably be construed to suggest that the City has exhibited 'deliberate indifference' to police discipline, either because it terminated officers with the expectation that they would be reinstated by arbitrators, or because it acquiesced in the arbitrators' reinstatements by failing to exercise its discretion to appeal to a court of law. . . . [I]t appears that a reasonable jury armed only with the present statistics and other cited evidence could, in reviewing the evidence in the light most favorable to Linthicum, conclude that the City has engaged in an unofficial custom or policy of 'deliberate indifference' to police discipline. The City's claim for summary judgment as to this issue is therefore DENIED.").

But see ***Brumfield v. Hollins***, No. 07-61023, 2008 WL 5063881, at * (5th Cir. Dec. 2, 2008) ("Brumfield has failed to raise a genuine issue of material fact demonstrating that Sheriff Stringer is not entitled to qualified immunity on the basis of failing to promulgate policies … concerning inmate supervision and medical care. Brumfield places great weight on the fact that Sheriff Stringer had no *written* policies and procedures at the Old Jail similar to the ones at a nearby facility known as the

'New Jail.' From this, she concludes that Sheriff Stringer implemented no policies at all. But we have acknowledged that 'the validity of prison policies is not dependent on whether they are written or verbal. A policy is a policy....' *Talib v. Gilley,* 138 F.3d 211, 215 (5th Cir.1998). Indeed, verbal policies existed concerning inmate supervision and medical care, and Sheriff Stringer, Bryant, Louge, Hollins, and Thornhill all testified to that effect."); ***Szabla v. City of Brooklyn Park***, 486 F.3d 385, 392 (8th Cir. 2007) (en banc) ("Brooklyn Park's written policy concerning the use of dogs is lawful on its face. . . . Brooklyn Park's directives do not affirmatively sanction the use of the dogs in an unconstitutional manner. The policy is simply silent concerning the circumstances under which an officer should provide a warning before a canine is directed to bite and hold a suspect. The directives do not reflect a deliberate choice by policymakers to refrain from warning citizens about the use of dogs. . . .[A] written policy that is facially constitutional, but fails to give detailed guidance that might have averted a constitutional violation by an employee, does not itself give rise to municipal liability. There is still potential for municipal liability based on a policy in that situation, but only where a city's inaction reflects a deliberate indifference to the constitutional rights of the citizenry, such that inadequate training or supervision actually represents the city's 'policy.'. . . The evidence presented on this record is insufficient to make a submissible case of deliberate indifference. The evidence does not show that Brooklyn Park had a history of police officers unreasonably using canines to apprehend suspects without advance warning, such that the need for additional training or supervision was plain. . . So far as the record reveals, this was a one-time incident, and there is no evidence of a pattern of constitutional violations making it 'obvious' that additional training or safeguards were necessary."); ***Doe v. Dallas Independent School District***, 153 F.3d 211, 217 (5th Cir. 1998) ("Plaintiffs . . . contend that DISD's failure to adopt an official policy should subject them to liability. . . . Plaintiffs point to no evidence suggesting that, at the time of the sexual abuse, the lack of an official policy on this issue was the result of an intentional choice on the part of the board of trustees. Moreover, in *Spann v. Tyler Independent School District*, we held that a school board's decision to vest school principals with complete discretion to address allegations of sexual abuse was a 'perfectly reasonable policy for dealing with reported instances of sexual abuse.'. . . If an explicit policy delegating the matter to principals was 'perfectly reasonable,' and thus did not constitute deliberate indifference on the part of the school district, then we cannot say that a custom tantamount to such a policy was not also reasonable. [footnote omitted] Thus, the district court was correct in granting summary judgment in favor of DISD."); ***Logan v. City of Pullman***, No. CV-04-214-FVS, 2006 WL 120031, at **2-4 (E.D. Wash.

Jan. 13, 2006) ("To impose liability against the City by liability through omission, Plaintiffs must demonstrate that (1) a City employee violated Plaintiffs' constitutional rights; (2) the City has customs or policies that amount to deliberate indifference; and (3) these policies were the moving force behind the employee's violation of Plaintiffs' constitutional rights. . . As the Court ruled previously in its Order Re: Qualified Immunity, Plaintiffs have already set forth evidence establishing that their constitutional rights under the Fourth and Fourteenth Amendments were violated by the individual Defendant Officers' on the night in question. Thus, the first prong of the *Gibson* test has been satisfied and the focus shifts to the second and third prongs. Under the second prong of the *Gibson* test, Plaintiffs must present evidence showing the City has a policy that amounts to deliberate indifference to the Plaintiffs' constitutional rights. . . Plaintiffs contend their constitutional rights to be free from excessive force were violated because Chief Weatherly approved a facially unconstitutional policy directive equating the use of O.C. spray with the same level of force as a peaceful escort. . . .However, assuming, without deciding, that equating the use of O.C. spray with an escort does constitute an official 'policy' approved by Chief Weatherly, to establish liability, Plaintiffs must still demonstrate this policy amounts to deliberate indifference. . . . Moreover, even if Plaintiffs had presented sufficient evidence to create an issue of material fact as to whether the portion of the City's PPD Manual that equates the use of O.C. spray with an escort was deliberately indifferent to the Plaintiffs' constitutional right to be free from excessive force, Plaintiffs have not satisfied the third prong of Gibson. Plaintiff have not presented any evidence illustrating that such policy was the 'moving force' behind the Plaintiffs' constitutional deprivations."); ***Brown v. Mitchell,*** 308 F.Supp.2d 682, 700, 701 (E.D.Va. 2004) ("Considering the . . . fact that a Virginia sheriff has no authority to construct or modify local jail facilities, Mitchell argues that, because she is required to accept 'all persons' committed to the Jail, she cannot have been deliberately indifferent or grossly negligent as to the alleged overcrowding conditions at the Jail. It is true that, by statute, the locality, not the sheriff, is required to build and maintain a jail of a reasonable size to house the inmate population. . . . A Virginia sheriff, by contrast, has no duty or ability to build, expand, or otherwise improve the structural facilities of a jail. As discussed above, as a constitutional officer, Mitchell's duties and responsibilities are created solely by statute.. . Her statutory duties include maintaining records on all prisoners, formulating and enforcing jail rules, providing security in the jail, and keeping inmates clothed and fed. . . There is no statute, however, requiring or allowing a sheriff to build, add to, or otherwise improve the physical structure of a jail. Thus, Mitchell is correct respecting her inability to remedy the problem of overcrowding by building a new jail

or modifying the existing one. Her failure, therefore, to build a new jail or remedy the existing one cannot be considered gross negligence or deliberate indifference. However, Mitchell's argument that, as a matter of law, she is exonerated from either a state-law wrongful death action or an action under Section 1983 by virtue of Va.Code Ann. S 53.1-119 et seq. is misplaced because the argument simply ignores the remainder of the statutory scheme of which Va.Code Ann. S 53.1-119 et seq. is a part. . . . Under S 53.1-74, which also is a part of Chapter 3 of Title 53: 'When a ... city is without an adequate jail ... the circuit court thereof shall adopt as its jail, the jail of another county or city until it can obtain an adequate jail.' The ensuing sections of Chapter 3 provide for the procedures that are to be followed after such an adoption and set forth mechanisms for providing payment to the adopted jurisdiction. Thus, the General Assembly has provided a means for eliminating overcrowding when overcrowding would render a jail inadequate other than the structural remedies of constructing a new jail facility or expanding an existing one. And, although the authority for arranging for the use of other facilities lies in the local circuit courts, . . . Chapter 3 requires the sheriff to know, and keep records reflecting, the population of the local jail. . . Indeed, the sheriff must report thereon to the Compensation Board and, if asked, to the local circuit court. . . Thus, when a Virginia sheriff knows that a local jail is so overcrowded as to render it inadequate, that sheriff is not, contrary to Mitchell's arguments, without recourse or ability to remedy the overcrowding because, under Virginia's statutory scheme, alternate arrangements can be made by informing the local circuit court of the fact of overcrowding. Indeed, the Virginia legislature provides, quite clearly, that when so informed, the circuit court 'shall adopt as its jail, the jail of another county or city until it can obtain an adequate jail.' . . . Additionally, under another section of the statute, the circuit court can, upon Petition for Writ of Mandamus, command a governing body to put its own jail in good repair and be made otherwise adequate. . . Mitchell, whose job includes the operation of the Jail in accord with the dictates of Title 53, is charged with knowledge of these statutes. And, she is charged with knowledge of conditions in the Jail over which she has charge. Her failure to use these statutory mechanisms in the face of known overcrowding to the extent of the inadequacy as alleged in the Complaint certainly can be considered 'deliberate indifference' within the meaning of Eighth Amendment jurisprudence or gross negligence under Virginia's wrongful death jurisprudence."); ***Ivory v. City of Minneapolis***, No. Civ. 02-4364JRTFLN, 2004 WL 1765460, at *7 (D. Minn. Aug. 4, 2004) ("Plaintiff asserts that defendants' actions violated numerous department rules, and that these violations were not investigated by the Minneapolis Police Department. Specifically, plaintiff claims that Morrison, Ramsdell, and Kaneko violated a number of Minneapolis Police

Department Manual Rules that, taken together, detail the appropriate use of force, including deadly force, by police officers and prescribe reporting and review requirements related to the use of force. Plaintiff seems to contend that the alleged lack of an investigation into violation of these rules indicates that such violations are commonplace and condoned by the City and Department. The Court disagrees. Plaintiff has not identified any official policy that arguably played a role in his getting shot. To the contrary, the department rules identified by plaintiff, if followed, help to protect plaintiff from unconstitutional behavior by the police. Further, there is insufficient evidence from which a jury could find that the City and Department had a custom of encouraging or permitting unconstitutional violation of these rules. A single incident of unlawful behavior cannot establish a custom of permitting such behavior, and cannot give rise to municipal liability. . . Further, it is undisputed that the St. Paul police department investigated the use of deadly force during this incident and determined that the officers acted appropriately. The Minneapolis police department reviewed the St. Paul report and on that basis determined that the officers had followed all necessary rules and procedures. Thus, the City did not fail to investigate the alleged violation of plaintiff's constitutional rights, and there is no evidence of a custom of either deliberate indifference to or tacit authorization of such conduct. The City is entitled to summary judgment on this claim."[footnote omitted]); ***La v. Hayducka,*** 269 F.Supp.2d 566, 586 (D.N.J. 2003) ("In contrast to the blatantly damaging evidence uncovered in *Russo*, plaintiffs rely solely on the fact that the SBPD [South Brunswick Police Department] did not have a written policy regarding use of force against EDPs. To implicate a municipality, a plaintiff must 'demonstrate that, through its deliberate conduct, the municipality was the moving force behind the injury alleged.'. . . Although the officers acknowledged that they did not receive specific EDP training, Hayduka testified that he had received training regarding the practice of contacting the UMDNJ and accompanying mental health evaluators to on-site screenings. . . . Furthermore, the officers each testified that they were trained in a variety of situations and in using several methods of dealing with people of varying psychological states. When asked if he received training regarding use of force against mentally disturbed individuals, Hayduka stated he received extensive on-the-job training, as well as training on handling people with Alzheimer's Disease. . .Officer Schwarz stated that in continuum of force training, topics included discussions of rational as well as irrational persons. . . Moreover, unlike in *Russo*, plaintiffs have not offered any internal documentation that would establish that the SBPD was aware of a lack of training in dealing with EDPs, or that there existed the potential for rampant injustice as a result of alleged lack of training."); ***Goodwin v. Furr***, 25 F. Supp.2d 713, 717 (M.D.N.C. 1998) ("[P]laintiff's complaint is deficient

because it never alleges that the County officially sanctioned or ordered the seizure. It never identifies (1) what 'illegal custom' compelled, much less allowed seizure, (2) any county official who was involved in the seizure, and (3) why the sheriff or deputies may be considered the county's final policymaker with respect to the seized vehicles. The complaint merely states that the County failed to correct unconstitutional practices of the Sheriff and as a result created a custom of illegal practices. Unlike the situation in *Dotson v. Chester*,. . . plaintiff makes no claim that under North Carolina law, the County had either a right or obligation to fund, maintain or operate the seizure program and that it appointed the sheriff to carry out the program.").

C. Liability Based on a Policy or Custom of Inadequate Training, Supervision, Discipline, Screening or Hiring

1. In ***City of Oklahoma City v. Tuttle***, 471 U.S. 808, 813 (1985), the Court disapproved a jury instruction to the effect that "a single, unusually excessive use of force may ... warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge."

Chief Justice Rehnquist questioned whether there could be a "policy" of "inadequate training" at all for ***Monell*** purposes, if the word "policy" implies some deliberate, conscious choice of a course of action. *Id*. at 823. He also raised doubts as to "whether a policy that itself was not unconstitutional . . . can ever meet the 'policy' requirement of ***Monell***." *Id*. at 823 n.7.

Even assuming such a policy could satisfy ***Monell***, the plurality concluded that "considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Id*. at 823.

Justice Brennan agreed that a government policy of inadequate training could not be inferred from a single incident of excessive use of force by a police officer. He did not share the plurality's doubts about whether inadequate training could be viewed as a "policy" under ***Monell***, nor did he think that ***Monell*** required the policy itself to be unconstitutional in order to find government liability. So long as the government policy caused an individual to be subjected to a deprivation of a constitutional right, ***Monell***-type liability could attach. *Id*. at 833 n.8 (Brennan, J.,

concurring in part and concurring in the judgment). The only clear consensus reached in ***Tuttle*** was that municipal liability based on a policy of inadequate training cannot be derived from a single incident of police misconduct. *See also* ***Robinson v. District of Columbia***, 403 F.Supp.2d 39, 54, 55 (D.D.C. 2005) ("Perhaps recognizing the need for more than a single incident, but providing no analysis whatsoever, Plaintiff attaches a letter summarizing and referencing a Memorandum of Agreement ('MOA') between the United States Department of Justice ('DOJ'), the District of Columbia, and the MPD, and relies entirely on this document as proof of a pattern or practice by the District of failing to investigate and discipline officers for their excessive use of force. . . Having conducted a searching review of this letter, the Court joins with the *Byrd* court in rejecting Plaintiff's lame attempt to transform the mere existence of a MOA into a policy or custom of deliberate indifference, for the MOA does not provide any evidence of specific instances of the District's failure to discipline, and if anything, it demonstrates not deliberate indifference, but rather, an effort to improve its practices and procedures relating to the investigation and discipline of police misconduct. . . . As Plaintiff seems to suggest, . . .it may be fair to infer that the MOA reflects an awareness by the District of serious allegations relating to its use of excessive force and its investigations of such use of force. However, a mere awareness of a problem in January 1999 and a need for improvement is not, as a matter of law, sufficient to impose municipal liability for an incident that occurred in October 2000. When analyzing the introductory letter attached by Plaintiff and descriptions of the MOA, two important legal points become obvious. First, and perhaps most significantly, the MOA conclusively demonstrates that the District was not indifferent to the problems with the MPD, as suggested by Plaintiff. Rather, the District was taking affirmative steps as early as January 1999 to remedy the situation. Indeed, the DOJ itself commended the District's 'unprecedented request' for the DOJ's investigation and recommendations and notes that this request 'indicated the City and the Chief's commitment to minimizing the risk of excessive use of force in [MPD] and to promoting police integrity.' . . . Plaintiff's reliance on the existence of the MOA to support her claims is inherently illogical. Under Plaintiff's approach, 'a municipality would be ill-advised to evaluate its operational practices or to institute reforms lest its efforts be labeled as a policy or custom of deliberate indifference.'"); ***Byrd v. District of Columbia,*** 297 F.Supp.2d 136, 139, 140 (D.D.C. 2003)("In support of his claim, plaintiff recounts the facts surrounding his claim of excessive force and then, without citation, claims that 'it is without question a fact that no real investigation of the facts surrounding his beating ever took place.'. . While the District appears not to dispute plaintiff's claim that the incident at issue here was not properly investigated, that does

not resolve the matter. For, even assuming the truth of plaintiff's claim, which one must do at this stage, that is not sufficient under the law for purposes of imposing liability on a municipality, since a single incident is clearly insufficient to establish the existence of a policy amounting to 'deliberate indifference.'. . Recognizing the need for more than a single incident, plaintiff cites to a Memorandum of Agreement (MOA) between the United States Department of Justice (DOJ), the District of Columbia, and the MPD, and relies entirely on this document as proof of a pattern or practice by the District of failing to investigate and discipline officers for their excessive use of force. . . Having reviewed this MOA, [footnote omitted] the Court must reject plaintiff's lame attempt to transform the mere existence of a MOA into a policy or custom of deliberate indifference, for the MOA does not provide any evidence of specific instances of the District's failure to discipline, and if anything, it demonstrates not deliberate indifference, but rather, an effort to improve its practices and procedures relating to investigation and discipline of police misconduct. . . . From the MOA, it is clear that the District was adopting a proactive remedial approach, and it was, as early as 1999, attempting to reform its practices to eliminate the problems of the past."), *aff'd. by Byrd v. Gainer,* 2004 WL 885228 (D.C. Cir. 2004).

2. In ***City of Springfield, Mass. v. Kibbe***, 480 U.S. 257, 107 S. Ct. 1114 (1987), the Court had granted certiorari to decide the question of whether a municipality could be held liable under section 1983 for the inadequate training of its employees. The Court, however, dismissed the writ as improvidently granted because of an inability to reach and decide the closely related question of "whether more than *negligence* in training is required in order to establish such liability." 107 S. Ct. at 1115.

Four members of the Court dissented from the dismissal of the writ of certiorari. Justice O'Connor (joined by C.J. Rehnquist, and JJ. White and Powell) took the position that inadequate training could serve as a basis for imposing section 1983 liability on a local government, but "only where the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the [government's] domain." *Id*. at 1121 (O'Connor, J., dissenting). The plaintiff in an "inadequate training" case must show reckless disregard or deliberate indifference in the inadequacy of the training program in order to establish the requisite "causal connection between omissions in a police training program and affirmative misconduct by individual officers in a particular instance . . . ." *Id*.

3. In ***City of Canton v. Harris***, 489 U.S. 378 (1989), the Supreme Court addressed the questions left unresolved in ***Tuttle*** and ***Kibbe***. In ***City of Canton***, the plaintiff claimed a deprivation of her right to receive necessary medical care while in police custody. She asserted a claim of municipal liability for this deprivation based on a theory of "grossly inadequate training." The plaintiff presented evidence of a policy that gave police shift commanders complete discretion to make decisions as to whether prisoners were in need of medical care, accompanied by evidence that such commanders received no training or guidelines to assist in making such judgments. *Id*. at 382.

The Sixth Circuit upheld the adequacy of the district court's jury instructions on the issue of municipal liability for inadequate training, stating that the plaintiff could succeed on her failure-to-train claim " [where] the plaintiff . . . prove[s] that the municipality acted recklessly, intentionally, or with gross negligence." *Id*.

In an opinion written by Justice White, the Court unanimously rejected the City's argument that municipal liability can be imposed only where the challenged policy is itself unconstitutional and concluded that "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983." *Id*. at 387. Noting the substantial disagreement among the lower courts as to the level of culpability required in "failure to train" cases, the Court went on to hold that "the inadequacy of training policy may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id*. at 388. The Court observed, *id.* at 390, that:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. [footnotes omitted]

The "deliberate indifference" standard has nothing to do with the level of culpability that may be required to make out the underlying constitutional wrong, but

rather has to do with what is required to establish the municipal policy as the "moving force" behind the constitutional violation. *Id*. at 388 n.8.

The Court made it clear that on remand the plaintiff would have to identify a particular deficiency in the training program and prove that the identified deficiency was the actual cause of plaintiff's constitutional injury. It would not be enough to establish that the particular officer was inadequately trained, nor that there was negligent administration of an otherwise adequate program, nor that the conduct resulting in the injury could have been avoided by more or better training. The federal courts are not to become involved "in an endless exercise of second-guessing municipal employee-training programs." *Id*. at 390-91.

Justice O'Connor elaborated on how a plaintiff could show that a municipality was deliberately indifferent under *City of Canton*. First, where there is "a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face, ... failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue." *Id*. at 396 (O'Connor, J., concurring in part and dissenting in part).

For example, all of the Justices agreed that there is an obvious need to train police officers as to the constitutional limitations on the use of deadly force, *see* ***Tennessee v. Garner***, 471 U.S. 1 (1985), and that a failure to so train would be so certain to result in constitutional violations as to reflect the "deliberate indifference" to constitutional rights required for the imposition of municipal liability. 489 U.S. at 390 n.10.

Justice O'Connor was also willing to recognize that municipal liability on a "failure to train" theory might be established "where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion, ... [which pattern] could put the municipality on notice that its officers confront the particular situations on a regular basis, and that they often react in a manner contrary to constitutional requirements." *Id*. at 397 (O'Connor, J., concurring in part and dissenting in part). *See also* ***Spell v. McDaniel***, 824 F.2d 1380 (4th Cir. 1987).

Thus, ***City of Canton*** provides a plaintiff with two different approaches to a failure-to-train case. **First**, a plaintiff may establish deliberate indifference by demonstrating a failure to train officials in a specific area where there is an obvious

need for training to avoid violations of citizens' constitutional rights. **Second**, plaintiff may rely on a pattern of unconstitutional conduct so pervasive as to imply actual or constructive knowledge on the part of policymakers, whose deliberate indifference, evidenced by a failure to correct once the need for training became obvious, would be attributable to the municipality.

See, e.g., ***Sornberger v. City of Knowville***, 434 F.3d 1006, 1029, 1030 (7th Cir.2006) ("Establishing *Monell* liability based on evidence of inadequate training or supervision requires proof of 'deliberate indifference' on the part of the local government. . . This proof can take the form of either (1) failure to provide adequate training in light of foreseeable consequences; or (2) failure to act in response to repeated complaints of constitutional violations by its officers. . . . Here, Teresa's proferred evidence suffices to create triable issues with respect to both forms of deliberate indifference. Teresa first cites evidence that Galesburg had a policy of coercing confessions out of female suspects by threatening to have DCFS take away their children. . . . This evidence gives rise to triable issues with respect to Galesburg's municipal liability on theories of both failure to train and refusing to correct complained-of behavior. On this record, summary judgment dismissing the City of Galesburg was therefore improper."); ***Dunn v. City of Elgin,*** 347 F.3d 641, 646 (7th Cir. 2003) ("Deliberate indifference may be shown in one of two ways. First, a municipality shows deliberate indifference when it fails to train its employees to handle a recurring situation that presents an obvious potential for a constitutional violation and this failure to train results in a constitutional violation. . . . Second, a municipality shows deliberate indifference if it fails to provide further training after learning of a pattern of constitutional violations by the police."); ***Cherrington v. Skeeter,*** 344 F.3d 631, 646, 647 (6th Cir. 2003) ("Given the dearth of case law addressing the issue, it cannot be said that police officers routinely confront the question of what to do with children upon arresting their parent or guardian. Thus, the Defendant City cannot be deemed deliberately indifferent to an obvious need for officer training in this area. [footnote omitted] Likewise, Plaintiffs have failed to identify any similar incidents or prior complaints that might have alerted the Defendant City to the need to cover this topic in its officer training. Absent some form of notice that its officers might confront such a situation, the Defendant City cannot be held liable under a 'failure to train' theory for any alleged deprivation of Daija King's constitutional rights."); ***Brown v. Shaner***, 172 F.3d 927, 931 (6th Cir. 1999) ("The Court [in *Canton*] indicated at least two types of situations that would justify a conclusion of deliberate indifference in the failure to train police officers. One is failure to provide adequate training in light of foreseeable consequences that

could result from the lack of instruction. . . . A second type of situation justifying a conclusion of deliberate indifference is where the city fails to act in response to repeated complaints of constitutional violations by its officers."); ***Cornfield v. Consolidated High School District No. 230***, 991 F.2d 1316, 1327 (7th Cir. 1993) ("[I]t may be that a municipality could fail to train its employees with respect to a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face. [cite omitted] Given the nebulous standards governing student searches, school districts and school district administrators cannot be held accountable on this ground because the particular constitutional duty at issue is not clear. Alternately, municipal liability would be proper for a failure to train when the need is not necessarily obvious from the outset, but the pattern or frequency of constitutional violations would put the municipality on notice that its employees' responses to a recurring situation are insufficient to protect the constitutional rights involved. [cite omitted] In other words, the policymakers had acquiesced in a pattern of constitutional violations."); ***Thelma D. v. Board of Education of the City of St. Louis***, 934 F.2d 929, 934-45 (8th Cir.1991) (analysis clearly illustrates the two different methods of establishing ***City of Canton*** deliberate indifference.). *See also* ***Palmquist v. Selvik***, 111 F.3d 1332 (7th Cir. 1997); ***Young v. City of Augusta, Georgia***, 59 F.3d 1160, 1172 (11th Cir. 1995) (same).

See also ***Brown v. Mitchell,*** 308 F.Supp.2d 682, 706 (E.D.Va. 2004) ("At bottom, as Justice O'Connor's separate opinion in *Harris* makes clear, there are, in fact, two categories of failure to train cases, one involving a pattern of constitutional deprivations and one involving singular deprivations of more obvious rights. And, due to the fair notice requirements of *Monell*, each category proceeds somewhat differently as respects what must be pleaded and proved to establish deliberate indifference. Mitchell, who contends that the Complaint fails to state a claim because it fails to allege a pattern of constitutional deprivations at the Jail, is really asking the Court to place this action in the second O'Connor category, i.e., the category at- issue in *Lytle*. If, however, the Complaint concerns 'a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face,' . . . it does not need to allege a pattern of constitutional deprivation to state a legally cognizable claim. . . Count II resonates in that category of failure to train cases involving singular violations of clear and recurrent rights rather than in the pattern- mode category of failure to train cases. The Complaint alleges that Mitchell had a duty to ensure that her subordinates were adequately trained to recognize and adequately respond to serious medical conditions presented by inmates under their charge. The constitutional requirements imposed by the Eighth Amendment on the individual

employee guards is clear: they must not be deliberately indifferent to a serious medical situation. Moreover, that Eighth Amendment duty is implicated in recurrent situations because, during his or her tenure, every Jail guard is almost certain to be in charge of inmates with serious medical conditions. Thus, as a case implicating a clear and recurrent constitutional right, Brown's Complaint is a cognizable failure to train claim under *Harris*.").

Note that the second method of establishing government liability was recognized by courts prior to ***City of Canton***. *See,e.g.,* ***Eddy v. City of Miami***, 715 F. Supp. 1553, 1555 (S.D. Fla. 1989) ("A municipality's continuing failure to remedy known unconstitutional conduct of police officers is a type of informal policy or custom that is amenable to suit under [§ 1983].").

In ***Spell v. McDaniel***, 824 F.2d 1380 (4th Cir. 1987), a pre-***City of Canton*** case, the court drew a similar distinction between government liability based on a policy of deficient training and liability based on a pattern or custom of unconstitutional conduct condoned by government policymakers. *Id*. at 1389. The court noted an important substantive distinction between the two theories. While government liability can attach for the first constitutional injury that is caused by a proven policy of inadequate or deficient training, there must be some pattern of unconstitutional conduct actually or constructively known to policymakers before government liability can be based on a theory of condoned custom or usage. *Id*.

Compare ***Whitfield v. Melendez-Rivera***, 431 F.3d 1, 13, 14 (1st Cir. 2005) ("[T]he fact that neither Lebron nor Mangome was disciplined for this incident . . . does not provide a sufficient basis by itself to support the jury's verdict. . . . In this case. . . there was an investigation into the shooting incident. According to Mangome, the investigation concluded that Lebron and Mangome had been justified in their use of force. Given that the question of whether Lebron and Mangome were justified in firing at Whitfield was fact-based and was hinged on competing versions of the events, it is not surprising that two different fact-finders (the police investigators and the jury in this case) came to two different conclusions. Standing alone, the lack of any disciplinary charges against Lebron and Mangome is not probative of a 'well settled and widespread' policy or custom.. . Nor does it establish deliberate indifference by the city."); ***Estate of Davis by and through Dyann v. City of North Richland Hills,*** 406 F.3d 375, 385, 386 (5th Cir. 2005) ("We do not suggest that a single incident, as opposed to a pattern of violations, can never suffice to demonstrate deliberate indifference.. . It is true that there is a so-called 'single

incident exception,' but it is inherently 'a narrow one, and one that we have been reluctant to expand.' . . 'To rely on this exception, a plaintiff must prove that the 'highly predictable' consequence of a failure to train would result in the specific injury suffered, and that the failure to train represented the 'moving force' behind the constitutional violation.'"); ***Burge v. St. Tammany Parish,*** 336 F.3d 363, 373 (5th Cir. 2003) (*Burge IV*) ("The single incident exception . . is a narrow one, and one that we have been reluctant to expand. . . Accordingly, the exception will apply only where the facts giving rise to the violation are such that it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy or failure to train. . . It is not reasonably inferable [sic] from the evidence in this case that a *Brady* violation was a highly probable consequence of the Sheriff's policies. Unlike the facts of *Bryan County,* there is no evidence in the present case that the employees of the Sheriff's records room had a reputation for recklessness, or that the on-the-job training those employees received was inadequate. Nor do we accept Burge's argument that the single-incident exception should be expanded based on the latent nature of a *Brady* claim. . . . We decline, therefore, to extend the single-incident exception to the present case, and Burge is accordingly left with the burden of showing deliberate indifference by establishing proof of a pattern of similar violations, a burden he has been unable to carry."); ***Pineda v. City of Houston,*** 291 F.3d 325, 335 (5th Cir. 2002) ("In the only case in this circuit to apply the single incident exception to a failure to train claim, *Bryan County,* we stressed the requirements of notice and causation. . . Assuming arguendo that the plaintiffs have raised a fact issue with respect to whether or not GTF officers were performing specialized narcotics operations, the void in the record remains: the summary judgment record sheds no light on any lack of training in the application of the rules of search and seizure or any evidence of a causal relationship between a lack of training and the death of Oregon. The plaintiffs' single incident argument proves too much, as it essentially requires, again, that any Fourth Amendment violation be sufficient to satisfy the exception."); ***Piotrowski v. City of Houston (Piotrowski II)***, 237 F.3d 567, 582 (5th Cir. 2001) (**"**As is the case with allegations of failure to adequately screen prospective police officers, it is nearly impossible to impute lax disciplinary policy to the City without showing a pattern of abuses that transcends the error made in a single case. . . . A pattern could evidence not only the existence of a policy but also official deliberate indifference."); ***Estate of Novack ex rel. Turbin v. County of Wood***, 226 F.3d 525, 531 (7th Cir. 2000) ("[P]laintiffs may prove their allegation that the County was deliberately indifferent to the constitutional violations WCJ personnel were inflicting on mentally ill inmates by presenting either a series of unconstitutional acts from which it may be inferred

that the County knew WCJ officers were violating the constitutional rights of WCJ inmates and did nothing or by direct evidence that the WCJ policies, practices or training methods were unconstitutional. Plaintiffs have not shown that there was a pattern of suicide at WCJ from which we can draw the inference that the County was aware that WCJ policies for treating mentally ill inmates at risk for suicide were inadequate and chose to do nothing in the face of this knowledge. Even if we were to find that Novack's suicide itself was a result of unconstitutional conduct, a single instance of allegedly unconstitutional conduct does not demonstrate a municipality's deliberate indifference to the constitutional rights of its inhabitants. . . . In the absence of a series of constitutional violations from which deliberate indifference can be inferred, the plaintiffs must show that the policy itself is unconstitutional."); ***Gabriel v. City of Plano***, 202 F.3d 741, 745 (5th Cir. 2000) ("In failure to train cases, the plaintiff can prove the existence of a municipal custom or policy of deliberate indifference to individuals' rights in two ways. First, he can show that a municipality deliberately or consciously chose not to train its officers despite being on notice that its current training regimen had failed to prevent tortious conduct by its officers. . . Second, under the 'single incident exception' a single violation of federal rights may be sufficient to prove deliberate indifference. . . The single incident exception requires proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights and the need for additional or different police training. . . We have consistently rejected application of the single incident exception and have noted that 'proof of a single violent incident ordinarily is insufficient to hold a municipality liable for inadequate training.' *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir.1998 . . . .") and ***Hanno v. Sheahan,*** No. 01 C 4677, 2004 WL 2967442, at *13 (N.D. Ill. Nov. 29, 2004) ("Plaintiffs invite the court to conclude that the Sheriff's failure to discipline the deputies is sufficient to establish a liability. The court declines the invitation. Although some Circuits have held that a policy of inadequate discipline of police officers could evidence deliberate indifference to the constitutional rights of citizens, those courts have emphasized that 'it is nearly impossible to impute lax disciplinary policy to [a municipality] without showing a pattern of abuses that transcends the error made in a single case.' . . The Seventh Circuit has held that in order to establish municipal liability in the absence of an express policy, a plaintiff must establish 'a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law.' . . With respect to the wrongful seizure or excessive force bases of their Fourth Amendment claims, no such evidence is offered. The wrongful seizure and excessive force claims against Sheriff Sheahan are, therefore, dismissed.") *with* ***Brown v. Bryan County***, 219 F.3d

450, 458-60 (5th Cir. 2000) ("[I]f *Monell* liability is to be imposed, it must be done on the grounds of the single decision by Sheriff Moore to require no training of Burns before placing him on the street to make arrests. . . . . We think it is clear from the Court's decisions in *City of Canton* . . .and *Bryan County*, that, under certain circumstances, § 1983 liability can attach for a single decision not to train an individual officer even where there has been no pattern of previous constitutional violations. . . . Liability of the county depends upon whether it should have been obvious to Sheriff Moore--or stated differently, whether Sheriff Moore had sufficient notice--that the failure to train Burns in his task of making arrests was likely to lead to a violation of the Fourth Amendment rights of those he would encounter. Furthermore, liability attaches only if there is direct causation between the policy and the injury. The *City of Canton* also suggests that a single incident of an alleged constitutional violation resulting from the policy may serve as a basis for liability so long as that violation was an obvious consequence of the policy. Thus, *City of Canton* is persuasive that a pattern of misconduct is not required to establish obviousness or notice to the policymaker of the likely consequences of his decision."). *See also* ***Brown v. Mitchell,*** 308 F.Supp.2d 682, 704, 706 (E.D. Va. 2004) ("[U]nder *Harris*, the absence of an allegation of a pattern is not necessarily fatal to a failure to train claim. . . . [A]s a majority of justices in *Harris* held, a failure to train claim also can be based on a municipality's failure to train its employees concerning an obvious constitutional duty that the particular employees are certain to face. . . Thus, when a failure to train claim posits the deprivation of a clear constitutional right that is implicated in recurrent situations, the presence of a pattern is not an element of the claim. . . . The Complaint's lack of an allegation respecting a pattern of constitutional deprivations, therefore, contrary to Mitchell's argument, is not fatal. Construed liberally in favor of the plaintiff, . .. the Complaint alleges that Mitchell was deliberately indifferent by failing to institute a proper training program respecting the clear and recurrent Eighth Amendment right of inmates to have their serious medical needs attended to. Thus, Count II fairly alleges that Mitchell acted with deliberate indifference, hence satisfying the second element of a Section 1983 failure to train claim.").

See also ***McClendon v. City of Columbia (McClendon I),*** 258 F.3d 432, 442, 443 (5th Cir. 2001) ("We find this case distinguishable from *Bryan.* Although there is no evidence that disputes McClendon's claim that the City of Columbia does not provide specific training for its officers regarding the use of informants, there is a difference between a complete failure to train, as in *Bryan,* and a failure to train in one limited area. Even if this failure to train is considered sufficiently culpable

conduct, however, McClendon has failed to prove a causal connection between this failure to train and his injury. He points to no evidence demonstrating that any training on behalf of the City with regards to the use of informants would have prevented Carney from providing Loftin with the gun used in this case."), *portion of opinion reinstated by* ***McClendon v. City of Columbia (McClendon II),*** 305 F.3d 314, 321 n.3 (5th Cir. 2002) (en banc).

See also ***Walker v. City of New York***, 974 F.2d 293, 299 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1387 (1993), where plaintiff, who spent nineteen years in prison for a crime he did not commit, claimed the police department was deliberately indifferent to his rights by failing to train and supervise officers "not to commit perjury or aid in the prosecution of the innocent."

The plaintiff argued in ***Walker*** that the duty to train in the area of not committing perjury was just like the duty to train in the use of deadly force, that "city policymakers know to a moral certainty that police officers will be presented with opportunities to commit perjury or proceed against the innocent . . . [and that] a failure . . . to resist these opportunities will almost certainly result in injuries to citizens." *Id*.

The Court of Appeals rejected plaintiff's "obviousness" claim, however, noting that plaintiff's argument had "misse[d] a crucial step":

> It is not enough to show that a situation will arise and that taking the wrong course in that situation will result in injuries to citizens . . . *City of Canton* also requires a likelihood that the failure to train or supervise will result in the officer making the wrong decision. Where the proper response . . . is obvious to all without training or supervision, then the failure to train or supervise is generally not 'so likely' to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise.

Id. at 299-300. *See also* ***Lewis v. Pugh,*** No. 07-40662, 2008 WL 3842922, at *6 (5th Cir. Aug. 18, 2008) (not published) ("The actions of Pugh in raping and assaulting Lewis in March 2005 were entirely caused by Pugh. There is simply no evidence in the record that Pugh made the decision to rape Lewis for any reason related to any City policy or custom or understanding thereof which he may have had,

or for any reason other than his own motivations for assaulting Lewis. In fact, Lewis herself has referred to Pugh as a 'rogue' police officer. In sum, the evidence shows no causal connection between the City's allegedly unconstitutional policy and the actions of Pugh."); ***Atkins v. County of Riverside***, 151 Fed.Appx. 501, 508 (9th Cir. 2005) ("There is no indication that the County needed to train officers to not lie on a police report, or to suppress a lie once told. Atkins has not explained how a failure to train or supervise on *Brady* obligations was the 'moving force' behind Miller's alleged fabrication and concealment."); ***Carr v. Castle,*** 337 F.3d 1221, 1232 (10th Cir. 2003)("Even if Carr is viewed from the most favorable perspective in terms of the Officers not having been trained to know how to react exactly to an individual who had just thrown a four-inch piece of concrete, one thing is certain: They were not trained by the City to shoot him repeatedly in the back after he no longer posed a threat. In sum, even if some inadequacy in training had been shown, Carr cannot demonstrate how it was a direct cause of the Officers' actions and of Randall's consequent death."); ***Hernandez v. Borough of Palisades Park Police Dep't.,*** 58 Fed. Appx. 909, 914 (3d Cir. 2003) ("Here, it was hardly obvious that police officers, sworn to uphold the law, would burglarize the homes of the very citizens whom they were duty-bound to protect because they lacked training that instructed them that such activity was unlawful. . . . Here, there is nothing to suggest that there is an inherently high risk that police officers will commit robberies absent ethics training. Thus, the failure to train police officers that they should not commit burglaries, or the failure to supervise them to ensure that they do not commit such felonies, is not so likely to result in a violation of a constitutional right as to demonstrate deliberate indifference by Borough policymakers."); ***Kitzman-Kelley v. Warner***, 203 F.3d 454, 459 (7th Cir. 2000) ("Kitzman-Kelley must show one of two things: that there is a history of child welfare employees molesting the children in their care; or that someone inclined to commit child abuse could be deterred through proper training. In considering this latter question, it is necessary to determine, of course, whether the sort of sexual assault alleged here can be avoided by 'training' the perpetrator."); ***Barney v. Pulsipher***, 143 F.3d 1299, 1308 (10th Cir. 1998) ("Even if the courses concerning gender issues and inmates' rights were less than adequate, we are not persuaded that a plainly obvious consequence of a deficient training program would be the sexual assault of inmates. Specific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior."); ***Hayden v. Grayson***, 134 F.3d 449, 457 n.14 (1st Cir. 1998) ("[T]here has been no showing that whatever training was not provided to Grayson could have thwarted any such purposeful discrimination. Whereas law enforcement training might inform an officer about the proper methods to be used in mediating and

diffusing crimes of domestic violence, for example, it does not necessarily follow that an officer intent on discriminating against a particular class of crime victims would be deterred from doing so by 'enlightenment' training, especially given the contraindications implicit in plaintiffs' other evidence that the challenged decisionmaking by Grayson resulted from alcohol abuse, lassitude, or personal animosity toward individuals."); ***Floyd v. Waiters***, 133 F.3d 786, 796 (11th Cir. 1998) ("Applying the reasoning of *Sewell* and *Walker* to the facts of this case, we conclude that the BOE [Board of Public Education and Orphanage for Bibb County] did not act with deliberate indifference to the training and supervision of the security department. Booker's conduct and the operation of the Playhouse were clearly against the basic norms of human conduct. The pertinent conduct was a crime in Georgia. Without notice to the contrary, the BOE was entitled to rely on the common sense of its employees not to engage in wicked and criminal conduct. The record contains no evidence that this reliance ever rose to the level of deliberate indifference by policymaking officials."); ***Sewell v. Town of Lake Hamilton***, 117 F.3d 488, 490 (11th Cir. 1997) (rejecting plaintiff's claim that officer's sexual molestation of arrestee resulted from deliberate indifference in training and supervision); ***Andrews v. Fowler***, 98 F.3d 1069, 1077 (8th Cir. 1996) ("In light of the regular law enforcement duties of a police officer, we cannot conclude that there was a patently obvious need for the city to specifically train officers not to rape young women."); ***Breland v. City of Centerville, Georgia***, 2008 WL 2233595, at *3 -*4 (M.D. Ga. 2008) ("Plaintiff's argument regarding inadequate training fails because the offense Ware committed against Plaintiff was obviously wrong and was not connected to any training he received or should have received. For liability to attach to Centerville based on deficient training, 'the identified deficiency in [its] training program must be closely related to the ultimate injury.'. . No training is required to teach police officers not to commit sexual assaults. Sexual assault is illegal, and police officers can reasonably be expected to know, without training, that they are not allowed to take sexual advantage of their prisoners. Ware knew that what he was doing was improper and unlawful. . . . An officer does not need to be trained not to commit sexual assault, and even the best training program will not stop an officer who has a criminal intent from committing a crime."); ***Ejchorszt v. Daigle***, No. 3:02CV1350(CFD), 2007 WL 879132, at *7, *8 (D. Conn. Mar. 21, 2007) ("Here Fusaro arguably knew that Daigle was likely to work with young female volunteers during his alcohol sting operations. However, there is no evidence, and it cannot reasonably be argued, that Daigle was faced with a difficult choice in deciding whether or not to abuse his position of authority to take partially nude photos of Ejchorszt. Further, even if Daigle's acts reflect a mistake in judgment rather than

wilful misconduct, there is no evidence that his mistake was the result of a faulty training program. Daigle did not need more training to convince him that this conduct was wrong; any reasonable person--or police officer--would likely know that this conduct was entirely inappropriate and could not be justified. Thus there is no genuine issue of fact about whether Daigle's conduct was caused by a faulty training program."); ***Santiago v. City of Hartford***, No. 3:00 CV 2386 WIG, 2005 WL 2234505, at *5 (D. Conn. Sept. 12, 2005) (not reported) ("In the instant case, Plaintiff Santiago, like the plaintiffs in *Amnesty America*, has failed to proffer any evidence concerning the City's training programs and has failed to identify any specific training deficiency. Other than proffering evidence that the sexual assault occurred and that, over a six-year period, there had been reports of fourteen other incidents involving Hartford police officers, which complaints were investigated with discipline imposed against certain individuals, Plaintiff has failed to offer any evidence in support of her claim that the City's training program was deficient in any manner whatsoever and that such deficiency amounted to a deliberate indifference by the City to the rights of people with whom the police would come into contact. Additionally, even if specific deficiencies in training had been identified by Plaintiff, she has failed to advance any theory as to how those training deficiencies, as opposed to some unrelated circumstance not implicating liability on the part of the City, caused Officer Camacho to sexually assault her. The proper conduct for a police officer, refraining from sexual assault and rape of an arrestee, is patently obvious. It is difficult to conceive of how additional training could have prevented the intentional sexual assault of Plaintiff by Officer Camacho so as to justify a finding of liability on the part of the City."); ***Ice v. Dixon***, No. 4:03CV2281, 2005 WL 1593899, at *9 (N.D. Ohio July 6, 2005) (not reported) ("[V]arious courts have found that causation and culpability of municipal entities are lacking based merely upon an absence of specific training or deficient training of jailers not to sexually assault inmates as 'the proper course of conduct--refraining from sexual assault and rape--is patent and obvious; structured training programs are not required to instill it. Consequently, the absence of such programs (even if such absence was proven) is not so likely to cause improper conduct so as to justify a finding of liability.'"); ***Harmon v. Grizzel***, No. 1:03CV169, 2005 WL 1106975, at *8 (S.D. Ohio Apr. 21, 2005) (not reported) ("Harmon also argues that the training recruits receive regarding sexual misconduct is inadequate. Regardless of the adequacy of the City's training program, the Court finds it difficult to believe that the lack of training was a 'moving force' in the deprivation of the Harmon's rights. Grizzel did not need to be instructed that luring a female into a parking lot under false pretenses, getting into her car, grabbing her nipple without her consent and masturbating was inappropriate and potentially

illegal."); ***Johnson v. CHA Security Officers***, No. 97 C 3746, 1998 WL 474138, *6 (N.D. Ill. Aug. 6, 1998) (not reported) ("In this case, CHA was not constitutionally deficient for failing to train its officers not to sexually assault tenants and visitors of CHA complexes since such assaults were clearly contrary to the basic duties of CHA officers and fundamental norms of human conduct. In this type of situation we follow the sound reasoning of our sister circuits and find that a municipal entity cannot be liable under § 1983 for the failure to train its employees not to engage in actions which are so repugnant to the common standards of human decency that common sense should serve as a sufficient deterrent.").

But see ***Drake v. City of Haltom***, 106 Fed. Appx. 897, 900 (5th Cir. 2004) (per curiam) ("The City cites *Barney v. Pulsipher,* 143 F.3d 1299 (10th Cir.1998), for the proposition that sexual assault of detainees is not an obvious consequence of a City's failure to train or to supervise its jailers. *Barney,* however, was decided on a motion for summary judgment, not a motion to dismiss, and the summary-judgment record in *Barney* showed that the jailer who committed the assaults had received instruction on 'offenders' rights, staff/inmate relations, sexual harassment, and cross-gender search and supervision.' *Id.* at 1308. We are unwilling to say, at this point, that it is not obvious that male jailers who receive *no* training and who are left virtually unsupervised might abuse female detainees. Thus, we hold that Appellants have stated cognizable claims against the City under § 1983."); ***Parrish v. Fite***, No. 06-6024, 2008 WL 4495704, at *5 (W.D. Ark. Oct. 7, 2008) (" In this case, Fite received no training in constitutional rights or the law and had not been through a training program. Despite being tasked to enforce the law, Fite received no training as to what the law was. Fite was given a badge, a gun, and a vehicle with no more idea of the laws he was enforcing or the rights he was protecting than he did when he worked for the sausage company. The Court finds Sheriff Ball's decision to place a Deputy on duty with no meaningful training is both shocking and alarming. The need to train Deputies in the basics of the law is so obvious that not doing so constitutes deliberate indifference to constitutional rights. The need to specifically train Sheriff's Deputies not to sexually assault the recently arrested is not immediately obvious. Indeed, Fite said that he knew what he did was wrong. However, the Court has been presented no evidence that suggests that working as a Sheriff's Deputy was anything other than another job for Fite. Fite worked as a jailer for some three months and about the same time as a Deputy, which reflects that he was less experienced in criminal justice than in his previous work of building cabinets, loading trucks, or selling sausage. If during Fite's time as a sausage salesman, he convinced a woman to expose herself and then touched her, that would not be a constitutional violation.

Fite said he was not aware at the time that what he did was a felony. After hearing Fite's testimony, the Court is convinced that if Fite had received training in dealing with arrestees, constitutional rights, and the law in general, he would not have sexually assaulted the Plaintiff. Accordingly, the Court can only conclude that the failure to train Deputy Fite caused the deprivation of Parrish's constitutional rights.").

See also ***Sallenger v. City of Springfield***, No. 03-3093, 2005 WL 2001502, at *24(C.D. Ill. Aug. 4, 2005) (not reported) ("A City can be guilty of deliberate indifference if it fails to train its employees to handle a recurring situation that presents an obvious potential for a constitutional violation. The City's hobble policy called for the use of hobbles on 'combative prisoners', a situation officers can be expected to face recurrently. . . The parties agree that training in positional asphyxiation 'is especially important where [the] department allows the use of hobbles and hog ties'. . . Thus, the obvious potential for a constitutional violation resulting from the use of a hobble is acknowledged. On the third prong, however, Plaintiff has not presented evidence to show that the lack of training in the application of the hobble was closely related to or actually caused Andrew's death. Even though the City had not trained the officers in the proper use of the hobble with respect to guarding against positional asphyxiation, at least one officer who was involved with hobbling Andrew was aware of it. Sergeant Zimmerman stated that he knew it was important to roll a hobbled individual onto his side to enable breathing. Since an officer knew this, any lack of training in this instance did not cause Andrew's injury. The officers may have failed to do what they knew to do under such circumstances, but their failure was not due to a lack of training. There is no nexus in this case between the failure to train and the injury to Andrew. Therefore, the City's Motion with regard to Plaintiff's claim for failure to train officers in the use of a hobble must also be allowed, and Count I against the City is dismissed.")

The plaintiff in ***Walker*** did state a claim against the City based on "a complete failure by the DA in 1971 to train ADAs on fulfilling *Brady* obligations." *Id*. at 300. The *Brady* standard was not so obvious or easy to apply as to require no training. *Id*. *But see* ***Burge v. Parish of St. Tammany***, 187 F.3d 452, 475 (5th Cir. 1999)(*Burge III*) ("Under the record evidence, however, the cause of the violation cannot be attributed reasonably to the District Attorney's failure to adequately supervise or train his personnel or to diligently seek *Brady* material from the Sheriff's Office. The undisclosed evidence favorable to the defense was of such a quality and quantity that any reasonably qualified and experienced prosecuting attorney would have recognized it as *Brady* material that he was required to disclose. The assistant

district attorneys who reviewed the Burge file possessed credentials even superior to those reasonably required by their positions. Thus, there was no obvious need for more or different training to enable them to recognize the particular undisclosed *Brady* material in this case and know that they were required to disclose it.").

Although the court rejected plaintiff's "obviousness" theory as to the New York City Police Department defendants, it concluded that the claim could withstand summary judgment if plaintiff could "produce some evidence that policymakers were aware of a pattern of perjury by police officers but failed to institute appropriate training or supervision. . . . " *Id*. *Accord* ***Carter v. City of Philadelphia***, 181 F.3d 339, 357 (3d Cir. 1999).

See also ***Davis v. Schule***, 1993 WL 58408, *2 (E.D.N.Y. March 4, 1993) (not reported) ("Under the 'duty to train' theory as explicated in *City of Canton v. Harris* [cite omitted], a plaintiff's claim against a municipality with respect to perjured evidence might survive summary judgment, despite the fact that the duty not to commit perjury is obvious to all without training and supervision, if a plaintiff could produce evidence that 'policymakers were aware of a pattern of perjury by police officers but failed to institute appropriate training or supervision.").

4. Illustrative Post-*Canton* Cases

a. "obviousness" cases

For examples of cases in which courts have found the evidence sufficient to put to a jury the issue of municipal liability based on a failure to train in an area where the need for training is obvious, *see, e.g.,* ***Thompson v. Connick***, No. 07-30443, 2008 WL 5265197, at * (5th Cir. Dec. 19, 2008) ("[T]he Supreme Court has made it clear that a pattern of constitutional violations is not always a prerequisite to a showing of deliberate indifference. However, the Court has limited those situations to circumstances in which the need for training is 'obvious' and when the violation of rights is a 'highly predictable consequence' of the failure to train.Fifth Circuit case law is not to the contrary. None of the cases cited by Defendants in support of the pattern requirement states that evidence of a pattern is *always* necessary. Instead, the cases all qualify the requirement by stating that a pattern is 'generally' or 'usually' necessary. . . . This court's precedent is thus consistent with the Supreme Court's limitation of single-incident liability to the narrow circumstances in which the need for training is 'obvious' and when the violation of rights is a 'highly predictable

consequence' of the failure to train. . . . Further, the evidence developed at trial clearly demonstrates that this case falls within the Supreme Court's description of the narrow range of situations that do not require a pattern of misconduct before deliberate indifference can be shown. Here, there was evidence that Connick was aware that the attorneys in the DA's Office would be required to confront *Brady* issues on a regular basis and that failure to properly handle those issues would result in constitutional violations for criminal defendants. . . . No pattern of similar violations was necessary to put Connick on notice that training on *Brady*'s requirements was needed. . . Therefore, under the tests set out in *City of Canton* and *Board of the County Commissioners v. Brown,* Thompson did not need to prove a pattern of *Brady* violations to demonstrate that the failure to train was deliberately indifferent, and the district court did not err in denying Thompson's motion for judgment as a matter of law on that ground. *See Walker v. City of New York,* 974 F.2d 293, 300 (2d Cir.1992) (finding that a plaintiff sufficiently alleged deliberate indifference in failing to train on *Brady* even though no pattern of violations was mentioned)."); ***Gregory v. City of Louisville,*** 444 F.3d 725, 754 (6th Cir. 2006) ("This Court finds that the district court erred when it failed to consider that evidence of failure to train on the proper handling of exculpatory materials has the 'highly predictable consequence' of constitutional violations. . . A custom of failing to train its officers on the handling of exculpatory materials is sufficient to establish the requisite fault on the part of the City and the causal connection to the constitutional violations experienced by Plaintiff. . . Plaintiff has carried his burden for summary judgment. . . . We therefore reverse the district court's grant on summary judgment to the City on Plaintiff's *Monell* liability theory for failure to train on the handling of exculpatory materials."); ***Young v. City of Providence***, 404 F.3d 4, 28, 29 (1st Cir. 2005) ("Although there was no evidence of a prior friendly fire shooting, a jury could find from the testimony of Commissioner Partington, Melaragno, and Boehm that the department knew that there was a high risk that absent particularized training on avoiding off-duty misidentifications, and given the department's always armed/always on-duty policy, friendly fire shootings were likely to occur. A jury could conclude that the severity of the consequences of a friendly fire shooting forced the department to take notice of the high risk despite the rarity of such an incident. Dr. Fyfe's report could lead the jury to conclude that it was common knowledge within the police community that the risk of friendly fire shootings with an always armed/always on-duty policy was substantial, and it was also common knowledge that particularized training on on-duty/off-duty interactions (and particularly on the risk of misidentifications) was required to lessen this risk. . . We think, in short, that the jury could find that the department knew that a friendly fire shooting in violation

of the Fourth Amendment was a predictable consequence of the PPD's failure to train on on-duty/off-duty interactions, and therefore that the department was deliberately indifferent to Cornel's constitutional rights."); ***A.M. v. Luzerne County Juvenile Detention Center,*** 372 F.3d 572, 583 (3d Cir. 2004) (In our view, the evidence supports an inference that the potential for conflict between residents of the Center was high. Taken as a whole, we believe the evidence concerning the Center's failure to train its child-care workers in areas that would reduce the risk of a resident being deprived of his constitutional right to security and well-being was sufficient to prevent the grant of summary judgment."); ***Flores v. Morgan Hill Unified School District,*** 324 F.3d 1130, 1136 (9th Cir. 2003) ("The plaintiffs have also produced sufficient evidence that the defendants failed to adequately train teachers, students, and campus monitors about the District's policies prohibiting harassment on the basis of sexual orientation. The record contains evidence that training regarding sexual harassment was limited and did not specifically deal with sexual orientation discrimination. The defendants also inadequately communicated District anti-harassment policies to students despite defendants' awareness of hostility toward homosexual students at the schools, and in some cases despite plaintiffs' requests to do so. A jury may conclude, based on this evidence, that there was an obvious need for training and that the discrimination the plaintiffs faced was a highly predictable consequence of the defendants not providing that training."); ***Miranda v. Clark County, Nevada***, 319 F.3d 465, 471 (9th Cir. 2003) (en banc) ("The complaint . . . construed liberally, alleges not merely an isolated assignment of an inexperienced lawyer, but a deliberate pattern and policy of refusing to train lawyers for capital cases known to the county administrators to exert unusual demands on attorneys. Under pleading standards now applicable, *see Galbraith,* 307 F.3d at 1125, the allegations are sufficient to create a claim of 'deliberate indifference to constitutional rights' in the failure to train lawyers to represent clients accused of capital offenses."); ***Sell v. City of Columbus,*** No. 00-4467, 2002 WL 2027113, at *9 (6th Cir. Aug. 23, 2002) (unpublished) ("If Columbus failed to instruct or train the officers responsible for emergency evictions about their constitutional responsibility to provide a hearing in all but 'extraordinary situations' where exigent circumstances preclude them from doing so, . . . that shortcoming is one that is so likely to lead a violation of the constitutional right to due process as to be deliberate indifference to citizens' constitutional rights, and give rise to municipal liability under § 1983."); ***Brown v. Gray,*** 227 F.3d 1278, 1290 (10th Cir. 2000) ("The always armed/always on duty policy was part of the Department's written regulations. Expert testimony established that always armed/always on duty policies present serious safety risks, to officers and to the public, if officers are not trained in off-shift implementation.

Captain O'Neill knew to a moral certainty that the policy would result in some officers taking police action while off-shift, yet he pursued a training program that did not adequately prepare the officers to do so. The failure to train officers in implementing this policy was, by Captain O'Neill's own admission, a conscious decision based on the perception that on-and-off-shift situations were the same. The jury was thus presented with sufficient information to conclude that Denver policymakers were aware of and deliberately indifferent to the risks presented by the training program's deficiencies."); ***Allen v. Muskogee***, 119 F.3d 837, 843, 844 (10th Cir. 1997) ("When read as a whole and viewed in the light most favorable to the plaintiff as the party opposing summary judgment, the record supports an inference that the City trained its officers to leave cover and approach armed suicidal, emotionally disturbed persons and to try to disarm them, a practice contrary to proper police procedures and tactical principles. . . . The evidence is sufficient to support an inference that the need for different training was so obvious and the inadequacy so likely to result in violation of constitutional rights that the policymakers of the City could reasonably be said to have been deliberately indifferent to the need."); ***Zuchel v. City and County of Denver***, 997 F.2d 730, 741 (10th Cir. 1993) (finding evidence clearly sufficient to permit jury reasonably to infer that Denver's failure to implement recommended periodic live "shoot--don't shoot" range training constituted deliberate indifference to the constitutional rights of Denver citizens.); ***Davis v. Mason County***, 927 F.2d 1473, 1483 (9th Cir. 1991) ("Mason County's failure to train its officers in the legal limits of the use of force constituted 'deliberate indifference' to the safety of its inhabitants as a matter of law."), *cert. denied*, 112 S. Ct. 275 (1991); ***Bibbins v. City of Baton Rouge***, 489 F.Supp.2d 562, 583 (M.D. La. May 2007) ("There is no dispute that identifications are routinely used in the vast majority of criminal investigations. The City is quick to point out that the Louisiana Law Enforcement Handbook in 1986 explained how to conduct a proper identification. However in this case, the summary judgment evidence shows that the City provided its officers with practically no training whatsoever in conducting identifications. The reasonable inferences drawn from the evidence . . . can support a finding that Officers Remington and Davis showed Canty proceeds of the crime (the broken radio) before asking Canty to make an identification of Bibbins. This is the exact sort of conduct that is avoidable with proper training. The court therefore holds that a reasonable jury could find that the total lack of training was the moving force that made it 'highly predictable' that an unconstitutionally suggestive show-up would occur."); ***LeBlanc v. City of Los Angeles***, 2006 WL 4752614, at *18 (C.D.Cal. Aug. 16, 2006) ("Here, the LAPD training materials in the record provide no guidance on how and whether Taser should be used when dealing with narcotically intoxicated individuals,

even though LAPD officers probably confront such individuals on a routine basis. Given the testimony of Plaintiff's experts that Taser is highly dangerous when used against such individuals, a reasonable jury can find that the LAPD's failure to instruct officers on Taser use against intoxicated individuals amounts to a deliberate indifference to likely constitutional violations in such circumstances. This is particularly so in light of Colomey's deposition testimony that he was not reprimanded for this incident, and would handle the situation in exactly the same way if confronted with it again. . . . Plaintiff also alleges that the LAPD failed to supervise or audit Taser use by LAPD officers. Each Taser unit contains a digital microprocessor that records every discharge, and the recorded data can be downloaded for audit and examination. After the LeBlanc incident, the Taser unit used against him was sent by the LAPD to Taser Inc. for audit and analysis. However, Taser Inc. could not recover an audit trail for the discharges on LeBlanc, because the device's internal clock battery died and prevented the chip from recording the charges. Taser Inc.'s analysis showed that the last recorded discharge occurred two months before the LeBlanc incident. Plaintiff argues that the fact that the LAPD had to send the unit to Taser Inc. for analysis rather than download the data on its own, and the fact that the unit was not properly maintained, demonstrates a custom of deliberate indifference to the abusive use of Taser in the field. In Plaintiff's view, if the LAPD properly maintains Taser clock batteries, the present of an audit trail would deter its officers from using the weapon in abusive ways. The absence of an audit trail on a single weapon is not, by itself, sufficient to establish a failure to supervise. If the challenged municipal practice is not a formal policy, Plaintiff must show the existence of a custom that is 'so persistent and widespread that it constitutes a permanent and well-settled city policy.'. . That said, the lack of an audit trail on the specific Taser unit at issue can still support an inference of deliberate indifference on Plaintiff's failure-to-train theory."); ***Estate of Harvey v. Jones***, 2006 WL 909980, at *12 (W.D. Wash. Apr. 6, 2006) ("In the instant case, both Officer Jones and Officer Kalich state that they never received any training on how to interact with mentally disturbed persons or persons under the influence of drugs. At the same time, Officer Jones notes that he had been coming in contact with a lot of mentally ill people 'on the streets.' In addition, plaintiff submits evidence that the City of Everett failed to so train police officers even after a similar incident had occurred in 1996, in which a man by the name of Douglas Reagan was arrested while naked and agitated, struggled with police officers, and ultimately died. The Court finds that this evidence creates a genuine issue of material fact as to whether the City of Everett's failure to train its police officers on how to deal with mentally disturbed persons or persons under the influence of drugs amounted to a deliberate indifference to Mr. Harvey's

constitutional rights. Accordingly, the Court agrees with plaintiff that summary judgment on this issue is not appropriate."); ***Allison v. Michigan State University***, No. 5:03-CV-156, 2005 WL 2123852, at *12 (W.D. Mich. Aug. 31, 2005)(not reported) ("Although the ELFD's [East Lansing Fire Department] decontamination policy addressed the need for privacy, the evidence of how the procedure was actually conducted is sufficient to raise an issue of fact for trial as to whether the privacy training received by the ELFD was adequate. Because there is no evidence of prior complaints of privacy violations by the ELFD that would put the City on notice that its officers needed additional training in decontamination procedures, the focus of this Court's analysis must be on whether the City provided adequate training in light of foreseeable consequences that could result from the lack of instruction. A wet decontamination procedure requires detainees to take off their clothes and to be washed off. Such a procedure necessarily implicates privacy issues. Because privacy concerns are foreseeable, a reasonable jury could find that an agency that undertakes responsibility for conducting wet decontaminations must train its employees on how to address privacy concerns and that the failure to provide adequate privacy training amounts to deliberate indifference. There is also evidence in this case from which a jury could find that the privacy training was inadequate. There is evidence that all of the detainees were women, that little effort was made to address the detainees' concern for having a female decontamination officer, that windows from the outside were not covered, that males who were not involved in the decontamination procedure were milling around the decontamination area, that there were no privacy curtains around the decontamination pools, and that some of the detainees were treated in a sexually derogatory manner. These facts are sufficient to create an issue for trial on the adequacy of the training provided by the City of East Lansing to its Fire Department employees who were assigned to carry out this procedure."); ***Freedman v. America Online, Inc.***, 412 F.Supp.2d 174, 194 (D. Conn. 2005) ("This Court is persuaded that Plaintiff has established a genuine issue of material fact as to whether the Town had an unconstitutional official policy permitting its officers to send unsigned warrants to ISPs for subscriber information. Plaintiff has proffered evidence that Young understood that the Town, although not having a formal rule, had adopted a particular course of action-sending unsigned search warrants to ISPs-which, according to the testimony of Young and Sambrook, had been followed consistently over time. . . .[T]he Town reasonably should have known to a moral certainty that the officers would confront situations in which they would need to execute a warrant for an individual's ISP subscriber information. The fact that police officers routinely execute search warrants, combined with the proliferation of internet use, makes it evident that the officers would increasingly confront the situation

presented in this case. . . .Defendants point out that the Town provided its officers with training. The most recent training provided to either Young or Bensey, however, occurred more than ten years before the incident involved in this case. Second, the situation presented the Defendant officers with a difficult choice of the sort that training or supervision would make less difficult. The choice in this case was not difficult by way of degree. Rather, it was a choice in which Young, with the proper training, could have presented the warrant application to a judge before sending it to the ISP. It was therefore a situation that would have made Young's decision less difficult by guiding him as to the proper procedure. . . . Although there is no history of employees mishandling the situation, a single action taken by a municipality is sufficient to expose it to liability, and repeated complaints are not a prerequisite to establishing that a policymaker's inaction was the result of a 'conscious choice,' and not mere negligence. . . . Lastly, Young's decision to send the unsigned warrant to AOL is a wrong choice that would frequently cause the deprivation of a citizen's constitutional rights. As previously stated, police officers routinely execute warrants to ascertain the identity of an anonymous internet speaker. Consequently, the failure to obtain any level of judicial review of the request before it is submitted to an ISP may potentially result in violations of the First and Fourth Amendments."); ***Watkins v. New Castle County***, 374 F.Supp.2d 379, 386, 387 (D. Del. 2005) ("Plaintiffs may be able to establish that the County acted with 'deliberate indifference,' under *City of Canton*, by the fact that it included discussions of positional asphyxia and cocaine-induced excited delirium in its training materials for new officers but allegedly did not require its veteran officers to undergo similar training. . . In a case based on similar facts and evidence, the United States District Court for the Southern District of Ohio held that 'a reasonable jury could find that the City had notice of the potential hazards of agitated delirium with restraint and that the City was deliberately indifferent in failing to adequately train the police and firefighters on how to deal with "at risk" persons.' *Johnson v. City of Cincinnati*, 39 F.Supp.2d 1013, 1020 (S.D.Ohio 1999) (internal citation omitted). Thus, Plaintiffs' have presented evidence to adequately establish that genuine issues of material fact preclude a grant of summary judgment for the County on Plaintiffs' 'failure to train' claims. . . . The Plaintiffs have failed to present similar evidence of 'deliberate indifference' with regard to the Town. They have not argued that the Town possessed information regarding the risks of excited delirium or prone restraint and then failed to train its officers in such matters. Therefore, the defendants' Motion for Summary Judgment . . . will be granted insofar as it pertains to the Town."); ***Lewis v. City of Chicago,*** No. 04 C 3904, 2005 WL 1026692, at **5-7 (N.D. Ill. Apr. 26, 2005) ("The city argues Lewis cannot demonstrate deliberate indifference because CPD trains its

police recruits not to use choke holds and neck restraints. The city's argument misses the point because it relies on CPD's current training program. The current training program is not at issue. The issue is whether CPD adequately retrained officers who were originally trained to use neck restraints. Lewis presents evidence that CPD taught neck restraints, including a choke hold or sleeper hold, in the police academy until at least 1983. Officer Soto attended the police academy in 1977. For purposes of this motion, the present training program is irrelevant. The court must focus on Officer Soto's training. Lewis presents evidence the city stopped teaching choke holds after Officer Soto left the police academy, presumably due to risk of injury or death. According to Lieutenant Mealer, CPD stopped teaching choke holds in response to public concern raised over their use. . . . There is no evidence CPD provided any written directive or order to police officers to stop using neck restraints. Indeed, the evidence is to the contrary. . . Although Officer Soto testified he was told not to use choke holds, he could not remember when, how or by whom. There is no evidence he or other police officers trained to use neck restraints were later provided retraining on alternative restraint tactics. Lewis presents evidence that police officers received no retraining on restraint tactics after police academy training. Based on this evidence, a jury could reasonably find the need for retraining was so obvious and the failure to provide it so likely to result in a constitutional violation that the city's failure to provide retraining amounts to deliberate indifference. CPD is aware police officers are required to arrest fleeing suspects. CPD taught its officers control and restraint tactics, in part, to allow them to accomplish this task. CPD determined choke holds were too dangerous to use, trained new police recruits not to use them, but failed to retrain officers who were originally taught to use choke holds in alternative restraint methods. Even though Officer Soto acknowledged he was later instructed not to use a choke hold, a reasonable jury could conclude that he used the choke hold because CPD failed to train him in alternative restraints. . . .The city relies on *Latuszkin v. City of Chicago*. . . to argue that Lewis has not shown policymakers were aware of the alleged training deficiencies. . . . *Latuszkin* is distinguishable on many grounds. First, *Latuszkin* was not a failure to train case. Thus, it did not involve a policy decision to prohibit use of choke holds because of the known associated risks. Second, unlike *Latuszkin,* Lewis presents evidence that city policymakers *should have known* of the risk of injury if police officers trained to use choke holds were not retrained in alternative restraint methods. Lewis presents evidence that a policy decision was made to prohibit choke holds in response to public concern over the risk of using neck restraints. . . Neither party identifies the policymaker. Under § 2-84-030 of the Chicago Municipal Code, the Police Board has the power to adopt rules and regulations governing CPD. It is reasonable to infer that the Police Board

knew or should have known of the policy change and the reasons for it. Lewis' expert testified that the need to retrain police officers in restraint techniques is obvious because those skills diminish over time. . . Several high ranking CPD officials acknowledged that restraint skills fade over time. . . A jury could reasonably conclude from this evidence that CPD policymakers were deliberately indifferent to the need to retrain police officers on restraint techniques."); ***Solis v. City of Columbus,*** 319 F.Supp.2d 797, 812, 813 (S.D. Ohio 2004) ("In addition to being subject to § 1983 liability based on its deficient operational policy, as outlined above, the City also may be liable, for the same reasons, based on its failure to train officers to comply with that policy. In other words, the jury may find the City liable for its failure to train officers to exercise something more than ordinary care when obtaining addresses for no-knock search warrants. . . .The need occasionally to have another officer complete the visual verification of a search warrant address is a recurring situation in law enforcement. The constitutional violation that occurred here is a predictable result of the failure to give officers the tools to handle this situation by training them in how to insure that information is fully and accurately transmitted and that the final address obtained is correct."); ***Foster v. City of Philadelphia,*** No. Civ.A. 01-CV-3810, 2004 WL 225041, at **13-15 (E.D. Pa. Jan. 30, 2004) (not reported) ("In conclusion, the record reveals that the City has proven the existence of comprehensive written policies regarding the handling detainees who are high-risk for suicide. The City, however, has offered insufficient evidence to refute the Plaintiffs contention that the content of the City's training program was inadequate. . . Thus, the adequacy of the content of the City's training program remains a disputed issue of material fact. . . Inadequacy of training in the area of suicide detection and reduction may be viewed as 'so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.' . . . On the whole, the record of this particular incident, viewed in a light most favorable to Plaintiff, as it must be on summary judgment, would support a fact-finder in drawing an inference that many of the officers involved failed to follow the City's policies. To be sure, the Supreme Court has cautioned against creating an inference of a failure to train from an isolated incident. 'The existence of a patterns [sic] of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the 'moving force' behind the plaintiff's injury.' . . This record would amply support a conclusion by a reasonable jury that the performance shortcomings were a result of constitutionally inadequate training practices, and were not simply the result of isolated negligence. Ultimately, however, the constitutional

adequacy of the City's training program for suicide risk reduction among detainees is a matter for determination in light of all of the facts and circumstances presented at trial, when a full evidentiary record can be developed. At the summary judgment stage, however, the City has not established, as a matter of law, the absence of disputed issues of material fact as to the adequacy of the content of training programs for the identification and handling of high-risk potential suicidal detainees. Therefore, summary judgment must be denied..."); ***Estate of Carpenter v. City of Cincinnati,*** No. C-1-99-227, 2003 WL 23415143, at *12 (S.D. Ohio, Apr. 17, 2003) ("Plaintiff's evidence creates a dispute of material fact, however, as to whether the City's police department had policies of 1) not asking subjects of traffic stops to put their cars in park and turn off the engines and 2) dealing with obstinate subjects by pulling them out of their cars, even when their engines are running. At the very least, the evidence raises an issue as to whether the City failed to train its officers with respect to disabling cars and reaching into cars during traffic stops. During CPRP's investigation of the Timothy Blair incident, Chief Streicher told CPRP that the City had no policy on disabling automobiles at traffic stops. Yet, the Curriculum that the City purports to follow instructs that officers tell every subject of a traffic stop to turn off his engine. Also, Officer Miller testified that the City never trained him to ask a suspect to put the car in park during a routine traffic stop, and Officer McCurley, Officer Miller's field training officer, testified that he never told Officer Miller to ask Mr. Carpenter to turn the engine off or put the car in park because he trusted Officer Miller's judgment. These statements together suggest that, despite the dictates of the official curriculum, the official custom of the City's police department was not to train officers to disable automobiles at the beginning of every traffic stop but to give them wide latitude on this front. In addition, Officer Carder's statement to the CPRP during its investigation of the Timothy Blair shooting that he had once been commended by the City for an extraction similar to that which he attempted on Mr. Blair raises an issue of fact as to whether the City's official policy was for officers to try to yank suspects out of running cars during traffic stops. This analysis all begs the question of whether such policies would create liability for the City under § 1983. If the City failed to train Officer Miller to ask the subject of a traffic stop to put his car in park and turn off the engine and had a policy whereby officers were to reach into running cars to extricate recalcitrant suspects, this might have been a moving force behind a constitutional violation--the use of deadly force against Mr. Carpenter. If the officers shot Mr. Carpenter dead because his car moved forward or backward, then the City's failure to train Officer Miller regarding the proper disabling of a car during a traffic stop was a proximate cause and, thus, a 'moving force' behind the deadly excessive force violation. Surely it would be foreseeable to the

City that if it did not train its officers to disable vehicles at the beginning of a traffic stop and did not train their officers to refrain from reaching in to those running vehicles, officers would reach into moving vehicles, struggles would ensue, drivers would lose control of their vehicles, and officers would feel compelled to escalate their use of force in response. A failure to train its officers on easy ways to avoid such tragic events would evince 'deliberate indifferen[ce]' on the part of the City. The City's motion for summary judgment on Plaintiff's § 1983 claim against the City is DENIED.")***; Fakorzi v. Dillard's, Inc.***,252 F. Supp.2d 819, 831 (S.D. Iowa 2003) ("The reasoning of *Harris* applies with equal force to the case at bar. The City of Coralville gives its officers handcuffs with the expectation that they will use them in arresting suspected criminals when necessary. Just as the officers in *Harris* were 'certain to be required on occasion to use force in apprehending felons,'. . . Coralville police officers have recurring occasions to make arrests and must frequently determine whether to handcuff potential suspects. The Court finds that a failure to train officers in the appropriate use of handcuffs is 'so likely to result in a violation of constitutional rights that the need for training is patently obvious.'. . Therefore, notice to the City is implied in this case."); ***Keeney v. City of New London,*** 196 F.Supp.2d 190, 201 (D. Conn. 2002) ("Keeney did submit an expert report . . . that noted Persi's comments about an increased population of mentally ill individuals in New London and statements by Mugovero and Persi that they did not receive any training on how to handle mentally compromised persons. Further, the expert report concluded that common police policies recognized the futility of standard techniques of intimidation and force against mentally ill individuals. The court concludes that the expert's report raises material issues of fact for each *Walker* factor--whether municipal officials knew to a moral certainty that officers would encounter mentally ill individuals, whether those encounters presented officers with a difficult choice regarding the use of force, and whether the wrong choice would lead to a deprivation of citizen's rights--that preclude summary judgment on this ground for municipal liability."); ***Smartt v. Grundy County, Tennessee***, No. 4:01-CV-32, 2002 WL 32058965, at *3 (E.D. Tenn. Mar. 26, 2002) (not reported) ("[P]laintiff provides the Court with deposition testimony of defendants Womack and Meeks indicating that neither of them knew or were trained about the proper legal standard for the use of deadly force. Deputy Womack testified that the use of deadly force is appropriate when valuable personal property is in danger. . . . He further stated that this belief was consistent with his in-service training. . . Similarly, Sheriff Meeks explained during his deposition that personal property could appropriately be protected with deadly force. . . . He further stated that he had not discussed the appropriate use of deadly force with his officers. . . Tennessee law clearly provides that deadly force is

not appropriate to protect personal property. . . The statements of Womack and Meeks might support a finding that Grundy County is liable for a failure to train that amounted to deliberate indifference."); ***Blair v. City of Cleveland,*** 148 F. Supp.2d 894, 908-10 (N.D. Ohio 2000) ("Plaintiffs seek to hold the City of Cleveland liable based upon its alleged failure to adequately train its officers in the use of choke holds and neck restraints. In order to hold a municipality liable for its officers' alleged use of excessive force on a theory of failure to adequately train its officers, Plaintiffs must first show that the City's officers were, in fact, inadequately trained. Second, Plaintiffs must establish that the City's failure to adequately train its officers directly caused Pipkins' injuries. Finally, Plaintiffs must establish that the City was deliberately indifferent to a clear need for such training. . . . [R]easonable jurors could find that the City of Cleveland knew that situations such as the instant case would arise, in which officers were faced with struggling arrestees, and were forced to decide just what amount and what type of force would be reasonable under the circumstances. . . . Viewing the evidence presented in a light most favorable to Plaintiffs, this court holds that a reasonable juror could find that the City of Cleveland failed to adequately train its officers in the use and/or advisability of neck restraints."); ***Hockenberry v. Village of Carrollton***, 110 F. Supp.2d 597, 602 (N.D. Ohio 2000) (denying Village's motion for summary judgment where plaintiff offerered evidence "suggesting that the Village provides relatively little training regarding the policies and procedures associated with pursuing a suspect."); ***Weaver v. Tipton County***, 41 F. Supp.2d 779, 790, 792 (W.D. Tenn. 1999) ("The court must thus determine whether in light of the duties assigned to employees at the Tipton County Jail the need for increased staffing, training, or supervision was 'so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [municipality] can reasonably be said to have been deliberately indifferent to the need.'. . . Based on the evidence before it, the court finds a reasonable juror could conclude that Tipton County's failure to ensure that adequate staffing, training, and/or supervision polices were in place and enforced would so obviously result in the violation of prisoners' constitutional rights that Tipton County could be found deliberately indifferent. Furthermore, it is possible that plaintiff's evidence could convince a reasonable juror that but for the inadequate policies, Weaver would not have had his constitutional rights violated. Accordingly, Tipton County's motion for summary judgment is denied."); ***Johnson v. City of Cincinnati***, 39 F. Supp.2d 1013, 1019, 1020 (S.D. Ohio 1999) ("Plaintiff provides evidence from which a reasonable jury could infer that dealing with highly agitated persons was a recurring situation for law enforcement officials nationwide and in Cincinnati and that a violation of civil rights is predictable result of being inadequately trained to

handle such persons. Plaintiff provides evidence that City officials knew of the potential danger of the prone restraint before Wilder's death. . . . On the basis of this evidence the Court believes that a reasonable jury could find that the City had notice of the potential hazards of agitated delirium with restraint and that the City was deliberately indifferent in failing to adequately train the police and firefighters on how to deal with 'at risk' persons."); ***Tazioly v. City of Philadelphia***, No. CIV. A. 97-CV-1219, 1998 WL 633747, *15 (E.D. Pa. Sept. 10, 1998) (not reported) ("With respect to the claim that Defendants failed to rectify a dangerous situation, the Court finds that given the nature of the duties assigned to caseworkers, the need for training and supervision is so obvious, and an inadequacy in this regard so likely to result in a violation of a child's constitutional right, that the DHS policymakers can reasonably be said to have been deliberately indifferent to the consequences of employing untrained, overworked, and unsupervised caseworkers."); ***Doe v. Estes***, 926 F. Supp. 979, 988 (D. Nev. 1996) ("Certain situations present a potential for constitutional violations that is so obvious and so clearly likely to occur, that a local government entity's failure to take prophylactic measures may well rise to the level of deliberate indifference even before any particular violation has been brought to the attention of the entity's policymakers. . . . It is the judgment of the court that a reasonable jury could find from the evidence in the record on summary judgment that the danger of children being sexually abused at school is so obvious that a school district's failure to take action to prevent sexual abuse of its students by its teachers--even in the absence of actual knowledge of such abuse--constitutes deliberate indifference, especially where the school district took no steps to encourage the reporting of incidents of such abuse."); ***Hurst v. Finley***, 857 F. Supp. 1517, 1523 (M.D. Ala. 1994) ("The court now finds that the City's failure to train its law enforcement personnel in the proper procedures to be followed when arresting an individual suspected of driving under the influence of alcohol was closely related to plaintiff Hurst's alleged injury, which was the deprivation of her Fourth Amendment right to be free of search and seizure without probable cause. Furthermore, the court finds that the City's lack of policy requiring that one or a battery of field sobriety tests be administered before placing a suspected driver under arrest was the motivating force behind the alleged violation of Hurst's Fourth Amendment right. . . . As a result, the court finds that Hurst has submitted sufficient evidence from which a jury could find. . . deliberate indifference to the constitutional rights of plaintiff Hurst."), *aff'd*, 63 F.3d 1112 (11th Cir. 1995); ***McClain v. Milligan***, 847 F. Supp. 970, 979 (D. Me. 1994) ("If, as Plaintiff asserts, an optional videotape and a written policy on the use of force are the only materials dealing with the proper use of force that a Rumford police officer might be exposed to, these facts could establish an inadequate training

policy sufficient for a finding of municipal liability under section 1983."); ***Simpkins v. Bellevue Hospital***, 832 F. Supp. 69, 75 (S.D.N.Y. 1993) (*City of Canton* "is equally applicable to claims concerning training of medical personnel and hiring and supervision of medical personnel. . . . [C]laim that plaintiff's injuries were caused by the city's failure to assure proper hiring or supervision or training of surgeons assigned to perform operations on inmates is one that should not be dismissed at this stage."); ***Feerick v. Sudolnik***, 816 F. Supp. 879, 887 (S.D.N.Y. 1993) (motion to dismiss by police dept. defendants denied where plaintiffs alleged that "the NYPD failed to train or supervise its officers regarding the handling of P.G. 118-9 interrogations and the need to separate the investigative and interrogative agencies within the NYPD and the DAO."), *aff'd*, 2 F.2d 403 (2d Cir. 1993) (Table); ***Frye v. Town of Akron***, 759 F. Supp. 1320, 1325 (N.D. Ind. 1991) (town's complete failure to train officers on subject of high speed pursuits can be characterized as deliberate indifference); ***Doe v. Calumet City***, 754 F. Supp. 1211, 1225 (N.D. Ill. 1990) (City was deliberately indifferent to the need to train officers in the constitutional limits of strip searches).

See also ***Mitchell v. City of Cleveland***, No. 1:03CV2179, 2005 WL 2233226, at *6 (N.D. Ohio Sept. 12, 2005) (not reported) ("Whether the officers were trained according to general minimum standards set forth by the state for police officers is largely irrelevant, however, because Plaintiff's injuries were not the result of her arrest. Rather, Plaintiff's injuries were the result of the behavior of certain IG's during her booking and detention. The question of whether training is adequate must be assessed by considering the extent of 'jail training.' The Defendants fail to specifically state what 'jail training' the IG's received or even to explain what policies were in place for IG's. The Defendants do not describe, for instance, whether and to what extent training was provided to IG's regarding treatment of injured or disabled prisoners, the removal of personal property from an uncooperative prisoner, or the administration of medical treatment. Given that the Plaintiff required two separate surgeries, '[s]uch undisciplined conduct on the part of law enforcement officers speaks ab initio of a lack of training and discipline.' . . While Plaintiff's showing in response to Defendant's motion for summary judgment is certainly not strong, Defendants bore the burden in the first instance of coming forward with a 'well supported' motion under Rule 56. On the question of IG training, they simply have not done so. Accordingly, the Court finds that questions of fact exist regarding the adequacy of the training provided to the IG's, and whether any inadequacies in that training were a moving force behind Plaintiff's injuries."); ***Johnson v. City of Richmond, Virginia***, No. Civ.A.3:04 CV 340, 2005 WL 1793778, at *9, *10 (E.D.

Va. June 24, 2005) (not reported) ("Relying on expert testimony, the Plaintiff has presented evidence that, although the City's training program appears adequate on the surface, a more thorough review of the training program reveals that it is not consistent with nationally accepted police standards and practices. In that regard, the Plaintiff points to evidence that there is no mandated use of force training that officers must receive after graduating from the Academy, and that there is no evidence that officers are given regular use of force training following graduation. Plaintiff's expert explained that national standards require training on the agency's use-of-deadly force policies at least annually. As further evidence on this issue, the Plaintiff quotes from the depositions of several current officers who demonstrated ignorance of the use of force policies outlined in the General Order on which the City so heavily relies to show that it provides adequate training in the use of force. The expert witness offered by the Plaintiff has opined that, when the City does provide use of force training, it is limited and ineffective. In that regard, the expert explains that the City fails to train its officers on a Use of Force Continuum, which is recommended by DCJS. This continuum teaches the several steps, ranging from less to more lethal alternatives, which are to be taken before using deadly force. The current Richmond Chief of Police, Chief Monroe, acknowledged publicly that there was a gap in the City's training when it came to alternatives to deadly force. There is evidence that, according to generally accepted practice, use of force training must include so-called 'shoot/no shoot' scenarios, to train officers when it is proper to shoot and when it is not. The City's training in this area is limited to the use of simulation machines, which, according to the Plaintiff's expert, is not in keeping with accepted practices and standards. Further, the City keeps no record on the simulation training and thus does not know whether Melvin received this training or how well he did. Without this critical information, the City, according to the Plaintiff's expert, is unable to show that its training is adequate. Again, the new Chief of Police recently has confirmed that adequate training should include both live 'shoot/no shoot' scenarios and situational training as part of the use of force training. To that general evidence, the Plaintiff offered testimony tending to show that the City did not provide adequate training on arrest procedures implicating the use of deadly force. For instance, all of the police officers who were deposed in this case said they did not receive any post-Academy training on arrest and the use of force. And, several officers were unaware of the City's putative policy of the use of force. Through her expert witness, the Plaintiff also offered evidence about four key areas of arrest procedure that are lacking in the City's training program. In each instance, the expert will opine that the deficiency offends general standards or practices. First, the expert opined that Richmond police officers are inappropriately trained on how to respond

to suspects who put their hands in their pockets. The expert noted that there is a standard police practice, which has been given to Richmond police officers by an FBI agent, and which calls for the officer to instruct the suspect to keep his hands in his pocket until they can be safely removed upon arrest. Instead of following that procedure, the City teaches its officers to instruct suspects to remove their hands immediately, which, according to the expert, increases the likelihood that force must be used. Second, the expert opined that the City fails adequately to train its officers in the use of cover and lighting, which also increases the likelihood of the use of force. The Academy provides training on these issues, but there is no evidence of training on lighting in nighttime operations or any post-Academy training on the use of cover. Third, the expert opined that the City fails adequately to train its officers on how to handle high-risk operations. The City has training on 'raids,' but only requires this training for officers who execute search warrants, and not for officers who serve arrest warrants at a suspect's home. Melvin, for example, did not receive this training until after Johnson's death. Fourth, the expert opined that the City fails adequately to train specialized units like the Task Force in high-risk situations. While City policy requires that 'specialized units' receive training on high-risk situations that the unit is likely to encounter, this Task Force received no such training, although it was labeled a 'specialized unit.' The evidence offered by the Plaintiff concerning the deficiencies in the City's training program, particularly with respect to use of force, is disputed by the City and its expert. However, a reasonable jury could conclude that the City acted with deliberate indifference as to adequate training in the use of force, which is an essential part of any training program.").

In ***Doe v. Borough of Barrington***, 729 F. Supp. 376 (D.N.J. 1990), plaintiff sued on her own behalf and on behalf of her children, for harm suffered as a result of an invasion of their constitutional right to privacy. The court found that disclosure by a police officer to neighbors that plaintiffs' husband and father had AIDS, was disclosure of a "personal matter" protected from government disclosure by the Fourteenth Amendment. *Id*. at 382.

Plaintiffs' assertion of liability against the Borough was based on a theory of failure to train its employees about AIDS and the importance of keeping the identity of AIDS carriers confidential. In granting summary judgment in favor of the plaintiffs on the issue of municipal liability, the court held that "[t]he need to train officers about AIDS and its transmission and about the constitutional limitations on the disclosure of the identity of AIDS carriers is so obvious that failure to do so is properly characterized as deliberate indifference." *Id*. at 390.

The court rejected the Borough's defense that there was no deliberate indifference where no other municipality or state agency had adopted a policy on AIDS. "That other municipalities do not have policies regarding AIDS is not material to the analysis set forth in ***City of Canton v. Harris***...." *Id*. The court expressly noted that it was not deciding whether the municipality could disclose a person's affliction with AIDS to someone actually at risk of contracting the disease from the identified AIDS carrier. *Id*. Finally, the court was careful to restrict the municipality's liability to failure to train about the disease AIDS. *Id.*

Compare ***Doe v. City of Cleveland***, 788 F. Supp. 979, 986 (N.D. Ohio 1991) (where City's AIDS policy reflected sufficient awareness of need for confidentiality, City could not be held liable where one officer circumvented the policy); ***Soucie v. County of Monroe***, 736 F. Supp. 33, 38 (W.D.N.Y. 1990) (claim against county based on failure to train probation personnel as to the confidentiality of juvenile pre-sentence reports failed to satisfy ***City of Canton*** where there were no allegations that County repeatedly ignored or failed to investigate prior disclosures).

For examples of cases where plaintiffs have alleged specific deficiencies in training and courts have found no deliberate indifference under ***City of Canton***, *see, e.g.,* ***Beard v. Whitmore Lake School Dist.***, 2007 WL 1748139, at *1, *4, *5 (6th Cir. June 19, 2007) ("This case concerning the unconstitutional strip search on May 24, 2000, of 24 students in the Whitmore Lake High School District reaches this court for the second time. See *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 601 (6th Cir.2005). In the first appeal, this court found that qualified immunity protected the school teachers who engaged in the illegal search. . . This appeal, in contrast, concerns the liability of the District for the conduct of the teachers. . . . [T]he need for additional training was not 'so obvious' to establish the District's deliberate indifference for several reasons. First, it is not inherently foreseeable that teachers would have ignored the District's policy and guidelines and engaged in an excessive and unconstitutional search. The District, as discussed above, provided teachers with the relevant policies and guidelines and could reasonably expect them to review the policies. . . . The teachers disregarded the District's written policies and engaged in a search that this court has found to have been unconstitutional. Second, while the need to have some policy on unconstitutional searches might be obvious, the need to have a training program above and beyond the policy is not obvious in this case. Clearly, the District recognized that there was a risk that teachers might engage in unconstitutional searches and that having a policy was an appropriate course of action. The risk that unconstitutional searches might occur, however, is distinct from

the risk that unconstitutional searches might occur despite the existence of the District's policy limiting such searches. . . . Third, and relatedly, the District's decision not to give a higher priority to search training is consistent with the District's position that the need for additional training was not obvious. . . . . Fourth, the students did not present evidence that teachers routinely encountered situations in which the teachers might have engaged in unconstitutional searches of students without proper training. . . . Fifth, this court previously found that the 'law, at the time the searches were conducted, did not clearly establish that the searches were unreasonable under the particular circumstances present in this case.'. . Given that it was not clear at the time that the search at issue in this case was unconstitutional, it is unlikely that the need for training to prevent the unconstitutional search was 'so obvious' that the District was deliberately indifferent to the need to prevent the search. . . Finally, it is important not to conflate our *ex post* view of the District's policy from the District's *ex ante* decision not to engage in additional training. . . . The District has numerous policies and guidelines and it would be impossible to provide sufficient training to cover every possible contingency; a decision to have training on one issue might inevitably lead to insufficient training on another. The Supreme Court in *City of Canton* only required districts to focus on 'obvious' risks; it did not require them to account for every possible risk."); ***Gray ex rel Alexander v. Bostic***, 458 F.3d 1295, 1308, 1309 (11th Cir. 2006) ("Gray emphasizes that Deputy Bostic received no training specifically addressing the detention of students. She contends that Sheriff Sexton should have foreseen that unwarranted handcuffed detentions of students were 'bound to happen' without such training. Thus, Gray is arguing that the need to train was 'so obvious' that the failure to do so constituted deliberate indifference without prior notice. . . . We . . . conclude that the need for training regarding the detention of students specifically is not obvious in the abstract and that a lack of such training is a 'possible imperfection,' but not a 'glaring omission' from a training regimen. Deputy Bostic received training, at both the police academy and the Tuscaloosa County Sheriff's Department, on the proper use of force and the principles of probable cause. The failure to provide specific training regarding the detention of students, in addition to general training regarding use of force during detention and arrest, was not 'so likely' to result in the violation of students' Fourth Amendment rights that Sheriff Sexton reasonably can be said to have been deliberately indifferent to the need for this particularized training without any prior notice."); ***Ciminillo v. Streicher***, 434 F.3d 461, 469, 470 (6th Cir. 2006) ("In arguing that the City of Cincinnati violated his constitutional rights by failing to train its officers in the use of beanbag propellants, Ciminillo points to an agreement entered into between the City of Cincinnati, the Cincinnati Police Department, and

the United States Department of Justice regarding, among other things, the use of beanbag propellants. That agreement was entered into less than one month before the events that underlie this action. Furthermore, Ciminillo points to Knight's affidavit, in which Knight states:

> I was trained in use of the bean bag shotgun in the Police Academy consecutively every year at the Police firing range. Part of training is review of Department Policy and Procedure about when you can and can't deploy bean bag shotguns, distances that are safe to deploy the weapon at a subject, and appropriate areas of the body to aim for.

Although Ciminillo argues that a jury could infer from that agreement and Knight's affidavit that the City had not completed the training of its officers, nothing in the record supports such an inference. To the contrary, both the agreement itself and Knight's affidavit suggest that the City was affirmatively taking steps to train officers in the use of beanbag propellants. Furthermore, Ciminillo has submitted no additional evidence regarding the number of incidents of beanbag misuse, delays in the implementation of the Department of Justice agreement, or any other evidence that suggests that the City's training of officers in the use of beanbags is, or ever was, constitutionally defective."); ***Whitfield v. Melendez-Rivera***, 431 F.3d 1, 10, 11 (1st Cir. 2005) ("The parties agree that the Puerto Rico Police Department had promulgated regulations governing the proper use of deadly force and that these regulations were applicable to the municipal police as well as to the Commonwealth police. . . The district court, however, found that there was a factual dispute as to whether Fajardo had adopted these regulations and trained police officers in accordance with them. The plaintiffs' primary evidence establishing this claim was testimony by the mayor and the police commissioner to the effect that there were no municipal regulations concerning the use of deadly force. According to the court, the jury could infer from this evidence, and from Whitfield's testimony concerning the officers' conduct in violating his constitutional rights, that the officers had not been properly trained in the use of deadly force. Such an inference was not warranted on the undisputed facts of this case. The undisputed evidence is that both officers were in fact trained by the Puerto Rico Police according to the policies of the Puerto Rico Police Department. . . . The defendants' evidence included diplomas certifying that both officers had successfully completed the intensive preparatory course administered by the Puerto Rico Police Department, certificates of training received by both officers establishing that they had participated in ongoing training in the proper handling and use of firearms, and the testimony of Mangome and Lebron that they had been trained concerning the constitutional standard for employing deadly force. . . . Whether Fajardo promulgated its own regulations is irrelevant to the lack

of training claim, and the plaintiffs' evidence does not otherwise rebut or contradict the evidence that Lebron and Mangome were trained in accordance with the Municipal Police Act and the related Police Department regulations governing the use of force. The testimony of the mayor and the police commissioner does not create a factual dispute as to whether Fajardo had actually adopted or enforced these regulations."); ***St. John v. Hickey***, 411 F.3d 762, 776 (6th Cir. 2005) ("While St. John can point to evidence in the record tending to show that Sheriff Hickey did not provide specific training on the issue of detaining and transporting disabled and/or wheelchair-bound persons,. . . this in and of itself does not support the conclusion that the need for such training was obvious in order to prevent violations of citizens' constitutional rights. St. John does not argue that the Sheriff failed to provide training on the core constitutional obligations of arresting officers, such as the requirement that an arrest be supported by probable cause and that it be carried out in a reasonable manner under the circumstances. A complete lack of training on concepts so fundamental as these may enable a plaintiff to survive summary judgment 'without showing a pattern of constitutional violations.' . . But such a case is very rare; indeed, the plaintiff must show that a violation of constitutional rights is 'a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.' . . Although it is reasonable, as St. John contends, to assume that arresting officers in Vinton County will encounter disabled and/or wheelchair-bound persons, this assumption alone does not support the conclusion required for §1983 liability to attach--i.e., that officers' general training on the manner of effectuating an arrest and using 'common sense' is so insufficient that a 'highly predictable consequence' will be recurring violations of the rights of disabled and/or wheelchair-bound persons. . .Because St. John did not produce evidence that Sheriff Hickey ignored a pattern of constitutional violations, nor that the failure to train on the specific issue of arresting and transporting wheelchair-bound persons was highly likely to result in widespread violations of constitutional rights, this Court must affirm the district court's grant of summary judgment to Defendants in their official capacities."); ***Larkin v. St. Louis Housing Authority Development Corporation***, 355 F.3d 1114, 1117, 1118 (8th Cir. 2004) ("Because the Constitution may require more training for some officers than for others, the Authority may not be protected from liability simply by relying on the requirements of the licensing agency. . . But the burden is on Larkin to proffer evidence establishing that conditions were such that the officers at Cochran Gardens needed additional training. She has failed to meet this burden. Johnson testified at his deposition that his duties at Cochran Gardens included patrolling in the complex's buildings and facilities, interdicting drug activities, and protecting tenants from harmful situations. He stated

that he had the authority to arrest those who committed crimes, to search for and seize evidence in connection with an arrest, and to use lethal force where there 'would be bodily harm or more serious' harm. But there was no evidence that these tasks were any different from those which all armed security guards are expected to be able to perform, and are, in fact, trained to perform. . . . Conclusory statements about the conditions at Cochran Gardens and the duties of its security guards are not sufficient for Larkin to meet her burden at summary judgment. Accordingly, we conclude that a reasonable juror could not find that the Authority's reliance on the training provided for licensure was inadequate, given the lack of evidence that Cochran Gardens' officers were required to perform unusually challenging duties under unusually challenging conditions. . . . A reasonable juror could not find, from the evidence provided, that a violation of constitutional rights was inevitably going to occur at Cochran Gardens. Although Dr. Fyfe did testify that the three days of training Johnson received, when coupled with the type of situations he could expect to see at Cochran Gardens, made 'it inevitable that those situations will be mishandled and that a tragedy will occur,' he never testified that the inevitability would have been patently obvious to the Authority. Thus, no reasonable juror could find, after considering the evidence regarding the nature of the property and the circumstances regularly faced by the security guards, that the Authority had actual or constructive notice of any inadequacy of the training it provided to the guards."); ***Dunn v. City of Elgin,*** 347 F.3d 641, 646 (7th Cir. 2003) ("Plaintiffs contend that the City of Elgin showed deliberate indifference by failing to provide any training regarding standby service. They argue that because child custody disputes implicate protected constitutional rights, the City had a responsibility to instruct its officers on how to proceed with regard to custody orders. However, Plaintiffs' argument cannot succeed because the City did adequately train its officers regarding standby service. . . . The fact that two police officers did not follow the policy set forth by the City of Elgin is not enough to prove deliberate indifference by the City. Rather, Plaintiffs had to show that the City was aware that unless further training was given the officers would undermine the constitutional rights of others."); ***Lytle v. Doyle,*** 326 F.3d 463, 473, 474 (4th Cir. 2003) ("[T]he Lytles argue that the City should be liable because it showed deliberate indifference to their rights by failing to adequately train Norfolk police officers in citizens' First and Fourteenth Amendment rights. . . . The training provided to officers in the Norfolk Police Department is extensive, varied, and on-going. The officers must attend basic recruit school, receive four months of field training, and attend inservice training and regular seminars on special topics. The Lytles have not provided any evidence that additional training would have resulted in Lieutenant Brewer or the other Norfolk police officers responding any

differently. Officers cannot be expected to analyze the complex issues of law surrounding every statute they are required to enforce and then to decide whether the statute is constitutional. And the City cannot be required to anticipate every situation that officers will face. . . The situation here was hardly one that occurred with sufficient frequency such that a failure to properly train officers to handle it reflected a reckless indifference to the Lytles' rights."); ***S.J. v. Kansas City Missouri Public School Dist.,*** 294 F.3d 1025, 1029 (8th Cir. 2002) ("[T]here was no showing of a 'pattern of misconduct,' and there is, in our view, no 'patently obvious' need for public schools to train volunteers not to commit felonies at home and in their private lives. We are aware of no authority suggesting that public schools have any such obligation, and we do not believe that the evidence can reasonably support a conclusion that Mr. Robertson's crimes can be attributed in any way to a lack of proper training from the school district."); ***Pineda v. City of Houston,*** 291 F.3d 325, 333, 334 (5th Cir. 2002) ("The summary judgment record cannot support the plaintiffs' assertion that the training the SWGTF officers received was inadequate. The plaintiffs presented no evidence regarding additional training the SWGTF officers should have received that would have prevented the incident here--they only repeat that 'specialized narcotics training' was required, without ever defining the content of that statement. This conflates the issue of whether GTF officers were performing certain types of unauthorized investigations with whether they were properly trained in Fourth Amendment law. The plaintiffs must create a fact issue as to the inadequacy of the Fourth Amendment training received by GTF officers. The plaintiffs do not allege, and do not provide evidence, that the officers were so untrained as to be unaware that warrantless searches of residences absent an applicable Fourth Amendment exception, such as consent, were unconstitutional. And we think that ignorance of such basic rules is most unlikely. This stands in marked contrast to *Brown v. Bryan County* and *City of Canton v. Harris.* In *Bryan County* the deputy who caused the plaintiff's injury had received *no* training in proper pursuit and arrest techniques. In *City of Canton* the officer had received rudimentary first-aid training, but allegedly not enough to recognize a detainee's serious illness. There is no evidence in the summary judgment record to indicate that the SWGTF officers' Fourth Amendment instruction was deficient as to when warrantless searches could be performed. Without this evidence plaintiffs cannot survive summary judgment. . . . In this case, the plaintiffs' experts do not reference the Fourth Amendment training the officers had received prior to the shooting. Even assuming the plaintiffs have created a genuine issue of material fact as to whether or not GTF officers were performing narcotics investigations in violation of HPD policy, and that GTF officers were not adequately trained to perform such investigations, that does

not mean that their lack of training *caused* the injury to Oregon, which for these purposes we assume was the result of a warrantless search of a residence in violation of the Fourth Amendment. There is no competent summary judgment evidence of any causal relationship between any shortcoming of the officers' training regarding warrantless searches of residences and the injury complained of. Viewing the evidence in the light most favorable to the plaintiffs, the record fails to put at issue whether additional training would have avoided the accident." [footnotes omitted)); ***Cozzo v. Tangipahoa-Parish Council-President Government,*** 279 F.3d 273, 288. 289 (5th Cir. 2002) ("Although we agree with the district court that the testimony of Ms. Cozzo's expert witness, stating that Joiner never attended Louisiana's 320-hour peace officer training course, provided evidence sufficient for the jury to infer that Sheriff Layrison failed to train Deputy Joiner, we emphasize that proffering this testimony did not end Ms. Cozzo's evidentiary burden. Even taking the evidence in the light most favorable to the jury's verdict that Sheriff Layrisson's failure to train Deputy Joiner actually caused Ms. Cozzo's injury, Ms. Cozzo still bore the onus to prove that this failure to train constituted deliberate indifference to her right not to be unconstitutionally dispossessed of her property. Kent's testimony alone is, however, insufficient to meet this burden. *See Conner,* 209 F.3d at 798 (stating that plaintiffs generally cannot show deliberate indifference through the opinion of only a single expert). Moreover, Captain Peoples's attestation that, in nineteen years of working for the Sheriff's Department, he had received and was aware of no citizens' complaints against any employee regarding the manner in which orders are served cuts against Ms. Cozzo's failure to train supervisory liability claim. Specifically, the elapsing of almost two decades without any such complaint being lodged suggests that the inadequate training was not 'obvious and obviously likely to result in a constitutional violation.' . . Ms. Cozzo pointed to no other evictions based on TROs or any such similar events in the Sheriff Department's history and therefore neglected to proffer proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights and the need for additional or different training. As such, Ms. Cozzo adduced evidence legally insufficient to support the jury's finding of deliberate indifference. Accordingly, this case does not fit within the single incident exception, and Sheriff Layrisson has persuasively argued that the district court erred in concluding that Ms. Cozzo demonstrated failure to train supervisory liability."); ***Isbell v. Ray***, 208 F.3d 213 (Table), 2000 WL 282463, at *8 (6th Cir. Mar. 8, 2000) (" We hold that Isbell has failed to demonstrate that Dekalb County had a policy or custom of inadequately training its law enforcement officers with respect to strip searches. There was a policy. . . that strip searches were to be conducted only upon 'reasonable belief that a person could have drugs, any kind

of contraband or weapons.' . . . Although the jailer Tom Lassiter, who allegedly participated in the search, expressed ignorance about the rules for conducting a strip search and stated that he had never been given a policy statement on this subject, this fact alone is not enough to show a deliberate policy of inadequate training on the part of the county. . . . Isbell has not pointed to any other cases of inappropriate strip searches conducted by Dekalb County officers. . . Nor has he shown that his case fits into that narrow class of circumstances in which the risk of injury is so obvious, and constitutional violations are so predictable, that the failure to train officers in strip search procedure is, without more, evidence of deliberate indifference. . . Isbell's conclusory statement that the risk of constitutional violation is particularly obvious because Dekalb County deputies are authorized to conduct strip searches in a recurring set of circumstances is not sufficient to meet this test. He has pointed to nothing unique about the nature of strip search procedure that would put it in this narrow category of cases."); ***Conner v. Travis County***, 209 F.3d 794, 797 (5th Cir. 2000) ("The Conners did not attempt to prove that the County's failure to train its staff in distinguishing between emergency and non-emergency conditions was deliberately indifferent by showing that prior incidents gave the County or Keel notice of the need for specific training. Instead, they rely on the single episode with Mr. Conner and on their experts' statements about the need for more training. We have previously noted the difficulty plaintiffs face in attempting to show deliberate indifference on the basis of a single incident. . . .We can reasonably expect--if the need for training in this area was 'so obvious' and the failure to train was 'so likely to result in the violation of constitutional rights'--that the Connors would be able to identify other instances of harm arising from the failure to train. The fact that they did not do so undercuts their deliberate indifference claim."); ***Lewis v. City of West Palm Beach,*** No. 06-81139-CIV, 2008 WL 763250, at *9, *10 (S.D. Fla. Mar. 19, 2008) ("Plaintiff's main argument is that the danger of constitutional violations from the city's failure to adequately train its officers in the proper use of hobble restraints was so obvious that the city should be deemed deliberately indifferent to the risk of those violations. The court cannot agree. Where the city is unaware of any pattern of constitutional violations, the plaintiff bears an extremely heavy burden to demonstrate the city's deliberate indifference. The plaintiff must show that the city knew 'to a moral certainty' that constitutional violations would occur in the absence of additional or revamped training. . . Any causal connection between deficiencies in the city's training programs and the alleged constitutional violation in this case is simply too remote. No policymaking official could reasonably be said to have known--certainly not 'to a moral certainty'--that without training specifically directed to the use of hobble restraints, or to the appropriate use of officer's knees in

restraining a struggling person, the city's police officers were likely to commit constitutional violations. Nor did the city's training policy with respect to confrontations with mentally ill persons reflect a conscious choice to ignore a risk 'so obvious' that the city should be deemed deliberately indifferent, even without having been aware of any past constitutional violations. . . Plaintiff has thus not produced sufficient evidence showing that the city was deliberately indifferent to the risk of constitutional violations."); ***Pickens v. Harris County***, Civil Action No. H-05-2978, 2006 WL 3175079, at *18 (S.D. Tex. Nov. 2, 2006) ("The inability to show a causal link between the training Jones received and his failure to identify Pickens as an off-duty officer is not the only basis to distinguish *Young*. As noted, in *Young*, the off-duty officers operated under a more rigid 'always on, always armed' policy than was present in this case. In *Young*, the First Circuit applied a different standard for deliberate indifference than the Fifth Circuit follows. . . .[I]n the Fifth Circuit, . . . a plaintiff 'usually must demonstrate a pattern of violations and that the inadequacy of the training is obvious and obviously likely to result in a constitutional violation.' . . . The record does not show a pattern of misidentification that would put Harris County on notice of an obvious need for additional, particularized training, so as to make the failure to provide it deliberate indifference. The defendants offer evidence of three previous friendly-fire incidents, two involving plainclothes on-duty officers, and one involving a uniformed on-duty officer. . . Pickens is the first off-duty law-enforcement officer in Harris County to be shot by on-duty officers. . . The plaintiffs did not produce any additional evidence of friendly-fire shootings. . . . The plaintiffs offer no evidence that inadequate training in on-duty/off-duty officer encounters caused Jones to shoot Pickens. The plaintiffs offer suggestions as to additional training for off-duty officers like Pickens, not on-duty officers like Jones. . . . The record does not support a finding that a particular defect in Jones's training caused him to act in an objectively unreasonable way. In this case, unlike *Young*, the record does not raise a fact issue as to whether, had Jones received specific additional or different training, he would have recognized Pickens as an officer and the shooting would not have occurred. Summary judgment is granted on the failure-to-train and related claims."); ***Williams v. City of Beverly Hills, Mo.***, No. 4:04-CV-631 CAS, 2006 WL 897155, at *16 (E.D. Mo. Mar. 31, 2006) ("Plaintiff's contention that the municipalities should have offered their officers training in ramming or PIT maneuvers does not establish a genuine issue of material fact on his failure to train claims. Plaintiff has cited no cases in which courts have held that failure to train in ramming or PIT maneuvers resulted in a violation of constitutional rights where officers were trained in pursuits and defensive driving tactics. In addition, there is no evidence in the record that Beverly Hills or Pine Lawn had notice that their

procedures were inadequate or likely to result in a violation of constitutional rights. There is no evidence that prior instances of ramming occurred in either municipality, or that any complaints concerning ramming were made to either municipality. Thus, it cannot be said that the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the municipalities were deliberately indifferent to the need."); ***Logan v. City of Pullman***, No. CV-04-214-FVS, 2006 WL 120031, at *5 (E.D. Wash. Jan. 13, 2006) ("Here, Plaintiffs argue that in failing to provide 'meaningful, substantive, and practical training regarding the use of O.C. spray in indoor locations, the use of non-violent techniques, and the limits of constitutional force,' the City acted with deliberate indifference to Plaintiffs' constitutional right to be free from excessive force. . . To succeed on this cause of action, Plaintiffs must show the need to train the officers on using O.C. spray indoors was so obvious and the failure to adopt such a specific training program was so egregious that it rose to the level of deliberate indifference. . . . Plaintiffs have produced no evidence showing the alleged inadequacy of the City's training was the result of a 'deliberate' or 'conscious' choice, which, under *Canton*, is necessary to establish a municipal policy. Absent any evidence showing the alleged inadequacy in the officers' training was the result of a 'conscious' or 'deliberate' choice, any shortcomings in the training can only be classified as negligence on the part of the City, which is a much lower standard than deliberate indifference standard adopted by the Supreme Court in *Canton*."); ***Atak v. Siem***, No. Civ. 04-2720DSDSRN, 2005 WL 2105545, at *5 (D. Minn. Aug. 31, 2005) (not reported) ("Plaintiff's claim against the City is based upon the single incident with defendant Siem. To support his claim, plaintiff points only to an expert's testimony that the need to train officers 'is so obvious' that the City's failure to adequately train officials 'can only be seen as deliberate indifference.' . . Plaintiff's expert emphasizes that the City failed to train officers to carry the Taser on the weak side of their body. However, plaintiff must show that the training deficiency was 'so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.'. . Plaintiff has failed to make such a showing or to offer any evidence of recurring situations that alerted or should have alerted the City to any obvious need to further train its officers. Therefore, summary judgment in favor of the City is appropriate."); ***Sallenger v. City of Springfield***, No. 03-3093, 2005 WL 2001502, at *22, *23 (C.D. Ill. Aug. 4, 2005) (not reported) ("Plaintiff argues that two of the City's express policies caused Andrew's death: (1) the City's policy of treating all persons alike and correspondingly failing to train police officers in how to deal with the mentally ill, and (2) the City's policy of using hobbles on combative arrestees without training officers how to

properly administer a hobble. . . . Conspicuously absent from Plaintiff's case is evidence regarding the type of training Department officers did receive. The record indicates that Sergeant Zimmerman, Officer Oakes, and Officer Oliver had no special training in dealing with the mentally ill. However, the degree of training of particular officers is not at issue here. Instead, Plaintiff must show that the Department's training program itself was deficient. To do that, one must first demonstrate what the training program was. It is possible that an existing training program that entails training officers in how to handle or approach other difficult or intoxicated subjects would have application to the mentally ill as well. The absence of proof on what the training actually provided is critical. . . . There is evidence that Department officers encountered the mentally ill on a regular basis. Yet the fact that better policies were available to the City does not prove a constitutional violation. . . . The City's policy of treating the mentally ill the same as every other citizen is not the type of policy that, on its face, presents an obvious potential for a constitutional violation. Further, Plaintiff presents no evidence to show that the Department's officers engaged in a pattern of constitutional violations involving the mentally disabled, which the City learned about but ignored. Without more, the Court cannot conclude that an issue of fact exists tending to show that the need for more or different training was so obvious, and the inadequacy of the officers' training so likely to result in a violation of constitutional rights, that the City was deliberately indifferent to the needs of the mentally ill. Therefore, the City's Motion for Summary Judgment on Plaintiff's claim for failure to train officers with regard to the mentally ill is allowed. Likewise, the claim that the City engaged in a pattern and practice of discriminating against the mentally ill fails."); ***Santiago v. Feeney***, 379 F.Supp.2d 150, 160 (D. Mass. 2005) ("Plaintiff contends that the risk of officers conducting unconstitutional searches and strip searches was 'so obvious' that the City's failure to train was the moving force behind the violation of Plaintiff's rights. . . This court disagrees. Plaintiff fails to present evidence that when Eddings and Feeney were hired there was a need for increased training in proper search and strip search techniques. Additionally, Plaintiff does not present evidence of a serious recurrence that required the City to provide its officers with increased training."); ***Leonard v. Compton***, No. 1:03CV1838, 2005 WL 1460165, at *8 (N.D. Ohio June 17, 2005)(not reported) ("Other than relying on the constitutional violation itself to establish the existence of inadequate training, plaintiffs have presented no evidence to suggest that the City of Cleveland disregarded an obvious need for training or that such disregard culminated with Ms. Leonard's injury. Although plaintiffs argue that the City of Cleveland has failed to properly train officers on the enforcement of Civil Domestic Relations Orders, they have not pointed to any evidence in the record which actually demonstrates whether

or not the City of Cleveland specifically conducts training on this issue. . . Even assuming that the City of Cleveland provides no specific training on this issue, plaintiffs' claim would still fail as they have provided nothing to suggest that the failure to conduct training in this area constitutes a deliberate choice to disregard an obvious risk of constitutional violations. On the contrary, the evidence in this case does not suggest the need for such training to avoid the constitutional injury suffered by Ms. Leonard. Indeed, Officer Durbin testified that this incident was the first time in his ten-year career that he arrested someone when effectuating a parent's court-ordered visitation rights. . . . Because plaintiffs have failed to provide sufficient evidence that the City of Cleveland's deliberate indifference to an obvious need for training led to Ms. Leonard's constitutional injury, the City of Cleveland is entitled to summary judgment on plaintiffs' Section 1983 claim."); ***Perez v. Miami-Dade County,*** 348 F.Supp.2d 1343, 1352, 1353 (S.D. Fla. 2004) ("A court must look to the 'particular area' of need to determine whether training was so obviously necessary that failure to provide training constituted deliberate indifference. . . Thus, in *City of Miami*, the Court determined that a claim of inadequate training in the use of handcuffs failed because the Plaintiff 'presented no evidence of a single prior incident in which a City police officer caused an injury by excessive force in handcuffing.' . . Similarly, here, Plaintiff has provided no evidence of any incident where Defendant's police officer unlawfully used a vehicle as a deadly weapon. On the other hand, Defendant has presented evidence that it has a training program that teaches its officers not to use their vehicles in a deadly manner except when necessary to protect their life or the lives of others. In such a case, the Court must find that the County did not inadequately train its officers in the use of vehicles as a deadly weapon or systematically cover-up the improper use of vehicles by its officers."); ***Brown v. City of Milwaukee,*** 288 F.Supp.2d 962, 980, 981 (E.D. Wis. 2003) ("The City does not dispute that it had an express policy that, under certain circumstances, officers stopping vehicles for investigative purposes were to surround the vehicle and order the driver out at gunpoint while shouting commands laced with profanities. The City admits that it trained police officers to use this tactic. Plaintiff does not contend that the City's policy was facially unconstitutional but, rather, that it was unconstitutional as applied to the stop of her vehicle. . . . . Plaintiff argues that the City failed to provide any supervision, monitoring or oversight of police officers who implemented the policy, and that such failure amounted to deliberate indifference to the policy's obvious consequences. The City does not dispute that, at the time of the incident, the policy contained no mechanism to review its use. The policy did not require officers who used the sensory overload tactic to advise their superiors of such use or document their actions and the results in reports. Plaintiff

argues that it should have been obvious to the City that without supervision and monitoring the consequences of a policy endorsing such highly intrusive conduct would be that individuals' constitutional rights would be violated. However, under Seventh Circuit law, a City cannot be held liable for deliberate indifference unless the plaintiff establishes that the City was or should have been aware of a *pattern* of constitutional violations caused by its policy. . . Here, plaintiff does not present evidence of a pattern of constitutional violations caused by the use of the sensory overload tactic; she refers only to her own experience. Thus, plaintiff may not prevail on her theory that the City was deliberately indifferent to the known or obvious consequences of its policy approving of the use of this tactic."); ***Pliakos v. City of Manchester,*** No. 01-461-M., 2003 WL 21687543, at *17 (D.N.H. July 15, 2003) (not reported) ("The fact that the Manchester Police Department produced a training video discussing the risk factors associated with positional asphyxia suggests that it was engaged in a reasonable effort to keep its officers informed of the latest information available concerning safe methods by which subjects might be restrained. That the individual defendants in this case may not have seen the training video until after the events at issue here, or that they saw but did not benefit from it, does not, without more, amount to 'deliberate indifference' on the part of the municipality."); *But see* ***Gray v. City of Columbus***, No. IP98-1395-C H/G, 2000 WL 683394, at *4 (S.D. Ind. Jan. 31, 2000) ("The written policy plays a critical role in shaping the legal issues in this case. Both Officers Yentz and Darnall testified they were aware of no such policy. Chief Latimer was also not aware of the policy, or else his memory of it was buried so deeply that he did not remember it even when he was personally responding to a document request for policies on searches in a case alleging unconstitutional strip searches and body cavity searches. On this record, a jury could reasonably conclude that the city went to the trouble of formulating a policy on this subject but was deliberately indifferent to the need to provide officers with at least some minimal guidance or training on the subject.").

See also ***Ross v. Town of Austin,*** 343 F.3d 915, 918, 919 (7th Cir. 2003) ("42 U.S.C. § 1983 imposes upon municipalities no constitutional duty to provide law enforcement officers with advanced, specialized training based upon a general history of criminal activity in the community. Here, the fact that APD officers had dealt with armed felons in the past did not obligate Appellees to anticipate the utility of hostage negotiation or tactical combat training. In the context of a failure-to-train claim, deliberate indifference does not equate with a lack of strategic prescience. The fact that Noble, a police officer in a town with a population of fewer than 5000, completed training from the Indiana Law Enforcement Academy and had met all

other statutorily mandated training standards, is further evidence that, as a matter of law, it was not the policy of Appellees inadequately to train police officers. By creating a law requiring municipalities to exceed the standards for police training established by state law, not only would this court exceed the scope of our judicial authority by usurping the policy-making authority of state legislators, but we would also impose upon smaller municipalities such as Austin, the untenable burden of maintaining the same standards of law enforcement training specialization as those of large cities or even national armies. Even were it within the province of this court to establish such a policy, it seems neither wise nor practical. Finally, neither Richey's preference for 'street' training of police officers nor his failure to attend a mandatory state training program for chiefs of police evinces an official policy of inadequately training APD officers or a deliberate indifference to the constitutional rights of the citizens of Austin. It does not follow logically from Richey's more favorable opinion of the value of on-the-job experience that he or the APD eschewed formal training as a matter of policy. Nor does his own failure to attend the mandatory training program demonstrate that he, the APD, or the Town had adopted a policy of failing to train Noble or other officers. Tamra does not suggest, and we do not discern, what constitutional harm might have been avoided by Richey's attendance of the training program."); ***Pena v. Leombruni***, 200 F.3d 1031, 1033 (7th Cir. 1999) ("[F]ailing merely to instruct police on the handling of dangerous people who appear to be irrational cannot amount to deliberate indifference, at least on the facts presented in this case. The sheriff had announced a policy that . . . the deputies were not to use deadly force unless they (or other persons) were threatened by death or great bodily harm, and this policy covered the case of the crazy assailant, giving him all the protection to which constitutional law entitled him. Maybe despite what we have just said it would be desirable to take special measures to render such a person harmless without killing or wounding him, . . . but if so the failure to adopt those measures would not be more than negligence, which is not actionable under section 1983."); ***Gold v. City of Miami***, 151 F.3d 1346, 1351, 1352 (11th Cir. 1998) ("This Court repeatedly has held that without notice of a need to train or supervise in a particular area, a municipality is not liable as a matter of law for any failure to train and supervise. . . . In *City of Canton v. Harris*, . . . the Supreme Court in dictum left open the possibility that a need to train could be 'so obvious,' resulting in a City's being liable without a pattern of prior constitutional violations. . . . [T]o date, the Supreme Court has given only a hypothetical example of a need to train being 'so obvious' without prior constitutional violations: the use of deadly force where firearms are provided to police officers."); ***Febus-Rodriguez v. Betancourt-Lebron***, 14 F.3d 87, 93 n.6 (1st Cir. 1994) ("[W]e do not find that the need to extensively

train officers about how to identify and deal with mentally handicapped persons is so obvious, that failure to give this training supports a finding of reckless or callous indifference to constitutional rights."); ***Benavides v. County of Wilson***, 955 F.2d 968, 975 (5th Cir. 1992) (no deliberate indifference based on Sheriff's failure to conduct further investigations of his deputies, beyond good-faith investigation of applicant's known arrest record), *cert. denied sub. nom. Bassler v. County of Wilson*, 113 S. Ct. 79 (1992); ***Graham v. Sauk Prairie Police Commission***, 915 F.2d 1085, 1104 (7th Cir. 1990) (where villages had taken a number of reasonable steps to investigate police applicant's background, failure to take additional screening steps was not so obvious as to constitute deliberate indifference to constitutional rights); ***Dorman v. District of Columbia***, 888 F.2d 159, 164 (D.C. Cir. 1989) (need for specific training in suicide prevention beyond what officers received, in contrast with need for training in use of deadly force, was not so obvious that city's policy could be characterized as deliberately indifferent); ***Holiday v. City of Kalamazoo,*** 255 F. Supp.2d 732, 738, 739 (W.D. Mich. 2003) ("The deficiency in KDPS' training that Holiday alleges is a failure to specifically instruct the officers in situation where the canine handler is incapacitated and not present at the scene of a canine apprehension. While such a situation occurred in the instant case, it is nonetheless a very unlikely scenario. Under *Harris,* KDPS is only required to adequately train its officers 'to respond properly to the usual and recurring situations which they must deal,' not every remotely-possible situation the imagination can conjure. . . KDPS' training program was adequate to train its officers to deal with routine apprehensions involving police dogs and their handlers."); ***Owens v. City of Fort Lauderdale,*** 174 F. Supp.2d 1282, 1297, 1298 (S.D. Fla. 2001) ("The plaintiffs also contend that this case fits into the narrow range of circumstances in which the need to train was so obvious that the failure to do so can be said to have been deliberately indifferent. . . . The only hypothetical example the Supreme Court has given of a need to train that is 'so obvious' without prior constitutional violations is the use of deadly force when officers are provided with firearms. . . . The plaintiffs contend that this case falls within the 'narrow range of circumstances, [when] 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 plaintiffs analogize the failure to train officers specifically in the use of neck restraints to the failure to train officers in the use of firearms. I do not think the analogy is apt. This is simply not the type of case in which Byron's injury was 'a highly predictable consequenc' of a failure to train regarding neck restraints. . . . The plaintiffs can simply not show that the likelihood that officers will be forced to restrain citizens--and especially mental patients such as Byron--using choke holds, or lateral vascular neck restraints is so

obvious, and constitutional violations so likely to result that the failure of the City to train on the use of choke holds was deliberately indifferent."); ***Tennant v. Florida***, 111 F. Supp.2d 1326, 1335 (S.D. Fla. 2000) ("The court concludes that this case is like *Gold*, where the Eleventh Circuit concluded that the need to train police in the proper response to handcuff complaints is not so obvious that it would support a finding of deliberate indifference without proof of prior incidents."); ***Bullard v. City of Mobile***, No. CIV. A. 00-0114-CB-M, 2000 WL 33156407, at *8 n.6 (S.D. Ala. Dec. 11, 2000) ("It can hardly be said . . . that failure to train every police officer in negotiating tactics or in the use of a bean bag gun or to pick up a knife within thirty seconds would so obviously lead to the violation of a constitutional right that the City could be considered deliberately indifferent."); ***Guseman v. Martinez***, 1 F. Supp.2d 1240, 1261 (D. Kan. 1998) ("It would not have been 'known or obvious' to a reasonable policymaker that a failure to provide immediate further training would likely result in a deprivation of constitutional rights. Such an eventuality would have seemed remote prior to this incident. Despite the fact that the city had no policy prohibiting restraint techniques of the type challenged, no person had ever before died of positional asphyxiation while in Wichita police custody. There were no known court decisions finding that the use of prone restraint techniques on a person who had resisted arrest was a violation of the person's constitutional rights. The materials in the record indicate that positional asphyxiation is a relatively rare event brought on by a unique combination of circumstances. Plaintiffs cite no evidence that the dangers of positional asphyxiation were widely understood prior to this incident or that police departments in general considered such information to be an essential part of their training regimens."); ***Barber v. Guay***, 910 F. Supp. 790, 801 (D. Me. 1995) ("A failure to train claim must establish deliberate indifference. Here there is no evidence that [Sheriff] Havey knew of any poor police work on the part of Guay to the extent that Havey's failure to supplement Guay's training would necessarily lead to the violation of constitutional rights."); ***Dansby v. Borough of Paulsboro***, No. CIV. A. 92-4558(JEI), 1995 WL 352995, *16 (D.N.J. June 7, 1995) (not reported) ("While plaintiff has adduced evidence that the Paulsboro police received no training on the enforcement of municipal ordinances or the sign-posting statute, this Court simply cannot believe that a small municipality must provide each police officer with extensive training on every obscure state statute and local ordinance. Indeed, plaintiff's assertion that the statutes at issue were rarely, if ever, enforced undercuts his argument that municipal policymakers were deliberately indifferent to the rights of citizens that were violated by the enforcement of these laws."); ***Anderson v. City of Glenwood***, 893 F. Supp. 1086, 1090 (S.D. Ga. 1995) ("The State training is modelled on minimum legal standards under Georgia law, and

without other evidence to support a finding of deliberate indifference, the fact that an officer received most of his training through the State and not from his small town police force is not nearly enough to accuse that town of deliberate indifference to the needs of its citizenry. [cites omitted] Anderson also has failed to reveal a direct causal link between not studying the Glenwood policies and procedures (as opposed to general State procedures) and the shooting in this case."); ***Wyche v. City of Franklinton***, 837 F. Supp. 137, 144-45 (E.D.N.C. 1993) ("As evidence that the Town of Franklinton displayed deliberate indifference, the plaintiff relies on the fact that the Town of Franklinton had no written policy on training, responding to 'abnormal mental behavior' calls, hiring, supervision, or equipping officers. In further support of her contention, the plaintiff submitted documents showing that the Town of Franklinton spent less than 1% of its annual budget on police training; that only one officer was on duty during the 8:00 p.m. to 8:00 a.m. shift; that the Town of Franklinton had no specific policy or procedure for investigating complaints against police officers; and, that alternative forms of restraint, such as chemical sprays or stun guns, were not available to [defendant]. The defendants do not dispute that the above facts are true. However, these facts do not aid the plaintiff in meeting her burden of showing deliberate indifference. The plaintiff has not shown that Franklinton police officers needed additional training in the use of force or had a history of using excessive force."); ***Fittanto v. Children's Advocacy Center***, 836 F. Supp. 1406, 1418 (N.D. Ill. 1993) ("Absent any evidence that the Village should have been on notice of the need for specialized training [in investigation of child sexual abuse], a reasonable jury could not conclude that the need was so obvious and the inadequacy so likely to result in constitutional violation that the Village could be said to have been consciously indifferent."); ***Behrens v. Sharp***, CIV. A. No. 92-1498, 1993 WL 205078, *4 (E.D. La. June 8, 1993) (not reported) ("There is no evidence that the alleged inadequate training of detectives to investigate cases of alleged sexual abuse of a child was 'so obvious ... and likely to result in violations of constitutional rights' that Sheriff Canulette can be said to have been deliberately indifferent to such rights in adopting his training policy."), *aff'd*, 15 F.3d 180 (5th Cir. 1994)(Table), *cert. denied*, 114 S. Ct. 2711 (1994); ***Fulkerson v. City of Lancaster***, 801 F. Supp. 1476, 1486 (E.D. Pa. 1992) (no "obvious need" for specialized training in high-speed pursuits, beyond what was given), *aff'd,* 993 F.2d 876 (3d Cir. 1993); ***Brown v. City of Elba***, 754 F. Supp. 1551, 1558 (M.D. Ala. 1990) (failure to train officers in handling of domestic disputes is not so obviously likely to result in constitutional violations as to satisfy deliberate indifference standard); ***East v. City of Chicago***, 719 F. Supp. 683, 694 (N.D. Ill. 1989) (unlike use

of force problem, ingestion of drugs by arrestees was not so common or obvious that City should have recognized need for training in that area).

Compare ***Carswell v. Borough of Homestead***, 381 F.3d 235, 245 (3d Cir. 2004) ("[W]e 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. . . . Mandating the type of equipment that police officers might find useful in the performance of their myriad duties in frequently unanticipated circumstances is a formidable task indeed. It is better assigned to municipalities than federal courts. We conclude that the judgment as a matter of law in favor of the Borough and Chief Zuger as well as that in favor of Snyder must be affirmed.") *with* ***Carswell v. Borough of Homestead***, 381 F.3d 235, 246-50 (3d Cir. 2004) (McKee, J., concurring in part and dissenting in part) ("As the majority ably discusses, the fact that a jury could conclude that Snyder used excessive force to subdue Carswell and thus violated Carswell's Fourth Amendment rights is not enough, standing alone, to deprive him of qualified immunity. It is, however, enough to support a finding that the use of excessive force resulted from the Borough's policy and custom of providing police officers only with guns, i.e. lethal weapons.[footnote omitted] The jury could conclude from Snyder's testimony that, at the very moment he fired the fatal shot, he believed that he was using excessive deadly force where non-lethal force would suffice. Indeed, if the jury accepted his testimony as true, it would have been hard to conclude anything else. The jury could therefore reason that the officer had to resort to excessive force solely because the Borough left him no alternative but to use his gun in a situation where non-lethal force could reasonably have been employed to subdue Carswell. . . . I believe that a jury could reasonably conclude that this record establishes such deliberate indifference because the Borough's training left Officer Snyder with no reasonable alternative to the use of deadly force. . . . Police Chief Zuger compiled the policy manual for the Borough's police department pursuant to his authority as police chief. . . The manual contains the Borough's official policy for the police department, and all police officers in the Borough were required to familiarize themselves with it and attest to having read it. It prescribes an official policy of 'progressive force' for the Borough's police, stating that '[t]he use of force will be progressive in nature, and may include verbal, physical force, the use of non-lethal weapons or any other means at the officer's disposal, provided they are reasonable under the circumstances.' . . Chief Zuger testified further that '[t]he policy of the Homestead Police Department is to use only the amount of force which is necessary in making an arrest or subduing an attacker. In all cases, this will be the minimum amount of force that is necessary.' . . . [footnote

omitted] However, as the majority notes, the Borough provided only guns to its officers. It did not equip them with any non-lethal weapons. Rather, an officer had to request any non-lethal weapon he/she might wish to carry and the request had to be approved by Zuger. If the request was approved, the officer then had to undergo additional training with the new weapon and become certified to use it. . . Although Chief Zuger was not asked about training in lethal force, the fact that officers were equipped with a gun and had to be trained in any approved non-lethal weapon they may have carried certainly supports the inference that the Borough only trained officers in the use of lethal force unless the Borough approved an individual request for a non-lethal weapon. It 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 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.' . . . [D]efining our inquiry in terms of whether the Constitution creates an approved 'equipment list' for police is both misleading and counterproductive. That is simply not the issue, and that formulation of the issue obfuscates our inquiry rather than advancing it. Given the duties of a police officer, it was certainly foreseeable that the Borough's policy of equipping officers only with guns and training them only in the use of deadly force would sooner or later result in the use of unjustifiable deadly force. . . . The result is. . .not a mandated equipment list, but a mandated alternative to using deadly force in those situations where an officer does not believe it is necessary to use deadly force. . . . Moreover, interpreting the Fourth Amendment as requiring municipalities to provide reasonable alternatives to the use of deadly force imposes no undue burden. In fact, here, it would do nothing more than effectuate the Borough's own announced policy of 'progressive force.' My colleagues imply that the Borough can not be liable under a failure to train theory because its police officers were properly trained in the use of deadly force. . . . However, plaintiff never argued that liability should be imposed on the basis of a failure to train in the use of deadly force. Rather, plaintiff argues that the Borough should be liable because its policy of requiring training only in using deadly force and equipping officers only with a lethal weapon, caused Officer Snyder to use lethal force even though he did not think it reasonable or necessary to do so. Moreover, as I have already noted, given the duties of a police officer, it does not require a 'pattern of underlying constitutional violations' to alert the Borough to the fact that its policies would cause police to unnecessarily use deadly force. Rather, as I have argued above, this record

satisfies the teachings of *Brown* because plaintiffs have established that 'narrow range of circumstances, [where] 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.'. . Thus, even without a pattern of abuse, '[t]he likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision ... reflected "deliberate indifference" to the obvious consequence of the policymakers' choice.'").

See also ***Estate of Larsen v. Murr***, No. 03 CV 02589 MSK OES, 2006 WL 322602, at *6 (D. Colo. Feb. 10, 2006) ("The Estate also contends that, at the time of Mr. Larsen's death, the City engaged in a custom of not arming officers with 'less-lethal' weapons. In 2000, the City assembled a committee to address whether to provide 'less-lethal' weapons to patrol officers, but the committee had not finished its work by the time of Mr. Larsen's death. 'Less-lethal' weapons such as Tasers, the 'less-lethal' shotgun, and the pepper ball were available at the time of Mr. Larsen's death but had not been provided to patrol officers. It was not until April 2003 that the City began deploying Tasers to patrol officers. It did not deploy the less-lethal shotgun or pepper ball to patrol officers until later that year. It is unclear that the City engaged in a deliberate decision not to deploy 'less-lethal' weapons between 2000 and 2003. However, assuming it did and that such behavior amounts to a 'custom or policy', there is no evidence in the record that Officer Murr would have acted any differently had he been equipped with a 'less lethal' weapon. He testified that he believed that Mr. Larsen was going to kill him. The Court cannot speculate that if Officer Murr had been issued a 'less-lethal' weapon, he would have chose to use it in these circumstances. Thus, the Court cannot conclude that the failure to issue 'less-lethal' weapons caused Mr. Larsen's death.").

Under some circumstances, having no policy may constitute deliberate indifference. *See, e.g.,* ***Vineyard v. County of Murray, Georgia***, 990 F.2d 1207, 1212 (11th Cir. 1993) ("The evidence demonstrates that the Sheriff's Department had inadequate procedures for recording and following up complaints against individual officers. . . . no policies and procedures manual. . . . [and] inadequate policies of supervision, discipline and training of deputies in the Murray County Sheriff's Department. . . ."); ***Oviatt v. Pearce***, 954 F.2d 1470, 1477-78 (9th Cir. 1992) (decision not to take any action to alleviate the problem of detecting missed arraignments constitutes a policy of deliberate indifference to the obvious likelihood of prolonged and unjustified incarcerations); ***Reynolds v. Borough of Avalon***, 799

F. Supp. 442, 447 (D.N.J. 1992) ("We hold that a reasonable jury might find that the risk of sexual harassment in the workplace is so obvious that an employer's failure to take action to prevent or stop it from occurring--even in the absence of actual knowledge of its occurrence--constitutes deliberate indifference, where the employer has also failed to take any steps to encourage the reporting of such incidents."); ***DiLoreto v. Borough of Oaklyn***, 744 F. Supp. 610, 623-24 (D.N.J. 1990) ("By not creating and implementing a policy and not training its employees regarding accompanying detainees to the bathroom, the Borough has expressed deliberate indifference to the fourth amendment rights of detainees....").

Note also that at least one court of appeals has rejected the notion "that a municipality may shield itself from liability for failure to train its police officers in a given area simply by offering a course nominally covering the subject, regardless of how substandard the content and quality of that training is." ***Russo v. City of Cincinnati***, 953 F.2d 1036, 1047 (6th Cir. 1992) (simple fact that officers received some training in course entitled "Disturbed-Distressed Persons" and that Department had policy of handling barricaded persons, did not necessitate finding that training was adequate as matter of law).

b. constructive notice cases

In ***Kerr v. City of West Palm Beach***, 875 F.2d 1546 (11th Cir. 1989), the court of appeals reinstated a verdict against the City, concluding that there was sufficient evidence from which the jury could have found that the plaintiffs' injuries were caused by the failure of the City and the former police chief to adequately train and supervise performance of the police department's canine unit, and that this failure constituted deliberate indifference to the constitutional rights of the plaintiffs. *Id*. at 1555-56. The evidence introduced included the following:

*officers in City's canine unit resorted to use of canine force more frequently than did officers in other cities

*the high ratio of bites to apprehensions was viewed in other canine units as a sign of irresponsible use of force

*officers in the canine unit often used excessive force when subduing individuals suspected of minor misdemeanor offenses

*reports were filed by officers whenever apprehensions resulted in bites; such reports were reviewed by the police chief

* City was aware of the deficiencies in the training and supervision of the canine unit

The jury could reasonably conclude the City's failure to take any remedial action amounted to deliberate indifference. *Id*. at 1557.

But see ***Samarco v. Neumann***, 44 F. Supp.2d 1276, 1288 (S.D. Fla. 1999) ("Evidence of a pattern or series of incidents is required to subject a government entity to liability. . . Proof of one or two incidents is not enough. . . Samarco must submit evidence of deficiencies on the Sheriff Office's general training of all its canine deputies, which he has failed to do. . .Thus, he has not produced evidence creating a genuine issue of material fact that the Sheriff's Office has a policy of failing to train its canine units on the proper use and limits of force. Absent a policy to use the canine teams in an unconstitutional manner or evidence that Sheriff Neumann was deliberately indifferent regarding the training of these teams, summary judgment in favor of Sheriff Neumann in his official capacity is warranted.").

See also ***Arledge v. Franklin County, Ohio,*** 509 F.3d 258, 264 (6th Cir. 2007) ("Plaintiffs claim that Franklin County inadequately trained its caseworkers such that they were not required to contact law enforcement agencies in the county of placement to insure that prospective care givers did not have criminal backgrounds. This failure resulted in Daniel's placement with Mr. Powers despite Mr. Powers's conviction for aggravated menacing, which would have precluded his eligibility as a possible residence for Daniel.As the district court held, in order to meet the deliberate indifference standard outlined in *Berry* and *City of Canton v. Harris*, the failure to train must reflect a deliberate or conscious choice made by the municipality. . . The County may be held liable only if 'the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need.' . . We agree with the district court that plaintiffs have not established deliberate indifference; rather, the plaintiffs have shown only negligence. As discussed earlier, it is obvious that more could have been done, and that better training and procedures may have helped to prevent Daniel's death. But it cannot be said that the inadequacy of the training provided by the county was so obviously inadequate as to likely result in a violation of constitutional rights. There was no history of this type of violence in Franklin County; only Daniel's tragic incident is presented as evidence of the alleged unconstitutional policy and practice. Accordingly, it cannot be said that Franklin County was deliberately indifferent to the

need for more or different training in this context."); ***Pena v. Leombruni***, 200 F.3d 1031, 1033, 1034 (7th Cir. 1999) ("If Winnebago County had seen a rash of police killings of crazy people and it was well understood that these killings could have been avoided by the adoption of measures that would adequately protect the endangered police, then the failure to take these measures might, we may assume without having to decide, be found to manifest deliberate indifference to the rights of such people."); ***Chew v. Gates***, 27 F.3d 1432, 1445 (9th Cir. 1994) ("Where the city equips its police officers with potentially dangerous animals, and evidence is adduced that those animals inflict injury in a significant percentage of the cases in which they are used, a failure to adopt a departmental policy governing their use, or to implement rules or regulations regarding the constitutional limits of that use, evidences a 'deliberate indifference' to constitutional rights. Under such circumstances, a jury could, and should, find that Chew's injury was caused by the city's failure to engage in any oversight whatsoever of an important departmental practice involving the use of force.").

In ***Bordanaro v. McLeod***, 871 F.2d 1151 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 75 (1989), plaintiffs, severely beaten by police officers of the City of Everett, claimed that their injuries "were the direct result of an unconstitutional police department custom of breaking down doors without a warrant whenever its officers were apprehending a felon. Second, the plaintiffs maintained that their injuries had been caused by a custom or policy of gross negligence amounting to deliberate indifference in the recruitment, training, supervision or discipline of Everett's police officers." 871 F.2d at 1155. The First Circuit affirmed the jury's imposition of liability on the City on both theories.

Based on testimonial evidence (uncontradicted version of arrest practice) and inference from the event itself (involvement of entire night watch acting in concert demonstrated shared set of rules, customs and pre-existing practices), the existence of the unconstitutional custom was established. *Id*. at 1156. Furthermore, the court found that the custom was so widespread that the Chief of Police, a policymaker for the police department, should have known of the unconstitutional practice. Allowing the practice to continue amounted to deliberate indifference to the constitutional rights of the citizens of Everett.

The court concluded that the Chief's "failure to eradicate this facially unconstitutional practice from the police department attributes that custom to the municipality." *Id*. at 1157.

In affirming the jury's finding that the City failed to provide minimally acceptable standards of recruitment, training, supervision and discipline of its police force, the First Circuit noted the substantial evidence presented to the jury on this issue. This was not a case where the jurors were asked to infer a policy of inadequate training from a single, though egregious, incident. The evidence included:

* the City was operating under a 1951 set of rules and regulations
* officers received little or no training after initial police academy course
* City discouraged officers from seeking supplementary training
* no supervisory or command training was required upon promotion to a higher rank
* too much discretion existed at all operating levels
* background checks of prospective officers were superficial
* discipline meted out inconsistently and infrequently
* no disciplinary action had been taken against officers involved in this incident until after they had been indicted
* a full, internal investigation by Everett Police Department did not occur until over one year after incident

871 F.2d at 1159-60.

The court also concluded that it was reasonable for the jury to attribute the established inadequacies to the municipality by finding that the Chief of Police and Mayor had express knowledge of the inadequacies and were deliberately indifferent to these failings. *Id*. at 1161-62. Finally, the jury could have found that the inadequacies in training, supervision and discipline "led directly to the constitutional violations . . . . " *Id*. at 1162.

In ***Bordanaro***, the First Circuit upheld the trial court's admission of post-event evidence (lack of proper internal investigation and failure to discipline officers involved) for the purpose of establishing what customs were in effect in the City *before* the King Arthur incident. *Id*. at 1166. "Post-event evidence can shed some light on what policies existed in the city on the date of an alleged deprivation of constitutional right." *Id*. at 1167. *Accord* ***Beck v. City of Pittsburgh***, 89 F.3d 966, 973 (3d Cir. 1996) (recognizing that post-event incident "may have evidentiary value for a jury's consideration whether the City and policymakers had a pattern of tacitly approving the use of excessive force."); ***Foley v. City of Lowell***, 948 F.2d 10, 13-15 (1st Cir. 1991); ***Grandstaff v. City of Borger***, 767 F.2d 161, 171 (5th Cir. 1985),

cert. denied, 480 U.S. 916 (1987). *See also* ***Willis v. Mullins***, No. CV F 04 6542 AWILJO, 2006 WL 302343, at *3, *4 (E.D. Cal. Feb. 8, 2006) ("Plaintiff argues that he should be able to find out about payment of punitive damages--after the incident 'because this would be evidence to support plaintiff's *Monell* claims.' . . He argues he should not be limited to evidence of pre-incident punitive damages payments. Plaintiff is correct, as a general proposition, that post incident events may prove that a policy or custom existed pre-incident. Plaintiff cites to numerous cases in support of his argument. [discussing cases] Thus, post-incident indemnification of punitive damages is probative of the existence that the policy existed pre-incident. From this post-incident evidence, which the jury may imply the existence of a pre-incident policy, the evidence may also infer knowledge and moving force. Although tenuous, plaintiff would be able to argue from this evidence that the officers were aware of the pre-incident policy, and was therefore a moving factor in their conduct. To be the moving force, the 'identified deficiency' in the County's policies must be 'closely related to the ultimate injury.'. . In other words, a plaintiff must show that his or her constitutional 'injury would have been avoided' had the governmental entity not indemnified officers. . .Post-incident evidence is relevant to the existence of a custom or policy, from which a plaintiff may argue it was the moving force in the alleged unconstitutional violation. Therefore, post-incident indemnification of police officers is relevant and probative.").

But see ***Barkley v. Dillard Dept. Stores, Inc.***, No. 07-20482, 2008 WL 1924178, at *6, *7 (5th Cir. May 2, 2008) (not published) ("Barkley bases part of his argument on the theory of ratification that we used in *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir.1985), which concerned allegations that the police shot an innocent man. . . . *Grandstaff*, however, has not enjoyed wide application in our circuit. . . We have limited its ratification theory to 'extreme factual situations.' . . . The instant situation is not an extreme factual situation as in *Grandstaff*, but is more like *Snyder*, in which a single officer was involved in shooting a fleeing suspect. Consequently, we decline to apply the theory used by the court in *Grandstaff*."); ***Escobedo v. City of Redwood City***, No. C 03-3204-MJJ., 2005 WL 226158, at *11, *12, *14 (N.D. Cal. Jan. 28, 2005) (not reported) ("While these cases--*Henry, McRorie, Larez*, and *Grandstaff*--stand for the proposition that the failure to reprimand may support a finding of a municipal policy of deliberate indifference to constitutional violations, none stands for the proposition that 'whenever [a municipality's] investigation fails to lead to a reprimand or discharge of an employee,' the municipality is deemed to have a policy or custom giving rise to §1983 liability. . . Indeed, the Ninth Circuit (and the Fifth) appears to require more

than a failure to reprimand to establish a municipal policy or ratification of unconstitutional conduct. . . . In the case at bar, the Court finds that the City's (or its decision-makers') post-event conduct (failure to reprimand and attempts to persuade the coroner not to classify Mr. Escobedo's death a homicide) does not rise to the level of post-event ratification described in the *Henry*, *Grandstaff*, *Larez*, and *McRorie* cases. Plaintiffs here present no evidence of other instances like this one where no post-event action was taken by the City of Redwood City. Plaintiffs present no evidence that the City of Redwood City routinely exonerates its officers of wrongdoing. While the force used by the officers here may very well have been excessive and unconstitutional,. . . Plaintiffs present no evidence that the officers' conduct rose to the *Grandstaff* or *McRorie* levels of gross disregard for human life such that the municipality's failure to reprimand can be found to constitute a policy of deliberate indifference. For these reasons, the Court finds that Plaintiffs have failed to demonstrate that a triable fact exists as to whether the City's post-event conduct evidences a preexisting municipal policy of deliberate indifference to its police officers' unconstitutional treatment of detainees. . . . The *Hopkins* and *Davis* cases are substantially different from the case at bar where there is neither evidence of a department-wide practice of failing to adequately train police officers on the use of nunchucks nor of any perception that the training program in existence is a sham. The defendant officers may have used the nunchucks improperly but this does not itself evidence a widespread policy that subjects the City to § 1983 liability. With no other evidence to support a custom or policy, Plaintiffs' argument fails. The Court finds no municipal liability on an inadequacy of training theory for Plaintiffs' claim of excessive force.").

See also ***Young v. City of Providence***, 404 F.3d 4, 28 (1st Cir. 2005) ("Young presented evidence that the general policy of the PPD was to document training, and yet for unclear reasons any on-duty/off-duty training was evidently undocumented. . . . In short, there are substantial unresolved issues of fact with respect to the amount of training that the PPD actually gave to officers, including Solitro, on avoiding misidentifications of off-duty officers. The jury could find that there was, at best, very minimal training on these issues, and no real program of training on them at all. A finding of deliberate indifference requires also that the City have disregarded a known or obvious risk of serious harm from its failure to develop a training program that dealt with off-duty identifications in the context of its always armed/always on-duty policy. We think the jury could reasonably make such a finding here. Such knowledge can be imputed to a municipality through a pattern of prior constitutional violations. . . Young does not rely primarily on this sort of notice, although she does

have some evidence from which a jury could find that it was common knowledge within the PPD that misidentifications of off-duty officers responding to an incident often occurred in Providence, particularly misidentification of minority officers. It is clear that a jury could find a pattern of knowledge of prior misidentifications and that this was likely to pose a significant risk of harm."); ***Amnesty America v. Town of West Hartford,*** 361 F.3d 113, 128 (2d Cir. 2004) ("The Town argues . . .that the district court correctly concluded that plaintiffs failed to raise a genuine issue of material fact as to McCue's failure to supervise because they have not proffered evidence that the demonstrators repeatedly complained about the excessive force after the demonstrations, or that McCue repeatedly failed to investigate such complaints. This argument is misplaced. While we have held that proof of a policymaker's failure to respond to repeated complaints of civil rights violations would be sufficient to establish deliberate indifference, . . . we have never required such a showing. The means of establishing deliberate indifference will vary given the facts of the case and need not rely on any particular factual showing. The operative inquiry is whether the facts suggest that the policymaker's inaction was the result of a 'conscious choice' rather than mere negligence. . . . Thus, plaintiffs' evidence must establish only that a policymaking official had notice of a potentially serious problem of unconstitutional conduct, such that the need for corrective action or supervision was 'obvious,' . . .and the policymaker's failure to investigate or rectify the situation evidences deliberate indifference, rather than mere negligence or bureaucratic inaction. Considered under this standard, plaintiffs' proffered affidavits are sufficient to withstand summary judgment, because the evidence allows the inference that [Police Chief] McCue himself witnessed (and perhaps encouraged) the unconstitutional conduct, and that the conduct was so blatantly unconstitutional that McCue's inaction could be the result of deliberate indifference to the protesters' constitutional rights."); ***Olsen v. Layton Hills Mall,*** 312 F.3d 1304, 1319, 1320 (10th Cir. 2002) ("We reverse the district court's grant of summary judgment to Davis County because Appellant has alleged the necessary facts that may establish that Davis County manifested deliberate indifference by failing to train its jail's prebooking officers to recognize OCD and handle sufferers appropriately. . . . Given the frequency of the disorder, Davis County's scant procedures on dealing with mental illness and the prebooking officers' apparent ignorance to his requests for medication, a violation of federal rights is quite possibly a ' "plainly obvious" consequence' of Davis County's failure to train its prebooking officers to address the symptoms. . . . And this is for a jury to decide. That OCD is relatively common and that the county had procedures in place for dealing with inmates with psychiatric disorders suggest that the municipality may have had constructive notice of the

illness' prevalence and consequences. Accordingly, Appellant has raised a genuine issue of material fact as to whether the county had notice of and was deliberately indifferent in its failure to train prebooking officers on OCD.”)***; Henry v. County of Shasta***, 132 F.3d 512, 518-20 (9th Cir. 1997), *amended on denial of rehearing*, 137 F.3d 1372 (9th Cir. 1998) ("Here, factual issues were presented that the county acted in accordance with an established policy or deliberate indifference to violation of rights by stripping and detaining in rubber rooms persons stopped for minor, non-jailable traffic offenses who refuse to sign a notice to appear, or demand to be taken before a magistrate. There was evidence that the county permitted an almost identical incident as that complained of by Henry to occur after the county was sued and after being put on notice unequivocally of its deputies' and nurses' unconstitutional treatment of Henry. . . . In holding that the May and Burns declarations may be used to establish municipal liability although the events related therein occurred after the series of incidents that serves as the basis for Henry's claims, we reiterate our rule that post-event evidence is not only admissible for purposes of proving the existence of a municipal defendant's policy or custom, but may be highly probative with respect to that inquiry. . . When a county continues to turn a blind eye to severe violations of inmates' constitutional rights--despite having received notice of such violations--a rational fact finder may properly infer the existence of a previous policy or custom of deliberate indifference. . . . If a municipal defendant's failure to fire or reprimand officers evidences a policy of deliberate indifference to their misconduct, surely its failure even after being sued to correct a blatantly unconstitutional course of treatment-- stripping persons who have committed minor traffic infractions, throwing them naked into a ‘rubber room' and holding them there for ten hours or more for failing to sign a traffic ticket or asserting their legal right to be brought before a magistrate--is even more persuasive evidence of deliberate indifference or of a policy encouraging such official misconduct. May's and Burns' declarations are sufficient to show for purposes of summary judgment that such abuse of people who commit minor infractions is ‘the way things are done and have been done' in Shasta County, and thus would allow a jury to make a finding as to the existence of a policy or custom.").

In ***Beck v. City of Pittsburgh***, 89 F.3d 966, 973-74 (3d Cir. 1996), "the plaintiff offered in evidence a series of actual written civilian complaints of similar nature, most of them before and some after [the incident in question], containing specific information pertaining to the use of excessive force and verbal abuse by Officer Williams." The court determined that "[w]ithout more, these written complaints were sufficient for a reasonable jury to infer that the Chief of Police of

Pittsburgh and his department knew, or should have known, of Officer Williams's violent behavior in arresting citizens, even when the arrestee behaved peacefully, in orderly fashion, complied with all of the Officer's demands, and offered no resistance." Furthermore, the court "reject[ed] the district court's suggestion that mere Department procedures to receive and investigate complaints shield the City from liability. It is not enough that an investigative process be in place . . . 'The investigative process must be real. It must have some teeth. It must answer to the citizen by providing at least a rudimentary chance of redress when injustice is done. The mere fact of investigation for the sake of investigation does not fulfill a city's obligation to its citizens.' . . . Formalism is often the last refuge of scoundrels." (quoting from appellant's brief).

See also ***Escobar v. City of Houston***, 2007 WL 2900581, at **37-40 (S.D. Tex. Sept. 29, 2007) ("Certainly, as the City states, no amount of training can eliminate the possibility of an accident. Nor can any amount of indexing training ensure that an officer will 'index' his weapon properly each time it is drawn. There are disputed issues, however, as to whether HPD adequately trained officers in safe-weapons handling. The evidence raises fact issues as to whether Officer Carbonneau had been properly instructed and trained on indexing his weapon before a decision to shoot was made. The evidence shows that Officer Carbonneau was not required to take additional training on indexing and related gun-safety issues in the seventeen months after he graduated from the academy. The evidence raises fact issues as to whether this training was inadequate and was a cause of Escobar's death. . . . The Noteworthy incidents raise a fact issue as to whether there is a pattern of weapons mishandling by HPD officers, particularly involving a failure to use weapons-handling techniques--including indexing--intended to prevent accidental discharges. . . . The pattern evidence here is not presented to show the existence of a custom or practice, but rather to show the City's knowledge of the need for additional training in firearms handling, especially indexing. Moreover, the facts described in the Noteworthies are 'fairly similar to what ultimately transpired.'. . . There is a fact issue as to whether the City faced and ignored a pattern of similar incidents. . . . The City argues that its training requirements met and in some respects exceeded the standards set by the State of Texas. . . . Meeting the State's standard, however, does not equate to a finding that as a matter of law, there is no constitutional violation. . . . The evidence shows that HPD's Police Chief receives the Noteworthy and internal affairs investigation of each incident. The relevant comparison is not with the number of times an HPD officer gets through a day without accidentally discharging his or her weapon at or in close proximity to other

people, including those in physical encounters. Rather, the issue is whether the number and nature of incidents reveals a pattern showing deficient training that is 'obvious and obviously likely to result in a constitutional violation.' . . . The evidence of twenty-six similar incidents of accidental discharges in five years, coupled with the various inquiries, memos, and letters about HPD's weapons and use-of-force training, the inconsistent evidence as to what training HPD in fact provided on indexing and related techniques, and the obviousness of the risk created if officers are not trained on indexing, raises fact issues that preclude summary judgment."); ***Hogan v. City of Easton***, No. 04-759, 2006 WL 3702637, at *12, *13 (E.D. Pa. Dec. 12, 2006) ("The City Defendants argue that they are entitled to summary judgment on the failure to train claim because the summary judgment record establishes that all EPD members involved in the Hogan incident received the required firearms and deadly force training required by the Pennsylvania Municipal Police Officers Education and Training Commission, 53 Pa.C.S.A. S 2161, et seq ("PMOETC"). . . . We find that the City Defendants reliance on the officers' PMOETC certifications to defeat the failure to train claim is misplaced. The City Defendants do not cite--and the Court has not located--any authority from the Third Circuit to the effect that compliance with firearms training absolutely bars any finding of a policy or custom of deliberate indifference to the need for training on SWAT Team tactics in barricade situations. . . Moreover, the City Defendants again read the Hogans' claim too narrowly. The Hogans do not claim that the officers did not receive firearms and deadly force training. Rather, their complaint pled generally that the City had a policy or custom to inadequately train officers, and the Hogans argue in their response to the summary judgment motion, that the City Defendants had a policy or custom of indifference to the need to adequately train the SWAT team on how to respond to an incident requiring that a distraught man be subdued without the use of deadly force. . . . The Hogans have met their burden of proof of a pattern of underlying constitutional violations and the existence of an issue of material fact as to whether the need for more or different training was so obvious that the policymaker's failure to respond amounted to deliberate indifference. The evidence they adduced on the failure to train issue includes their expert's report that the EPD lacked adequate policies and training regarding mentally ill individuals, that the SWAT Team was operating without any written standards, and that permitting non-SWAT officers who had not trained with the SWAT Team to participate in the situation proximately caused the use of excessive force when the SAGE weapon was deployed. As the Hogans have identified these specific failures in the training practices that the City Defendants failed to remedy, they have satisfied their burden of showing evidence that, if believed, would show that the need for more or different

training was so obvious that the policymaker's failure to respond amounted to deliberate indifference. Thus, they have created a jury issue on whether the policymaker's failure to respond amounts to deliberate indifference to the EPD SWAT Team's lack of adequate training."); ***Perrin v. Gentner,*** 177 F.Supp.2d 1115**,** 1124, 1125 (D. Nev. 2001) ("From the statements of those who worked with and came in contact with Officer Gentner, it appears that Officer Gentner has a tendency not only to use excessive force, but to misperceive potential safety threats. If Officer Gentner's own fellow officers were afraid to work with him, surely Metro was on constructive notice that Gentner was not only a potential threat to public safety, but that he regularly flaunted constitutional safeguards intended to protect citizens against the use of excessive force. . . . Plaintiff has presented sufficient evidence to demonstrate that she could present proof of a Metro policy tolerating the use of excessive force through inadequate training and supervision. . . . Finally, there is evidence to show that Metro's policy of tolerating the use of excessive force was the "moving force" behind Officer Gentner's killing of Perrin. . . . Here there is evidence that Metro employed inadequate training procedures and failed to reprimand its officers for using excessive force, actions which Metro should have known would cause its officers to inflict constitutional injuries on citizens. Plaintiff has presented sufficient evidence that Metro's policy of inadequate training and supervision was the moving force behind Officer Gentner's use of deadly force against an unarmed jaywalker. . . . Here Metro should have known of the potential for constitutional violations when it placed a gun in the hands of Officer Gentner and should have taken prophylactic measures to ensure that Gentner did not use deadly force without taking constitutionally mandated precautions. The Court concludes that a reasonable jury could find that Metro's failure to train and supervise its officers constituted a policy which led to an unreasonable use of deadly force against Perrin.").

But see ***Peet v. City of Detroit***, 502 F.3d 557, 568 (6th Cir. 2007) ("All told, the plaintiffs have produced only the arrests of Peet, Williams, and Latham as admissible evidence of a city-wide custom of arresting witnesses without probable cause. But that is not enough to create a genuine issue of material fact. A custom or policy must be shown by 'a clear and persistent pattern,' and three discrete instances in one investigation is simply not enough to reasonably draw such a conclusion. . . .Just as this court held in *Thomas* that no reasonable juror could 'infer a municipal-wide policy based solely on one instance of potential misconduct,'. . . no reasonable juror could infer such a custom or policy based on a mere three instances that are limited to one police investigation."); ***Beard v. Whitmore Lake School Dist.***, 2007 WL 1748139, at *6 (6th Cir. June 19, 2007) ("The students are also unable to

show that the District failed to act in response to 'repeated complaints of constitutional violations by its officers.'. . The students seek to establish a pattern of unconstitutional searches by pointing to a January 6, 2000, incident in which District officials searched student's backpacks and pockets. The district court was correct to conclude as a matter of law that the January 6, 2000, incident does not establish a pattern."); ***Jenkins v. Bartlett***, 487 F.3d 482, 492, 493 (7th Cir. 2007) ("The jury found that Mr. Jenkins' constitutional rights were not violated when Officer Bartlett fired upon him, thus the City cannot be held liable for any failure to train. . . . The evidence Ms. Jenkins presents shows only that four individuals were shot by MPD officers while in a vehicle; it does not show that each or any of these shootings amounted to a constitutional violation. . . This is not enough to provide the City or Chief Jones with actual or constructive knowledge that 'the police ... so often violate constitutional rights that the need for further training must have been plainly obvious.'"); ***Green v. City of New York***, 465 F.3d 65, 81, 82 (2d Cir. 2006) ("We also conclude that plaintiffs offered insufficient evidence to reach the jury on a failure-to-train theory; however, this issue is closer. Although plaintiffs offered no evidence of the number of people in New York who are disabled by their inability to communicate verbally, it is likely true, given the City's enormous population, that there are a substantial number of such people and that a significant subset of that population will, at some point in their lives, experience medical emergencies potentially calling for transportation to a medical facility. Further, emergency medical personnel who respond to a medical emergency involving a person who refuses to accept medical treatment do face a difficult choice between honoring the person's refusal and offering treatment or transportation for treatment that they feel is necessary. Because medical professionals are trained to heal, absent proper training, they may well believe they should override the ill or injured person's refusal. Finally, proper training would increase the likelihood of a constitutionally appropriate response. . . . Two factors, however, cause us to conclude that a reasonable jury could not find for plaintiffs on a failure-to-train theory. First, despite the likelihood of a significant problem, there is no admissible evidence in the record of any problem. Second, and more important, the City did not fail to fulfill any training obligation it may have had. It provided personnel with guidelines that specifically and clearly informed them that they had to evaluate non-verbal refusals of medical treatment. Without evidence that these provisions were ignored prior to the incident at issue in this lawsuit, a reasonable jury could not find that the City had a further training obligation. Therefore, the district court correctly dismissed all Section 1983 claims against the City."); ***Williams v. Limestone County, Alabama***, 198 Fed. Appx. 893, 897, 898 (11th Cir. 2006) ("First, Williams fails to provide any evidence--or even

allege--that there was a history or pattern of jail personnel's deliberate indifference to inmates' serious medical needs that would render obvious the need for additional or different medical training. In fact, Williams cites only the incident involving himself. On these facts, this is insufficient to establish Sheriff Blakely's liability for a failure to train the jail staff. . . . Second, there is no indication from the record that Sheriff Blakely had notice his policies, training procedures, or supervision were 'likely to result in the violation of a constitutional right.'. . The contract between Naphcare and Limestone County provided for 24-hour care at the jail, and jail personnel were trained to call Naphcare's on-call nurse should a medical emergency arise outside of the nurses' standard work hours. . . . In this case, Sheriff Blakely promulgated general procedures for dealing with emergency situations, which procedures relied primarily on the medical expertise Naphcare was obligated by contract to provide. The fact that alternative procedures, such as providing jail personnel with additional medical training, might have better addressed Williams' particular needs does not show that Sheriff Blakely was deliberately indifferent to Williams' medical needs."); ***Ellis ex rel. Pendergrass v. Cleveland Municipal School District***, 455 F.3d 690, 701 (6th Cir. 2006) ("Thus, the School District had notice of only two incidents of possible constitutional violations. Pendergrass has not shown how two incidents, over a two-year period, could put the School District on notice of a problem when the School District operated 127 schools with over 69,000 students. To establish deliberate indifference through these reports, Pendergrass would have had to allege and put on some evidence that two incidents of abuse over two years is an excessive number. . . Such a conclusion is compelled by our decision in *Thomas v. City of Chattanooga*, 398 F.3d 426, 431 (6th Cir.2005). In *Thomas*, the plaintiff introduced evidence of forty-five suits of excessive force against the Chattanooga Police Department to establish that the department had a custom of condoning excessive force by its officers. . .This court held that such evidence was 'conclusory' because the plaintiff 'did not produce any data showing what a "normal" number of excessive force complaints would be.'. .Similarly, because Pendergrass has not presented any evidence that two incidents of substitute-teacher abuse is more than what the normal number of incidents would be, she cannot show that the School District had notice of a problem requiring additional training or supervision. Thus, as a matter of law, her claim of failure to train or supervise fails because a reasonable jury could not find the School District deliberately indifferent."); ***Phillips v. Stevens***, 2007 WL 2359758, at *14 (S.D.Ohio Aug. 16, 2007) ("Mollette submitted copies of intra-divisional memos sent by the Internal Affairs Bureau ('IAB') to Paden's supervising commanders on March 1, 2003, July 3, 2003, August 7, 2003, and September 1, 2003. Each memo noted that Paden had been the subject of three or

more citizen complaints within the previous 12 months. The memos directed the commanders to bring the information to the attention of Paden's immediate supervisor to determine whether there was a problem developing that needed to be addressed. . . Mollette has submitted two memos sent by Sergeant Thomas Miller to Chief of Police James Jackson in response to the IAB memos. The first memo, dated March 15, 2003, reviewed six citizen complaints stemming from incidents that occurred between February 8, 2002 and November 10, 2002. Some complained of rude or discourteous behavior; others complained of excessive force. While Sergeant Miller concluded that the complaints were unfounded, he nevertheless found that 'the number of complaints within the specified time period warrant some action.'. . Miller ordered Paden to attend classes on the 'Art of Listening' and 'Dealing with Difficult Customers.' Miller also stated that he would 'continue to monitor Officer Paden closely and try to help him reduce these complaints.'. .The second memo, dated March 19, 2003, reviewed three additional citizen complaints involving a use of force. . . Miller concluded that the uses of force were within departmental policy and that he did 'not see a pattern that would reveal a concern of Officer Paden's discretion to use physical force at this time.' . . These memos are proof that the City is not deliberately indifferent to citizen complaints involving use of excessive force. The City reviewed each complaint and each self-reported use of force to determine whether the officer engaged in wrongdoing. In addition, once a certain number of complaints were filed against a particular officer, a more in-depth investigation was conducted to determine whether there was a problem that needed to be addressed. In Paden's case, after investigating some of the citizen complaints, Sergeant Miller determined that Paden would benefit from classes to improve his interpersonal communication skills. Although Miller also concluded that there was no need to be concerned that Paden was engaged in a pattern of use of excessive force, the fact that he was alerted to a potential problem and conducted an investigation counsels against a finding of deliberate indifference. Based on the evidence presented, no reasonable jury could find that the City was deliberately indifferent to the alleged problem."); ***Wolfanger v. Laurel County, Ky***., No. 6: 06-358-DCR, 2008 WL 169804, at *10 (E.D.Ky. Jan. 17, 2008) ("While Dr. Alpert suggests that the County was 'deliberately indifferent' in its failure to provide its deputies with specialized training in handling mentally ill and/or suicidal individuals, the mere fact that Laurel County did not offer any specialized training in this area does not necessitate a finding that the County acted unconstitutionally. As noted above, a plaintiff's allegations of inadequate training will not trigger § 1983 liability, unless the situation causing the injury is recurring such that the Court may impute prior knowledge and deliberate indifference to the municipality. Here, the Plaintiff has not suggested that this set of

circumstances has ever arisen before, let alone occurred with frequency so as to impute liability to the County. Likewise, the Plaintiff has not shown that Deputy Poynter had a history of using excessive force against mentally ill individuals."); ***Morrison v. Board of Trustees of Green Tp.***, No. 1:03cv755, 2007 WL 4246277, at *9, *10 (S.D.Ohio Nov. 29,,2007) ("Dr. Kirkham, relying on deposition transcripts of Sergeant Eagle and Lieutenant Coyle concerning the lack of standard practices for handling emotionally disturbed persons, opined that the Defendants' 'failure ... to provide regular in-service training to their sworn personnel regarding the proper reaction to emotionally disturbed individuals and the importance of avoiding unnecessary physical force during such encounters was a significant and proximate cause of the injuries suffered by the plaintiffs in the instant case.'. . Conspicuously absent from Plaintiffs's pool of evidence are complaints by other persons against the Hamilton County Sheriff's Department or the Green Township Police Department with respect to their responses to Code 9s. Taken together, the officers' testimony that the Defendant Departments do not provide specialized training to the officers regarding Code 9s and Dr. Kirkham's opinion that this lack of regular training on the subject caused Plaintiffs' injuries are insufficient under Sixth Circuit precedent to create a genuine issue for trial. . . Plaintiffs' proffered proof does not demonstrate either 'a history of [constitutional rights] violations' or an obvious 'likelihood ... that [constitutional rights] violations were likely to result absent better training.' . . Therefore, Plaintiffs have failed to demonstrate a triable issue of fact that any inadequacies in training were the result of the Hamilton County Sheriff's Department's and the Green Township Police Department's deliberate indifference to the rights of the Plaintiffs."); ***Santiago v. City of Hartford***, No. 3:00 CV 2386 WIG, 2005 WL 2234505, at *10 (D. Conn. Sept. 12, 2005) ("Although eight of the fourteen complaints of sexual misconduct by police officers occurred prior to December 1997, when Plaintiff was sexually assaulted, . . . all were investigated, with two of the eight resulting in the arrest of the officer. . . To the extent that Plaintiff disagrees with the level of discipline imposed or deficiencies in the citizen complaint process, that does not demonstrate deliberate indifference to serious acts of misconduct, rising to the level of unconstitutional acts. . . . Plaintiff Santiago has produced no evidence that a policymaker had notice of a potentially serious problem involving unconstitutional conduct, such that the need for additional supervision was obvious, and then made a conscious choice not to investigate or rectify the situation. . . . The Court finds that Plaintiff has failed to present any evidence that a policymaker consciously ignored the need for additional supervision or that the lack of supervision caused her injury. Given this lack of evidence to support her claim, the City is entitled to summary judgment as a matter of law on her failure to supervise

theory of liability. . . ."); ***Sauceda v. Dailey***, No. 97-2278-JWL, 1998 WL 422811, *12 (D. Kan. June 12, 1998) (not reported) ("Unlike the plaintiff in *Beck*, Mr. Sauceda has not presented evidence sufficient for a jury to conclude that the county has a custom of dismissing meritorious excessive force complaints. Mr. Sauceda has presented evidence that the county has no system for formally tracking complaints against individual officers, that it treats each complaint as an individual event with no consideration of prior complaints, and that it does not maintain statistics on excessive force complaints. What Mr. Sauceda is missing that the *Beck* plaintiff had, however, is evidence that the county's investigative system had failed in the past and that it effectively amounted to no investigative system at all. Wyandotte County has presented uncontroverted evidence that Sheriff Dailey has terminated at least one officer on his relatively small staff for employing excessive force, and that he has disciplined other officers for misconduct. While the sheriff's office does not formally track complaints against officers, internal affairs officers do keep informal track of such complaints. The picture painted by this evidence is much different from the picture painted by the evidence in *Beck*, where excessive force complainants had virtually no chance of having their claims sustained. Accordingly, there is no room here for a jury to conclude that the prior complaints against Lt. Melton or any other officer should have put the county on notice of a substantial risk that its officers would inflict constitutional harm.").

See also ***Franklin v. Messmer***, No. 03-5184, 2004 WL 2203592, at *5, *6 (6th Cir. Sept. 14, 2004) (Cole, J., dissenting) (unpublished) ("Franklin points to statistics which demonstrated--as to Messmer specifically and the police force generally--that the introduction of pepper spray into the police officers' arsenal resulted in a significant increase in the total uses of force. In rejecting Franklin's reliance on these statistics, the district court concluded, and the City now argues, that '[t]he alleged increase in the uses of force ... reflects merely a change in the reporting of uses of force.' This assertion, though superficially appealing, misunderstands the statistics. It is true that with the Department's introduction of pepper spray came the requirement that all uses of pepper spray be reported. But the subsequent conclusion--that the statistics reflected only a change in reporting, not a change in actual use--would suffice only if the use of pepper spray had *always* been legal and the City simply added the requirement that the use of pepper spray be reported. Here, in contrast, there had never been pepper spray use unaccompanied by reporting. Any increase in the reported use of force, therefore, would have reflected an actual increase in the use of force. How big an increase? Following the introduction of pepper spray, overall use of force by the City's police officers increased by forty to

fifty incidents per month. (And as I noted above, Messmer's statistics mirrored this trend.) Thus, the City's rationale--that the introduction of pepper spray allowed officers to restrain hostile individuals with less dangerous means--defies the evidence. Moreover, the use of other types of force decreased by only about six incidents per month following the introduction of pepper spray, belying the City's claim that the use of pepper spray would result in markedly fewer uses of more dangerous force. Of course, another inference from the large increase in the overall use of force following the introduction of pepper spray is that prior to the allowance of pepper spray, the officers were taking too many risks with their own safety. It may have been that there were hundreds of incidents each year in which a police officer used, say, wrist control or verbal commands when even greater force was necessary. And the City might have further supported that inference by introducing evidence about the number of excessive force complaints that had been filed since pepper spray was introduced. On summary judgment, however, we are required to give all inferences to the nonmoving party, Franklin. In any event, the City's failure to investigate the increased use of force by its officers was itself a dereliction of its responsibilities: it was confronted with data that revealed (at the very least) a potential problem and chose to assume that everything was just fine. A reasonable jury could have concluded, therefore, that the City's lack of response to the new data constituted a deliberate indifference to the protection of its citizens from the excessive use of pepper spray by its police officers."); ***Wallis by and through Wallis v. Spencer***, 202 F.3d 1126, 1143 (9th Cir. 2000) ("A reasonable jury could readily conclude . . . that the moving force behind the removal of the children from the parents' custody was the policy of accepting telephonic representations from CPS without any procedure for checking on the accuracy or validity of the supposed orders. . . . Similarly, a reasonable jury could conclude that the investigatory vaginal and anal examinations were performed on the children pursuant to a Police Department custom and practice of instigating body cavity examinations without first notifying the parents and without seeking prior court authorization whenever its officers place children in protective custody."); ***Vann v. City of New York***, 72 F.3d 1040, 1049, 1051 (2d Cir. 1995) ("An obvious need [for more or better supervision] may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents. . . . [A] rational jury could find that where an officer had been identified by the police department as a 'violent prone' individual who had a personality disorder manifested by frequent quick-tempered demands for 'respect,' escalating into physical confrontations for which he always disavowed responsibility,

the need to be alert for new civilian complaints filed after his reinstatement to full-duty status was obvious."); ***Lasher v. City of Schenectady***, No. 02-CV-1395, 2004 WL 1732006, at *11 (N.D.N.Y. 2004) ("Plaintiff provides circumstantial evidence that ranking members of the City police department had notice of incidents of officer misconduct and consciously chose not to take any disciplinary action. Former Schenectady Police Department internal affairs officer Eric Yager stated in an affidavit that he informed Schenectady Police Department Chief Gregory Kaczmarek that some patrol division officers were entering into investigations without proper training, that the officers were not following proper procedures and policies, and that the officers were acting in an illegal manner towards citizens. Yager stated that Kaczmarek did not believe the information and refused to open an investigation. Furthermore, former Schenectady Police Department internal affairs officer Daniel Johnson stated that the chief requested that complaints regarding certain officers be referred to assistant chiefs, but not to Johnson, for investigation. Taking this evidence in the light most favorable Plaintiff, a fair minded trier of fact could reasonably conclude that the City had notice that its officers engaged in illegal activities with citizens, including the excessive use of force, but exhibited deliberate indifference by declining to properly investigate or impose disciplinary measures."); ***Hayward v. City of New Orleans,*** No. Civ.A. 02-3532, 2004 WL 258116, at *6, *7 (E.D. La. Feb. 12, 2004) ("In most cases, the deficient training of one officer in one aspect of law enforcement does not evidence deliberate indifference to civil rights. . . Nor does the failure to discipline officers in a single case trigger municipal liability. . . The present case involves a single officer with multiple abuse complaints. Recent cases have left unresolved the question of whether a city's failure to discipline a single officer in light of multiple official abuse complaints can evidence an official policy of deliberate indifference to civil rights. Although *Monell* liability has yet to be imposed under this factual scenario, prior precedent indicates that a policy maker's failure to discipline an officer conduct could result in municipal liability. The Fifth Circuit recently indicated that in certain circumstances a repeated pattern of lax discipline in light of official abuse complaints may evidence official deliberate indifference to civil rights. *Piotrowski*, 237 F.3d at 582. Moreover, proof of such a constitutionally inadequate official policy toward officer discipline might be supported by 'a purely formalistic investigation in which little evidence was taken, the file was bare, and the conclusions of the investigator was perfunctory.'. . . Hayward presents evidence of many previous abuse complaints against Philibert and suggests that the investigations of those complaints were formalistic and inadequate. . . Hayward alleges that city officials, such as Superintendent Pennington, were aware that the investigations were cursory and insufficient. She suggests that the prior

investigations reveal a systematic inattention to official police complaints by city policy makers. The need to provide 'specific officers' with more or different training can be so obvious and the inadequacy of existing supervision 'so likely to result in a violation of constitutional rights that the city can reasonably be said to have been deliberately indifferent to the need for training.'. . . In the present case questions of fact exist on whether city policy makers had notice of the abuse complaints against Philibert, whether the city was deliberately indifferent to abuse complaints against Philibert, and--if the city was deliberately indifferent in its investigation of previous civil rights claims--whether the city's failure to train or discipline Philibert was the moving force behind Ms. Hayward's injuries. Accordingly, the Defendants are not entitled to summary judgment on the Plaintiff's *Monell* claim for the city's failure to train or failure to discipline Philibert." [footnotes omitted]); ***Fultz v. Whittaker,*** 261 F. Supp.2d 767, 780, 781 (W.D. Ky. 2003) ("In part, Plaintiff relies on the absence of specific language regarding the use of neck restraints in the Oldham County Police Department's Policy Manual to establish 'deliberate indifference' by the municipality. Admittedly the policy is rather general. . . As a practical matter, however, it would impossible for a single manual to cover the advisability of every police maneuver an officer may elect to use in the field and the precise circumstances under which such maneuvers can be used. The manual itself instructs the police officers to avoid the use of unnecessary force. Given the fairly particularized training police officers receive at the police academy in the use of neck restraints and other specific defense tactics, Oldham County's force policy is reasonable and certainly does not exhibit a deliberate indifference to the rights of Oldham County's citizenry. Had Plaintiff presented specific evidence that the municipality received complaints from its citizens about the use of neck restraints then Plaintiff would certainly have a much stronger argument that the municipality should have taken action or given its officers some clear instruction on the use of this specific defense tactic. The policy standing alone, however, is simply insufficient to establish that Oldham County disregarded a known risk that its officers would ignore their training at the police academy and improperly utilize neck restraints while in action on the field."); ***Kurilla v. Callahan***, 68 F. Supp.2d 556, 568, 569 (M.D. Pa. 1999) ("In this case, there were three (3) incidents involving Callahan in less than one year. There is no evidence of any independent investigation by the School District of any of these incidents. No disciplinary action was taken against Callahan. Even following Callahan's convictions of the summary offense of harassment in connection with his physical abuse of students, no disciplinary action was taken against Callahan. While Callahan's assault on Kurilla was preceded by only one incident, the failure to take any disciplinary action against Callahan following the three incidents in the span of

less than one year is probative of the question of whether the School District had a policy or custom to tolerate or be deliberately indifferent to excessive use of force by teachers."); ***Johnson v. CHA Security Officers***, No. 97 C 3746, 1998 WL 474138, *5 (N.D. Ill. Aug. 6, 1998) (not reported) ("Contrary to CHA's position, plaintiff's complaint contains more than bare allegations. She alleges a pattern of sexual misconduct by CHA officers that persisted for a year prior to the incident in question, without a meaningful investigative or disciplinary response by CHA. She also alleges that she was injured as a result of CHA's failure to investigate, causing Pate and Grady to believe that they could get away with their actions. This is therefore not a case where the plaintiff has pled facts that relate only to the specific incident in question and therefore should be dismissed. . . Instead, plaintiff alleges a pattern of misconduct which the CHA failed to investigate. We think that these allegations are sufficient to state a claim that CHA was deliberately indifferent to the citizens with whom its officers came in contact."); ***Burnell v. Williams***, 997 F. Supp. 886, 893 (N.D. Ohio 1998) ("Plaintiff Burnell does not claim that the individuals or the School Board had a custom of affirmatively condoning sexual abuse. Clearly, none exists. Instead, Burnell claims that defendants failed to act to prevent the sexual abuse. To state a claim under an 'inaction' theory, Burnell must establish: (1) the existence of a clear and persistent pattern of sexual abuse by school employees; (2) notice or constructive notice of the School Board; (3) the School Board's tacit approval of the unconstitutional conduct, such that a court can say that their deliberate indifference amounted to an official policy of inaction; and (4) that the School Board's custom was the 'moving force' or direct causal link in the constitutional deprivation." citing *Clairborne*.); ***Cox v. District of Columbia***, 821 F. Supp. 1, 13 (D.D.C. 1993) ("[T]he District of Columbia's maintenance of a patently inadequate system of investigation of excessive force complaints constitutes a custom or practice of deliberate indifference to the rights of persons who come in contact with District police officers."); ***Czajkowski v. City of Chicago***, 810 F. Supp. 1428, 1440 (N.D. Ill. 1992) ("It was . . . known in the Department that there was a serious problem of domestic violence against wives of police officers. Plaintiffs present sufficient evidence from which a jury could find that police officers would have understood that excessive force and domestic violence would not necessarily be punished. Plaintiffs also present sufficient evidence from which it could be found that a code of silence existed within the Department. . . . it could also be found that there was deliberate indifference to the fact that failure to discipline officers for such conduct did or could result in additional such incidents. There is a sufficient basis for a jury to find that the City was deliberately indifferent or that it tacitly authorized or condoned the conduct that was occurring."); ***Scott v. Lewis***, 1991 WL 71810, *2 (N.D. Ill. April

26, 1991) (not reported) ("[T]he facts are sufficient to allege that the CHA [Chicago Housing Authority] knew of multiple incidents of unconstitutional conduct by privately hired security guards, and failed to adequately supervise or train the guards, or investigate shootings by them."); ***Doe v. Calumet City***, 754 F. Supp. 1211, 1225 (N.D. Ill. 1990) (unconstitutional strip searches were "part of a consistent pattern of behavior that simply would not have occurred in the department-wide manner that it did if the training had been adequate . . . .").

But see ***Reynolds v. Giuliani,*** 506 F.3d 183, 194-97 (2d Cir. 2007) ("Although plaintiffs decline to state the argument so bluntly, and speak instead in terms of 'ultimate responsibility,' we understand their position to be that the statutes themselves render the states vicariously liable to plaintiffs. We see no support in the language of the Acts or our case law for the proposition that § 1983 claims arising under the Food Stamp or Medicaid Acts are exempt from the standards governing all other § 1983 claims. . . . Plaintiffs contend state defendants were deliberately indifferent under the test set out in *Walker* because they had knowledge of an obvious need for supervision and the risk of harm to plaintiffs. . . .State defendants did not sit on their hands in the face of an obvious need to act. . . They did not, as did the municipal defendant in *Amnesty*, stand idly by, let alone encourage, the City's non-compliance. . . In short, there is little evidence showing the state to be deliberately indifferent. Nonetheless, we do not hold that any action taken by a local government insulates it from supervisory liability. If a supervisor's steps are proven so meaningless or blatantly inadequate to the task that he may be said to be deliberately indifferent notwithstanding his nominal supervisory efforts, liability will lie. . . Here, however, there is no evidence to suggest that the state's phased efforts were meaningless or obviously inadequate, except the fact of the City's continued failure to comply with certain provisions of law. Contrary to the district court's and plaintiffs' suggestion, the extent of state defendants' ultimate success in averting injury cannot be the legal measure of its efforts to do so, as such a standard is tantamount to vicarious liability. . . .Our view that state defendants' efforts to foster compliance preclude a finding of deliberate indifference finds support in our cases and those of our sister circuits addressing claims against supervisors who tried, but failed, to prevent injury to plaintiffs. [citing cases] The rationale underlying these cases is clear. A local government's liability under § 1983 must be based on its policy or custom under *Monell*. Where, as here, that policy incorporates the defendants' deliberate efforts to protect plaintiffs' rights, it cannot, at the same time, be deemed deliberately indifferent to those rights. . . A natural presumption arises in such cases that any supervisory inadequacies are the result of negligence rather than deliberate

choice."); ***Olsen v. Layton Hills Mall,*** 312 F.3d 1304, 1328, 1329 (10th Cir. 2002) (Hartz, J., concurring in part and dissenting in part) ("I assume that 'constructive notice' of a fact can arise when the fact is widely known by those in the particular field of endeavor. . . In *Allen* itself the plaintiff had properly relied on an expert who testified that the municipality's procedures were 'out of synch with the rest of the police profession.' . . . If this is a proper interpretation of 'constructive notice,' then Davis County could have constructive notice of an OCD problem (so that the problem is 'obvious') based on information from outside the experience of its own jail. The record before us, however, contains no evidence of 'best practices' in other prisons with respect to treating persons with OCD, nor does it refer to literature on the subject directed to prison administrators or other law enforcement personnel. All the record contains is medical literature. But a matter cannot be considered 'obvious' to jail administrators simply because it is well known to medical professionals or families of those affected by a particular disorder. Prison officials do not have constructive notice of what appears in medical literature. Because Olsen relies only on medical literature, and provides no evidence regarding what was known by Davis County jail administrators or by jail administrators in general, or even what happens in jails in general, he has not established the obviousness required for liability of Davis County."); ***Hernandez v. Borough of Palisades Park Police Dep't.,*** No. 02-2210, 2003 WL 202441, at * (3d Cir. Jan. 29, 2003) (unpublished) ("Appellant first argues that the existence of a widespread pattern of prior robberies was enough for a reasonable fact-finder to conclude that the policymaker should have known about the constitutional violations. A reasonable fact-finder may conclude that a Police Chief has constructive knowledge of constitutional violations where they are repeatedly reported in writing to the Police Department. [citing *Beck*] In addition, 'constructive knowledge may be evidenced by the fact that the practices have been so widespread or flagrant that in the proper exercise of [their] official responsibilities the [municipal policymakers] should have known of them.' [citing *Bordanaro*]. Unlike *Beck*, where written complaints clearly alleged that a police officer was acting unconstitutionally, or *Bordanaro*, where officers made no attempt to hide the fact that they would regularly break doors down without warrants, the mere existence of past robberies in the Borough is insufficient to establish that the Police Chief had constructive knowledge that the robberies were being committed by police officers."); ***Christie v. Iopa***, 176 F.3d 1231, 1235 (9th Cir. 1999) ("Plaintiffs cannot satisfy the requirement of a longstanding practice or custom, because they allege to the contrary that a county official has singled them out for unique treatment. A single constitutional deprivation ordinarily is insufficient to establish a longstanding practice or custom."); ***Snyder v. Trepagnier***, 142 F.3d 791, 799 (5th Cir. 1998)

("Even if we accept that this evidence proves Trepagnier was dangerously stressed, there was no probative evidence concerning the stress level in the NOPD as a whole. There was no evidence of a pattern or practice of constitutional violations committed by overstressed New Orleans police officers. There was no evidence showing that the city was aware of the supposedly high stress levels in the NOPD or knew that the absence of a stress management program was likely to endanger the constitutional rights of its citizens. In short, the totality of the evidence does not even approach the *City of Canton* standard: that the inadequacy be 'so obvious' and 'so likely to result in the violation of constitutional rights,' 489 U.S. at 390, that the city can be said to have been deliberately indifferent."), *cert. dism'd,* 119 S. Ct. 1493 (1999); ***Andrews v. Fowler***, 98 F.3d 1069, 1076 (8th Cir. 1996) (where there was "no evidence that the city ever had received, or had been deliberately indifferent to, complaints of violence or sexual assault on the part of an officer prior to the time [Defendant] raped [Plaintiff,] . . . we conclude that the district court did not err by granting summary judgment to the city on Andrews' failure to investigate . . . claim."); ***Sargi v. Kent City Board of Education***, 70 F.3d 907, 912 (6th Cir. 1995) ("Without notice that students suffering from seizures on school buses were harmed by school bus drivers' lack of 'seizure management training,' the Board's failure to conduct such a training program cannot rise to the level of deliberate indifference."); ***Donovan v. City of Milwaukee***, 17 F.3d 944, 956 (7th Cir. 1994) ("The record is devoid of evidence that the failure to supplement its high speed chase policy with an exhortation to consider the safety of fleeing drivers and their passengers has led to frequent constitutional violations. Even if this case were such an instance, we could not find the City deliberately indifferent. There must be a 'pattern of violations' sufficient to put the City on notice of potential harm to the fleeing drivers."); ***Wilson v. City of Chicago***, 6 F.3d 1233, 1240 (7th Cir. 1993) ("A rational jury could have inferred from the frequency of the abuse, the number officers involved in the torture of [plaintiff], and the number of complaints from the black community, that [the Superintendent of Police] knew that officers in Area 2 were prone to beat up suspected cop killers. Even so, if he took steps to eliminate the practice, the fact that the steps were not effective would not establish that he had acquiesced in it and by doing so adopted it as a policy of the city . . . . Deliberate or reckless indifference to complaints must be proved in order to establish that an abusive practice has actually been condoned and therefore can be said to have been adopted by those responsible for making municipal policy."); ***Woods v. City of Wellston***, No. 2:02 CV 762, 2005 WL 1406105, at **12-14 (S.D. Ohio June 15, 2005) (not reported) ("As the Court understands Plaintiff's claim, Plaintiff alleges that: (1) the City failed to adequately investigate his own complaint of excessive use of force and failed to discipline the arresting officers; and

(2) the City had a policy of ignoring citizen complaints involving an excessive use of force, and of failing to discipline officers who engaged in an excessive use of force. Plaintiff first contends that the City failed to conduct an adequate investigation into his complaint of excessive force. . . . Even if Defendants failed to conduct a meaningful investigation into Plaintiff's complaint, this is not enough, standing alone, to establish municipal liability. Once an individual's rights have been violated, a subsequent failure to conduct a meaningful investigation cannot logically be the 'moving force' behind the alleged constitutional deprivation. . .Therefore, to the extent that Plaintiff's claim against the City is based on the City's alleged failure to investigate his own complaint of excessive use of force, the City is entitled to summary judgment. Plaintiff also claims that the City had a policy or custom of ignoring citizen complaints involving an excessive use of force, and of failing to discipline officers who engaged in an excessive use of force. . . . In this case, there is simply no evidence that previous complaints of excessive use of force were ignored by the City of Wellston, or that officers that should have been disciplined were not. Absent any evidence of previous widespread abuse, Plaintiff cannot establish deliberate indifference or the requisite causal connection."); ***Reed v. City of Lavonia***, 390 F.Supp.2d 1347, 1367, 1368 (M.D. Ga. 2005) ("In this case, Plaintiffs fail to point to any specific evidence to suggest that the City was somehow on notice that additional baton training for Officer Masionet was needed. There is no evidence of previous complaints about baton abuse or other claims that Masionet was excessively abusive to arrestees while working for the City of Lavonia. Plaintiffs only vaguely allege that Masionet's previous employment history placed Chief Shirley on notice that Masionet was more inclined to use excessive force during an arrest. The Eleventh Circuit has held, however, that a city is not deemed to have notice of past police misconduct if the plaintiff 'never demonstrated that past complaints of police misconduct had any merit.'. . The panel even added that 'the number of complaints bears no relation to their validity.'. . Here, Plaintiffs apparently rely on the fact that Officer Masionet was accused of using excessive force prior to his employment with the City of Lavonia. Even so, the undisputed record establishes that neither of these excessive force complaints were found to have any merit at the time they were investigated, and no disciplinary action was taken against Masionet as a result of these allegations. Moreover, neither of these previous complaints involved the use of an ASP baton. Such allegations may not serve as notice to the City of a need to re-train Officer Masionet in ASP baton use. This Court thus finds that Plaintiffs have further failed to provide any evidence suggesting that Chief Shirley had knowledge that baton training was needed but deliberately chose not to provide it. The City is accordingly entitled to summary judgment on Reed's failure to train claim."); ***Beal***

v. Blache, No. Civ.A.02-CV-12447-RG, 2005 WL 352861, at *7, *8 (D. Mass. Feb. 14, 2005) (not reported) ("There are distinctions between this case and *McCabe*. In *McCabe*, the allegations involved repeated instances of misconduct. Blache was accused in a single, albeit very serious, incident. The investigation in *McCabe* had confirmed the allegations against the Trooper. The investigation into S.T.'s allegations against Blache had come to no firm conclusions. The Trooper in *McCabe* was suspended without pay for six months. Blache was suspended without pay for a year. While both the Trooper and Blache were required to submit to a psychological examination, the Trooper was virtually guaranteed reinstatement. Blache was not. His reinstatement was conditioned on his not committing 'any criminal act or acts which in the opinion of the Chief would be unbecoming conduct.' While MacDougall might be faulted for not investigating S.T.'s claims further on his own, rather than relying on the State Police investigation, or for having mistakenly believed that the punishment and conditions that he imposed were sufficient to insure the protection of the public, such fault as there was cannot reasonably be seen to constitute deliberate indifference. . . . As much as one might lament the failure of Chief MacDougall to fully apprehend Blache's potential dangerousness, or his failure to discipline Blache more severely, these failures simply do not rise to the level of a conscience shocking and callous disregard for the rights of others, as a finding of deliberate indifference would require."); ***Ferguson v. Leiter,*** 220 F. Supp.2d 875, 885 (N.D. Ohio 2002)("Plaintiffs do not dispute or refute Leitter's testimony regarding his training as to various restraint techniques, including neckholds, yet Plaintiffs provide no evidence suggesting that Leitter or any other officer's training was so deficient as to constitute deliberate indifference on the part of the city. Nor do Plaintiffs provide any evidence that as of 1998, the city was on notice that the Fostoria officers' training at that time was constitutionally deficient. There is no evidence in the record of any incidents prior to 1998 regarding neckholds, and thus it cannot be said that as of 1998, Fostoria knew or should have known of a problem regarding its officers' training yet failed to implement corrective measures."); ***Owens v. City of Fort Lauderdale,*** 174 F. Supp.2d 1282, 1297 (S.D. Fla. 2001) ("[T]he failure of the City to provide specific training on neck restraints is not unconstitutional such that the single incident with Byron can be said to have been the result of a municipal policy . . . . Given that the plaintiffs have presented only two similar previous incidents, and given that both incidents were unsubstantiated, the plaintiffs have failed to present the kind of pattern or series of violations which would place the City on notice that its training program was inadequate."); ***Tofano v. Reidel***, 61 F. Supp.2d 289, 306 (D.N.J. 1999) ("Plaintiff has presented absolutely nothing which would establish that Ramsey was deliberately indifferent to the rights

of its citizens by failing to properly train its officers to deal with mentally unstable individuals. The record is devoid of any evidence of interactions in the past between Ramsey police officers and mentally unstable individuals which would have placed the municipality on notice that its training was inadequate. . . In addition, nothing in the record establishes that it would have been known or 'obvious' to a reasonable policymaker that the training provided to Ramsey police officers concerning interaction with mentally unstable individuals would likely result in the deprivation of constitutional rights."); ***Guseman v. Martinez***, 1 F. Supp.2d 1240, 1260 (D. Kan. 1998) ("There is no evidence here of any similar prior incident in which an individual in custody of Wichita police officers suddenly suffered serious injury or death as a result of positional asphyxia. Thus, the City cannot be said to have been on notice of an inadequate training program by virtue of a history of constitutional violations by its officers."); ***Triest v. Gilbert***, No. Civ. A. 95-1984, 1997 WL 255668, *14 (E.D.Pa. May 8, 1997) (not reported) ("An obvious need for additional or different training is not established by one accident, however horrifying it may be. Plaintiff has adduced no evidence of prior incidents or citizen complaints which might have put the municipal defendants on notice that officers improperly use their police vehicles when responding to emergency situations in general, when responding to domestic disputes in particular, or otherwise."); ***Hanrahan v. City of Norwich***, 959 F. Supp. 118, 124-25 (D. Conn. 1997) ("Plaintiff might be able to establish liability on the part of the City based on police suicides elsewhere if the experience in other jurisdictions made it obvious that more training was needed in Norwich. . . However, the affidavits of plaintiff's proposed experts fall far short of providing a sufficient evidentiary basis for that theory of liability. Plaintiff has presented no proof concerning the number of police suicides in other jurisdictions, the circumstances in which the suicides occurred or the policies and procedures of other police departments for preventing police suicide. On this record, no reasonable juror could find that the City failed to train its police officers in suicide prevention, despite an obvious need for more training, because of deliberate indifference to the need."); ***Ringuette v. City of Fall River***, 888 F. Supp. 258, 271 (D. Mass. 1995) (finding no obvious need for higher level training in signs of drug overdoses); ***Mendoza v. City of Rome***, 872 F. Supp. 1110, 1118 (N.D.N.Y. 1995) ("[T]he mere fact that [Notices of Claims] had been filed against the City of Rome, standing alone, does not establish a pattern, policy, or practice which was causally related to the false arrest and use of excessive force upon the plaintiff."); ***Jones v. Chieffo***, 833 F. Supp. 498, 510 (E.D. Pa. 1993) ("[P]laintiffs have shown no evidence that policymakers in the City or Department knew of or acquiesced in a custom of using police vehicles without sirens in pursuits."), *aff'd*, 22 F.3d 301 (3d Cir. 1994).

c. jail suicide cases

In a number of jail suicide cases, plaintiffs have relied on ***City of Canton*** in an attempt to impose liability upon the governmental entity for a failure to train officers in the detection and prevention of potential suicides or for acquiescence in a policy or custom which is deliberately indifferent to the medical needs of potentially suicidal detainees or inmates.

See e.g., ***Wever v. Lincoln County, Nebraska***, 388 F.3d 601, 607 (8th Cir. 2004) ("Wever's complaint alleges that Carmen was aware of two prior suicides in the Lincoln County jail, one occurring in 1999 while he was sheriff, and one occurring in 1996, prior to his tenure. [footnote omitted] Carmen argues that as a matter of law, one or two suicides are insufficient to put a sheriff on notice that his training and supervision is constitutionally inadequate. Under his proposed rule, a sheriff may sit idly by until at least a third inmate known to be suicidal takes a blanket from an officer and hangs himself, only then ordering his officers not to place a suicidal person in an isolation cell and hand him a blanket. We decline to so hold. We have previously stated that, in most circumstances, a single incident does not provide a supervisor with notice of deficient training or supervision . . . . However, as indicated, this calculus is not rigid, and must change depending on the seriousness of the incident and its likelihood of discovery. In *Howard,* the alleged constitutional violation was caused by an unsanitary cell. *Id.* at 136. A supervisor is not expected to be put on notice of constitutionally deficient sanitation training by a single instance of a dirty cell. But we cannot equate death with dirty cells. Our case law reflects this flexible calculus. In *Andrews,* the plaintiff sued a police chief for failing to supervise an officer who ultimately raped two women. . . We held that the chief's knowledge of two prior complaints against the officer for making inappropriate sexual advances to women during traffic stops was sufficient to create an issue of material fact as to notice, rendering summary judgment improper. . . In some circumstances, one or two suicides may be sufficient to put a sheriff on notice that his suicide prevention training needs revision. In the present case, Wever has alleged that Carmen was placed on notice by two previous suicides, and we cannot say this is insufficient as a matter of law."); ***Woodward v. Correctional Medical Services of Illinois, Inc.,*** 368 F.3d 917, 927, 928 (7th Cir. 2004) ("[W]e find that there was enough evidence for the jury to conclude that CMS's actual practice (as opposed to its written policy) towards the treatment of its mentally ill inmates was so inadequate that CMS was on notice at the time Farver was incarcerated that there was a substantial risk that he would be deprived of necessary care in violation of his Eighth Amendment rights. .

. . [A] reasonable jury could find that CMS's custom of repeatedly failing to follow proper procedures led to Farver's successful suicide attempt. . . . The reality is that CMS's actual policy and practice caused its employees to be deliberately indifferent to Farver's serious health needs. . . . Finally, we cannot leave unaddressed CMS's claim that 'the plaintiff's failure to introduce evidence of any suicide at the Lake County jail besides Farver's dooms plaintiff's efforts to prove a custom or practice.' CMS does not get a 'one free suicide' pass. The Supreme Court has expressly acknowledged that evidence of a single violation of federal rights can trigger municipal liability if the violation was a 'highly predictable consequence' of the municipality's failure to act. . . Here, there was a direct link between CMS's policies and Farver's suicide. That no one in the past committed suicide simply shows that CMS was fortunate, not that it wasn't deliberately indifferent. Moreover, we note that CMS's liability is based on much more than a single instance of flawed conduct, such as one poorly trained nurse. It was based on repeated failures to ensure Farver's safety--by Dean, by Mollner, and by Dr. Fernando--as well as a culture that permitted and condoned violations of policies that were designed to protect inmates like Farver."); ***Cabrales v. County of Los Angeles***, 864 F.2d 1454, 1461 (9th Cir. 1988) (in detainee suicide case, plaintiff prevailed against County on ground that County's policy of understaffing its jail with psychiatrists was itself an unconstitutional policy or custom of deliberate indifference to inmates' medical and psychological needs), *vacated*, 490 U.S. 1087 (1989) (remanded for consideration in light of ***City of Canton v. Harris***, 109 S. Ct. 1197 (1989)), 886 F.2d 235 (9th Cir. 1989) (reinstating prior decision) (***City of Canton*** does not alter previous opinion which was based on finding of unconstitutional policy), *cert. denied*, 494 U.S. 1091 (1990); ***Mombourquette v. Amundson***, 469 F.Supp.2d 624, 651-53 (W.D. Wis. 2007) ("I have little difficulty in concluding that a reasonable jury could find that there is an 'affirmative link' between Amundson's failings and the failure to prevent plaintiff from attempting to commit suicide. At least two related problems with the general operation of the jail contributed to defendants' failure to stop plaintiff's attempted suicide: (1) the lack of a clear delineation of authority with respect to assessing risks of suicide; and (2) inadequate means of staff communication. . . . The likely reason that each party denies responsibility is that the jail's policy does not squarely place responsibility on anyone. Again, all jail staff are equally responsible under the policy, which not surprisingly means that all staff attempt to fix the blame on someone else. Closely related, effective communication was also sorely lacking at the jail. . . . If the jury believes plaintiff's assessment of the jail under defendant Amundson's tenure, with staff essentially running amok without any supervision from Amundson, it could find reasonably that he was deliberately indifferent to a risk that an inmate like

plaintiff would seriously harm herself."); ***Wilson v. Genessee County,*** No. 00-CV73637, 2002 WL 745975, at *11, *14 (E.D.Mich. March 26, 2002) (not reported) ("[A] reasonable juror could find that the City of Flint's policy of verbally communicating an individual's suicide risk is inadequate and/or that the City of Flint does not adequately train its police officers regarding its policy, that this failure was the result of the City of Flint's deliberate indifference to Wilson's right to be reasonably protected against taking his own life, and that the inadequacies were closely related to Wilson's eventual suicide. . . . In essence, this case is about a failure to communicate and/or to have policies in place for adequately accessing and communicating an individual's suicide risk at all levels, and especially when transporting an individual from one facility to another. The evidence of record is sufficient to have this issue submitted to a jury to determine whether the individual defendant's actions, and the City of Flint and Genesee County's policies and training amounted to deliberate indifference to Wilson's serious medical need to be adequately screened for suicidal tendencies and to be protected against taking his own life.").

In ***Dorman v. District of Columbia***, 888 F.2d 159 (D.C. Cir. 1989), the court of appeals reversed the district court's judgment for the plaintiff in a detainee suicide case, and remanded with instructions to enter judgment for the defendant District in accordance with defendant's motion for a judgment n.o.v. *Id*. at 160. The court found the evidence insufficient under ***City of Canton*** to establish § 1983 liability on the part of the District.

The court rejected plaintiff's attempt to establish municipal liability by pointing to an obvious need for training, concluding that "the need for specific training in suicide prevention beyond what the officers received ...[was] not 'so obvious' that the city's policy may be characterized as 'deliberately indifferent.'" *Id*. at 164. In addition, the court could find no evidence of a pattern of constitutional violations acquiesced in by municipal policymakers. *Id*. at 165.

See also ***Whitt v. Stephens County***, 529 F.3d 278, 284 (5th Cir. 2008) ("In the absence of 'manifest signs' of suicidal tendencies, a city may not be held liable for a detainee's suicide in a § 1983 suit based on a failure to train."); ***Evans v. City of Marlin***, 986 F.2d 104, 108 (5th Cir. 1993) (City's failure to train police personnel to detect potential suicidal impulses did not give rise to deprivation of constitutional rights of prisoner who committed suicide in city jail cell, absent any manifest signs that prisoner was danger to herself.); ***Rhyne v. Henderson County***, 973 F.2d 386,

393 (5th Cir. 1992) (evidence was insufficient to support finding that county acted with deliberate indifference in adopting policies regarding care of pretrial detainees known to be suicidal); ***Colburn v. Upper Darby Township***, 946 F.2d 1017, 1030 (3d Cir. 1991) (***Colburn* II**) ("In a prison suicide case . . . . plaintiff must (1) identify specific training not provided that could reasonably be expected to prevent the suicide that occurred, and (2) must demonstrate that the risk reduction associated with the proposed training is so great and so obvious that the failure of those responsible for the content of the training program to provide it can reasonably be attributed to a deliberate indifference to whether the detainees succeed in taking their lives."); ***Buffington v. Baltimore County, Maryland***, 913 F.2d 113, 123 (4th Cir. 1990) (evidence was insufficient under ***Canton*** to permit jury to find policy of failure to train officers in suicide prevention actually and proximately caused particular harm), *cert. denied*, 111 S. Ct. 1106 (1991); ***Camps v. City of Warner Robins***, 822 F. Supp. 724, 737, 738 (M.D. Ga. 1993) ("[P]laintiffs have not shown that any alleged need for further training in suicide prevention was plainly obvious to County policymakers. There is no evidence that the training program in place in 1989 resulted in any suicides prior to the incident involving the decedent. Thus, there is no pattern of similar incidents upon which to base a claim for failure to train."); ***Smith v. City of Joliet***, 1993 WL 18981, *7, *8 (N.D. Ill. Jan. 28, 1993) (not reported) (Even where training was "non-existent or at least inadequate," court concluded "the need for more or different training was not so obvious and the inadequacy of current training not so likely to result in a violation of constitutional rights, that the policymakers of the City of Joliet can be said to have been deliberately indifferent to the need to train police officers in recognizing the signs and symptoms of potential suicide victims among its detainees.).

A common problem for plaintiffs attempting to impose § 1983 liability on a government entity in jail suicide cases is making out the underlying constitutional deprivation that is necessary before a remedy will be available against any defendant under § 1983. *See, e.g.,* ***Short v. Smoot***, 436 F.3d 422, 427-30 (4th Cir. 2006) (" The right in question here, defined at the appropriate level of specificity, is the right of a detainee, whose jailers know that he is suicidal, to have his jailers take precautions against his suicide beyond merely placing him in a cell under video surveillance. We hold that *Brown v. Harris*, 240 F.3d 383 (4th Cir.2001), demonstrates that no such right derives from the Eighth Amendment. . . . Importantly, a prison official 'who actually [knows] of a substantial risk to inmate health or safety may be found free from liability if [he] responded reasonably to the risk, even if the harm ultimately was not averted.'. . . *Brown* demonstrates that the first-shift officers' response to Short's

risk of suicide was objectively reasonable and therefore sufficient to prevent liability under the Eighth Amendment. . . . Here, the first-shift officers' response to the risk that Short would kill himself was the same as Ogden's response in *Brown*: they placed the detainee in a cell under video surveillance. Thus, under *Brown*, this response was sufficient under the Cruel and Unusual Punishments Clause regardless of whether additional precautions might also have been advisable. . . . The critical point is that despite the actual failure of the officers' measures to prevent the detainees' suicides, and despite possible inattentiveness of the officers whose duty it was at the time of the suicides to watch the monitors, in both *Brown* and the present case the officers placed their detainees in video-monitored cells, knowing that someone would be responsible for watching the monitors. . . . Appellants do not dispute that it was clearly established on the day of Short's death that the conscious failure by a jailer to make any attempt to stop an ongoing suicide attempt by one of his detainees would constitute deliberate indifference."); ***Gray v. City of Detroit,*** 399 F.3d 612, 616 (6th Cir. 2005) ("*Barber* confirmed an earlier holding that there is no general constitutional right of detainees to receive suicide screenings or to be placed in suicide safe facilities, unless the detainee has somehow demonstrated a strong likelihood of committing suicide. . . . Here, plaintiff has presented no evidence to support his claim that Officer Gross actually knew that Gray was at risk of committing suicide. All of Gray's complaints had been of a physical nature, and none of his behavior had been self-injurious. He did not demonstrate a 'strong likelihood' of committing suicide. The only conceivable way that any individual officer could have possibly concluded that Gray was a suicide risk was to have obtained and appropriately pieced together the knowledge of every other officer involved in the case. And as the District Court said, '[t]he test for deliberate indifference is a subjective test ... not an objective test or collective knowledge.' Because Gray's conduct and statements did not give rise to a constitutional duty on the part of his jailors to screen or monitor him for suicide, there is no evidence that Officer Gross violated Gray's constitutional rights in any way."); ***Crocker v. County of Macomb***, No. 03-2423, 2005 WL 19473, at *4, *5 (6th Cir. Jan. 4, 2005) (unpublished) ("Jail officials cannot be charged with knowledge of a particular detainee's high suicide risk based solely on the fact that the detainee fits a profile of individuals who purportedly are more likely to commit suicide than those who do not fit the profile in all respects. This is particularly true since if past suicide attempts are factored out, the profile described by plaintiff casts a very wide net, and there is no evidence that the majority of detainees who fit the profile in those respects that would be apparent to an observer are at risk for attempting suicide. Thus, absent evidence that any individual defendant knew Tarzwell had a serious medical need manifesting itself in suicidal

tendencies or that such need was obvious, plaintiff cannot prevail on the Fourteenth Amendment claim against the individual defendants under the *Estelle* analysis. As in another jail suicide case decided by this court, because there is no evidence that the individual defendants knew Tarzwell was at risk of attempting suicide, '[t]he "right" that is truly at issue here is the right of a detainee to be screened correctly for suicidal tendencies and the right to have steps taken that would have prevented suicide.' . . Indeed, plaintiff identifies the right which forms the basis for the alleged constitutional violation in this manner by arguing that although Officer Murphy knew that Tarzwell met certain criteria for a suicide risk, Murphy failed to take steps to confirm the risk, such as checking law enforcement records or asking Tarzwell about his suicidal ideation, and did not conduct any screening of Tarzwell when he was delivered to the jail. We found in *Danese* that a right to be screened correctly for suicidal tendencies and to have steps taken to prevent suicide was not clearly established as of the date of that decision, noting that, '[i]t is one thing to ignore someone who has a serious injury and is asking for medical help; it is another to be required to screen prisoners correctly to find out if they need help.'. .Plaintiff has not cited any case decided by the United States Supreme Court or by this Circuit since *Danese* finding a constitutional right to be screened for suicidal tendencies on the part of either a pretrial detainee or a prisoner entitled to the protections of the Eighth Amendment. Consistent with our prior decisions addressing this issue, we hold that the individual defendants' failure to screen Tarzwell for suicidal tendencies or ideation and to take measures that would have prevented his suicide are not tantamount to punishment under the circumstances of this case and cannot serve as the basis for imposing liability on the individual defendants under § 1983. Accordingly, the district court did not err by granting summary judgment in favor of the individual defendants."); ***Matos ex rel Matos v.. O'Sullivan***, 335 F.3d 553, 557 (7th Cir.2003) (defendant must have had actual knowledge of detainee's risk of suicide); ***Cagle v. Sutherland,*** 334 F.3d 980, 987(11th Cir. 2003) ("Cagle concedes, in her brief, that consent decrees can neither create nor expand constitutional rights. She says, however, that the consent decree can still be relevant to a section 1983 action. She claims that the *Praytor* order put Winston County on notice of the understaffing problem and, in this sense, that the violation of the order establishes deliberate indifference to the risk of jail suicide. We disagree. . . . The *Praytor* order derived from a jail-condition class action. Suicide was no factor in that litigation. The word 'suicide' appears nowhere in the *Praytor* complaint and nowhere in the *Praytor* order. Sheriff Sutherland's requests for an additional nighttime jailer were based on his concerns about escape. His requests make no mention of a risk of suicide. These facts fall short of establishing that the County

was aware of a strong likelihood of suicide. In addition, no evidence shows that, before Butler, any prisoner had ever committed suicide in Winston County Jail. Nothing in the record required County officials to conclude that commonly prisoners in the Winston County Jail were substantially likely to attempt suicide."); ***Boncher v. Brown County,*** 272 F.3d 484, 488 (7th Cir. 2001) ("The plaintiff is left to argue that the defendants exhibited deliberate indifference to suicide risk by failing to train the intake officers or adopt a better intake questionnaire. It is not clear what good the better training would have done, at least in this case; the basic judgment the intake officers had to make was whether Boncher was joking, and that is not a judgment likely to be much assisted by special training. . . . The form is defective, but because of a rather subtle problem--the failure to specify probing follow-up questions for inmates who indicate mental or emotional problems. That is a serious deficiency and one that ought to be corrected, if only to shield the defendants from liability for commonlaw negligence in suits under state law. But like other courts to consider the issue, we don't see how such a slip, at worst careless, could be proof evidence of something much worse, a deliberate failure to deal with a known high risk of death."); ***Payne v. Churchich,*** 161 F.3d 1030, 1041, 1042 (7th Cir. 1998) ("When the § 1983 claim is based on a jail suicide, the degree of protection accorded a detainee is the same that an inmate receives when raising an inadequate medical attention claim under the Eighth Amendment-- deliberate indifference. . . . [O]ur cases dealing with § 1983 claims based on a pretrial detainee's suicide have held that a state actor like Deputy Papa can be held liable for a detainee's suicide only if the defendant was deliberately indifferent to a substantial suicide risk. . . . We have held that knowledge of a substantial risk of suicide can be inferred from the obviousness of the risk. . . However, we do not believe that the allegations in the complaint about Mr. Hicks' conduct and tattoo message, without more, indicate an obvious, substantial risk of suicide. There is no allegation of Mr. Hicks' suicidal tendencies, no claim or evidence of past suicide attempts or warnings from family members of a mental disturbance and suicidal condition. . .None of the facts alleged in this case--Mr. Hicks' intoxication, cursing and tattoo--raises an issue of whether Deputy Papa had knowledge of, or even particular reason to suspect, a substantial risk of suicide on Mr. Hicks' part."); ***Liebe v. Norton***, 157 F.3d 574, 578 (8th Cir. 1998) ("The facts of this case are strikingly similar to those in *Rellergert*. In both cases, the prisons had policies in place for the protection of inmates classified as suicide risks. Tragically, in both cases, despite those preventive policies, inmates were successful in committing suicide. . . . While Norton may have been negligent in not checking on Liebe more often, or in failing to notice the exposed electrical conduit in the temporary holding cell, we cannot say as a matter of law that his actions were

indifferent. To the contrary, Norton's actions constituted affirmative, deliberate steps to prevent Liebe's suicide. Despite Norton's ultimate failure to prevent that suicide, Norton did not act with deliberate indifference."); ***Barrie v. Grand County***, 119 F.3d 862, 868, 869 (10th Cir. 1997) ("[W]e conclude that in this circuit a prisoner, whether he be an inmate in a penal institution after conviction or a pre-trial detainee in a county jail, does not have a claim against his custodian for failure to provide adequate medical attention unless the custodian knows of the risk involved, and is 'deliberately indifferent' thereto. Whether the detainee has been taken before a magistrate judge or other judicial officer to determine the legality of his arrest is not material, the custodian's duty is the same in either event. And the same standard applies to a claim based on jail suicide, i.e., the custodian must be 'deliberately indifferent' to a substantial risk of suicide."); ***Estate of Hocker by Hocker v. Walsh***, 22 F.3d 995, 1000 (10th Cir. 1994) ("Here, no facts suggest that the Detention Center staff had knowledge of the specific risk that Ms. Hocker would commit suicide. Nor do the facts suggest that Ms. Hocker's risk of suicide was so substantial or pervasive that knowledge can be inferred. Though the staff obviously knew that Ms. Hocker was intoxicated or under the influence of drugs, intoxication with its accompanying incoherence does not, by itself, give the Detention Center staff knowledge that Ms. Hocker posed a specific risk of suicide." footnote omitted); ***Bowen v. City of Manchester***, 966 F.2d 13, 18, 19 (1st Cir. 1992) ("In cases involving the psychological needs of a potentially suicidal detainee, courts have found officials to have acted with deliberate indifference only when the detainee shows clear signs of suicidal tendencies and the officials had actual knowledge, or were willfully blind, to the large risk that the detainee would take his life."); ***Manarite v. City of Springfield***, 957 F.2d 953, 954 (1st Cir. 1992) ("where police departments have promulgated commonplace suicide-prevention policies, courts ordinarily have found supervisors not liable . . . even if officers did not always follow the department's policy and even if other, better policies might have diminished suicide risks."), *cert. denied*, 113 S. Ct. 113 (1992); ***Hall v. Ryan***, 957 F.2d 402, 405 (7th Cir. 1992) (prison officials not entitled to qualified immunity if they actually knew inmate was serious suicide risk, yet failed to take appropriate steps to protect inmate); ***Schmelz v. Monroe County***, 954 F.2d 1540, 1545 (11th Cir. 1992) (no liability for suicide of prisoner who had never threatened or attempted suicide and who was never viewed as suicide risk); ***Barber v. City of Salem***, 953 F.2d 232, 239-40 (6th Cir. 1992) ("[W]e adopt the Eleventh Circuit's holding in ***Popham*** that the proper inquiry concerning the liability of a City and its employees in both their official and individual capacities under section 1983 for a jail detainee's suicide is: whether the decedent showed a strong likelihood that he would attempt to take his own life in

such a manner that failure to take adequate precautions amounted to deliberate indifference to the decedent's serious medical needs."); ***Colburn***, *supra*, 946 F.2d at 1023, ("[P]laintiff in a prison suicide case has the burden of establishing three elements: (1) the detainee had a 'particular vulnerability to suicide,' (2) the custodial officer or officers knew or should have known of that vulnerability, and (3) those officers 'acted with reckless indifference' to the detainee's particular vulnerability."); ***Elliott v. Cheshire County, N.H.***, 940 F.2d 7, 10-11 (1st Cir. 1991) ("The key to deliberate indifference in a prison suicide case is whether the defendants knew, or reasonably should have known, of the detainee's suicidal tendencies . . . . Moreover, the risk must be 'large,'. . . and 'strong,'. . . in order for constitutional (as opposed to tort) liability to attach." cites omitted); ***Popham v. City of Talladega***, 908 F.2d 1561, 1564 (11th Cir. 1990) (absent knowledge of detainee's suicidal tendencies, cases have consistently held failure to prevent suicide does not constitute deliberate indifference); ***Burns v. City of Galveston, Texas***, 905 F.2d 100, 104 (5th Cir. 1990) (constitutional right of detainees to adequate medical care does not include absolute right to psychological screening in order to detect suicidal tendencies); ***Belcher v. Oliver***, 898 F.2d 32, 36 (4th Cir. 1990) (plaintiffs' attempt to turn case into one for inadequate training is unavailing where no underlying constitutional infraction); ***Williams v. Borough of West Chester***, 891 F.2d 458, 464-467 (3d Cir. 1990) (not enough evidence to prove that officers knew of arrestee's suicidal tendencies).

See also ***Hare v. City of Corinth***, 949 F. Supp. 456, 462-63 (N.D. Miss. 1996) (on remand) ("The subjective nature of the *Farmer* and *Hare IV* analyses are relevant when determining whether or not the officer had actual knowledge of the existence of the risk, but not at all dispositive of whether or not the risk itself was in fact a substantial one of serious harm. An officer cannot escape liability by being actually aware of an objectively substantial risk of serious harm which he subjectively believes is not substantial. To do so would only protect detainees and inmates from risks of harm that prison officials deem substantial. This portion of the deliberate indifference inquiry focuses upon subjective knowledge, not subjective seriousness."), *rev'd on other grounds*, 135 F.3d 320 (5th Cir. 1998).

See also ***Cook v. Sheriff of Monroe County***, 402 F.3d 1092, 1115-17 (11th Cir. 2005) ("[T]o succeed on her § 1983 claim, Cook must establish that the Sheriff himself, as representative of Monroe County, was deliberately indifferent to the possibility of Tessier's suicide, since neither *respondeat superior* nor vicarious liability exists under § 1983. . . . Accordingly, 'our first inquiry ... is the question whether there is a direct causal link between a municipal policy or custom and the

alleged constitutional deprivation.' . . . After thorough review of the entire record in this case, we conclude that there is not. Cook in essence offers two municipal policies or customs that she believes establish such a link: first, the County's allegedly deficient procedures for processing and responding to inmate medical requests; and second, the County's failure to adequately train MCDC employees in suicide prevention. However, we need look no further than Cook's failure to establish that the County should have foreseen Tessier's suicide to conclude that any deficiencies that may exist in MCDC polices do not rise to the level of deliberate indifference. Foreseeability, for the purpose of establishing deliberate indifference, requires that the defendant have had 'subjective knowledge of a risk of serious harm,' meaning, in a prison suicide case, knowledge of 'a strong likelihood rather than a mere possibility that the self-infliction of harm will occur.' . . Moreover, because *respondeat superior* liability does not attach under § 1983, the defendant himself--in this case, the Sheriff (as representative of the County)--must have had this knowledge. The record in this case is devoid of any evidence that the Sheriff had any such knowledge. As we have explained previously, '[n]o matter how defendants' actions might be viewed, the law of this circuit makes clear that they cannot be liable under § 1983 for the suicide of a prisoner who never had threatened or attempted suicide and who had never been considered a suicide risk.'. . Cook has presented no evidence that Tessier had previously attempted suicide or had ever been considered a suicide risk. . . . Cook argues that the MCDC's allegedly defective procedures amount to 'deliberate indifference toward a class of suicidal detainees to which Tessier belongs, and that the deliberate indifference toward that class caused constitutional harm to Tessier individually.'. . However, as we have explained previously, under our precedent, the defendant must have had 'notice of the suicidal tendency of the individual whose rights are at issue in order to be held liable for the suicide of that individual.' . . Deliberate indifference, in the jail suicide context, is not a question of the defendant's indifference to suicidal inmates or suicide indicators generally, but rather it 'is a question of whether a defendant was deliberately indifferent to an individual's mental condition and the likely consequences of that condition.' . . For this reason, '[a]bsent knowledge of a detainee's suicidal tendencies, [our] cases have consistently held that failure to prevent suicide has never been held to constitute deliberate indifference.' . . Thus, even if Cook had established the Sheriff's deliberate indifference toward suicidal inmates in general--and, on this record, precious little evidence points to such a conclusion--this would not suffice to demonstrate the foreseeability of Tessier's suicide and to hold the Sheriff liable under § 1983. . . Because Cook has failed to demonstrate that Tessier's suicide was foreseeable to the Sheriff, the sole defendant in this case, 'there is no legally

sufficient evidentiary basis for a reasonable jury to find' deliberate indifference. . . Accordingly, the district court properly entered judgment as a matter of law for the Sheriff on Cook's § 1983 claim."); ***Tittle v. Jefferson County Commission***, 10 F.3d 1535, 1539 (11th Cir. 1994) (*en banc*) ("[I]n this circuit a finding of deliberate indifference requires that officials have notice of the suicidal tendency of *the* individual whose rights are at issue in order to be held liable for the suicide of that individual.").

But see ***Cavalieri v. Shepard,*** 321 F.3d 616, 623, 624 (7th Cir. 2003) ("Of course, the law did not require Shepard to sit by the telephone all day, communicating with the CCCF about transferred prisoners. The question is what he was supposed to do in the face of the knowledge of a life-threatening situation that he actually had. He made several telephone calls to the CCCF, but he passed by the opportunity to mention that he had been informed that Steven was a suicide risk, and that the jail itself had recognized this only a month earlier. If Shepard had known that a detainee had an illness that required life-saving medication, he would also have had a duty to inform the CCCF, or any other entity that next held custody over the detainee. . . . We conclude that the law as it existed at the time of Steven's suicide attempt provided Shepard with fair notice that his conduct was unconstitutional. The rule that officials, including police officers, will be 'liable under section 1983 for a pre-trial detainee's suicide if they were deliberately indifferent to a substantial suicide risk,' . . . was clearly established prior to 1998. The fact that several state agencies were working together on his case, and that Steven happened to attempt suicide in the county's facility rather than at the police station, does not change this analysis."); ***Tittle***, *supra*, 10 F.3d at 1541 (Kravitch, J., concurring in part and concurring in the judgment) ("The majority today announces a per se rule: 'Deliberate indifference, in the context of a jail suicide case, is [solely] a question of whether a defendant was deliberately indifferent to an individual's mental condition and the likely consequences of that condition.' [cite omitted] Hence, deliberate indifference to a dangerous jail condition that invited and facilitated the decedent's suicide cannot itself form the basis of an Eighth Amendment claim. This holding absolves jail authorities of responsibility for features of their jails which they know contribute substantially to detainee suicides.").

See also ***Bowens v. City of Atmore,*** 171 F. Supp.2d 1244, 1253, 1254 (S.D. Ala. 2001) ("Because *Farmer* requires that the defendant's knowledge of the facts and appreciation of the resulting risk be actual, Eleventh Circuit cases suggesting that merely constructive knowledge is sufficient [footnote reference to *Popham v. City*

of Talladega, 908 F.2d 1561, 1564 (11 th Cir.1990)] are no longer good law. While the defendant's mere denial of subjective awareness is not dispositive, the plaintiff must provide sufficient circumstantial evidence, including the obviousness of the facts and of the resulting inference of risk, to support a finding of subjective awareness and appreciation. . . . The only circumstance recognized as providing a sufficiently strong likelihood of an imminent suicide attempt is a prior attempt or threat."), *aff'd*, 275 F.3d 57 (11th Cir. 2001), *aff'd,* 275 F.3d 57 (11th Cir. 2001); ***Vinson v. Clarke County***, 10 F. Supp.2d 1282, 1301 (S.D. Ala. 1998) ("[T]he liability of an Alabama county in this context can only properly be based on an indifference to the obvious needs of detainees in general, or of certain defined classes of detainees. . . . Accordingly, the court finds that, in jail suicide cases involving conditions of confinement, the appropriate inquiry is whether jail conditions and past events made it so obvious that suicide would result from the county's failure to modify its jail facilities that the county could be seen as deliberately indifferent to the interests of all detainees and/or intoxicated detainees.").

The issue of municipal liability for a prison suicide has received extensive consideration by the Third Circuit in ***Simmons v. City of Philadelphia***, 947 F.2d 1042 (3d Cir. 1991). Plaintiff, the mother and administratrix of the estate of the decedent, brought suit under § 1983 against the City and the individual officer who was the "turnkey" on duty when her son hanged himself after being taken into custody for public intoxication. Municipal liability was predicated upon two theories: First, "that the City violated Simmons' constitutional right to due process through a policy or custom of inattention amounting to deliberate indifference to the serious medical needs of intoxicated and potentially suicidal detainees" and second "that the City violated Simmons' due process rights through a deliberately indifferent failure to train its officers to detect and to meet those serious needs." *Id*. at 1050.

The jury in ***Simmons*** found that the individual officer, although negligent, did not violate Simmons' constitutional rights, but that the City was liable under § 1983. One of the many issues raised on appeal was whether, in light of ***City of Los Angeles v. Heller***, 475 U.S. 796 (1986), the City could be held liable under § 1983 where the individual, low-level official was found not to have violated decedent's constitutional rights.

In affirming the verdict against the City, Judge Becker engaged in a lengthy analysis of municipal liability based on a custom, policy, or failure to train, concluding that to establish municipal liability, principles set forth by the Supreme

Court in its "***Pembaur*** trio" must be satisfied. Plaintiff must both identify a particular official with policymaking authority in the area and adduce "scienter-like" evidence with respect to that policymaker.

Judge Becker drew support for the imposition of a "scienter-like" evidence requirement not only from the ***Pembaur*** trio, but also from ***Wilson v. Seiter***, 111 S. Ct. 2321 (1991), in which the Supreme Court held that a prisoner challenging conditions of confinement under the Eighth Amendment must establish "a culpable state of mind" on the part of particular prison officials. 947 F.2d at 1062-63. Finding the level of care owed to pretrial detainees to be at least the same as that owed to convicted prisoners under the Eighth Amendment, Judge Becker determined that ***Wilson*** supported his conclusion that plaintiff was required to adduce "scienter-like" evidence of deliberate indifference of identified policymakers. 947 F.2d at 1064 n.20.

Judge Becker noted that plaintiff need not name the specific policymaker as a defendant, nor obtain a verdict against him to prevail against the municipality. Plaintiff must only present evidence of the policymaker's "knowledge and his decisionmaking or acquiescence." *Id*. at 1065 n.21. *See also* ***Brown v. City of Margate***, 842 F. Supp. 515, 519 (S.D. Fla. 1993) ("Defendant argues that because a municipality can only act through natural persons, the City of Margate could not be found liable unless one or more of the individual named Defendants had also been found liable. Defendants do not cite any authority for this argument, and it merits no more than brief consideration here. . . . The jury may not have been able to decide which official was ultimately responsible for the City's policies, and therefore declined to find any particular individual liable. This is not necessarily inconsistent with a finding that someone or some combination of policymakers had implicitly or explicitly condoned a policy of tolerance toward the excessive use of force.").

Judge Becker concluded, 947 F.2d at 1064, that:

> In order to establish the City's liability under her theory that Simmons' rights were violated as a result of a municipal policy or custom of deliberate indifference to the serious medical needs of intoxicated and potentially suicidal detainees, plaintiff must have shown that the officials determined by the district court to be the responsible policymakers were aware of the number of suicides in City lockups and of the alternatives for preventing them, but either deliberately chose not to pursue these alternatives or acquiesced in a longstanding

> policy or custom of inaction in this regard. [footnote omitted] As a predicate to establishing her concomitant theory that the City violated Simmons' rights by means of a deliberately indifferent failure to train, plaintiff must similarly have shown that such policymakers, likewise knowing of the number of suicides in City lockups, either deliberately chose not to provide officers with training in suicide prevention or acquiesced in a longstanding practice or custom of providing no training in this area.

See also ***Plasko v. City of Pottsville***, 852 F. Supp. 1258, 1266 (E.D. Pa. 1994) ("[T]o find the City of Pottsville liable for the death of detainee, plaintiff must include in the complaint some allegations indicating that responsible policymakers either deliberately chose not to pursue a policy of securing the personal effects of detainees prior to incarceration or acquiesced in a long-standing policy or custom of inaction in light of a prior pattern of similar incidents."); ***Herman v. Clearfield County, Pa.***, 836 F. Supp. 1178, 1188 (W.D. Pa. 1993) ("[A] plaintiff must show that the decedent's rights were violated as a result of a[n] . . . official policy or custom not to train correctional officers, which policy or custom . . . was the product of a conscious decision not to act on a known risk of prison suicides despite the availability of alternatives for preventing such suicides."), *aff'd*, 30 F.3d 1486 (3d Cir. 1994).

5. *Bryan County v. Brown*

In ***Board of County Commissioners of Bryan County v. Brown***, 520 U.S. 397 (1997), the Supreme Court revisited the issue of municipal liability under section 1983 in the context of a single bad hiring decision made by a County Sheriff who was stipulated to be the final policymaker for the County in matters of law enforcement.

Plaintiff was injured when she was forcibly extracted from a vehicle driven by her husband. Mr. Brown was avoiding a police checkpoint and was eventually stopped by a squad car in which Reserve Deputy Burns was riding. Burns removed Mrs. Brown from the vehicle with such force that he caused severe injury to her knees.

Plaintiff sued both Burns and the County under section 1983. A panel of the Fifth Circuit affirmed the district court's entry of judgment on the jury's verdict against Burns for excessive force, false arrest, and false imprisonment. The majority

of the panel also affirmed the judgment against the County based on the decision of Sheriff Moore to hire Burns without adequately investigating his background. The Fifth Circuit concluded that Moore's inadequate screening and hiring of Burns demonstrated "deliberate indifference to the public's welfare." ***Brown v. Bryan County***, 67 F.3d 1174, 1185 (5th Cir. 1995), *rev'd* 520 U.S. 397 (1997).

Burns, the son of Sheriff Moore's nephew, had an extensive "rap sheet," but the numerous violations and arrests included no felonies. State law prohibited the Sheriff's hiring of an individual convicted of a felony, but did not proscribe the hiring of someone like Burns.

The Supreme Court, in a five-four opinion written by Justice O'Connor, reversed the Court of Appeals, distinguishing Brown's case, involving a claim that a single lawful hiring decision ultimately resulted in a constitutional violation, from a case where plaintiff claims that "a particular municipal action itself violates federal law, or directs an employee to do so." 520 U.S. at 404. As the Court noted, its prior cases recognizing municipal liability based on a single act or decision attributed to the government entity involved decisions of local legislative bodies or policymakers that directly effected or ordered someone to effect a constitutional deprivation. *See, e.g.,* ***Pembaur***, discussed *infra*; ***Fact Concerts***, *supra*; ***Owen v. City of Independence***, *supra.* In such cases, there are no real problems with respect to the issues of fault or causation.

See also ***Looper Maintenance Service, Inc. v. City of Indianapolis***, 197 F.3d 908, 913 (7th Cir. 1999) (“Looper's counsel claimed at oral argument that a single act motivated by the intent to deny Looper equal bidding access because of his race could constitute municipal policy within the meaning of 42 U. S.C. § 1983. . . While we agree that this is an accurate statement of the law, it is true only when the act complained of is accomplished by a defendant with final policymaking authority. . . . As previously stated, Looper's third amended complaint names only the City and IPHA as defendants. The City and IPHA are municipal entities, not individuals with final policymaking authority. Accordingly, Looper has failed to allege that any named individual possessed final policymaking authority and that such an individual denied him a constitutional right within the meaning of 42 U.S.C. § 1983.”); ***Bennett v. Pippin***, 74 F.3d 578, 586 & n.5 (5th Cir. 1996) (County held liable for Sheriff's rape of murder suspect, where Sheriff was final policymaker in matters of law enforcement); ***Gonzales v. Westbrook***, 118 F. Supp.2d 728, 735 (W.D. Tex. 2000) (“In this circuit, then, a single unconstitutional act by a local governmental entity's

final policymaker may subject that governmental entity to liability under section 1983. . . However, that act must reflect an intentional, deliberate, decision by a final policymaker and, where the act or omission of the final policymaker personally did not directly cause the violation of a constitutional right, only decisions of the final municipal policymaker which constitute a conscious disregard for a high risk of unconstitutional conduct by others can give rise to municipal liability."). *See also* ***Williams v. Kaufman County,*** 352 F.3d 994, 1014 n.66 (5th Cir. 2003) ("The district court did not need to determine whether Harris's conduct also amounted to deliberate indifference, because that element must be shown only when there is a claim that the municipality's facially lawful action caused an employee to inflict the injury, not when the municipality (through its policymaker) has directly caused the injury, as has occurred here. Thus, it is unnecessary to examine the deliberate indifference issue to establish liability in this instance.").

Because there was no pattern of "bad hires" alleged by the plaintiff in ***Brown***, the argument for County liability was based on Sheriff Moore's alleged deliberate indifference in failing to investigate Burns' background, on the theory that "Burns' use of excessive force was the plainly obvious consequence of Sheriff Moore's failure to screen Burns' record." 520 U.S. at 409.

The majority, however, rejected plaintiff's effort to analogize her inadequate screening case to a failure-to-train case. Justice O'Connor noted:

> In attempting to import the reasoning of *Canton* into the hiring context, respondent ignores the fact that predicting the consequence of a single hiring decision, even one based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties. As our decision in *Canton* makes clear, 'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. Unlike the risk from a particular glaring omission in a training regimen, the risk from a single instance of inadequate screening of an applicant's background is not 'obvious' in the abstract; rather, it depends upon the background of the applicant. A lack of scrutiny may increase the likelihood that an unfit officer will be hired, and that the unfit officer will, when placed in a particular position to affect the rights of

> citizens, act improperly. But that is only a generalized showing of risk. 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.

Id. at 410, 411.

The majority opinion concluded that

> 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 411.

Thus, the majority insisted on evidence from which a jury could find that had Sheriff Moore adequately screened Deputy Burns' background, he "should have concluded that Burns' use of excessive force would be a plainly obvious consequence of the hiring decision." *Id.* at 412. In the view of the majority, scrutiny of Burns' record produced insufficient evidence from which a jury could have found that Sheriff Moore's hiring decision reflected deliberate indifference to an obvious risk that Burns would use excessive force. *Id.* at 415.

Justice Souter, joined by Justices Breyer and Stevens, dissented in ***Brown***, characterizing the majority opinion as an expression of "deep skepticism" that "converts a newly-demanding formulation of the standard of fault into a virtually categorical impossibility of showing it in a case like this." 520 U.S. at 421 (Souter, J., dissenting).

Justice Breyer, joined by Justices Ginsburg and Stevens, authored a dissent that criticizes the "highly complex body of interpretive law" that has developed to maintain and perpetuate the distinction adopted in *Monell* between direct and vicarious liability, and calls for a reexamination of "the legal soundness of that basic distinction itself." 520 U.S. at 430.

6. Post-*Brown* Cases

See, e.g., ***Hardeman v. Kerr County, Tex.***, 244 Fed. Appx. 593, 2007 WL 2264113, at *2, *3 (5th Cir. Aug. 8, 2007) ("There must be a strong connection between the background of the particular applicant and the specific violation alleged. Accordingly, plaintiffs cannot succeed in defeating summary judgment merely because there was a probability that a poorly-screened officer would violate their protected rights; instead, they must show that the hired officer was highly likely to inflict the particular type of injury suffered by them. . . It is obvious that Kerr County should have done a better job screening Marrero. His omission of answers to key questions, such as whether he had previously been fired, alone should have been cause for alarm. Furthermore, had the County contacted Harlandale ISD it likely would have learned that the district fired Marrero for making improper advances towards female students. Such information may have prompted the County to rethink hiring him for a position that would place him in close proximity to female inmates on a regular basis. Even if the County was negligent in hiring him, however, that still is not sufficient to hold the County liable for the constitutional violation. . . . There are no grounds to find that the alleged rape in question was a 'plainly obvious consequence' of hiring him. Id. Even if the County had done a thorough job of investigating Marrero, there was absolutely no history of violence, sexual or otherwise, to be found. While the grounds for his discharge from Harlandale ISD were troubling, especially in retrospect, it requires an enormous leap to connect 'improper advances' towards female students to the sexual assault at issue here."); ***Perez v. Oakland County***, 466 F.3d 416, 431 (6th Cir. 2006) (" It does not seem 'obvious,' as Perez Sr. argues (Pl.'s Br. 59), that allowing a caseworker well-trained in mental health needs and suicide [footnote omitted] to occasionally make housing decisions that affect the mental health of inmates would result in a suicide, and the lack of statistics to support this conclusion furthers the argument that there was a lack of foreseeability. . . We agree with the district court that supplying expert testimony that the County's practice is inadequate and poses a risk to inmates does not support the conclusion that the County acted with deliberate indifference to Perez's mental health needs, though it might support the conclusion that the County was negligent. A finding of negligence does not satisfy the deliberate indifference standard."); ***Whitewater v. Goss***, 192 Fed.Appx. 794, 799 (10th Cir. 2006) ("Plaintiffs have pointed to no evidence that Sheriff Goss was put on notice by information that the SWAT team had employed excessive force against children on prior occasions or that such abuse is to be expected absent some training not given to SWAT-team members. Plaintiffs' bald allegations of training failures contrast with the evidence

presented in *Allen v. Muskogee*, . . . in which we reversed a grant of summary judgment on such a claim. In *Allen* the plaintiffs had presented expert testimony that 'the training was out of synch with the entire United States in terms of what police are being trained to do.' . . The evidence here establishes only that the SWAT-team members were trained, and no evidence was presented that the training was deficient under prevailing norms. Nor are the supervisory failures referenced by Plaintiffs such that their 'highly predictable or plainly obvious consequence' would be holding a 12-year-old at gunpoint without justification."); ***Doe v. Magoffin County Fiscal Court,*** 174 Fed.Appx. 962, 968 (6th Cir. 2006) ("Like the municipality in *Brown*, the fiscal court is not liable because Doe cannot demonstrate that any policy or custom of the fiscal court in its hiring practices caused her constitutional injury. . . Adequate scrutiny of Patton's criminal record would not reveal that it was highly likely that Patton would sexually assault a juvenile or lock her in a room against her will. First, the defendants submitted evidence, which Doe does not challenge with any record evidence, that Patton's criminal record does not reveal violent crimes. Second, the crimes with which Patton was allegedly charged do not demonstrate any propensity to commit sex crimes or to imprison someone. At most, the record demonstrates that Patton was convicted of vote fraud, attempted arson, and battery against a male politician while Patton was drunk. As in *Brown*, Patton may have been an 'extremely poor candidate' for his job as custodian or even supervisor, . . . but his convictions do not make it 'plainly obvious' that Patton would commit sexual assault or falsely imprison someone. . . . Doe's case is not salvaged by the fact that the fiscal court and the county judge executives never performed criminal-background checks on potential employees. . . . . Doe has not pointed to any other instance in which the Magoffin County Fiscal Court's failure to perform background checks caused another to be deprived of his or her constitutional rights. Moreover, both Dr. Hardin and Salyer testified in their depositions that background checks were unnecessary because everyone knows everyone else in the county. The mere fact that one employee committed a crime does not demonstrate that Magoffin County's custom of not performing background checks was sure to lead to constitutional deprivations, especially when scrutiny of Patton's record would not have revealed that he was highly likely to commit rape or imprison someone. Because Doe has failed to demonstrate that any custom of the Magoffin County Fiscal Court was the 'moving force' behind the injury alleged, Doe's federal hiring-practices claims against the Magoffin County Fiscal Court and Salyer in his official capacity fail as a matter of law."); ***Crete v. City of Lowell***, 418 F.3d 54, 66 (1st Cir. 2005) ("In this case, the City's hiring decision was itself legal, and the City did not authorize Ciavola to use excessive force. The process used to investigate the background of Ciavola was

reasonable: it revealed the past conduct which Crete asserts links the hiring of Ciavola with his use of excessive force. The department made its hiring decision with knowledge of Ciavola's background and assurances from Ciavola's probation officer that Ciavola would 'make an excellent police officer' despite his assault and battery conviction. But '[e]ven when an applicant's background contains complaints of physical violence, including acts of aggression and assault, this may still be insufficient to make a City liable for inadequate screening of an officer who then uses excessive force.'. . And such is the case here: Crete simply cannot meet his heavy burden. There was insufficient evidence on which a jury could base a finding that a 'plainly obvious consequence' of the City's decision to hire Ciavola was the violation of Crete's constitutional rights. . .Summary judgment was proper."); ***Estate of Davis by and through Dyann v. City of North Richland Hills,*** 406 F.3d 375, 381-85 (5th Cir. 2005) ("When, as here, a plaintiff alleges a failure to train or supervise, 'the plaintiff must show that: (1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference.'. . . We are persuaded that there is no material issue on the record before us with respect to the question of whether Appellants were deliberately indifferent. Because this case falters on the requirement of deliberate indifference, we need not address the other two prongs of supervisory liability. . . . We are persuaded that these facts do not demonstrate a prior pattern by Hill of violating constitutional rights by employing excessive force. We have stressed that a single incident is usually insufficient to demonstrate deliberate indifference. Prior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question. . . That is, notice of a pattern of similar violations is required. While the specificity required should not be exaggerated, our cases require that the prior acts be fairly similar to what ultimately transpired and, in the case of excessive use of force, that the prior act have involved injury to a third party. None of the facts highlighted by the district court indicated use of excessive force against a third party resulting in injury. First, while Hill's over-'exposed' photography stunt and his earned nickname collectively demonstrate lack of judgment, crudity, and, perhaps illegalities, they do not point to past use of excessive force. Similarly, the traffic stop, while perhaps improper in its own right, did not involve excessive force with a deadly weapon resulting in harm to a citizen in a context similar to the present case. By comparison, in *Roberts v. City of Shreveport*, we recently held that a habit of displaying a firearm during traffic stops does not constitute a relevant pattern with respect to using deadly force during a traffic stop. Here, there is no evidence that Hill had previously improperly displayed his weapon

to a third party, or used excessive force. Second, Hill's inappropriate use of his gun during training is, at first blush, more troubling. Hill inappropriately fired his weapon in mock settings apparently much like the scene in which Hill ultimately shot Davis. However, because it was a training exercise it is undisputed that no one's constitutional rights were violated and that Hill never used excessive force against a third party. Furthermore, we hesitate in analyzing supervisory liability to place too much emphasis on mistakes during training. We are wary of creating incentives to conduct less training so as to minimize the chance that a subordinate will make a training mistake that can be used against the supervisor if that subordinate later makes a mistake in the course of duty. More to the point, in training mistakes are the fodder and 'adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis' for holding a supervisor liable. Even if a fact finder were to infer that Hill's training did not stick or that he resisted it, the incidents in training did not effect a violation of a third party's rights. On this record, Appellants cannot be deemed deliberately indifferent by failing to supervise or train differently." footnotes omitted); ***Estate of Sowards v. City of Trenton,*** No. 03-2036, 2005 WL 434577, at * 10 (6th Cir. Feb. 24, 2005) (not published) ("In order for liability to attach in this type of circumstance, 'the identified deficiency in a city's training program must be closely related to the ultimate injury.' . . A plaintiff must 'prove that the deficiency in training actually caused the police officers' indifference' to the rights or needs of the person harmed. . . For this reason, the injuries based on the inadequacy of training claim, if any, are those stemming from the illegal entry, not the shooting. Again, the district court correctly found that the failure to adequately train was not the proximate cause of the shooting and appropriately limited the damages recoverable to those stemming from the illegal entry, not Sowards's death. The City, then, can only be held liable to the extent its failure to train caused Corporal O'Connor and Officer Scheffler to act with deliberate indifference toward Sowards's rights by entering the apartment without a warrant."); ***McDowell v. Brown,*** 392 F.3d 1283, 1291, 1292 (11th Cir. 2004) ("Mr. McDowell traces the County's liability to its failure to properly fund the resources necessary to staff the Jail. The Supreme Court has recognized that inadequate training may impose § 1983 liability on a municipality in 'limited circumstances.' . . The Court, however, refused to extend liability to inadequate hiring practices. . . McDowell is asking this Court to extend liability to inadequate budgeting practices, but does not identify any 'pattern of injuries' linked to the County's budgetary decisions, nor does he insist that its accounting practices are 'defective.' . . McDowell's claim rests upon one incident, which he attempts to trace back to a single decision; a decision that does not represent a violation of federal law on its face. Our precedent does not permit such

an attenuated link. If it did, the 'danger that a municipality would be held liable without fault is high. . . The County's decision impacted this single case; it had no notice of the consequences 'based on previous violations of federally protected rights.'. . McDowell cannot establish that a reasonable member of the Board would conclude that the County's budget decisions would lead to events that occurred here. . . Although the record reflects that several deputies testified that the field division lacked the personnel to move inmates to Grady, no evidence was presented that the County's Board was aware of the health consequences involved. Moreover, the record demonstrated that the field division accomplished non-emergency transfers to Grady within a one-to-two hour window. Finally, the County's policy directed the field division to send all emergency cases to Grady by ambulance, and even non-emergency cases, if transport could not be effected in a timely manner. It was a clear, simple directive that said if you cannot transport with your resources you are to call an ambulance for needed medical transportation. With such practices in place, McDowell cannot establish or seriously dispute that the Board would anticipate that inmates would not receive timely medical attention. The alleged constitutional violation here was not a 'highly predictable consequence' of the County's failure to budget (and hence, adequately staff) the Sheriff's Office."); ***J.H. ex rel Higgin v. Johnson,*** 346 F.3d 788, 794 (7th Cir. 2003) ("Our decision in *Kitzman-Kelley v. Warner,* 203 F.3d 454 (7th Cir.2000) addresses the importance that an adequate link exist between the danger known to state officials and the alleged harm suffered by the plaintiff in cases falling within the 'special relationship' exception to the *DeShaney* doctrine, as does this case. In *Kitzman-Kelley,* a DCFS intern subjected a seven-year-old foster child to a pattern of sexual abuse. It was alleged that the DCFS defendants violated the child's due process rights by failing to provide adequate screening, training and supervision of the intern. We found that the deliberate indifference standard could not be met by merely showing that hiring officials engaged in less than careful scrutiny of the applicant resulting in a generalized risk of harm, but rather the standard 'require[d] a strong connection between the background of the particular applicant and the specific constitutional violation alleged.' . . Accordingly, proving a general risk of minor dangers is insufficient to warrant liability. It must be shown that there were known or suspected risks of child abuse or serious neglect in particular. . . . Against this backdrop, we cannot conclude in this case that the placement of a child with an individual who had two past accusations of child abuse that were investigated and determined to be unfounded warrants imposing liability on these defendants."); ***Cousin v. Small,*** 325 F.3d 627, 638 (5th Cir. 2003) ("Cousin also failed to demonstrate that the training or supervision obviously was inadequate and plainly would result in violations of

constitutional rights. As Cousin concedes, Connick's policy and training program was adequate. Therefore, it is his failure to impose sanctions on prosecutors responsible for *Brady* violations that must be shown to render his supervision inadequate. Connick's enforcement of the policy was not patently inadequate or likely to result in constitutional violations. Where prosecutors commit *Brady* violations, convictions may be overturned. That could be a sufficient deterrent, such that the imposition of additional sanctions by Connick is unnecessary. Further, prosecutors exercise independent judgment in trying a case, and they have the legal and ethical obligation to comply with *Brady.* It is not apparent that these prosecutors, who, Cousin concedes, are adequately trained with respect to *Brady* requirements, are so likely to violate their individual obligations that the threat of additional sanctions is required."); ***Morris v. Crawford County,*** 299 F.3d 919, 923-25 (8th Cir. 2002) ("*Bryan County* teaches us that liability may not be imposed unless a plaintiff directly links the applicant's background with the risk that, if hired, that applicant would use excessive force. In other words, a plaintiff must show that the hiring decision and the plaintiff's alleged constitutional injury are closely connected--an applicant's background is that causal link. What then must an applicant's background reveal for a plaintiff's alleged injury to be the plainly obvious consequence of the hiring decision? . . .In sum, to avoid summary judgment, a plaintiff must point to prior complaints in an applicant's background that are nearly identical to the type of misconduct that causes the constitutional deprivation allegedly suffered by the plaintiff. This is a rigorous test to be sure. . . . Deputy Ruiz's background does not reveal that he knee-dropped an inmate (or anyone for that matter), nor does it reveal a single complaint of excessive force. Deputy Ruiz's record includes slapping an inmate at the Sebastian County Detention Center in 1996; mishandling inmates' money and property; 'mouthing off' to two fellow deputies at Sebastian County and 'invit[ing] [one of them] to the gym any day, any time ... to take care of it' in 1997; disobeying a nurse during which the nurse overheard Deputy Ruiz say 'he was going to knock that bitch out'; and acting insubordinate at work, disobeying orders, cursing other employees, failing to adhere to rules. . . . There are also accusations by Deputy Ruiz's ex-wife that, in 1997, he ran her off the road, tore a necklace off her neck, and pushed her, as well as accusations by Deputy Ruiz's girlfriend that, in 1999, he grabbed her arm and threw her, and threatened to assault her. Morris emphasizes Deputy Ruiz's past incidents of domestic violence, arguing such acts portend violence in the workplace. Both Deputy Ruiz's ex-wife and girlfriend obtained ex parte protective orders against him, but none of their claims were ever substantiated. Morris relies on *Parrish v. Luckie*, 963 F.2d 201 (8th Cir.1992), for the proposition that violent or abusive behavior of any kind indicates a strong potential for violent

behavior against persons in custody. We need not decide whether *Parrish* stands for such a proposition, however, because even if it did, *Bryan County* implicitly rejected such an argument in the context of municipal liability based on a single hiring decision."); ***Riddick v. School Board of the City of Portsmouth***, 238 F.3d 518, 525, 526 (4th Cir. 2000) ("When Crute was investigated in 1989 for openly filming fully-clothed female students, it was not plainly obvious that he would videotape other students with a hidden camera nearly three years later. . . . . Put simply, the causal connection between the 1989 incident and the alleged constitutional deprivation is simply too attenuated to impose municipal liability on the Board. . . . Admittedly, in light of his subsequent reprehensible behavior, the failure to terminate Crute in 1989 was unfortunate and perhaps ill-advised. However, short-sightedness does not suffice to establish 'deliberate indifference.'"); ***Gros v. City of Grand Prairie (Gros IV)***, 209 F.3d 431, 434, 435 (5th Cir. 2000) ("[P]laintiffs cannot succeed in defeating summary judgment merely because there was a probability that a poorly-screened officer would violate their protected rights; instead, they must show that the hired officer was highly likely to inflict the particular type of injury suffered by them. . . . Rogers had never sexually assaulted, sexually harassed, falsely arrested, improperly searched or seized, or used excessive force against any third party. Indeed, the record reflects that he never committed a serious crime. Just as in *Aguillard*, the incident in Rogers's past that was potentially most damaging to his record--the complaint for an alleged improper drawing of his weapon during a traffic stop--was not sustained by UTA. And the reprimands and complaints that were sustained do not meet *Brown's* requirement of a 'strong' causal connection between Rogers's background and the specific constitutional violations alleged."); ***Aguillard v. McGowen***, 207 F.3d 226, 230, 231 (5th Cir. 2000) ("Here, the record is far less suggestive of McGowen committing homicide than the record in *Bryan County* was of Burns committing battery. The record shows that McGowen threatened the mother of a juvenile with arrest, that he meddled in this mother's supervision of the child while he was off duty, and that the mother ultimately hired an attorney and threatened to obtain a restraining order against him. Colleagues at the Houston Police Department reported that McGowen wanted to 'ride where the women were,' and a female colleague stated that she did not want to ride with him under any circumstances. The record also discloses a report that in March 1990, McGowen assaulted and pistol-whipped a teenage boy who was driving his car around McGowen's apartment complex. Significantly, McGowen was neither arrested for nor convicted of the alleged assault. But while all of this may indicate that McGowen was 'an extremely poor candidate' for the County's police force, . . . the record shows not one shred of solid evidence foreshadowing McGowen's tragic killing of White. McGowen had never been

formally disciplined, and his informal discipline record included only the infractions of using the police radio for broadcasting personal messages and refusing to convey information to one party in a vehicular accident. McGowen had never wrongfully shot anyone before, nor did his record reveal him to be likely to use excessive force in general or possess a trigger-happy nature in particular. Certainly, the evidence of deliberate indifference in this case falls short of the quantum and quality of evidence presented in *Bryan County*, which the Supreme Court determined to be insufficient. In short, even when viewing the evidence, as we must, in the light most favorable to Aguillard, the record is bereft of evidence sufficient to impose liability on the County for wrongfully hiring McGowen. While the County may have been negligent in its employment decision, the magnitude of its error does not reach constitutional cognizance. We therefore hold that the district court erred in denying the County's Rule 50 motion for judgment as a matter of law, and we dismiss the County from this case."); ***Kitzman-Kelley v. Warner***, 203 F.3d 454, 458, 459 (7th Cir. 2000) ("[A]lthough it is permissible to base a sec. 1983 claim on a failure to screen properly a candidate for a public position, our case law makes clear that the plaintiff must allege and establish that the defendants went about the hiring process with 'deliberate indifference.' As our colleagues in the Tenth Circuit have noted, the 'deliberate indifference' standard is not met by a showing that hiring officials engaged in less than careful scrutiny of an applicant resulting in a generalized risk of harm. The requisite showing of culpability 'requires a strong connection between the background of the particular applicant and the specific constitutional violation alleged.' [citing *Barney v. Pulsipher*]"); ***Kitzman-Kelley v. Warner***, 203 F.3d 454, 461, 462 (7th Cir. 2000) (Posner, C.J., dissenting) ("The supervisory employees of the state's welfare department who are sued in this case hired Philip Heiden, a college student, as an intern and assigned him to work with the caseworker assigned to Melissa. . . Heiden was hired on the recommendation of one of his professors, and the defendants did not bother to investigate his background; had they done so, they would have discovered that he had a history of mental illness and drug abuse. After he was hired, on several occasions he took Melissa to his home and there sexually abused her. The defendants did not monitor his work with Melissa. He kept detailed notes of his sessions with her and turned them into his supervisors, but they didn't bother to read them. Had they done so, they would have discovered that he was taking her to his home, though not that he was sexually abusing her. The defendants were negligent in failing to investigate Heiden's background and to monitor his work with Melissa, but negligence, as the plaintiff fails to understand but my colleagues rightly emphasize, is not a basis for liability under 42 U.S.C. sec.1983. . . . The defendants doubtless should have been more careful and not relied entirely on a

professor's recommendation, but the failure to exercise due care is precisely what the law means by negligence. It is not as if they had entrusted Melissa to someone whom they knew to have a record as a child molester; that would be an example of conscious indifference to an obvious danger, . . .but it is a far cry from hiring an intern on a professor's recommendation and then neglecting to monitor the intern. If that is reckless indifference, I do not know what it means to say that negligent misconduct is not actionable under section 1983."); ***Lopez v. LeMaster***, 172 F.3d 756, 760 (10th Cir. 1999) ("It is not enough, however, for appellant to show that there were general deficiencies in the county's training program for jailers. Rather, he must identify a specific deficiency in the county's training program closely related to his ultimate injury, and must prove that the deficiency in training actually caused his jailer to act with deliberate indifference to his safety. . . Appellant did not meet that burden here. Appellant not only did not name his jailer as a defendant in this suit, he failed to identify him at all. That omission seriously undermines his attempt to hold the county liable for any actions deliberately taken by the jailer. Appellant has presented no evidence concerning deficiencies in training of the particular jailer involved in his case. Nor has he shown that the county had a uniform policy of providing its jailers with insufficient training in the areas closely related to his ultimate injury from which we might infer that his particular jailer's training also was insufficient."); ***Carter v. Morris***, 164 F.3d 215, 218, 219 (4th Cir.1999) ("[A] plaintiff cannot rely upon scattershot accusations of unrelated constitutional violations to prove either that a municipality was indifferent to the risk of her specific injury or that it was the moving force behind her deprivation. . . . Section 1983 does not grant courts a roving commission to root out and correct whatever municipal transgressions they might discover--our role is to decide concrete cases. Unfocused evidence of unrelated constitutional violations is simply not relevant to the question of whether a municipal decisionmaker caused the violation of the specific federal rights of the plaintiff before the court. Permitting plaintiffs to splatter-paint a picture of scattered violations also squanders scarce judicial and municipal time and resources. As a practical matter, a case involving inquiries into various loosely related incidents can be an unruly one to try. . . In this case, Carter does not allege that the City of Danville promulgated any formal unconstitutional policy. Rather, she asserts that the City has remained deliberately indifferent to or has actively condoned a long and widespread history of violations of the federal rights of citizens on the part of its police department. But Carter's proffered evidence, mainly allegations of prior instances of excessive force and the discouragement of citizen complaints, ranges far a field of her own alleged constitutional injuries. Her approach is insufficiently precise to establish the existence of a municipal policy or custom that actually could

have caused her specific injuries. On the record before us, Carter's only plausible federal claims are that Danville police officers subjected her to an unreasonable search and seizure and to an unlawful arrest. [footnote omitted] The bulk of her evidence, however, is not relevant to those claims. . . . Past incidents of excessive force do not make unlawful arrests or unreasonable searches or seizures 'almost bound to happen, sooner or later, rather than merely likely to happen in the long run.' . . Carter in essence claims that past generalized bad police behavior led to future generalized bad police behavior, of which her specific deprivations are an example. This nebulous chain fails the 'rigorous standards of culpability and causation' required for municipal liability under section 1983. [citing *Brown*]."); ***Barney v. Pulsipher***, 143 F.3d 1299, 1308 & n.7, 1309 (10th Cir. 1998) ("Merely showing that a municipal officer engaged in less than careful scrutiny of an applicant resulting in a generalized risk of harm is not enough to meet the rigorous requirements of 'deliberate indifference.'. . Culpability requires a strong connection between the background of the particular applicant and the specific constitutional violation alleged. Establishing municipal liability in the hiring context requires a finding that 'this officer was highly likely to inflict the particular injury suffered by the plaintiff.' . . . Mr. Pulsipher's background investigation revealed an arrest at age seventeen for possession of alcohol and several speeding tickets. He completed a state certified basic training program, to which he would have been denied admission had he been convicted of any crimes involving unlawful sexual conduct or physical violence. Plaintiffs have presented no evidence that Mr. Pulsipher's background could have led Sheriff Limb to conclude Mr. Pulsipher was highly likely to inflict sexual assault on female inmates if hired as a correctional officer. . . . We note that the focus of the inquiry in determining when a single poor hiring decision is sufficient to constitute deliberate indifference appears to be on the actual background of the individual applicant and not on the thoroughness or adequacy of the municipality's review of the application itself. . . . Whether or not an unsuitable applicant is ultimately hired depends more on his actual history than the actions or inactions of the municipality. Take, for example, a situation in which a hiring official completely fails to screen an application and hires an applicant, but the applicant actually has a spotless background. In such cases, the Court has stated that the hiring official cannot be said to have consciously disregarded an obvious risk that the applicant would inflict constitutional harm on the citizens of the municipality when even a thorough investigation would have revealed no cause for concern."); ***Snyder v. Trepagnier***, 142 F.3d 791, 797 (5th Cir. 1998) ("Trepagnier had admitted to two nonviolent offenses: stealing a jacket and smoking marihuana. On this evidence, Snyder's claim that the city's screening policies were inadequate fails the *Bryan County* test: that the

plaintiff's injury be the 'plainly obvious consequence' of the hiring decision."), *cert. dism'd,* 119 S. Ct. 1493 (1999); ***Allen v. Muskogee***, 119 F.3d 837, 845 (10th Cir. 1997) ("The case before us is within the 'narrow range of circumstances' recognized by *Canton* and left intact by *Brown*, under which a single violation of federal rights may be a highly predictable consequence of failure to train officers to handle recurring situations with an obvious potential for such a violation. The likelihood that officers will frequently have to deal with armed emotionally upset persons, and the predictability that officers trained to leave cover, approach, and attempt to disarm such persons will provoke a violent response, could justify a finding that the City's failure to properly train its officers reflected deliberate indifference to the obvious consequence of the City's choice. The likelihood of a violent response to this type of police action also may support an inference of causation--that the City's indifference led directly to the very consequence that was so predictable."); ***Lancaster v. Monroe County***, 116 F.3d 1419, 1428-29 & n.10 (11th Cir. 1997) (noting that holding of *Parker*, that County could be held liable for hiring policies of Sheriff that resulted in rape of female arrestee, may no longer be good law after *Brown*.); ***Doe v. Hillsboro Independent School District***, 113 F.3d 1412, 1416 (5th Cir. 1997) (en banc) ("When the district court afforded Doe the opportunity to amend his complaint, he could not even allege that the custodian who assaulted his daughter either had a prior record of violent crime or previously had been reported to the officials for sexual misbehavior towards students. Even in the context of resisting a Rule 12 motion to dismiss, plaintiffs have demonstrated an inability to show a nexus between any failure to check criminal background and this assault."); ***M.C. v. Pavlovich,*** No. 4:07-cv-2060, 2008 WL 2944886, at * 6 (M.D. Pa. July 25, 2008) ("In this case, the allegations of the plaintiff's complaint, assumed to be true, suffice to meet the admittedly high burden of establishing deliberate indifference and causation. The complaint alleges a pattern of similar violations that began before Pavlovich's employment with the Marysville Police Department and continued thereafter. Pavlovich's continuing pattern of conduct involved not just M.C., but fourteen other minor girls. Pavlovich used Borough equipment and his position as a police officer to directly accomplish his illegal ends. M.C. alleges that, prior to hiring Pavlovich, the Borough and Chief Stoss were aware of this pattern, which had resulted in his prior termination from two other police departments. Further, the complaint alleges that the Borough and Chief Stoss personally became aware of Pavlovich's continuing pattern of conduct through the complaints of the parents of at least three of the minor victims. These facts establish that the defendants were confronted with information which made it obvious that Pavlovich would likely inflict the particular injury suffered by M.C., and yet made the decision to hire

Pavlovich. In the face of this clear and unreasonable risk, the defendants took no action to adequately supervise Pavlovich despite his repeated misconduct and the multiple complaints which should have made his constitutional violations obvious. Accordingly, M.C. has stated a claim under § 1983 against the Borough and Chief Stoss in his personal capacity."); ***Teasley v. Forler***, No. 4:06-CV-773 (JCH), 2008 WL 686322, at * 10 (E.D. Mo. Mar. 10, 2008) ("The Eighth Circuit notes that Courts have closely adhered to the requirements of *Bryan County*. . . It held that a county is not liable for the excessive force of its officer where his employment records from a prior law enforcement job indicated that he had slapped an inmate, disobeyed orders, cursed at other employees, and been accused of beating his wife. . . Specifically, the Court found that the nature of these complaints did not satisfy the 'strong' causal connection needed to find that it was obvious risk that he would use excessive force. . . Other circuits also closely adhere to the requirements of *Bryan County*. [collecting cases] . . . . Upon consideration, the Court finds that Plaintiffs' evidence does not satisfy the strong causal connection required by *Bryan County* and its progeny. Here, an adequate investigation into Forler's past would have uncovered his convictions for driving while intoxicated and minor in possession of alcohol as well as his assault arrest. Many courts have held that prior incidents involving assault and alcohol do not make it plainly obvious that an officer would improperly use deadly force. [citing cases] An adequate investigation would have also uncovered that he failed the Academy psychological exam because he showed a willingness to disregard safety procedures. Complaints about ignoring safety protocols do not make it obvious that an officer will use excessive force. . . Similarly, prior issues concerning communicating with the public, as well as earning poor grades in college, do not satisfy the strong causal connection required by *Bryan County*. As such, Lincoln County and Torres cannot be liable based on the decision to hire Forler."); ***Wilhelm v. Clemens***, No. 3:04 CV 7562, 2006 WL 2619995, at *9 (N.D. Ohio Sept. 13, 2006) ("In the instant action, Plaintiff claims that Carr failed to contact George Clemens's former employer, the Village of Paulding, which terminated his employment as a police officer after eight separate occasions of discipline. . . Plaintiff, however, fails to provide any evidence that had Carr contacted the Village of Paulding, she would have discovered that George Clemens would likely use excessive force or otherwise violate the constitutional rights of the citizens of Antwerp. It does not appear that Clemens was ever disciplined for the use or misuse of force. Plaintiff further contends that George Clemens's prior convictions for misdemeanor assault, criminal trespass, and driving under the influence of alcohol should have 'tipped off' Carr. While his prior convictions may make George Clemens a peculiar choice for a position as a police officer, they are not sufficient to

impose liability on the Village. . . . Here, George Clemens's criminal record is similar to the deputy in *Brown*. Just as the deputy's assault conviction was not sufficient to impose liability in *Brown*, Clemens's record is not sufficient to impose liability here. Had Joyce Carr adequately reviewed George Clemens's criminal record, it would not have been 'plainly obvious' that he would use excessive force. Accordingly, Joyce Carr did not act with deliberate indifference to Plaintiff's right to be free from excessive force, and summary judgment is granted as to Plaintiff's failure-to-screen claim."); ***Atwood v. Town of Ellington***, 427 F.Supp.2d 136, 148, 149 (D. Conn. 2006) ("The evidence in this case cannot reasonably support a finding that the Town was deliberately indifferent to the likelihood that Nieliwocki would violate plaintiff's constitutional rights by sexually assaulting her. A report of the August 2001 complaints from the two female ambulance staff members was placed in Nieliwocki's personnel file by the investigating state trooper. While it is perplexing why Stupinski failed to review the file before reappointing Nieliwocki in November 2001, particularly as he acknowledged 'he would have taken [the report] into consideration' in his reappointment decision, . . .mere negligence does not amount to deliberate indifference to plaintiff Atwood's constitutional right against unreasonable force or substantive due process violations. It is clear that Stupinski did not know about Nieliwocki's troubling behavior toward females in the preceding months when he decided to reappoint Nieliwocki. Additionally, the misconduct reported in August 2001--which may have been suggestive of aggressive or violent tendencies toward women--was factually distinct from the February 2002 incident and would not necessarily have made it 'plainly obvious' to the Town at the time that Nieliwocki might have had sexually abusive propensities. . . Plaintiff has profferred no expert or other testimony linking the previous incident of what Nieliwocki characterized as 'mutual horse play' to a future likelihood to commit sexual assault. Moreover, plaintiff has proffered no evidence that Stupinski's practice of not reviewing personnel files when reappointing constables ever led to previous deprivations of the constitutional rights at issue here, and therefore plaintiff cannot show that the Town was deliberately indifferent to the consequences of Stupinski's hiring practices."); ***Estate of Smith v. Silvas***, 414 F.Supp.2d 1015, 1019-21 (D. Colo. 2006) ("In addition to their failure to train claim, the Estate also asserts that the city is liable for failure to properly supervise Officer Silvas throughout his career. This claim requires essentially the same showing of deliberate indifference and direct causation as discussed above. . . In support of its claim, the Estate argues that Officer Silvas has engaged in numerous acts of misconduct throughout his long career..However, the issue always remains whether, viewing the evidence in the light most favorable to the Estate, does it give rise to a reasonable inference that the City

was deliberately indifferent to the risk that Silvas would improperly shoot the decedent in the circumstances. . . Specifically, the issue is whether the City had notice that its actions or inactions will likely result in the constitutional violation, namely an unconstitutional or improper shooting, not simply a shooting. . . Officer Silvas has an extensive history of incidents involving guns. Plaintiff provides a litany of various events which bear repeating to the extent they are acknowledged by defendants or are supported by appropriate Rule 56(c) evidence: [court lists nine incidents involving guns, five of which resulted in deaths] . . . . With particular regard to the incidents involving shootings, the defense emphasizes that the Estate does not make any claim that the Silvas's decision to shoot in any case was unwarranted and there is no admissible evidence that any constituted an improper or unconstitutional use of deadly force. This factual background in a summary judgment context presents a difficult issue: Can a reasonable jury infer that the City was deliberately indifferent to the risk that Officer Silvas would use constitutionally excessive force by improperly shooting Mr. Smith? On the one hand it is undisputed that the City has institutional knowledge of Silvas's history of at least eight shootings, resulting in five deaths, in four separate events, as well as a record of threats and abuse. On the other hand, it is also undisputed that: (1) no shooting was ever found to be improper; (2) Silvas was disciplined; (3) he was required to take additional training concerning the use of firearms; (4) he had a history of commendable restraint in the face of two serious threats; and (5) several years had passed since his last discharge of a firearm. The bar for such supervisory liability is quite high. In *City of Canton, Ohio v. Harris*, Justice White noted that a showing concerning the need for more or different training must be 'so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the City can reasonably be said to have been deliberately indifferent to the need.' . . The same standard would be applicable as to the need for more or different supervisory action in this case. . . .The issue can thus be restated: did the City of Denver have notice that its failure to further supervise was substantially certain to result in an unconstitutional shooting and choose to consciously or deliberately disregard that risk? Certainly a reasonable jury could conclude from Officer Silvas's history of shooting (and killing) individuals in the course of his police service that the City had notice that he may use deadly force. Beyond that, however, can a reasonable juror infer that the City had notice that Silvas's use of force would be so excessive as to be unconstitutional? There is no evidence that he ever improperly fired his weapon. Further, considering the discipline imposed, additional training required, and the significant temporal separation from the last shooting involving Officer Silvas, evidence is lacking to show a 'direct causal link' between the shooting and inadequate supervision. I find

that, considering the evidence as a whole and drawing all reasonable inferences in favor of the Estate, the City did not have notice that it was substantially certain that a constitutional violation would occur." [footnotes omitted]); ***Ice v. Dixon***, No. 4:03CV2281, 2005 WL 1593899, at *9 (N.D. Ohio July 6, 2005) ("Plaintiff presents no legal support for a finding that knowledge of an investigation into the possible use of excessive force against a male inmate suffices to establish knowledge and indifference to unknown risks of sexual assault or sexual contact with female inmates. As previously stated, a finding of municipal liability 'must depend on a finding that this officer was highly likely to inflict the particular injury suffered by the plaintiff.'"); ***Perrin v. City of Elberton, Georgia***, No. 3:03-CV-106(CDL), 2005 WL 1563530, at *11 (M.D. Ga. July 1, 2005) (not reported) ("For the decision to hire Kupkowski to give rise to a §1983 claim, Plaintiff must show that Kupkowski was highly likely to inflict the particular injury suffered by Plaintiff. . . This connection must be strong--the specific constitutional violation must be a 'plainly obvious consequence of the hiring decision.' . . In this case, Plaintiff has accused Kupkowski of violating his federal rights by applying for the warrant using an unsworn warrant application. No reasonable juror could find that Plaintiff's evidence regarding Kupkowski's prior employment establishes that the specific constitutional violation alleged by Plaintiff would be an obvious consequence of hiring Kupkowski. Therefore, municipal liability cannot be based upon Welsh's decision to hire Kupkowski, and Defendants' Motion for Summary Judgment is granted as to Plaintiff's federal claims based upon the decision to hire Kupkowski."); ***Christopher v. Nestlerode***, 373 F.Supp.2d 503, 522 (M.D. Pa. 2005) ("Nothing in these officers' personnel records would put a supervisor on notice that Nestlerode or Kerr were likely to effect stops without probable cause or to engage in racial profiling. . . It may be true, as noted in plaintiff's briefs, that Nestlerode has a less than exemplary law enforcement record. He was admonished by his previous employer, a municipal police department, for misusing resources for his own benefit and for misconduct during citizen encounters. He lost property of a Hispanic individual who was taken into custody. . . He admitted during testimony that, if stopped by another officer, he would 'flash his badge' to avoid a citation, in violation of standard policy. Nevertheless, Hose was not informed of these incidents. . . Even if he had been, this misconduct is indicative of a propensity to violate standard procedures, not to violate the Fourth and Fourteenth Amendment rights of citizens. However unfavorably these infractions reflect on Nestlerode's professionalism, none of them would have alerted Hose to the potential for biased policing. . . Hose had no reason to assume that officials in the department were prone to engage in such conduct, particularly in light of the training requirements relating to cultural diversity and his admonitions

concerning the need for equal treatment under the law. . . . The record does not reflect a history of similar violations in the sheriff's department, the presence of racial animus among deputies, or reports of race-based offenses in the personnel records of Nestlerode and Kerr. Deputy sheriffs were trained on issues of cultural diversity, and were taught to enforce laws equally regardless of ethnicity or race. Neither Hose nor the County of York had any reason to suspect that an incident of this type would arise or that additional training was necessary."); ***Crumes v. Myers Protective Services, Inc.***, No. 1:03CV1135DFHTAB, 2005 WL 1025784, at *1, **6-8 (S.D. Ind. Apr. 22, 2005) (not reported) ("Constitutional claims of improper hiring or appointment like this are difficult to prove. They require the plaintiff to meet 'rigorous requirements of culpability and causation.' *Board of County Comm'rs of Bryan County v. Brown,* 520 U.S. 397, 415 (1997). . . . The information actually known to Sheriff Cottey and his department showed that Myers had a prior felony conviction for theft that had later been reduced to a misdemeanor. That information was not sufficient to signal, in the words of *Brown,* 'that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff.' . . Crumes' arguments to the contrary amount to a sweeping indictment of Myers' character for honesty and obeying the law. The evidence still lacks a sufficiently specific link between Myers' background and the particular injuries suffered by Crumes. . . . In this case, Myers' appointment was contrary to state law. Myers was convicted of felony theft in 1995, which was changed to misdemeanor theft in 1996. Crumes has come forward with evidence showing that the sheriff's appointment of Myers was contrary to state law and to the local written policy. Even giving effect to the *post hoc* discount of the theft conviction from felony to misdemeanor, the misdemeanor conviction was still for a crime of moral turpitude. . . . The alleged violations of both state law and the sheriff's written policy are not conclusive on the federal constitutional question, but they are evidence that tends to support plaintiff's claim of deliberate indifference to the threat Myers posed to constitutional rights. . . . Sheriff Cottey appointed Myers as a special deputy in the face of a state law prohibiting the appointment, and despite the terms of his own policy prohibiting the appointment. From this evidence, a reasonable jury could find that Sheriff Cottey acted with deliberate indifference to the public welfare and to the general risk that Myers would violate constitutional rights. . . . The information known to the Sheriff's Department in this case--Myers' theft conviction and the events reported in the arrest report--presents a weaker case for causation than the evidence in *Brown* . In *Brown,* the reserve deputy was accused of excessive force. His prior criminal record included at least misdemeanor convictions for assault, battery, and resisting arrest (all in connection with a fight on a college campus). . . In other words, there was at least the common thread of force or violence linking the

criminal history to the events in suit. Here, even that modest and insufficient thread is lacking. Here, the sheriff's department knew that Myers had stolen property from a store and had pursued a fraudulent scheme to exchange it for cash. That crime bears no specific connection to the constitutional violations in this case: unreasonable seizure of the person, use of excessive force, and causing unfounded criminal charges to be filed. . . . A reasonable jury could not find that an 'obvious consequence' of deputizing a shoplifter would be that the shoplifter would eventually use excessive force in the course of an invalid arrest. As a matter of law, the evidence of the special deputy's prior criminal conduct was not tied sufficiently to the use of excessive force against Crumes to allow a reasonable jury to find municipal liability."); ***Doggett v. Perez***, 348 F.Supp.2d 1179, 1195 (E.D. Wash. 2004)("In sum, plaintiffs' evidence does not establish that Perez was less than forthright with the Wenatchee Police Department about his previous encounters with the law. Furthermore, a reckless driving conviction, a petty theft conviction later expunged, and a charge of possession of amphetamine would not have made it 'plainly obvious' to Badgley and the City of Wenatchee that 25 years later Perez might deliberately fabricate evidence against criminal defendants."); ***Perez v. Miami-Dade County,*** 348 F.Supp.2d 1343, 1353, 1354 (S.D. Fla. 2004) ("*Bd. of County Comm'rs. of Bryan County* is illustrative of the difficulty of proving deliberate indifference based on one single action and the rigorous standards applied. . . . Plaintiff cannot establish that it was highly likely that Defendant's failure to terminate Alsbury would lead to Plaintiff's injury even if it is assumed Alsbury struck Plaintiff on purpose. First, Plaintiff's attempt to argue that Alsbury's actions were racially motivated does not further his burden of proof. Certainly Alsbury was a racist who disliked African-Americans. He admitted this. Also, Plaintiff has presented adequate evidence demonstrating that some fellow officers in the force knew that Plaintiff was a racist. However, the Court cannot assume that persons with policy-making authority in Defendant's Police Department knew he was a racist; leap from the fact of racism to the conclusion that Alsbury intentionally hit African-American suspects with his car; or find that Defendant should have known Alsbury was likely to hit African-American suspects with his car. Simply put, while it might be unwise policy to permit racists to serve as County officers, Plaintiff has not presented evidence that a 'plainly obvious consequence' of employing Alsbury would be the intentional unlawful use of force against African-Americans. If such a consequence were really so obvious, one would expect Plaintiff to have evidence of multiple racially motivated incidences of unlawful force over the course of Alsbury's twenty-five-plus year career."); ***Adams v. City of Balcones Heights***, No. Civ.A.SA-03-CA-0219-, 2004 WL 1925444, at *6 (W.D. Tex. Aug. 27, 2004) ("The Plaintiffs' complaint has not alleged the requisite strong

connection between Guidry's or Trevino's background and the particular injury suffered. In Plaintiffs' Third Amended Original Complaint, the Plaintiffs allege that the Defendants were aware that Guidry's employment file showed that he had been 'rough with inmates' and had 'got friendly with' female inmates at his previous job. The Plaintiffs fail, however, to allege anything in either Guidry's. . .background along the same lines as the background of the lieutenant in *Kesler*. In fact, the allegations as to Guidry's record fall short of what the Fifth Circuit found insufficient to support liability in *Gros*. The Plaintiffs' allegations as to Guidry show that, at the time of the decision to hire him, Guidry may not have been the perfect candidate for a police officer. The allegations do not, however, state a claim against the Defendants for liability based on the decision to hire Guidry. . . There are no allegations that would make it plainly obvious to an official screening his background that Guidry would be likely to commit the acts in question."); ***Cain v. Rock***, 67 F. Supp.2d 544, 549-50 (D. Md. 1999) ("Given that the policy of cross-gender guarding did not violate Cain's constitutional rights, Cain will need to follow the more typical route to proving a Section 1983 violation. . . First she must point to an underlying violation of her constitutional rights. For present purposes, the court assumes arguendo that if Rock sexually assaulted Cain, that act would suffice as a violation of Cain's constitutional rights as a prisoner. . . Second, Cain must meet the strict standards of fault and causation to link the facially constitutional municipal policy to the alleged assault. . . . In this case, Cain has failed to demonstrate that the County's policy was the direct cause of the alleged assault. Indeed, Cain has provided little more than allegations and legal conclusions about how the policy made her more vulnerable to assaults. It is simply not sufficient, for § 1983 purposes, to show that a municipal policy put an employee in the position to commit a constitutional tort. More evidence of causation is necessary. . . . In sum, the Court finds that the County's official policies were not the cause of Rock's alleged sexual assault on the Plaintiff, and the County did not act with deliberate indifference toward violations of this type. It follows that Cain has failed to establish municipal liability for the County's official policy of cross-gender guarding."); ***Doe v. Granbury ISD***, 19 F. Supp.2d 667, 676 & n.4 (N.D. Tex. 1998) ("To prevail on their negligent hiring theory, plaintiffs must show that Granbury ISD was deliberately indifferent to the risk that a violation of the particular constitutional rights at issue here would follow the decision to hire Talmage and Lee. . . . The only summary judgment evidence offered by plaintiffs to support this claim is hearsay testimony of Jane Doe that, at some unidentified point in time, Granbury ISD had a policy not to check into the background of employment candidates prior to hiring them. They present no competent summary judgment evidence with regard to any policy, much less any evidence that adequate scrutiny of

the backgrounds of Talmage and Lee would have led to the conclusion that they would have violated Jane Doe II's rights in the manner alleged in this lawsuit. . . . Although plaintiffs present evidence that Talmage sexually abused students in Mansfield, they present no evidence that a background check of Talmage would have revealed such conduct."); ***Doe I v. Bd. of Educ. of Consolidated School District 230***, 18 F. Supp.2d 954, 960, 961 (N.D. Ill. 1998) ("In discussing the elements of culpability and causation, the Court stated that although inadequate screening of an applicant's record may reflect indifference to an applicant's background, that is not the indifference relevant for purposes of a legal inquiry into municipal liability under § 1983. To establish such liability, a plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of a decision to hire the applicant would constitute 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. . . Therefore, for municipal liability there must be a definite connection between the background of the applicant and the specific constitutional violation alleged. . . . In the instant case, there is evidence in the record to suggest that the District decided to rehire Vasquez with some knowledge that he may have engaged in an extramarital sexual relationship with a student (Amy). If plaintiffs can prove that to be true, Vasquez would have been violating Amy's constitutional rights. From that, a jury could conclude that a decision to ignore Vasquez' relationship with Amy would reflect more than just an indifference to Vasquez' record, but a deliberate indifference to plaintiffs' constitutional rights, and that it was highly likely that Vasquez would do the same thing with other students that he had done with Amy. Thus, as alleged by plaintiffs, this instructor was highly likely to inflict the particular injury suffered by plaintiffs. What exactly the District knew about Vasquez's relationship with Amy when it rehired him is in dispute. Both Vasquez and Amy have denied having a sexual relationship while Amy was a student. Nevertheless, if plaintiffs can prove that upon proper inquiry the District could have discovered that Vasquez had abused Amy, it may be able to establish that his abuse of plaintiffs would have been a plainly obvious consequence of the hiring decision. Accordingly, the District's motion for summary judgment on Count II is denied."); ***Mirelez v. Bay City Independent School Dist.***, 992 F. Supp. 916, 920 (S.D. Tex. 1998) ("Plaintiff argues that Defendant's policies violate § 1983 because they do not require a background check for substitute teachers. However, it is undisputed in this case that, even if it were checked, no information could have been garnered from Garcia's

criminal record that would have prevented his employment. Without such causation, Plaintiff's argument is fatally flawed."); ***Morrissey v. City of New York***, 963 F. Supp. 270, 275-76 (S.D.N.Y. 1997) ("While there is certainly a genuine issue of material fact as to whether a failure to supervise cooperators could conceivably lead to a deprivation similar to that which plaintiff allegedly suffered, it is clear that such a deprivation is not 'highly predictable.' There can be little doubt that cooperators are under some stress, but it cannot be said that such stress is in any way closely linked to the arbitrary shooting of other individuals. This is particularly so where defendants already had a policy of not permitting officers known for violent behavior to become cooperators. . . . While training an officer not to shoot other officers may not be particularly useful, supervising him while he is in a situation generally acknowledged as stressful could prevent him from making choices which might deprive others of their constitutional rights. However, in this case, . . . there is a great deal of evidence that such supervision was undertaken. . . . [E]ven if the court were to assume that there was a pervasive failure by defendants to train and supervise their officers properly, no liability could attach to their conduct in this instance because even an extraordinary amount of supervision could not have prevented the shooting of plaintiff.").

But see ***Griffin v. City of Opa-Locka,*** 261 F.3d 1295, 1313 (11th Cir. 2001) ("Construing all inferences in favor of Griffin, we believe the evidence was sufficient for a finding that the City's inadequate screening of Neal's background was so likely to result in sexual harassment that the City could reasonably be said to have been deliberately indifferent to Griffin's constitutional rights."); ***Abdi v. Karnes***, No. C2-06-971, 2008 WL 2222073, at *14, *15 (S.D. Ohio May 27, 2008) ("As explained in *Soward*, proof of a constitutional violation does not establish that the deprivation caused injury. 125 Fed. Appx. at 42. The *Soward* decision cited as an example a hypothetical situation in which officers enter a house without a warrant thereby violating the Constitution. The suspect is found in the house, breaks away, shoots one of the officers and is then killed by a second officer. The antecedent unlawful entry was wholly superceded by the intervening conduct of the suspect, thereby breaking any causal link to the original entry. . . Likewise, in *Soward*, the decedent pointed a gun at the officers, who responded with deadly force. The decedent's conduct broke any causal link connecting his death to any failure to adequately train the officers. Put another way, the plaintiffs could not demonstrate that a properly trained officer would not have also responded with deadly force had the decedent pointed a gun at him or her.In this Court's view, Plaintiff must show that the deficiency in a city's training actually caused the death of Abdi. . . All of the Sixth

Circuit cases following *Russo*, involved an unexpected, potentially lethal attack upon an officer. . . The common thread in these cases is that a sudden, unprovoked, unanticipated violent assault by a mentally ill person breaks any casual link between resulting injury or death and a claim of inadequate training. All of these cases involved patrol-type officers or deputies. All were responding to exigent circumstances. In this case, the deputies routinely arrested mentally ill individuals and had reason to take precaution. Unlike the officers in the cases described, the deputies in this case had time to plan for the encounter with a mentally ill individual. This opportunity to actually use specialized techniques in encountering Abdi was absent in the other cases. As noted in *City of Canton*, 489 U.S. at 391, the issue of proximate cause is a question of fact and not law. The trier of fact must determine from a review of all the evidence whether the failure to train was closely related to' or 'actually caused the ... injury.'. . At this juncture, the Plaintiff has produced sufficient evidence demonstrating a genuine issue of material fact as to the issue of causation."); ***Pirolozzi v. Stanbro,*** No. 5:07-CV-798, 2008 WL 1977504, at *9-*11 (N.D. Ohio May 1, 2008) ("In this case, the Court finds that the Plaintiff has presented sufficient evidence to show that the City of Canton's police training program is inadequate to the tasks that its officers must perform. The City of Canton requires its new police officers to complete the state-mandated Ohio Peace Officer's Training curriculum and requires all of its officers to attend an annual 40-hour in-service training program, with the content to be determined by the City. . . Despite this general instructional program, however, it is undisputed that the City of Canton does not train its police officers regarding the existence of, or the risks and dangers associated with, positional asphyxia. David Clouse ('Clouse'), one of the City's police training officers, testified that, at least since 1998, Canton police officers have not been trained about positional or compression asphyxia. . . Rather than arguing that the City was unaware of this cause of death in police custody cases, Clouse attempted to justify this lack of training by stating, '[W]e don't recognize it. It's not a recognized problem. There's documentation that says there's other things going on out there, and it's not because they're in the position or it's not because officers are putting weight on them. . . . Positional asphyxia is a well-known cause of death in many police custody cases throughout the nation. . . . Courts in the Sixth Circuit have also repeatedly dealt with several cases involving compression or positional asphyxia. . . . Finally, the Court concludes that there is sufficient evidence that a jury could find that the inadequacy of the City of Canton's police training regarding the forcible restraint and its association with positional asphyxia is closely related to or actually caused Pirolozzi's death. The Defendant Officers testified as to their lack of awareness that the manner in which they restrained and held Pirolozzi, even without

additional force, may have caused his death. . . .The Court therefore denies summary judgment to the City of Canton as to the Plaintiff's § 1983 failure to train claim."); ***Gaston v. Ploeger***, 399 F.Supp.2d 1211, 1219, 1220 (D. Kan. 2005) ("To the extent that Plaintiff argues Shoemaker failed to adequately train jail personnel, Plaintiff (1) must identify a specific deficiency in Shoemaker's training that is closely related to Belden's ultimate injury; and (2) must prove that the deficiency in training actually caused jail personnel to act with deliberate indifference to Belden's safety. In this case, the Court finds Plaintiff has presented sufficient evidence that a jury could find an affirmative link between the constitutional deprivation alleged and Shoemaker's training practices and general exercise of control over the jail. Sheriff Shoemaker is responsible for all aspects of the Brown County Jail. Brandon Roberts testified that he did not receive any formal training of any type at the Brown County Jail and he specifically did not receive any formal suicide prevention training. Roberts further states that he was never given any training formally or informally relating to clues to look for to determine if an inmate was at risk for suicide. Roberts indicated that any information he did learn about suicide prevention and actions, he learned from other officers at the jail while on the job. Roberts testified that he was informally told that suicidal inmates might act depressed. Other than depression, however, Brandon Roberts does not remember any other signs to look for to determine if an inmate is suicidal. In this case, Plaintiff has presented sufficient evidence of constitutional violations by Sergeant Hollister and Brandon Roberts. Moreover, Plaintiff has presented sufficient evidence to demonstrate that the policies and practices promulgated by Sheriff Shoemaker with regard to training could very well have been the moving force behind these alleged constitutional violations. In other words, a jury could find from the evidence presented that Sheriff Shoemaker's policies, procedures, and practices reflect deliberate indifference to the . . . known risk that the jail will inevitably house suicidal inmates."); ***Cahill v. Walker***, No. 3:03-CV-00257, 2005 WL 1566494, at *5 (E.D. Tenn. July 5, 2005) (not reported) ("Here, the five prior complaints against Officer Walker alleging misconduct of a sexual nature arguably establish a 'clear and persistent pattern of sexual misconduct.' . . A material issue of fact exists as to whether the City of Gatlinburg had actual or constructive notice of this misconduct. Because the court cannot determine whether the city government was 'deliberately indifferent' without first deciding whether the government knew of the sexual nature of the complaints, the City of Gatlinburg is not entitled to summary judgment on the issue of its alleged failure to investigate."); ***Jones v. James***, No. Civ.02-4131 JNE/RLE, 2005 WL 459652, at *4 (D. Minn. Feb. 24, 2005) (not reported) ("Considering the Affidavits, and viewing this evidence in the light most favorable to Jones, the Court concludes that there is a genuine issue

of material fact with respect to whether Sheriff Fisher acted with deliberate indifference by hiring Stoneking to transport female prisoners without conducting any further background check into Stoneking's past and whether Jones's alleged injuries were caused by Cass County's inadequate hiring. A reasonable juror could find that the plainly obvious consequence of hiring Stoneking would be the deprivation of Jones's rights."); ***Kesler v. King***, 29 F. Supp.2d 356, 369 (S.D. Tex. 1998) ("An official may be subject to liability under § 1983 for an employment decision that 'reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision.' [citing *Bryan County*] In Defendant King's case, the decision to 'recommend' the hiring of Lieutenant Wallace, a former Texas Department of Corrections officer who had actually been convicted of beating an inmate in violation of his civil rights, carried a substantial risk that some inmate's right to be free from excessive force would be violated. No reasonable, similarly situated official in Defendant King's position would believe that hiring a man who had been convicted for beating an inmate is an acceptable risk in this context. Accordingly, the Court concludes that Defendant King is not entitled to qualified immunity with respect to Plaintiffs' allegation of failure to screen."); ***Raby v. Baptist Medical Center***, 21 F. Supp.2d 1341, 1354, 1355 (M.D. Ala. 1998) ("The evidence indicates that Alford failed to investigate [defendant officer's] background even though he was told the police department would not again hire [officer] and even though he knew that [officer] had been terminated and that complaints, whether substantiated or not, had been made against him, and even though he had access to [officer's] personnel files. Beyond showing that Alford failed to fully look into Mangum's background, however, Raby has also pointed to evidence that Mangum had been confronted about his allegedly aggressive behavior and that a person Mangum had arrested in the past needed hospitalization. Evidence of aggressiveness, especially in the context of a suspect who required hospitalization, is tied to the constitutional right at issue here. . . . The court concludes that the evidence provided by Raby meets the causal connection requirement to impose liability upon Baptist Medical Center based on deliberate indifference under [*Brown*]. . . . [T]he court concludes that the evidence presented as to Alford's deliberate indifference for purposes of holding Baptist Medical Center responsible for Mangum's actions is also evidence which supports a claim against Alford individually."); ***Owens v. City of Philadelphia***, 6 F. Supp.2d 373, 391-92 (E.D. Pa. 1998) ("On the whole, the record of this particular incident, viewed, as it must be on summary judgment, in plaintiffs' favor, would support a fact-finder in drawing an inference that a systemic problem existed: that is, the record would lend support to a finding that none of the officers involved, either before or after the incident, followed the instructions contained in the

training materials proffered by the City. At the very least, these failures suggest the possibility that the 1988 memorandum and the academy training had not been deployed in an effective manner. To be sure, the Supreme Court has cautioned against creating an inference of failure to train from an isolated incident. [*citing Bryan County* and *City of Canton*] However, the record in this case would support an inference that the events leading up to and following Gaudreau's suicide amounted to a good deal more than an isolated instance that could be attributed to the negligence of, or the failure to train, one employee. . . . Plaintiffs' unrebutted expert testimony and the very course of events in this case would permit a reasonable fact-finder to conclude that the City, although aware of the problem of suicide within City correctional facilities, failed to do more than go through the motions of training its correctional officers in suicide prevention and in administering first aid to a person found hanging."); ***Foote v. Spiegel***, 995 F. Supp. 1347, 1357-58 (D. Utah 1998) (on remand) ("Throughout the deposition testimony quoted above, not one person believed the policy required, as a prerequisite to a strip search, that a jailer possess reasonable suspicion of concealed contraband that would not be discovered through a rub search. And the reason that none of the jailers ever considers the constitutional touchstone of reasonable suspicion is that the policy clearly does not require it. There is simply no mention of 'reasonable suspicion' as a factor to be considered by jailers prior to commencing a strip search of a detainee who is not entering the general jail population. This glaring omission is, in itself, a policy decision made by the county which is sufficient to subject it to liability in this case. . . . In this case, there is a basis for municipal liability under both the prior occurrences theory articulated in *Canton* and the first occurrence theory advanced in *Brown*. The constitutional flaws with the County's strip search policy were known as early as the *Cottrell* decision in 1993. That case put the County on warning that gross constitutional violations were occurring under the strip search policy then in existence. Despite this knowledge, the County refused to change the policy, thereby exhibiting 'deliberate indifference' to the likelihood of future violations. In truth, however, the court believes that the County should have been aware of potential problems with its strip search policy even prior to the *Cottrell* case. Jail officials must search detainees many times every day. The temptation to strip search each and every such detainee is great because it may provide marginal increases in jail security. Such blanket policies are also attractive to jail administrators because they make it unnecessary to determine the existence of reasonable suspicion on a case-by-case basis. . . Davis County should therefore have realized that, if it did not explicitly forbid strip searches of detainees absent reasonable suspicion of drugs or other contraband, that sooner or later the constitutional rights of detainees would be

violated. The court therefore holds Davis County liable for its failure to formulate a detainee strip search policy which incorporates the constitutional imperatives identified by each and every Court of Appeals to date.").

See also ***Rossi v. Town of Pelham***, No. CIV. 96-139-SD, 1997 WL 816160, at *16, *17, *21 n.* (D.N.H. Sept. 29, 1997) (not reported) ("This court believes that *Brown* has no application to the facts of this case. Rather, *Brown* was intended to govern cases where the municipal policy is not itself unconstitutional, but rather is said to cause a downstream constitutional violation. . . . The heightened deliberate indifference standard enunciated by the *Brown* court was intended to ensure that a strong causal link existed between a municipal policy, by itself constitutional, and the underlying constitutional violation in order to preclude a pure respondeat superior theory of the municipality's liability. When, as here, the policymaker specifically directs or orders the conduct resulting in deprivation of constitutional rights, there is a straightforward causal connection between the municipal policy and the constitutional violation. The municipal policymakers in this case, the selectmen and Police Chief Rowell, directed Officer Cunha to engage in the conduct that constituted a violation of Rossi's constitutional rights. Even under the most rigorous standards of causation, the causal connection between the municipal policy and violation of Rossi's constitutional rights is plain and obvious; therefore, there is no need to inquire whether the heightened deliberate indifference standard enunciated by the *Brown* court is met. . . . [F]or municipal policy that is either facially unlawful or directs unlawful conduct, plaintiffs need not further establish 'deliberate indifference.'. . The 'deliberate indifference' standard is a mens rea requirement that is unnecessary and redundant when a plaintiff establishes an intentional constitutional violation caused by facially unlawful policy."); ***Richardson v. City of Leeds***, 990 F. Supp. 1331, 1336 (N.D. Ala. 1997) (concluding that "[t]he majority in *Board of Commissioners* definitely intended drastically to narrow the *Pembaur* opening.").

Compare ***Sassak v. City of Park Ridge***, No. 05 C 3029, 2006 WL 560579, at **3-5 (N.D. Ill. Mar. 2, 2006) ("Lake Zurich argues that plaintiffs cannot state a claim based on a failure-to-train theory because on the night McGannon arrested plaintiffs he was a Park Ridge, not a Lake Zurich, police officer. Thus, Lake Zurich continues, it had no obligation or ability to train, control or discipline McGannon, and it cannot be held responsible for actions taken by former officers who are in the employ of other police departments. . . . [E]even though no Lake Zurich police officer came into contact with plaintiffs, Lake Zurich could still face municipal liability. . . However, under the facts alleged, plaintiffs fail to state a claim based on

the alleged policies, customs and practices of failing to properly train, discipline, and control officers engaged in illegal conduct. . . . With respect to the failure-to-train allegations, any link between Lake Zurich's failure to train and McGannon's arrest of plaintiffs was severed by McGannon's subsequent employment by Park Ridge. . . . Lake Zurich and Park Ridge are distinct municipalities and it cannot be said that the policies and customs of the former motivated plaintiff when he was employed by the latter. Lake Zurich's failure to discipline and control its police officers could provide no incentives for McGannon to engage in illegal activity as a Park Ridge police officer. Further, Lake Zurich could not ratify or condone McGannon's arrest of plaintiffs. . . . In contrast, even if Lake Zurich adequately trained or disciplined its police officers, that training would not prevent an officer from committing acts of abuse when subsequently employed by another jurisdiction. . . . Unlike the first alleged policy, plaintiffs' second policy, which involved Lake Zurich's concealing of criminal conduct and providing false job references to prospective employers, states a claim upon which relief can be granted. According to plaintiffs, had Lake Zurich fired McGannon, which it allegedly had ample cause to do, instead of hiding his criminal and disciplinary record, he would not have been in a position to violate their rights as a Park Ridge police officer. As alleged, Lake Zurich's manipulation of McGannon's employment record and false statements to Park Ridge and other prospective employers is more severe than official inaction in the face of a known danger. . . . Plaintiffs have adequately alleged that the Lake Zurich defendants' policy, custom or practice of concealing its officers' criminal conduct, misrepresenting their employment records and providing knowingly false job references, caused their injuries. . . . The passing of time between the effectuating of the municipal policy and the constitutional deprivation may be so great that it severs the causal link between policy and harm, but the impact of that time presents questions of degree and fact that cannot be answered on a motion to dismiss. . . In sum, plaintiffs do state a *Monell* claim against Lake Zurich, but only to the extent that they allege Lake Zurich hid information about officers' known misconduct and provided positive references on behalf of those officers.") *with* ***Roach v. Schutze,*** No. CIV.A.7:02-CV-110-R, 2003 WL 21210445, at *3 (N.D. Tex. Mar. 21, 2003) (not reported) ("Here, the plaintiffs allege that the City of Iowa Park 'knew or should have known' that withholding information about McGuinn in accord with the [Settlement] Agreement would allow him to gain employment in the future. . . The plaintiffs allege that this constituted a policy of the City of Iowa Park and was a proximate cause of their injuries. Plaintiffs fail, however, to cite any case law in support of their position that a former employer of a police officer can be held liable for constitutional violations that allegedly occurred after the police officer resigned from that department and was hired by

another law enforcement agency. At most, Plaintiffs are alleging a negligence claim against Iowa Park. Plaintiffs have not stated facts sufficient to support a claim for deliberate indifference. Moreover, McGuinn was no longer employed by Iowa Park when the Plaintiffs allege that their constitutional rights were violated; McGuinn was employed by Electra at that time.").

See also ***Pascocciello v. Interboro School District***, No. 05-5039, 2006 WL 1284964, at *6 (E.D. Pa. May 8, 2006) ("Plaintiffs argue that Interboro clearly created a danger to Michael by concealing Friedrichs's pedophilia and aiding Friedrichs in finding a new teaching position. In the complaint, Plaintiffs allege that the Fayette County school district relied upon the 1974 and 1975 correspondence from Interboro to hire Friedrichs. That correspondence failed to disclose Friedrichs's prior pedophilia. Plaintiffs argue that, if Interboro had revealed Friedrichs's pedophilia, Friedrichs would not have been hired by the Fayette County school district, let alone any other school district. In the Court's view, the allegations in the complaint allow for the reasonable inference that Friedrichs was hired by the Fayette County school district because Interboro concealed his past pedophilia. Whether the Fayette County school district actually would have hired Friedrichs if Interboro had revealed his past pedophilia seems unlikely but it is an issue that may be pursued in discovery. Therefore, the court declines to dismiss the Due Process claim on this ground.").

7. Note on "Deliberate Indifference"

In ***Farmer v. Brennan***, 511 U.S. 825 (1994), the Supreme Court distinguished the test for "deliberate indifference" established in *City of Canton* from the test required for culpability under the Eighth Amendment in prison conditions cases:

> It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective. *Canton's* objective standard, however, is not an appropriate test for determining the liability of prison officials under the Eighth Amendment as interpreted in our cases.

Id. at 841. The Court held "that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that

inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* at 847. *See also* ***Gonzales v. Martinez***, 403 F.3d 1179, 1187 (10th Cir. 2005) ("First, Sheriff Salazar explicitly stated his Jail Administrator did not want to investigate allegations of problems at the Jail. Second, the evidence indicates the sheriff's consistent willingness to ignore inmate complaints by attributing them to attitudes of the complainants, characterizing them as 'troublemakers' or 'conjuring up' incidents to 'discredit' his deputies,' allowed him to excuse his failure to pursue the issues any further. Finally, and most astonishing, when first advised two visibly 'upset' female inmates accused two of his jailers of sexually assaulting them, he not only left the prisoners unprotected in the jail, but also in the custody and control of the very men accused of the assaults. When the women were removed for their protection, the decision to do so was not made by Sheriff Salazar, but by the District Attorney. None of this evidence is controverted, and its significance was seemingly ignored by the district court. Finally, we are constrained to note the district court misread *Farmer*, believing it required Ms. Gonzales to show Sheriff Salazar specifically knew Major Bob posed a substantial risk of harm to her. Rather, the *Farmer* Court noted a prison official could not escape liability by showing although 'he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault. . . . The undisputed evidence of the physical assaults on inmates set against the facts of Sheriff Salazar's knowledge of reported risks to inmate health or safety, including the documented lapse of security in the control room, complaints of sexual harassment and intimidation, Dominick's demotion for, as Sergeant Zudar characterized it, 'a combination of things,' as well as the presence in the record of Ms. Tefteller's letter, which she attested was handed to Major Bob, surely raise a reasonable inference that Sheriff Salazar knew of and disregarded an excessive risk to Ms. Gonzales."); ***Parrish ex rel Lee v. Cleveland***, 372 F.3d 294, 306, 307, 309 (4th Cir. 2004) ("In the absence of particularized evidence showing that the officers actually had training or experience with the TranZport Hood and therefore were familiar with the manner in which it fit and the uses for which it was designed, it is difficult to conclude that this particular risk was obvious to the officers. Finally, and most importantly, EMT Earl, a trained medical professional, observed the placement of Lee in the van with the spit mask over his head and expressed no concern . . . . While the EMT's presence by no means immunizes the officers from liability, the fact that a trained medical technician did not recognize the risk associated with transporting a handcuffed inebriated person wearing a spit mask strongly suggests that the risk was something less than obvious. . . .[W]e have noted that an officer's response to a perceived risk

must be more than merely negligent or simply unreasonable. . . If a negligent response were sufficient to show deliberate indifference, the Supreme Court's explicit decision in *Farmer* to incorporate the subjective recklessness standard of culpability from the criminal law would be effectively negated.. . . . Accordingly, where the evidence shows, at most, that an officer's response to a perceived substantial risk was unreasonable under the circumstances, a claim of deliberate indifference cannot succeed. [citing cases in support and in opposition] . . . . In short, the evidence shows that the officers took precautions that they believed (albeit erroneously) were sufficient to prevent the harm that befell Lee. There simply is no evidence in the record, in the form of contemporaneous statements or otherwise, to justify an inference that the officers subjectively recognized that their precautions would prove to be inadequate."); ***Greene v. Bowles***, 361 F.3d 290, 294 (6th Cir. 2004) ("[W]here a specific individual poses a risk to a large class of inmates, that risk can also support a finding of liability even where the particular prisoner at risk is not known in advance. . . . Greene has raised an issue of fact as to Warden Brigano's knowledge of a risk to her safety because of her status as a vulnerable inmate and because of Frezzell's status as a predatory inmate."); ***Taylor v. Michigan Dep't of Corrections***, 69 F.3d 76, 81 (6th Cir. 1995) ("*Farmer* makes it clear that the correct inquiry is whether he had knowledge about the substantial risk of serious harm to a particular class of persons, not whether he knew who the particular victim turned out to be.").

But see ***Greene v. Bowles***, 361 F.3d 290, 296, 297 (6th Cir. 2004) (Rogers, J., dissenting) ("The fact that Warden Brigano recognized the existence of certain risks attendant with the placement of certain categories of inmates in protective custody, however, does not amount to an awareness of a significant risk of harm to Greene's health or safety. The Eighth Amendment requires, instead, that a warden actually recognize a significant risk of harm arising from particular facts. While the majority properly states that, in some contexts, a particular victim, or a particular perpetrator, need not be known, general recognition of some risks is not enough. . . . The effect of the majority's opinion in this case is to impose an objective standard of deliberate indifference--a position explicitly rejected by the Supreme Court. . . Although a reasonable person may well have reached the conclusion based on this body of facts that Greene was in danger, the appropriate test is whether *Warden Brigano* reached the conclusion that Greene was in particular danger. Greene has clearly failed to establish a triable issue as to Warden Brigano's awareness in this case.").

See also ***Baker v. District of Columbia,*** 326 F.3d 1302, 1305, 1306, 1308 (D.C. Cir. 2003) ("On appeal, Baker . . . contends that the district court incorrectly analyzed his claim against the District of Columbia under *Monell* . . . . Essentially, he contends that the district court erred by confusing the 'deliberate indifference' required to find an underlying Eighth Amendment violation by the Virginia defendants, which does require subjective knowledge, with the 'deliberate indifference' required to find that the District of Columbia ignored the unconstitutional conduct of the Virginia prison officials to whom it had entrusted its prisoners, which only requires objective knowledge. He contends that under *Monell* he may state a claim against the District of Columbia based on a policy or custom without any analysis of the subjective state of mind of District of Columbia officials.The distinction between the two 'deliberate indifference' standards was drawn by the Supreme Court in *Collins* . . . . Accordingly, in considering whether a plaintiff has stated a claim for municipal liability, the district court must conduct a two-step inquiry . . . First, the court must determine whether the complaint states a claim for a predicate constitutional violation. . . Second, if so, then the court must determine whether the complaint states a claim that a custom or policy of the municipality caused the violation. . . [B]ecause the district court erred by applying a subjective standard to Baker's *Monell* claim and resolution of his claim against the District of Columbia may depend on additional pleadings and discovery in light of the records of the Virginia proceedings, we reverse and remand the case to the district court."); ***Gibson v. County of Washoe,*** 290 F.3d 1175, 1188 n.8 (9th Cir. 2002) ("Because the Eighth Amendment's deliberate indifference standard looks to the subjective mental state of the person charged with violating a detainee's right to medical treatment, it--somewhat confusingly--differs from the *Canton* deliberate indifference standard, which we also apply in this opinion. The *Canton* deliberate indifference standard does not 'turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation;' instead it is used to determine when a municipality's omissions expose it to liability for the federal torts committed by its employees. . . As opposed to the *Farmer* standard, which does not impose liability unless a person has actual notice of conditions that pose a substantial risk of serious harm, the *Canton* standard assigns liability even when a municipality has constructive notice that it needs to remedy its omissions in order to avoid violations of constitutional rights."); ***Marsh v. Butler County,*** 268 F.3d 1014, 1028 (11th Cir. 2001) (en banc) ("We accept that conditions in a jail facility that allow prisoners ready access to weapons, fail to provide an ability to lock down inmates, and fail to allow for surveillance of inmates pose a substantial risk of serious harm to inmates. In addition, Plaintiffs' allegations that the County received

many reports of the conditions but took no remedial measures is sufficient to allege deliberate indifference to the substantial risk of serious harm faced by inmates in the Jail."); ***Marsh v. Butler County,*** 268 F.3d 1014, 1036 n.17 (11th Cir. 2001) (en banc) ("In considering the Sheriff's potential personal liability as a policymaker, we have looked at decisions involving the liability of local governments as policymakers. The local government precedents are not directly on point. The reason is that the standard for imposing policymaker liability on a local government is more favorable to plaintiffs than is the standard for imposing policymaker liability on a Sheriff or other jail official in his personal capacity in a case like this one. [citing *Farmer*] Still, the local government cases can guide us by analogy; if a local government would not be liable as a policymaker *a fortiori* there is no personal liability."); ***Doe v. Washington County***, 150 F.3d 920, 923 (8th Cir. 1998) (noting that "the Court has not directly addressed the question of how *Monell*'s standard for municipal liability meshes with *Farmer*'s requirement of subjective knowledge."); ***Simmons v. Bd of County Commissioners for Jackson County***, No. CIV-06-79-F, 2006 WL 3611821, at *5, *6 (W.D. Okla. Dec. 11, 2006) ("The plaintiff asserts that her claims against Jackson County may be established without recourse to the second, subjective prong of the deliberate indifference test. She cites *Berry v. City of Muskogee, Okl.*, 900 F.2d 1489, 1498 (10th Cir.1990), for the proposition that only the objective prong is relevant when a plaintiff seeks to hold a municipality liable for constitutional violations under §1983. It appears the plaintiff may understandably confuse the deliberate indifference test set forth in *Farmer v. Brennan*, 511 U.S. 825 (1994), for establishing Eighth Amendment (or in this instance Fourteenth Amendment) violations, and the deliberate indifference test set forth in *Canton* for establishing a municipality's § 1983 liability for the constitutional violations of its agents and employees. . . . The objective *Canton* test is only implicated in this case only to the extent that the plaintiff seeks to hold Jackson County liable for the conduct of the jail's non-policy making employees. To the extent that she is seeking to hold Jackson County liable for Sheriff Roberts' official acts, it is well established that such acts are binding upon the county. . . If a jury determines that Sheriff Roberts was responsible for policies or customs evidencing deliberate indifference to jail inmates' serious medical needs, his deliberate indifference may be attributed to Jackson County. . . The defendants' argument that the Board of County Commissioners cannot be held liable absent a showing that its members themselves acted with deliberate indifference is without merit. Before the plaintiff can establish Jackson County's liability for the official acts of Sheriff Roberts, she must first establish that Sheriff Roberts was deliberately indifferent to Ms. Biddy's serious medical needs and this requires that she satisfy not only the objective prong of the Farmer test, but also its

subjective prong. As discussed above, the court concludes that the plaintiff's evidence that Sheriff Roberts maintained policies and customs subjecting inmates to unconstitutional delays of medical care and failed to train jail personnel to recognize emergency medical conditions raises genuine issues of material fact with regard to the subjective prong of the deliberate indifference test.") Because numerous material factual issues remain to be resolved by the trier of fact, including issues regarding the extent to which the jail's alleged failure to provide timely medical attention actually caused the harm suffered by Ms. Biddy, summary judgment in the plaintiff's favor must be denied."); ***Ginest v. Bd. of County Commissioners of Carbon County***, 333 F.Supp.2d 1190, 1204 (D. Wyo. 2004) A difference exists, however, regarding *burden of proof* in those Eighth Amendment cases where, as here, the plaintiffs claim that their rights were violated due to a supervisor's failure to train subordinates. In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court held that the 'deliberate indifference' test to determine municipal liability differs from the one applicable in individual liability cases; in municipal liability cases, there is no subjective component, and the plaintiff need only show an objective risk of injury and a failure to train. . . . In short, to win their case against Sheriff Colson, the plaintiffs need to show both an objective risk of substantial harm and subjective intent--on a par with criminal recklessness--to cause injury. To win their claim against Carbon County, however, the plaintiffs need only to show an objective risk of substantial harm and the Sheriff's failure to train staff in how to reasonably address and abate that risk."); ***Vinson v. Clarke County***, 10 F. Supp.2d 1282, 1300 (S.D. Ala. 1998) ("As a preliminary matter, it is important to note that the court's inquiry into defendant Clarke County's alleged deliberate indifference cannot take the form of the traditional, subjective analysis as established in the governing case law. . . .Proving such subjective awareness on the part of a governmental entity is not practical, and, therefore, it is necessary to apply a more awkward objective analysis to the deliberate indifference factor. . . . . Under this objective approach to deliberate indifference, the court must consider whether the substantial risks associated with unreasonably unsafe conditions of confinement were 'so obvious' that the county's policymakers 'can reasonably be said to have been deliberately indifferent to the need.'[citing *Canton*]"); ***Earrey v. Chickasaw County***, 965 F. Supp. 870, 877 (N.D. Miss. 1997) ("The actions of governmental officials, who are fully capable of subjective deliberate indifference, serve as the basis of governmental liability for Eighth Amendment violations. While the governmental entity may only need be shown to be objectively deliberately indifferent to the known or obvious consequences of a custom or policy which does not itself violate federal law, it cannot be held liable unless the plaintiff shows that a constitutional violation has in fact occurred. In the Eighth Amendment

context, in order for a violation to occur, a prison official must know 'that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it.'"); ***Lowrance v. Coughlin***, 862 F. Supp. 1090, 1115 (S.D.N.Y. 1994) ("Adopting a subjective standard, the Court in *Farmer* held that a prison official may be held liable under the Eighth Amendment for acting with deliberate indifference to prisoner health or safety only if the official has actual knowledge that the prisoner faced a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. . .The *Farmer* Court was careful to explain that this result was not inconsistent with the objective standard applied in [*City of Canton*] . . . . Under the objective test, municipal liability attaches when policymakers have actual or constructive notice of the constitutional violation.").

See generally the lengthy discussion of the "deliberate indifference" standard in ***Paiva v. City of Reno***, 939 F. Supp. 1474, 1494 n.27 (D.Nev. 1996):

> The ongoing judicial struggle to explain the concept of deliberate indifference has produced intolerable confusion, the words "reckless," "conscious," "willful," and "negligent" being defined only recursively. This infinitely regressive process, with which this court has previously expressed its exasperation, *Dorris v. County of Washoe*, 885 F.Supp. 1383, 1386 n. 3 (D.Nev.1995) (Reed, J.), adds nothing to our understanding of the words which are our crude attempts to convey complex and subtle ideas. [citing cases] Effective communication requires some consensus as to the meaning of the words we use. The Model Penal Code, while perhaps not the model of clarity, at least approaches a useful differentiation between the various states of mind upon which our legal system relies: To act "purposely" requires the actor to envision some objective, and to act intending to achieve that objective or accomplish some result; to act "knowingly" requires an awareness by the actor of the nature and therefore the probable consequences of her conduct, or certainty as to the result of that conduct; to act "recklessly" requires an awareness by the actor of some unacceptably grave risk of injury entailed by her conduct and a decision to proceed despite her awareness of the existence of such a risk; to act "negligently requires a normative judgment by the community that the actor should have been aware of the unacceptably grave risk entailed by her conduct. Model Penal

Code s 2.02(2) (Proposed Official Draft 1962). Although at first glance the concept of "deliberate indifference" seems to embody most of the same requirements as the Model Penal Code's "recklessness," the words chosen by Mr. Justice White, writing for the Supreme Court in *City of Canton v. Harris*, appear explicitly to reject a requirement of subjective awareness of the risk encountered by the defendant. . . To whom must the risk be "so obvious?" By whom may it "reasonably be said" that the defendant acted recklessly, or with conscious disregard for a known risk, or with deliberate indifference to the constitutional risks encountered? This is the language of negligence, requiring proof not that the defendant actually knew of the risk, but only that she "must have been aware of it." *Davis v. Macon County*, 927 F.2d 1473, 1482 (9th Cir.1991). Whether denominated "deliberate indifference," "conscious disregard," "recklessness," or "gross negligence," the concept is the same: In some situations, civil rights plaintiffs will not have to show subjective awareness by the defendant of the risk encountered; it is enough if the community, as represented by a jury, determines that the defendant's failure to apprise herself of the nature and degree of the risk to be encountered was itself so unacceptable as to justify the imposition of Section 1983 liability. The *Harris* Court itself approved the imposition of supervisory liability where, for example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons [and have] armed [their] officers with firearms. Thus, the need to train officers in the constitutional limitations on the use of deadly force ... can be said to be 'so obvious' that failure to do so could be properly characterized as 'deliberate indifference' to constitutional rights." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 n. 10 (1989). There exists a sharp distinction between *Harris*' "constructive notice" basis for local government liability in the context of a failure to train claim and, for example, the requirement of some subjective awareness of a particular risk of constitutional injury in the context of a claim of deliberate indifference by prison officials to harm inflicted on inmates by other inmates. The Supreme Court itself recognized the distinction in *Farmer v. Brennan*. . . .

See also ***West by and through Norris v. Waymire***, 114 F.3d 646, 651 (7th Cir. 1997) ("[*Board of County Commissioners v.*] *Brown* suggests as we have seen that a deliberate choice to avoid an obvious danger (or 'plainly obvious,' as the Court put it, no doubt for emphasis, 117 S. Ct. at 1392) is actionable under 42 U.S.C. § 1983 if the choice results in harm to a protected interest, even though the defendant obtusely lacks actual knowledge of the danger. Granted, there may be less here than meets the eye. The difference between a 'plainly obvious' and an actually known danger--the critical difference between the criminal and tort standards of recklessness--may have little significance in practice, given the difficulty of peering into minds, especially when the 'person' whose mind would have to be plumbed is an institution rather than an individual.").

NOTE: There is some question as to what standard applies in Fourteenth Amendment contexts involving pretrial detainees. *See, e.g.,* ***Butler v. Fletcher***, 465 F.3d 340, 343, 344 (8th Cir. 2006) ("On appeal, relying on *Bell v. Wolfish*, 441 U.S. 520 (1979), Butler primarily argues that the district court erred in applying the Eighth Amendment standard of deliberate indifference because, as a pretrial detainee, Butler was protected by the Fourteenth Amendment's guarantee of substantive due process. . . . After *Bell* noted the difference between Substantive Due Process and Eighth Amendment protections, we have recognized it is an open question but have repeatedly applied the deliberate indifference standard of *Estelle* to pretrial detainee claims that prison officials unconstitutionally ignored a serious medical need or failed to protect the detainee from a serious risk of harm. . . Later Supreme Court decisions, while not resolving the issue, are consistent with this approach. . . . . [W]e hold that deliberate indifference is the appropriate standard of culpability for all claims that prison officials failed to provide pretrial detainees with adequate food, clothing, shelter, medical care, and reasonable safety."); ***Hubbard v. Taylor,*** 399 F.3d 150, 166 (3d Cir. 2005) ("The district court then erred in concluding that 'pretrial detainees are afforded essentially the same protection as convicted prisoners and that an Eighth Amendment analysis is appropriate for determining if the conditions of confinement rise to the level of a constitutional violation.'. . . The district court's error is understandable given our discussion in *Kost.* There, we were discussing medical and nonmedical conditions of confinement. Although we specifically stated that the Eighth Amendment provided a floor for our due process inquiry into the medical and nonmedical issues, much of our discussion focused on whether the plaintiffs had established the 'deliberate indifference' that is the hallmark of cruel and unusual punishment under the Eighth Amendment. . . Moreover, we failed to cite *Bell v. Wolfish* which, as we have explained, distinguishes between pretrial detainees'

protection from 'punishment' under the Fourteenth Amendment, and convicted inmates' protection from punishment that is 'cruel and unusual' under the Eighth Amendment. . . Nevertheless, it is clear that plaintiffs here 'are not within the ambit of the Eighth Amendment['s],' prohibition against cruel and unusual *punishment*. . . They are not yet at a stage of the criminal process where they can be punished because they have not as yet been convicted of anything. As the Supreme Court explained in *Bell,* pre-trial detainees cannot be punished at all under the Due Process Clause."); ***Board v. Farnham***, 394 F.3d 469, 478 (7th Cir. 2005) ("[W]e have found it convenient and entirely appropriate to apply the same standard to claims arising under the Fourteenth Amendment (detainees) and Eighth Amendment (convicted prisoners) 'without differentiation.'"); ***A.M. v. Luzerne County Juvenile Detention Center,*** 372 F.3d 572, 584 (3d Cir. 2004) ("Given his status as a detainee, A.M. maintains his claims must be assessed under the Fourteenth Amendment. We do not dispute that A.M.'s claims are appropriately analyzed under the Fourteenth Amendment since he was a detainee and not a convicted prisoner. However, the contours of a state's due process obligations to detainees with respect to medical care have not been defined by the Supreme Court. . . Yet, it is clear that detainees are entitled to no less protection than a convicted prisoner is entitled to under the Eighth Amendment."); ***Gibson v. County of Washoe,*** 290 F.3d 1175, 1189 n.9 (9th Cir. 2002) ("It is quite possible, therefore, that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment."); ***Patten v. Nichols,*** 274 F.3d 829, 834 (4th Cir. 2001) ("As to denial-of-medical-care claims asserted by pre-trial detainees, whose claims arise under the Fourteenth Amendment rather than the Eighth Amendment, the Supreme Court has yet to decide what standard should govern, thus far observing only that the Fourteenth Amendment rights of pre-trial detainees 'are at least as great as the Eighth Amendment protections available to a convicted prisoner.'"); ***Leialoha v. MacDonald***, Civ. No. 07-00218 ACK-KSC, 2008 W L 2736020, at *6, *7 (D.Hawaii July 11, 2008) ("[T]he Court finds that the concept of 'seizure,' as articulated by the Fourth Amendment, is not so expansive as to cover post-arraignment detention. The Court is not alone in declining to interpret *Gibson* as applying Fourth Amendment protections to post-arraignment detainees. . . .This was not a situation in which an officer allegedly used excessive force during an arrest or immediately thereafter. This was a situation in which a convicted felon violated his parole, was arraigned on new charges, and attempted escape. . . Thus, the Court finds that Decedent, a convicted felon and a post-arraignment detainee, is not afforded Fourth Amendment protections. Accordingly, the Court must determine whether the Fourteenth or Eighth Amendment applies. While on the one hand

Decedent was a post-arraignment detainee; on the other hand he was a convicted felon still serving his sentence on parole. . . .Because Decedent was still serving his sentence as a convicted felon, the Court finds that he was only entitled to the protections of the Eighth Amendment."); ***Henderson v. City and County of San Francisco,*** 2007 WL 2778682, at *2 (N.D. Cal. Sept.21, 2007) ("In articulating the contours of the due process protections against excessive force for post-arraignment pretrial detainees, this Court considers that after a court has found an individual to be legally in custody based on probable cause for arrest, the seizure which commenced incident to arrest has terminated. Moreover, once lawful custody has begun, the government's potential interest in using force takes on greater salience. . . . While a pretrial detainee may not be punished for any alleged crime prior to conviction for that crime, a pretrial detainee may be subject to the use of force for purposes other than punishment for the crime charged. . . .Punishment in the constitutional sense refers to the imposition of penalties for an alleged crime. In the context of detention prior to trial, a custodial authority may impose restrictions or even use force on a detainee in ways that are used in the detention facility to maintain safety and order--'legitimate governmental objectives' justifying restraints on pretrial detainees. . . . Such force may be lawful, so long as it is used to maintain safety and order and not to punish--in the Eighth Amendment sense--the detainee for the alleged crime giving rise to the justification for custody. . . . This Court finds that the same general parameters for the use of force in a post-conviction context apply in the pretrial context, with the additional provisio that force in the pretrial context may not be used as a form of punishment for the alleged crime. . . . To the extent that the use of force is acceptable, it must further the jail's interest in order and security or its interest in the safety of inmates, custodians, or visitors."); ***Dickinson v. Purinton***, 2007 WL 2343650, at **2 -4 (D.Me. Aug. 3, 2007) ("After further review of the applicable precedents, and building on both my exploration of the question in *Clarke* and Judge Hornby's newly minted pattern instruction, I conclude that the standard to apply must include both the intent to punish and an objective evaluation of the reasonableness of the conduct. I will follow the standard for restrictions and conditions claims by a pre-trial detainees outlined in *O'Connor v. Huard,* 117 F.3d 12 (1st Cir.1997), a case that heretofore flew under my radar screen, and apply it to this claim of excessive force. . . .[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate government objective, it does not, without more, amount to 'punishment.' Conversely, if a restriction or condition is not reasonably related to a legitimate goal-if it is arbitrary or purposeless-a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.").

See also ***Cotton v. County of Santa Barbara***, No. 06-560792008, 2008 WL 2812581, at *3 n.1 (9th Cir. July 22, 2008) (Tallman, J., dissenting) ("The majority's citation to *Graham*, 490 U.S. at 399 n. 11, in an attempt to argue that officers in this case had a duty to use less force simply because Cotton was in custody is misleading. First, I cite to *Whitley* for the unremarkable proposition that the custodial setting raises considerations not accounted for by the *Graham* factors. Nothing in *Graham* undermines that statement. In the footnote cited by the majority, the Supreme Court explained why its endorsement of Judge Friendly's partially subjective test in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.1973), was limited to the Eighth Amendment context and did not extend to an excessive force analysis under the Fourth Amendment. Our court's holding that the Fourth Amendment sets the applicable standards for an excessive force claim raised by a pretrial detainee, *see Gibson*, 290 F.3d at 1197, does not mandate that we turn a blind eye to the volatile conditions inherent in custodial settings, particularly when dealing with a mentally ill, violent offender who refused to comply with lawful directives of the jailers. The importance of maintaining institutional security should be a significant factor we consider in determining whether the officer's actions were objectively reasonable.").

Compare ***Hare v. City of Corinth***, 74 F.3d 633, 643 (5th Cir. 1996) (en banc) (concluding that "a state jail official's constitutional liability to pretrial detainees for episodic acts or omissions should be measured by a standard of subjective deliberate indifference as enunciated by the Supreme Court in *Farmer*.") *with* ***Neely v. Feinstein***, 50 F.3d 1502, 1508 (9th Cir. 1995) ("[O]ur Fourteenth Amendment jurisprudence has never required officials to have a subjective awareness of the risk of harm in order to be deemed 'deliberately indifferent.'"). *But see* ***L.W. v. Grubbs*** (**L.W. II**), 92 F.3d 894, 897 (9th Cir. 1996) ("While *Neely* can be distinguished on its facts from the present case, its language (which was not necessary to the decision) is either incorrect to the extent that it approves the gross negligence standard, or it must be limited to the claims of inmate plaintiffs injured because of a miscarriage of the 'professional judgment of a [government] hospital official' in the context of a captive plaintiff."). *See also* ***Anderson v. Dallas County Texas***, No. 07-10589, 2008 WL 2645657, at **8-10, *12 (5th Cir. July 7, 2008) ("The plaintiffs admit that the defendant had policies in place that, if followed, would have prevented Baines's suicide. Fundamentally, the plaintiffs assert that Baines would not have been able to commit suicide if suicide precautions had been enacted in accordance with Jail policy. The plaintiffs ultimately take issue with the DSOs' and physician assistants' failure to follow those policies and procedures. This is a classic episodic-act-or-omission case. . . . Because the plaintiffs cannot prove that Baines

was subjected to cruel and unusual punishment without first proving that a state actor deprived him of his constitutional rights, the plaintiffs' case is an episodic-act-or-omission case [not a conditions of confinement case]. To establish county liability for a failure to protect under an episodic-act-or-omission theory, a plaintiff must show that: (1) a county employee violated his clearly established constitutional rights with subjective deliberate indifference; and (2) the violation resulted from a county policy or custom adopted or maintained with objective deliberate indifference. . . . If a plaintiff is unable to show that a county employee acted with subjective deliberate indifference, the county cannot be held liable for an episodic act or omission. . . Even if an officer acted with subjective deliberate indifference, however, the plaintiff must still show that the county employee's act resulted from a county policy adopted or maintained with objective deliberate indifference to the inmate's rights. . . .The failure to fully staff the Jail, even if true, cannot be said to be the reason CPR was not performed because the undisputed facts show that medical officials promptly responded to the discovery of Baines. The only theory that might be connected is the failure to train adequately Jail officials, but there is no evidence in the record indicating that Jail officials failed to perform CPR due to inadequate training. Nor is there evidence in the record that the defendant should have known that its training inadequately instructed its employees either how or when to perform CPR on inmates.").

See also ***Richman v. Sheahan,*** 512 F.3d 876, 882, 883 (7th Cir. 2008) ("But can a Fourth Amendment and an Eighth Amendment claim of excessive force be raised in the same case? Often no. If you are beaten to a pulp before you are convicted, your remedy is under the Fourth Amendment; after, under the Eighth Amendment. But when as in this case it is uncertain whether the act complained of is punishment, deciding which remedy is available must wait upon the determination of the facts. If the officers were removing Jack Richman from the courtroom because he refused to leave under his own steam, the Fourth Amendment governs; if they were punishing him for his contempt of court (an inference for which there is some evidence, as we have just seen), the Eighth."); ***Wever v. Lincoln County, Nebraska***, 388 F.3d 601, 606 n.6 (8th Cir. 2004) ("While *Yellow Horse* involved an Eighth Amendment claim, it is well established that pretrial detainees such as Wever are 'accorded the due process protections of the Fourteenth Amendment, protections "at least as great" as those the Eighth Amendment affords a convicted prisoner.' *Boswell v. Sherburne County*, 849 F.2d 1117, 1121 (8th Cir.1988). We have previously suggested that the burden of showing a constitutional violation is lighter for a pretrial detainee under the Fourteenth Amendment than for a post-conviction prisoner under

the Eighth Amendment. *Smith v. Copeland,*87 F.3d 265, 268 n. 4 (8th Cir.1996)."); ***Oregon Advocacy Center v. Mink****,* 322 F.3d 1101, 1121 (9th Cir.2003) (holding that "the substantive due process rights of incapacitated criminal defendants are not governed solely by the deliberate indifference standard"); ***Patten v. Nichols,*** 274 F.3d 829, 841, 842 (4th Cir. 2001) ("[E]ven though pre-trial detainees and involuntarily committed patients both look to the Fourteenth Amendment for protection and neither group may be punished (in the Eighth Amendment sense), it can hardly be said that the groups are similarly situated. The differences in the purposes for which the groups are confined and the nature of the confinement itself are more than enough to warrant treating their denial-of-medical-care claims under different standards . . . . We therefore conclude that denial-of-medical-care claims asserted by involuntarily committed psychiatric patients must be measured under *Youngberg*'s 'professional judgment' standard."); ***Davis v. Rennie,*** 264 F.3d 86, 99, 100, 108 (1st Cir. 2001) ("[T]here is precedent for subjecting the conduct of a mental health worker to a more exacting standard than that of a prison guard controlling a riot or a police officer chasing a fleeing car. . . . Davis was in the state's custody because of mental illness, not culpable conduct, and the trial court's decision to reject the "shocks the conscience" standard is consistent with this distinction. [citing *Andrews v. Neer*] We agree . . . with the Eighth Circuit that the usual standard for an excessive force claim brought by an involuntarily committed mental patient is whether the force used was 'objectively reasonable' under all the circumstances."); ***Andrews v. Neer***, 253 F.3d 1052, 1060, 1061 (8th Cir. 2001) ("This Circuit has not addressed the constitutional standard applicable to § 1983 excessive-force claims in the context of involuntarily committed state hospital patients. In other situations in which excessive force is alleged by a person in custody, the constitutional standard applied may vary depending upon whether the victim is an arrestee, a pretrial detainee, or a convicted inmate of a penal institution. If the victim is an arrestee, the Fourth Amendment's 'objective reasonableness' standard controls.. . . The evaluation of excessive-force claims brought by pre-trial detainees, although grounded in the Fifth and Fourteenth Amendments rather than the Fourth Amendment, also relies on an objective reasonableness standard. . . .Excessive-force claims brought by prisoners fall under the protections provided by the Eighth Amendment's prohibition of cruel and unusual punishment. . . . Andrews's excessive force claim does not fit neatly into an analysis based on status as an arrestee, a pre-trial detainee, or a prisoner. Bobby Andrews was held in Fulton after having been found not guilty of murder by reason of insanity, and thus he was not a 'prisoner' subject to punishment. . .The Eighth Amendment excessive-force standard provides too little protection to a person whom the state is not allowed to punish. On the other hand, the state of Missouri was

entitled to hold Bobby Andrews in custody. His confinement in a state institution raised concerns similar to those raised by the housing of pretrial detainees, such as the legitimate institutional interest in the safety and security of guards and other individuals in the facility, order within the facility, and the efficiency of the facility's operations. . . Accordingly, we conclude that Andrews's excessive-force claim should be evaluated under the objective reasonableness standard usually applied to excessive-force claims brought by pretrial detainees. "); ***Fuentes v. Wagner***, 206 F.3d 335, 347, 348 (3d Cir. 2000) ("[W]e hold that the Eighth Amendment cruel and unusual punishments standards found in *Whitley v. Albers* . . . and *Hudson v. McMillian* . . . apply to a pretrial detainee's excessive force claim arising in the context of a prison disturbance. We can draw no logical or practical distinction between a prison disturbance involving pretrial detainees, convicted but unsentenced inmates, or sentenced inmates. Nor can prison guards be expected to draw such precise distinctions between classes of inmates when those guards are trying to stop a prison disturbance."); ***United States v. Walsh***, 194 F.3d 37, 48 (2d Cir. 1999) ("Because all excessive force claims in the prison context are qualified, . . . we conclude that the *Hudson* analysis is applicable to excessive force claims brought under the Fourteenth Amendment as well."); ***Tesch v. County of Green Lake***, 157 F.3d 465, 474 (7th Cir. 1998) ("[T]he Supreme Court and this Court have applied the *Bell* test to analyze constitutional attacks on the general practices, rules, and restrictions of pretrial confinement. . . . However, a second line of cases exists which establishes a different state of mind standard from the *Bell* test when the State denies a pretrial detainee his basic human necessities. Since *Archie v. City of Racine*, 847 F.2d 1211, 1218-19 (7th Cir.1988) (en banc), we have required plaintiffs to establish that officials acted intentionally or in a criminally reckless manner in order to sustain a substantive due process claim for their specific acts or failures to act. Under the alternative description 'deliberate indifference,' we have required plaintiffs to establish that a jail official acted with this level of intent in relation to a pretrial detainee's need for medical care, . . . risk of suicide, . . . risk of harm from other inmates, . . . and need for food and shelter."); ***Scott v. Moore***, 114 F.3d 51, 53-55 (5th Cir. 1997) (en banc) ("In an 'episodic act or omission' case, an actor usually is interposed between the detainee and the municipality, such that the detainee complains first of a particular act of, or omission by, the actor and then points derivatively to a policy, custom, or rule (or lack thereof) of the municipality that permitted or caused the act or omission. Although, in her amended state petition, Scott complains generally of inadequate staffing, . . . the actual harm of which she complains is the sexual assaults committed by Moore during the one eight-hour shift--an episodic event perpetrated by an actor interposed between Scott and the city,

but allegedly caused or permitted by the aforesaid general conditions. . . . [A]s to the discrete, episodic act, the detainee must establish only that the constitutional violation complained of was done with subjective deliberate indifference to that detainee's constitutional rights. . . In the instant case, Scott has met that burden. Accordingly, we next must determine whether the city may be held accountable for that violation. Under *Hare*, as we have stated, this latter burden may be met by putting forth facts sufficient to demonstrate that the predicate episodic act or omission resulted from a municipal custom, rule, or policy adopted or maintained with objective deliberate indifference to the detainee's constitutional rights. . . . At best, the evidence proffered by Scott may be construed to suggest that the jail could have been managed better, or that the city lacked sufficient prescience to anticipate that a well-trained jailer would, without warning, assault a female detainee. In either event, they do not reflect objective deliberate indifference to Scott's constitutional rights."); ***Clarke v. Blais***, Civil No. 05-177-P-H, 2006 WL 3691478, at *7 & n.7 (D. Me. Dec. 12, 2006) ("Assuming the objective reasonableness standard [footnote omitted] of the Supreme Court precedent extends to claims involving the use of force to control a perceived threat or an outburst by a pretrial detainee, at least where the disturbance is limited to conduct on the part of the pretrial detainee acting alone and not part of a general prison riot, I conclude Clarke has not presented sufficient evidence to survive summary judgment. . . . This approach has not been universally adopted by the circuit courts of appeals, at least three of which have imposed the malicious and sadistic standard to claims of excessive force brought by pretrial detainees where the force was used to suppress a 'disturbance.'[citing cases from 3d, 4th and 5th Circuits] Some courts treat denial of medical care claims the same under either the Eighth Amendment or the Fourteenth Amendment regardless of whether the claimant is a pretrial detainee or an inmate serving a sentence of incarceration. . . . Conceivably, the subjective component might be lowered when it comes to the medical needs of a pretrial detainee. . . However, it does not appear that the objective component would be lowered for pretrial detainees; they would still need to demonstrate the existence of a 'serious' medical need."); ***Guerts v. Piccinni,*** No. C 00-3588 PJH (PR), 2002 WL 467709, at *4 (N.D.Cal. March 25, 2002) (not reported) ("Several circuits have held that the *Hudson* analysis also applies to excessive force claims brought by pretrial detainees under the Fourteenth Amendment. [citing cases] Although the Ninth Circuit has not addressed the issue, it has used the Eighth Amendment as a benchmark for evaluating claims brought by pretrial detainees. . . The court need not resolve the question of whether the *Hudson* standard also applies when considering an excessive force due process claim brought by a pretrial detainee. The actions of defendants were reasonably related to the facility's interest in

maintaining jail security, and given plaintiff's agitated condition and refusal to comply with orders to stand still, were not an excessive response. Defendants' actions hence did not constitute 'punishment' in the Fourteenth Amendment sense. They certainly did not rise to the level of malicious and sadistic actions taken for the purpose of causing harm, the *Hudson* standard."); ***Thornhill v. Breazeale***, 88 F. Supp.2d 647, 651 (S.D. Miss. 2000) ("Through a long line of cases involving both convicted prisoners and pretrial detainees, the Fifth Circuit has fashioned two different standards of care that the State owes to a pretrial detainee. A Section 1983 challenge of a jail official's episodic acts or omissions evokes the application of one standard while a challenge of the general conditions, practices, rules, or restrictions of pretrial confinement evokes another. . . A jailer's constitutional liability to a pretrial detainee for episodic acts or omissions is measured by a standard of deliberate indifference. . . Constitutional attacks on general conditions, practices, rules, or restrictions, otherwise known as jail condition cases, are subject to the *Bell* test which is premised on a reasonable relationship between the condition, practice, rule, or restriction and a legitimate governmental interest.").

See also ***Jones v. Blanas,*** 393 F.3d 918, 931-34 (9th Cir. 2004) ("Jones claims that Blanas and the County violated his substantive due process rights by confining him for a year among the general criminal inmate population of the Sacramento County Jail and for another year in T-Sep, an administrative segregation unit where Jones experienced substantially more restrictive conditions than those prevailing in the Main Jail. While in T-Sep, Jones was afforded substantially less exercise time, phone and visiting privileges, and out-of-cell time than inmates in the general population. Jones was completely cut off from recreational activities, religious services, and physical access to the law library. Jones continued to be subjected to strip searches during this time. . . . Though it purported to analyze Jones's conditions of confinement claim under the Fourteenth Amendment, the district court actually applied the standards that govern a claim of cruel and unusual punishment under the Eighth Amendment. The court mistook the amendment that was to be applied. . . . The case of the individual confined awaiting civil commitment proceedings implicates the intersection between two distinct Fourteenth Amendment imperatives. First, '[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.' *Youngberg,* 457 U.S. at 321-22. Second, when the state detains an individual on a criminal charge, that person, unlike a criminal convict, 'may not be *punished* prior to an adjudication of guilt in accordance with due process of law.' *Bell,* 441 U.S. at 535 (emphasis

added). . . As civil detainees retain greater liberty protections than individuals detained under criminal process, *see Youngberg,* 457 U.S. at 321-24, and pre-adjudication detainees retain greater liberty protections than convicted ones, *see Bell,* 441 U.S. at 535-36, it stands to reason that an individual detained awaiting civil commitment proceedings is entitled to protections at least as great as those afforded to a civilly committed individual and at least as great as those afforded to an individual accused but not convicted of a crime. . . . In addition to comparing the conditions of confinement of pre-adjudication *civil* detainees to those of pre-trial *criminal* detainees, it is also relevant to compare confinement conditions of civil detainees *pre-adjudication* to conditions *post-commitment.* As the Eleventh Circuit has persuasively reasoned, '[i]f pretrial detainees cannot be punished because they have not yet been convicted, [citing *Bell*], then [civil] detainees cannot be subjected to conditions of confinement substantially worse than they would face upon commitment.' *Lynch,* 744 F.2d at 1461. Or, to put it more colorfully, purgatory cannot be worse than hell. Therefore when an individual awaiting SVPA adjudication is detained under conditions more restrictive than those the individual would face following SVPA commitment, we presume the treatment is punitive. . . . In sum, a civil detainee awaiting adjudication is entitled to conditions of confinement that are not punitive. . . . With respect to an individual confined awaiting adjudication under civil process, a presumption of punitive conditions arises where the individual is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held, or where the individual is detained under conditions more restrictive than those he or she would face upon commitment. Finally, to prevail on a Fourteenth Amendment claim regarding conditions of confinement, the confined individual need not prove 'deliberate indifference' on the part of government officials.").

There is also some disagreement among the Circuits as to when the Fourth Amendment or arrest context ends and the Fourteenth Amendment pre-trial detainee context begins. *See e.g.,* ***Orem v. Rephann***, 523 F.3d 442, 445, 446 (4th Cir. 2008) ("Here, the district court analyzed Orem's claim that Deputy Rephann used excessive force under the Fourth Amendment's 'objective reasonableness standard.' However, we have made clear that Fourth Amendment protections do not extend to arrestees or pretrial detainees. *Riley v. Dorton*, 115 F.3d 1159 (4th Cir.1997) (*en banc*). Indeed, in *Riley*, we held that '[t]he Fourth Amendment [only] governs claims of excessive force during the course of an arrest, investigatory stop, or other'seizure' of a person.'. . Whereas, 'excessive force claims of a pretrial detainee [or arrestee] are governed by the Due Process Clause of the Fourteenth Amendment.'. . The point

at which Fourth Amendment protections end and Fourteenth Amendment protections begin is often murky. But here, Orem's excessive force claim arises during her transport to EJR, after she was arrested. While she had not been formally charged, her status as an arrestee requires application of the Fourteenth Amendment to her claim. The district court erred in applying the Fourth Amendment."); ***Williams v. Rodriguez***, 509 F.3d 392, 402, 403 (7th Cir. 2007) ("Although Williams's deliberate indifference claim fails under the Fourteenth Amendment analysis, it is worth noting that while this suit was before the district court, this court recognized in *Lopez v. City of Chicago* that the Fourteenth Amendment's due process protections only apply to a pretrial detainee's confinement conditions after he has received a judicial determination of probable cause. *Lopez v. City of Chicago*, 464 F.3d 711, 719 (7th Cir.2006). Claims regarding conditions of confinement for pretrial detainees such as *Williams*, who have not yet had a judicial determination of probable cause (a *Gerstein* hearing), are instead governed by the Fourth Amendment and its objectively unreasonable standard. . . . The *Lopez* decision came out nearly two months before the district court granted defendants' summary judgment motion in this case, and *Williams* has waived any Fourth Amendment claim by failing to amend or supplement his motion for summary judgment or raise the issue on appeal Without offering any opinion as to whether Williams's deliberate indifference claim would have been successful under a Fourth Amendment analysis, we do note that the deliberate indifference standard under the Eighth and Fourteenth Amendments requires a higher showing on a plaintiff's part than is necessary to prove an officer's conduct was 'objectively unreasonable under the circumstances.' . . . What is 'objectively unreasonable' in the context of a medical needs case has been further clarified by this court in *Sides v. City of Champaign*, 496 F.3d 820 (7th Cir.2007). In that case, the plaintiff was ordered out of his vehicle by police and made to stand against the fender of his car, which was hot, on a ninety degree day for approximately one hour. . . This led the plaintiff to complain to the officers of dizziness, dehydration, and soreness, but the officers did not permit the plaintiff to move. . . The reasoning underlying this court's determination that the officers did not violate the plaintiff's Fourth Amendment rights implicitly identified four factors that are relevant for ascertaining whether a defendant's conduct was objectively unreasonable. . . The first is that the officer be given notice of the arrestee's medical need, whether by word as occurred in *Sides*, or through observation of the arrestee's physical symptoms. . . Second, the court in *Sides* considered the seriousness of the medical need, in that case noting that the plaintiff's complaints were not accompanied by any physical symptoms. . . The severity of the medical condition under this standard need not, on its own, rise to the level of objective seriousness required under the Eighth and

Fourteenth Amendment. Instead, the Fourth Amendment's reasonableness analysis operates on a sliding scale, balancing the seriousness of the medical need with the third factor--the scope of the requested treatment. In *Sides* for example, the court noted that the plaintiff was partially responsible for his lengthy detention outdoors, since he insisted that the officers not charge him at all, rather than requesting that the officers take him to the station house or write him a citation immediately. . . Finally, police interests also factor into the reasonableness determination. This factor is wide-ranging in scope and can include administrative, penological, or investigatory concerns. *Sides* reflected the latter of these interests, with the court emphasizing the importance of an on-site investigation and noting that the officers did not prolong the plaintiff's detention once this investigation was completed. . . Again, we offer no opinion as to whether defendants' conduct violated Williams's Fourth Amendment rights under this multi-factor analysis, but for the reasons discussed above, Williams has failed to meet the higher burden of showing that Officer Rodriguez was deliberately indifferent to an objectively serious medical condition."); ***Sides v. City of Champaign***, 496 F.3d 820, 827, 828 (7th Cir. 2007) ("Sides claims that the officers were deliberately indifferent to his serious medical needs during his detention in the parking lot. All of the briefs use the 'deliberate indifference' approach from jurisprudence under the Eighth Amendment, . . . but that provision does not apply until a suspect has been convicted. The governing standard at the time of arrest is the Fourth Amendment's ban on unreasonable seizures. . . . . Although *Chapman v. Keltner*, 241 F.3d 842, 845 (7th Cir.2001), asks whether the officers' conduct at the time of arrest evinced 'deliberate indifference to a serious injury or medical need,' the parties to *Chapman* did not join issue on the proper standard or discuss the bearing of *Graham* and *Bell* on contentions of this kind. A decision that employs a mutual (and mutually mistaken) assumption of the parties without subjecting it to independent analysis does not constitute a holding on the subject. *Chapman* should not be understood as extending the domain of Eighth Amendment analysis beyond the bounds set by *Graham* and *Bell*."); ***Hicks v. Moore***, 422 F.3d 1246, 1254 n.7 (11th Cir. 2005)("'Claims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause,' and require a showing of deliberate indifference to a substantial risk of serious harm. . .Plaintiff asserts protection under the Fourth Amendment standard, which is commonly an easier standard for a plaintiff to meet. At the time of the fingerprinting, Plaintiff had already been arrested, delivered to the Jail, and had begun--but not completed--the booking process. The original arresting officer had turned Plaintiff over to jailers, and he was not present during and did not participate in the events underlying the complaint. The precise point at which a seizure ends (for

purposes of Fourth Amendment coverage) and at which pretrial detention begins (governed until a conviction by the Fourteenth Amendment) is not settled in this Circuit. We underline that Defendants never argue that the strip search or fingerprinting was separate from Plaintiff's seizure; so we--will assume (for this case) Plaintiff was still being seized and--analyze the claim under the Fourth Amendment."); ***Bryant v. City of New York,*** 404 F.3d 128, 136 (2d Cir. 2005) ("The Fourth Amendment, which applies to the states through the Fourteenth Amendment. . . prohibits 'unreasonable ... seizures,' U.S. Const. amend IV. Indisputably, an arrest is a seizure. Further, although plaintiffs would have us rule that a 'seizure' within the meaning of the Fourth Amendment consists only of the initial act of physical restraint, and nothing thereafter . . . , it is well established that the Fourth Amendment governs the procedures applied during some period following an arrest. . . . . Accordingly, given that plaintiffs complain that defendants' failure to issue them desk appearance tickets unconstitutionally prolonged their respective periods of postarrest detention, we turn to Fourth Amendment principles."); ***Boone v. Spurgess,*** 385 F.3d 923, 933, 934 (6th Cir. 2004) ("An allegation by Boone that Moyer had used excessive force against him after his arrest would therefore be a Fourth Amendment question: was the continuing seizure of Boone reasonable? A seizure can be 'unreasonable' for any number of reasons, and the guarantee of reasonableness in the manner of a seizure does not seem to allow for a distinction between a claim that an officer used excessive force and a claim that the same officer denied medical care to a detainee. In *Graham* itself, the excessive force claim was partially based on the officers' refusal to provide medical care to a handcuffed suspect suffering from a diabetic attack. . . At least one circuit has therefore applied the Fourth Amendment's guarantee of 'reasonable' seizures to a claim that police failed to provide adequate medical care to a suspect in their custody. *See Estate of Phillips v. City of Milwaukee,* 123 F.3d 586, 595-96 (7th Cir.1997). *But see Barrie v. Grand County,* 119 F.3d 862, 865-69 (10th Cir.1997). None of our prior cases speak directly to this issue, although we have in the past used the Fourteenth Amendment even where the suspect was still technically "seized" under the continuing seizure doctrine, without noting the conflict. *See, e.g., Weaver,* 340 F.3d at 410; *Lily v. Watkins,* 273 F.3d 682, 685-86 (6th Cir.2001). District courts in the circuit have split on the issue. *Compare Estate of Owensby v. City of Cincinnati,* No. 1:01-CV-00769, 2004 U.S. Dist. LEXIS 9444, *42-*60 (S.D.Ohio May 19, 2004) (using substantive due process) *with Alexander v. Beale St. Blues Co.,* 108 F.Supp.2d 934, 940-41 (W.D.Tenn.1999) (using reasonableness standard and relying on *Estate of Phillips,* 123 F.3d at 595-96). Ultimately, there seems to be no logical distinction between excessive force claims and denial of medical care claims when determining the applicability of the Fourth

Amendment. Because we conclude that under either standard, Boone has not made out a claim, we do not decide this issue, but instead reserve it for a more appropriate case."); ***Garrett v. Athens-Clarke County***, 378 F.3d 1274, 1279 n.11 (11th Cir. 2004) ("Defendants argue we should analyze the excessive force claims under the rubric of the Fourteenth Amendment, not the Fourth Amendment. We disagree. The excessive force claims arise from events happening in the course of the arrest. . . . Although the line is not always clear as to when an arrest ends and pretrial detainment begins, the facts here fall on the arrest end. *See Gutierrez v. City of San Antonio*, 139 F.3d 441, 452 (5th Cir.1998) (stating Fourteenth Amendment analysis does not begin until "after the incidents of arrest are completed, after the plaintiff has been released from the arresting officer's custody, and after the plaintiff has been in detention awaiting trial for a significant period of time") (quotation and citation omitted)."); ***Gibson v. County of Washoe,*** 290 F.3d 1175, 1197 (9th Cir. 2002) ("Although the Supreme Court has not expressly decided whether the Fourth Amendment's prohibition on unreasonable searches and seizures continues to protect individuals during pretrial detention, . . we have determined that the Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention. . . *Graham* therefore explicates the standards applicable to a pretrial detention excessive force claim in this circuit."); ***Phelps v. Coy,*** 286 F.3d 295, 299, 300 (6th Cir. 2002) ("The question of which amendment supplies Phelps's rights is not merely academic, for the standards of liability vary significantly according to which amendment applies. . . . Which amendment applies depends on the status of the plaintiff at the time of the incident, whether free citizen, convicted prisoner, or something in between. . . . If the plaintiff was a free person at the time of the incident and the use of force occurred in the course of an arrest or other seizure of the plaintiff, the plaintiff's claim arises under the Fourth Amendment and its reasonableness standard . . . . For a plaintiff who was a convicted prisoner at the time of the incident, the Eighth Amendment sets the standard for an excessive force claim. . . . Finally, if a plaintiff is not in a situation where his rights are governed by the particular provisions of the Fourth or Eighth Amendments, the more generally applicable due process clause of the Fourteenth Amendment still provides the individual some protection against physical abuse by officials . . . . Coy contends that the Fourth Amendment does not apply to Phelps's case because Phelps had already been arrested when the incident took place. Our cases refute the idea that the protection of the Fourth Amendment disappears so suddenly. At the time of the incident, Phelps was still in the custody of Coy and Stutes, the arresting officers. Stutes was booking Phelps when he asked Phelps to raise his foot, and this was the gesture which Coy mistook for aggression. After the

incident, Phelps was booked and released, rather than being incarcerated as a pretrial detainee. We have explicitly held that the Fourth Amendment reasonableness standard governs throughout the seizure of a person. . . . Whatever arguments can be made about pretrial detainees' rights are beside the point in this case, in which the plaintiff was still in the custody of the arresting officers and was never incarcerated. The 'murky area' does not begin until the protection of the Fourth Amendment ends, and our precedent establishes that an arrestee in the custody of the arresting officers is still sheltered by the Fourth Amendment."); ***Fontana v. Haskin,*** 262 F.3d 871, 878, 879 & n.5 (9th Cir. 2001) ("At the outset, we make two related points about the scope of the Fourth Amendment. (1) Fontana's claim is a Fourth Amendment claim for unreasonable seizure and intrusion on one's bodily integrity, and (2) the Fourth Amendment protects a criminal defendant after arrest on the trip to the police station. First, even though this case does not involve excessive force in the traditional sense, it still falls within the Fourth Amendment. The Fourth Amendment's requirement that a seizure be reasonable prohibits more than the unnecessary strike of a nightstick, sting of a bullet, and thud of a boot. . . . Second, we have held that 'once a seizure has occurred, it continues throughout the time the arrestee is in the custody of the arresting officers.... Therefore, excessive use of force by a law enforcement officer in the course of transporting an arrestee gives rise to a section 1983 claim based upon a violation of the Fourth Amendment.' *Robins v. Harum,* 773 F.2d 1004, 1010 (9th Cir.1985). . . . . We note that the circuits are split on this issue. *Compare Wilson v. Spain,* 209 F.3d 713, 715-16 (8th Cir.2000) (adopting continuing seizure approach); *United States v. Johnstone,* 107 F.3d 200, 206-07 (3d Cir.1997) (same), *and Frohmader v. Wayne,* 958 F.2d 1024, 1026 (10th Cir.1992) (same), *and Powell v. Gardner,* 891 F.2d 1039, 1044 (2d Cir.1989) (same), *and McDowell v. Rogers,* 863 F.2d 1302, 1306 (6th Cir.1988), *with Riley v. Dorton,* 115 F.3d 1159, 1164 (4th Cir.1997) (declining to adopt a 'continuing seizure' conception of the Fourth Amendment, and listing cases from circuits rejecting and adopting the rule), *and Cottrell v. Caldwell,* 85 F.3d 1480, 1490 (11th Cir.1996) (analyzing claims of pretrial detainees under Fourteenth Amendment's due process clause), *and Brothers v. Klevenhagen,* 28 F.3d 452, 456 (5th Cir.1994) (same), *and Wilkins v. May,* 872 F.2d 190 (7th Cir.1989) (same)."); ***Wilson v. Spain***, 209 F.3d 713, 715 & n.2 (8th Cir. 2000) ("Between arrest and sentencing lies something of a legal twilight zone. The Supreme Court has left open the question of how to analyze a claim concerning the use of excessive force by law enforcement 'beyond the point at which arrest ends and pretrial detention begins,' *Graham*, 490 U.S. at 395 n. 10, and the circuits are split. . . . Some circuits hold that after the act of arrest, substantive due process is the proper constitutional provision because the Fourth Amendment is no longer relevant.

See Riley v. Dorton, 115 F.3d 1159, 1161-64 (4th Cir.) (en banc), *cert. denied*, 522 U.S. 1030 (1997); *Cottrel v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir.1996); *Wilkins v. May*, 872 F.2d 190, 192-95 (7th Cir.), *cert. denied*, 493 U.S. 1026 (1989). Other circuits hold that the Fourth Amendment applies until an individual arrested without a warrant appears before a neutral magistrate for arraignment or for a probable cause hearing, or until the arrestee leaves the joint or sole custody of the arresting officer or officers. *See Barrie v. Grand County*, 119 F.3d 862, 866 (10th Cir.1997); *Pierce v. Multnomah County*, 76 F.3d 1032, 1042-43 (9th Cir.), *cert. denied*, 519 U.S. 1006 (1996); *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir.1989); *McDowell v. Rogers*, 863 F.2d 1302, 1306-07 (6th Cir.1988). The Fifth Circuit, while generally taking the position that substantive due process applies after the act of arrest, *see Valencia v. Wiggins*, 981 F.2d 1440, 1443-45 (5th Cir .), *cert. denied*, 509 U.S. 905 (1993), has concluded that the relevant constitutional provisions overlap and blur in certain factual contexts. *See Petta v. Rivera*, 143 F.3d 895, 910-914 (5th Cir.1998) (noting that Fourth Amendment standards are sometimes used in analyzing claims technically governed by substantive due process). . . . This Court previously has applied the Fourth Amendment to situations very similar to this case. In *Moore v. Novak*, 146 F.3d 531 (8th Cir.1998), law enforcement officers at a jail used force against an arrestee who was being violent and disruptive during the booking process. See id. at 532-33. We held that the district court appropriately applied Fourth Amendment standards to Moore's excessive-force claims. *See id*. at 535. Similarly, in *Mayard v. Hopwood*, 105 F.3d 1226 (8th Cir.1997), we applied Fourth Amendment standards not only to the act of arrest, but also to use of force against an arrestee who was restrained in the back of a police car. *See id*. at 1228. We therefore shall use the Fourth Amendment to analyze Wilson's federal claims. In doing so, we observe that if Wilson cannot win his case under Fourth Amendment standards, it is a certainty he cannot win it under the seemingly more burdensome, and clearly no less burdensome, standards that must be met to establish a Fourteenth Amendment substantive due process claim."); ***Holmberg v. Tieber***, No. 1:07 CV 1849, 2008 WL 1930089, at * 6 (N.D. Ohio Apr. 29, 2008) ("The Sixth Circuit has recently recognized that under the Fourth Amendment, 'a governmental seizure of an individual must be reasonable, a rule that applies to an officer's use of force during a booking procedure. Force in this setting becomes constitutionally excessive if it is objectively unreasonable in light of the facts and circumstances confronting the officer.' *Lawler v. City of Taylor*, 2008 WL 624770 (6th Cir. March 5, 2008) (*citing Phelps v.. Coy*, 286 F.3d 295 (6th Cir.2002) and *Graham*, 490 U.S. at 397)."); ***Ratliff v. City of Houston*** 2008 WL 910205, at *1, *2 (S.D. Tex. Apr. 3, 2008) ("[C]ourts in this Circuit have indicated that the point at which Constitutional

protections for detainees shift from the Fourth Amendment to the Due Process Clause of the Fifth or Fourteenth Amendment is the point at which an individual is placed into secure custody in a jail cell. . . Indeed, to hold otherwise would create an unnecessarily complicated inquiry, especially in the context of this case, where there are well over one hundred plaintiffs, each complaining of similar, yet factually distinct conduct by police. More importantly, the protections of the Fourth Amendment necessarily cede to the protections afforded under Due Process once a seizure--whether lawful or not-- has been completed. . . Due Process tests contemplate the needs of law enforcement and jail personnel to protect the safety and security of police, correctional officers, and detainees. . . These needs exist regardless whether a detainee is in a cell for one hour, or for weeks."); ***Harris v. City of Circleville***, No. 2:04-cv-1051, 2008 WL 211363, at **5 -7 (S.D.Ohio Jan 23, 2008) ("The Sixth Circuit has held that the Fourth Amendment's protections extend 'throughout the time the person remains in the custody of the arresting officers.' *McDowell v. Rogers*, 863 F.2d 1302, 1306 (6th Cir.1988). The parties agree that this is the governing law, but disagree as to its application in this particular case. The question is whether, at the time the Circleville police officers used force against Plaintiff, he was in the joint custody of the arresting officers, Ohio State Highway Patrol Troopers McManes and Cooper, and the Circleville police officers who were booking Plaintiff at the troopers' request. . . . Although McManes and Cooper were present and observed the entire incident, they had no physical contact with Plaintiff and were not involved in the use of force. However, this does not necessarily mean that Plaintiff was not in the joint custody of the arresting officers and the booking officers. Throughout the entire incident, he was physically restrained by handcuffs placed on him by the State Highway Troopers. After the Circleville officers dragged Plaintiff back to his cell, McManes and Cooper remained at the Circleville Jail for over an hour to complete paperwork incident to the arrest . . . and, presumably, to obtain the handcuffs they used to restrain their prisoner. . . .In this Court's view, Plaintiff's claim is governed by the Fourth Amendment. It is undisputed that Plaintiff was injured at the very beginning of the booking process, in the presence of the arresting officers. . . . The protections of the Fourth Amendment should be extended to cover all claims of excessive force that arise through the time the booking process is completed. The arresting officer has an obvious interest in remaining with the prisoner until the booking process has been correctly completed, at which time the jail assumes sole custody of the prisoner. Until then, the arrestee remains in the joint custody of the arresting officer and the booking officers. Therefore, even though the jail officers may find it necessary to take physical control of the arresting officer's prisoner in order to complete the booking process, the Fourth Amendment protection

follows the prisoner throughout the arrest and the contiguous booking process."); ***Crenshaw v. Lister***, No. 2:03-cv-134-FtM-29SPC, 2008 WL 151881, at *6 (M.D.Fla. Jan. 15, 2008) ("In this case, plaintiff was injured on two separate occasions. First, when he was attempting to surrender, and then during his interrogation. Plaintiff had clearly been seized within the meaning of the Fourth Amendment by virtue of his arrest, but his status had evolved into that of an arrestee in custody while being interrogated. The Eleventh Circuit has analyzed such 'custody' situations under different constitutional amendments. [discussing cases] The Court will therefore analyze plaintiff's excessive force claim under both the Fourth Amendment and the Fourteenth. While the Fourth and Fourteenth Amendment standards are similar, plaintiff has a higher burden when the Fourteenth Amendment is involved."); ***Rosa v. City of Fort Myers***, 2007 WL 3012650, at *12, *14 (M.D. Fla. Oct. 12, 2007) ("In this case, plaintiff had been arrested and brought to the police station where she was detained as the booking process took place. Plaintiff had clearly been seized within the meaning of the Fourth Amendment by virtue of her arrest, but her status had evolved into that of an arrestee in custody. The Eleventh Circuit has analyzed such 'custody' situations under different constitutional amendments. In *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir.2002), the Court analyzed an excessive force claim during arrestee's ride to the jail under the Fourth Amendment. In *Mercado v. City of Orlando*, 407 F.3d 1152, 1154 n. 1 (11th Cir.2005), the Court rejected a Fourteenth Amendment analysis in favor of a Fourth Amendment analysis where a suspect was 'in custody' by virtue of being surrounded by officers. On the other hand, in *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir.1996), a suspect was arrested and transported in the back of a police car in a position which led to his asphyxiation. The Eleventh Circuit stated that excessive force claims 'involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause ...' *See also Redd v. R.L. Conway*, 160 Fed. Appx. 858, 860 (11th Cir.2005) (applying Fourteenth Amendment substantive due process analysis to claims of excessive force during arrest and booking process)." Analyzing claim under both Fourth and Fourteenth Amendment standards, court concluded "plaintiff has presented sufficient evidence to show either a Fourth Amendment or a Fourteenth Amendment excessive force claim."); ***Stephens v. City of Butler, Ala***, 509 F.Supp.2d 1098, 1108, 1109 (S.D.Ala.,2007) ("[T]his case presents an additional issue which also has not been settled in this Circuit. '[T]he line is not always clear as to when an arrest ends and pretrial detainment begins.' *Garrett v. Athens-Clarke County, Georgia*, 378 F.3d 1274, 1279 n. 11 (11th Cir.2004). Even under standardized police procedures, there is a practical gap, a 'legal twilight zone,' between the completion of the arrest as that term is commonly used and the

beginning of pretrial detainment. . . The procedures utilized in this case-in which the seizure began at the apartment complex but the arrest did not occur until after plaintiff had already been booked . . . are far from standardized. Other Circuits have taken divergent approaches to the issue. [collecting cases] The authority in this Circuit establishes no clear cut-off point beyond which the Fourth Amendment ceases to apply. . . .At the hearing, the court noted the evidence--principally in the form of deposition testimony from the arresting officer, defendant Lovette--that plaintiff was not arrested until he was already in the jail and the booking process was underway. . . . As set forth above, plaintiff has offered sufficient evidence that a reasonable jury could find that Lovette first arrested plaintiff immediately prior to the tasing. Moreover, at the time of the tasing the plaintiff had not been searched or fingerprinted and the arresting officer continued to command plaintiff.Based on these facts, the court finds that the tasing occurred incident to the arrest and thus the Fourth Amendment is applicable."); ***Miller v. City of Columbus***, No. 2:05-CV-425, 2007 WL 915180, at *10 (S.D. Ohio Mar. 26, 2007) ("Miller was convicted of a Fifth Degree Felony and sentenced to two years of community control. Defendants allege that Miller fled before completing his sentence, and was not a free citizen; therefore, the Fourth Amendment's objective reasonableness standard is not applicable to Defendants' encounter with Miller. Defendants are correct that the Fourth Amendment does not apply post-conviction, *Johnson v. City of Cincinnati*, 310 F.3d 484, 491 (6th Cir.2002), however, at the time of this encounter, Miller had not yet been convicted of violating his supervised release.Neither party has provided any Sixth Circuit law on point on this issue, . . . however the Court notes that other federal appellate and district courts have not applied the Eighth Amendment to persons who are not incarcerated or imprisoned at the time of the encounter despite the plaintiff's status as a parolee. . . The Ninth and Tenth Circuits have applied the Fourth Amendment's objective reasonableness standard to excessive force claims by individuals on parol or on supervised release. [citing cases] Accordingly, this Court will apply the Fourth Amendment's objective reasonableness standard to Plaintiff's excessive force claims."); ***Rose v. City of Lafayette*****,** No. 05-cv-00311-WDM-MJW, 2007 WL 485228, at *4 (D. Colo. Feb. 12, 2007) ("Plaintiff is correct that 'following arrest the due process protections of the Fourteenth Amendment are triggered to protect a pretrial detainee from excessive force approaching punishment.' . . However, the Tenth Circuit has ruled that claims based on physical assaults by police on a person arrested but not yet presented to a judicial officer are subject to the Fourth Amendment objectively reasonable framework, not substantive due process. . . Other types of claims of mistreatment in the post-arrest context may fall under due process considerations . . . but Plaintiff's do not."); ***Stewart v. Beaufort County***, 481

F.Supp.2d 483, 490 (D.S.C. 2007) ("The court notes that it is often not clear when an arrestee becomes a pretrial detainee for purposes of determining the applicable constitutional protection. . . . For purposes of determining constitutional protections, the holding in *Riley* [*v. Dorton*, 115 F.3d 1159 (4th Cir.1997)] instructs the court that a person is an 'arrestee' when an officer decides to detain, and that the Fourth Amendment applies only to the single act of the arrest. Applying this rule to the case at hand, it follows that Stewart was an arrestee during his arrest in the parking lot of Smoker's Express. By the time he arrived in the sally port of the Beaufort County Detention Center, however, he was lawfully arrested and being held prior to a formal adjudication of guilt, and was therefore a pretrial detainee."); ***St. Amant v. Taylor Police Department***, No. 05-CV-72900, 2006 WL 2365007, at *4 (E.D. Mich. Aug. 14, 2006) ("However, Plaintiff does not claim that he was still in the custody of the arresting officers at the time of the incident, nor has he named either of the arresting officers as defendants. Yet it is also unclear whether Plaintiff would fall under the definition of a 'pretrial detainee' for purposes of substantive due process analysis, since he was only being held at the police station for the night and was released the next morning. On the other hand, Plaintiff was under arrest for his third drunk driving violation and was not necessarily entitled to nominal bond inasmuch as he was chargeable with a felony offense. In short, neither the facts nor the case law are developed enough to conclude whether Plaintiff's exact status at the time of this incident was that of a 'pretrial detainee' or simply 'in custody.' Nevertheless, for purposes of the Fourteenth Amendment substantive due process claim advanced by the Plaintiff, the Defendants' actions clearly do not 'shock the conscience,' as set forth in the analysis below. Moreover, even under the less forgiving standard applied under Fourth Amendment analysis, the actions of the Defendants were not unreasonable. Plaintiff's claim would therefore fail under either standard."); ***McBride v. Clark***, No. 04-03307-CV-S-REL, 2006 WL 581139, at *22, *23 (W.D. Mo. Mar. 8, 2006) (not reported) ("In this case, the parties disagree on the appropriate governing standard. That is, Plaintiff argues that the Fourth Amendment's objective reasonableness standard applies; Defendant contends that the Eighth Amendment governs Plaintiff's excessive force claim. It is clear that the Eighth Amendment does not apply, as Plaintiff had not yet been convicted of a crime and was not serving a sentence at the time of the alleged violation. . . It is less clear, however, whether Plaintiff's claim is governed by the Fourth Amendment standard for arrestees or the Fourteenth Amendment standard for pretrial detainees. Here, Plaintiff was being held on a warrant for suspicion of a drug-related offense. Although both parties categorize Plaintiff as a 'pretrial detainee,' merely labeling him as such does not make it so. Under factually analogous circumstances, courts of this

circuit have applied--and the Eighth Circuit has upheld--the Fourth Amendment standard rather than the Fourteenth Amendment standard. . . As a result, I find that the Fourth Amendment governs Plaintiff's excessive force claim."); ***Turner v. White,*** 443 F.Supp.2d 288, 294 (E.D.N.Y. 2006) (" The status of a parolee who seeks to bring claims of excessive force against his parole officer is unsettled in this Circuit. . . Courts in the Fifth Circuit have held that constitutional claims by parolees are governed by an Eighth and Fourteenth Amendment analysis. [citing cases]These cases, however, are not binding on this Court . . . and appear to be contrary to the approach followed by district courts in this Circuit. . . . In *Blake v. Base*, the district court, after distinguishing the cases that applied an Eighth Amendment analysis to claims brought by parolees, concluded that a parolee's claim that he was subjected to excessive force while in detention at a time prior to the time he had been arraigned on the new charges for which he was being detained is more properly analyzed under the Fourth Amendment. 1998 WL 642621, at *10 n. 21. This Court finds this analysis to be persuasive. Just because an individual has been convicted of a crime in the past and is on parole does not deprive him of his Fourth Amendment constitutional right to be free from excessive force if arrested on another crime."); ***Bornstad v. Honey Brook Township***, No. C.A.03-CV-3822, 2005 WL 2212359, at *19 n.47 (E.D. Pa. Sept. 9, 2005) ("Some courts have evaluated a claim for failure to render medical assistance during the course of an arrest using a Fourth Amendment excessive force analysis. *Price*, 990 F.Supp. at 1241 n. 22. Here, Plaintiff does not argue that the Defendants' failure to offer medical assistance constituted excessive force. Rather, he relies solely on the protections afforded by the Fourteenth Amendment."); ***Calhoun v. Thomas,*** 360 F.Supp.2d 1264, 1271-74 (M.D. Ala. 2005) ("[W]hile it is clear that Calhoun had already been 'seized' and, for all intents and purposes, arrested at the time of the alleged abuses, it is equally plain that he had not yet acquired the status of a pretrial detainee. As a formal matter, Calhoun had not yet been officially arrested at the time the alleged abuses occurred. In addition, he was in the custody of the officers who eventually arrested him at all times during the interrogation process. He had not been booked into the Pike County Jail, and had not yet made an initial appearance before a judge. . . Furthermore, at that point in time, Calhoun had not been charged with any crime. Thus, the alleged application of excessive force in this case occurred while Calhoun was in a 'legal twilight zone,' the legal implications of which were left unclear by *Graham*. . . Since *Graham* was decided, lower courts have grappled with the issue of which constitutional provision provides protection from excessive force during this period of detention following an arrest or seizure, but prior to a judicial determination of probable cause. . . While some federal appellate courts have continued to apply the

Fourteenth Amendment Due Process Clause to excessive force claims occurring during this post-arrest, pre-custody time period, a number of appellate courts have applied the Fourth Amendment to incidents of excessive force occurring after the moment of arrest by adopting the 'continuing seizure' approach to defining when seizure ends and pretrial detention begins. Under this analysis, a Fourth Amendment seizure is treated as extending beyond the actual moment of arrest to the ensuing period of intermittent custody in the hands of the arresting officers. [citing cases] The Eleventh Circuit Court of Appeals has not explicitly adopted this 'continuing seizure' test. However, it has indirectly countenanced the application of the Fourth Amendment to post-arrest, pre-detention excessive-force claims in several cases. [discussing cases] . . . . Most recently, the Eleventh Circuit touched upon the issue in *Garrett v. Athens-Clarke County*, 378 F.3d 1274 (11th Cir.2004), another § 983 excessive-force case alleging a Fourth Amendment violation of an arrestee's rights. As in *Cottrell*, the arrestee in *Garrett* died from positional asphyxia. In this case, arresting officers had pepper-sprayed him and bound his feet and ankles together during the course of arresting him. He died while lying in the road behind the squad car, moments after he had been physically subdued. In noting that Garrett's claim was properly analyzed under the rubric of the Fourth Amendment, the court stated in a footnote, 'Although the line is not always clear as to when an arrest ends and pretrial detention begins, the facts here fall on the arrest end. *See Gutierrez v. City of San Antonio*, 139 F.3d 441, 452 (5th Cir.1998) (stating Fourteeenth Amendment analysis does not begin until 'after the incidents of arrest are completed, after the plaintiff has been released from the arresting officer's custody, and after the plaintiff has been in detention awaiting trial for a significant period of time') (quotation and citation ommitted).' . . . By citing to a Fifth Circuit Court of Appeals case that emphasized the specific limits of the Fourteenth Amendment in excessive-force cases, the court again implied that the Fourth Amendment provides a more appropriate framework of analysis for post-arrest, pre-detention cases. . . . Thus, the Eleventh Circuit's own case law, in addition to the case law of a number of other circuits and the Supreme Court, suggests that an analysis under the Fourth Amendment is appropriate, if not required, in post-seizure, pre-detention allegations of excessive force such as Calhoun's. Accordingly, this court finds that the Fourth Amendment is the specific constitutional right allegedly infringed by the challenged application of force in this case."); ***Whiting v. Tunica County,*** 222 F. Supp.2d 809, 822, 823 (N.D. Miss. 2002) ("Some Circuits, for example, apply the Fourth Amendment reasonableness standard to excessive force claims arising post-arrest, setting arraignment as the line of demarcation between the Fourth and Fourteenth Amendments. In these circuits, the Fourth Amendment reasonableness standard

applies until the arrestee appears before a neutral magistrate for arraignment or probable cause hearing, or until the individual leaves the joint custody of the arresting officers. [citing cases] Other Circuits focus on the Due Process Clause of the Fourteenth Amendment and apply a substantive due process standard at the moment the incidents of arrest are complete. [citing cases] On facts similar to the instant case, the Eighth Circuit has applied Fourth Amendment standards to a claim of excessive force allegedly suffered by an individual in being restrained in the back of a police car post-arrest. . . The Fifth Circuit has taken a somewhat hybrid approach. As a general rule, substantive due process applies in the Fifth Circuit after the fact of arrest. [citing cases] On these facts, the Court concludes that the Fourth Amendment applies to Whiting's claim arising out of the post-arrest events in the police car. . . . The proximity to the arrest in this case, unlike in *Valencia*, transpired so closely to the actual arrest, that, under *Graham*, the most reasoned approach is to apply the Fourth Amendment. This is especially so since Whiting was still in the custody of the arresting officer, having never left that custody."); ***Carlson v. Mordt,*** No. 00 C 50252, 2002 WL 1160115, at *4, *5 (N.D.Ill. May 29, 2002) (not reported) ("The Seventh Circuit has not made clear at precisely what point an arrest ends, and pretrial detention begins. *See, e.g.*, *Proffitt v. Ridgway*, 279 F.3d 503, 506 (7th Cir.2002) (analyzing excessive force claim under due process standard where action occurred en route to jail following arrest); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 596 (7th Cir.1997) (acknowledging struggle with the issue, and analyzing excessive force claim under Fourth Amendment where conduct in question occurred shortly after arrestee was handcuffed) . . . The court concludes that in this case, when the police dog was dropped from the attic, Carlson's arrest was still ongoing. At that time, Carlson had not been removed from his house, where he had been apprehended. The attack occurred immediately after Carlson was handcuffed, while he was still on the floor. . . . [C]onsequently the court must analyze Carlson's excessive force claim as to that incident under the Fourth Amendment."); ***Bartram v. Wolfe,*** 152 F. Supp.2d 898, 910 & n.8 (S.D.W.Va. 2001) (noting that the Fourth Circuit in *Riley v. Dorton,* 115 F.3d 1159, 1161 (4th Cir.1997), rejected concept of a 'continuing seizure' but provided no simple rule for determining when Fourth Amendment protection ends; suggesting "[a] simple rule would be that a person is an arrestee until the person has made an initial appearance before a judicial officer, and then the person becomes a pretrial detainee. Such a rule would have the added benefit of discouraging the use of force and intimidation by police officers in the obtaining of a statement from an accused who has not appeared in court and has not obtained counsel."); ***Hill v. Algor***, 85 F. Supp.2d 391, 402, 403 (D.N.J. 2000) ("[T]he Supreme Court [in *Graham*] left unanswered (1) the particular moment in

time at which arrest or seizure ends and pretrial detention begins; and (2) whether the Fourth Amendment applies beyond arrest into the period of pretrial detention. . . . [I]t is clear from *Bell* that one who remains in detention after formal charge and while awaiting trial is a pretrial detainee subject to Due Process protection. The question now plaguing the courts of appeals, however, concerns whether the starting point of pretrial detention, as determined by the termination of a Fourth Amendment 'seizure', precedes post-charge detention as acknowledged in *Bell*. . . .At least three circuits have declined to extend the Fourth Amendment beyond the initial arrest or seizure. [citing cases from Fourth, Fifth and Seventh Circuits] Disagreeing with these courts, the Ninth and Tenth Circuits have applied the Fourth Amendment to post-arrest, pre-arraignment custody obtained without a warrant. [citing cases] In line with the Ninth and Tenth Circuits, the Second Circuit has concluded, 'the Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned, or formally charged, and remains in the custody ... of the arresting officer.' *Powell v. Gardner*, 891 F.2d 1039, 1043 (2nd Cir.1989). . . . This Court agrees with the Ninth and Tenth Circuits that a person continues to be an arrestee subject to Fourth Amendment protection through the period of post-arrest but prearraignment detention. Stated differently, this Court declines to extend pretrial detention beyond the circumstances in *Bell*, concluding that such detention does not begin until an arrestee is at least formally charged and his release or continued detainment is determined.").

See also ***Johnson v. City of Cincinnati,*** 310 F.3d 484, 492, 493 (6th Cir. 2002) ("To be sure, application of the Ordinance's post-arrest provision resembles a seizure in that it is a show of government authority and a restraint on a freedom of movement. . . But in each of the cases addressed by our sister circuits, the government not only curtailed the suspect's right to interstate travel, it also imposed additional restrictions designed to compel an ultimate court appearance, such as obligations to post bond, attend court hearings, and contact pretrial services. [citing cases] In contrast, (1) the Ordinance imposes solely travel restrictions; (2) the ninety day exclusion is not bounded by an eventual court appearance; and, (3) the stated purpose of these restrictions is to combat drug crime in Over the Rhine. Thus, we conclude that the Fourth Amendment's prohibition against unreasonable seizures does not provide the appropriate analytical framework for evaluating the constitutionality of such restrictions.").

NOTE: Although local governments have no qualified immunity under § 1983, the court in ***Watson v. Sexton***, 755 F. Supp. 583 (S.D.N.Y. 1991), dismissed plaintiff's claim against the City Department of Sanitation for failure to train its employees in proper administration of a substance abuse policy, where individual defendants had prevailed on qualified immunity grounds.

The court held that "[t]o be 'deliberately indifferent' to rights requires that those rights be clearly established. Therefore, even if plaintiff could prove that her Fourth Amendment rights were violated by current standards because the City inadequately trained its employees, plaintiff cannot show that the City was deliberately indifferent to rights that were not clearly established [at the time the challenged actions were taken]...." *Id*. at 588.

Compare ***Szabla v. City of Brooklyn Park***, 486 F.3d 385, 393, 394 (8th Cir. 2007) (en banc) ("In this case, a constitutional requirement that an officer in Baker's situation give advance warning before commanding a canine to bite and hold a suspect was not clearly established as of August 2000. . . The need for training or other safeguards relating to warnings, therefore, was not so obvious at the time of this incident that Brooklyn Park's actions can properly be characterized as deliberate indifference to Szabla's constitutional rights. While a municipality does not enjoy qualified immunity from damages liability that results from a policy that is itself unconstitutional or from an unconstitutional decision by municipal policymakers, . . . we agree with the Second Circuit and several district courts that a municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established. . . . [T]he lack of clarity in the law precludes a finding that the municipality had an unconstitutional policy at all, because its policymakers cannot properly be said to have exhibited a policy of *deliberate* indifference to constitutional rights that were not clearly established..") *with* ***Szabla v. City of Brooklyn Park***, 486 F.3d 385, 403, 404 (8th Cir. 2007) (en banc) (Gibson, J., with whom Wollman, Bye, and Melloy, JJ., join dissenting) ("In the face of these two Supreme Court holdings [*Owen* and *Pembaur*], our court today holds that in cases of municipal liability that depend on a showing of deliberate indifference (i.e., most of them), a municipality cannot be liable unless the law was clearly established at the time of its action. . . Thus, via the words 'deliberate indifference,' our court imports the qualified immunity standard into municipal liability.").

See also ***Fletcher v. Town of Clinton***, 196 F.3d 41, 56 (1st Cir. 1999) ("While a finding that the law was not clearly established may foreclose municipal liability for failure to train, *see Joyce*, 112 F.3d at 23, a finding that the law was clearly established does not dispose of the municipality's motion for summary judgment. Rather, the court must go on to consider whether allegations of a municipal policy or practice have been made that are sufficient to survive summary judgment."); ***Joyce v. Town of Tewksbury***, 112 F.3d 19, 23 (1st Cir. 1997) ("[O]ur rationale here for granting qualified immunity to the officers--that the unsettled state of the law made it reasonable to believe the conduct in this case constitutional--also precludes municipal liability. Tewksbury could not have been 'deliberately indifferent' to citizens' rights . . . in failing to teach the officers that their conduct was unconstitutional."); ***Gonzalez v. Ysleta Independent School District***, 996 F.2d 745, 760 (5th Cir. 1993) ("It therefore may well be, as several district courts have held, that 'to be deliberately indifferent to rights requires that those rights be clearly established.'" [citing *Watson*]); ***Hinton v. City of Elwood***, 997 F.2d 774, 783 (10th Cir. 1993) ("An individual municipal officer may . . . be entitled to qualified immunity . . . because the officer's conduct did not violate the law. When a finding of qualified immunity is predicated on this latter basis, such a finding is equivalent to a decision on the merits of the plaintiff's claim. ... In such a case, a finding of qualified immunity may preclude the imposition of any municipal liability."); ***Barber v. City of Salem***, 953 F.2d 232, 240 (6th Cir. 1992) ("[W]here no constitutional violation exists for failure to take special precautions, none exists for failure to promulgate policies and to better train personnel to detect and deter jail suicides."); ***Zappala v. Albicelli***, 980 F. Supp. 635, 639 (N.D.N.Y. 1997) ("In the present case, the Court notes that its finding that the individual Defendants are entitled to qualified immunity probably precludes municipal liability for a related 'failure to train' claim. That is because if the independent actors' conduct was objectively reasonable given the circumstances, it logically follows that the unconstitutional nature of the resulting conduct could not have been 'highly predictable' to the Liverpool School District."), *aff'd*, 173 F.3d 848 (2d Cir. 1999); ***Mason v. Stock***, 955 F. Supp. 1293, 1304 n.9 (D. Kan. 1997) ("A finding that an officer is entitled to qualified immunity because the officer's conduct did not violate the law is equivalent to a decision on the merits of the claim and precludes the imposition of any municipal liability. On the other hand, when qualified immunity is predicated on the basis that the law is not clearly established, the corresponding claim against a municipality may proceed."); ***B.M.H. v. The School Board of the City of Chesapeake***, 833 F. Supp. 560, 572 (E.D. Va. 1993) ("[T]he Court is of the opinion that a § 1983 action based on a 'deliberately indifferent' policy or custom of the School Board first requires an underlying

constitutional deprivation in order to stand."); ***Williamson v. City of Virginia Beach***, 786 F. Supp. 1238, 1264-65 (E.D. Va. 1992) ("[T]he conclusion that [constitutional rights] were not clearly established negates the proposition that the city acted with deliberate indifference."), *aff'd*, 991 F.2d 793 (4th Cir. 1993).

In ***Brown v. Phelan***, No. 93 C 4636, 1993 WL 364842, *3 (N.D. Ill. Sept. 14, 1993) (not reported), the court found no basis for ascribing deliberate indifference to the conduct of a Sheriff who was "responsible by statute for operation of the County Jail, [where he] was inherently limited by the funds and facilities that had been made available to him...." *See also* ***Watson v. Sheahan***, No. 93 C 6671, 1994 WL 130759, *3 (N.D. Ill. April 14, 1994) (not reported) ("[I]n all the respects about which [plaintiff] complains both [defendants] are simply limited to doing the best that they can with what they are given to work with. That being the case, both [defendants] are unquestionably chargeable with knowledge of the adverse conditions, but they cannot be said--given the limitations on their power--to have 'acquiesced' in them. In sum, it is not possible to characterize either of the named defendants with 'deliberate indifference' so as to subject them to [§] 1983 liability.").

But see ***Brown v. Mitchell,*** 308 F.Supp.2d 682, 700, 701 (E.D.Va. 2004) ("Considering the . . . fact that a Virginia sheriff has no authority to construct or modify local jail facilities, Mitchell argues that, because she is required to accept 'all persons' committed to the Jail, she cannot have been deliberately indifferent or grossly negligent as to the alleged overcrowding conditions at the Jail. It is true that, by statute, the locality, not the sheriff, is required to build and maintain a jail of a reasonable size to house the inmate population. . . . A Virginia sheriff, by contrast, has no duty or ability to build, expand, or otherwise improve the structural facilities of a jail. As discussed above, as a constitutional officer, Mitchell's duties and responsibilities are created solely by statute.. . Her statutory duties include maintaining records on all prisoners, formulating and enforcing jail rules, providing security in the jail, and keeping inmates clothed and fed. . . There is no statute, however, requiring or allowing a sheriff to build, add to, or otherwise improve the physical structure of a jail. Thus, Mitchell is correct respecting her inability to remedy the problem of overcrowding by building a new jail or modifying the existing one. Her failure, therefore, to build a new jail or remedy the existing one cannot be considered gross negligence or deliberate indifference. However, Mitchell's argument that, as a matter of law, she is exonerated from either a state-law wrongful death action or an action under Section 1983 by virtue of Va.Code Ann. S 53.1-119 et seq. is misplaced because the argument simply ignores the remainder of the

statutory scheme of which Va.Code Ann. S 53.1-119 et seq. is a part. . . . Under S 53.1-74, which also is a part of Chapter 3 of Title 53: 'When a ... city is without an adequate jail ... the circuit court thereof shall adopt as its jail, the jail of another county or city until it can obtain an adequate jail.' The ensuing sections of Chapter 3 provide for the procedures that are to be followed after such an adoption and set forth mechanisms for providing payment to the adopted jurisdiction. Thus, the General Assembly has provided a means for eliminating overcrowding when overcrowding would render a jail inadequate other than the structural remedies of constructing a new jail facility or expanding an existing one. And, although the authority for arranging for the use of other facilities lies in the local circuit courts, . . . Chapter 3 requires the sheriff to know, and keep records reflecting, the population of the local jail. . . Indeed, the sheriff must report thereon to the Compensation Board and, if asked, to the local circuit court. . . Thus, when a Virginia sheriff knows that a local jail is so overcrowded as to render it inadequate, that sheriff is not, contrary to Mitchell's arguments, without recourse or ability to remedy the overcrowding because, under Virginia's statutory scheme, alternate arrangements can be made by informing the local circuit court of the fact of overcrowding. Indeed, the Virginia legislature provides, quite clearly, that when so informed, the circuit court 'shall adopt as its jail, the jail of another county or city until it can obtain an adequate jail.' . . . Additionally, under another section of the statute, the circuit court can, upon Petition for Writ of Mandamus, command a governing body to put its own jail in good repair and be made otherwise adequate. . . Mitchell, whose job includes the operation of the Jail in accord with the dictates of Title 53, is charged with knowledge of these statutes. And, she is charged with knowledge of conditions in the Jail over which she has charge. Her failure to use these statutory mechanisms in the face of known overcrowding to the extent of the inadequacy as alleged in the Complaint certainly can be considered 'deliberate indifference' within the meaning of Eighth Amendment jurisprudence or gross negligence under Virginia's wrongful death jurisprudence."); ***Laube v. Haley,*** 234 F.Supp.2d 1227, 1249, 1250 (M.D. Ala. 2002) ("Here, the defendants urge the court to consider the reasonableness of each official's response with respect to his or her ability to act within budgetary constraints. In other words, the defendants ask the court to consider whether each official's response was reasonable given the lack of funds available to him or her. The lack-of-funds defense is common in prison suits, and precedent clearly establishes that this defense is available to officials only when they are sued in their individual capacities.").

8. Note on "Shocks the Conscience"

In ***County of Sacramento v. Lewis***, 523 U.S. 833 (1998), the Court granted certiorari "to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." *Id.* at 839. The decedent in *Lewis* was a sixteen-year-old passenger on a motorcycle driven by a friend. A pursuit took place when the driver of the motorcycle ignored an officer's attempt to stop him for speeding. The chase reached speeds of up to 100 miles per hour and ended when the motorcycle failed to maneuver a turn, resulting in both the driver and passenger falling off the cycle. The police officer in pursuit skidded into Lewis, propelling him 70 feet down the road. Lewis died as a result of his injuries.

Because Supreme Court precedent precluded application of the Fourth Amendment to the facts of the case, *see* ***California v. Hodari***, 499 U. S. 621, 626 (1991) (police pursuit does not amount to "seizure" within meaning of Fourth Amendment) and ***Brower v. County of Inyo***, 489 U. S. 593, 596-597 (1989) (Fourth Amendment seizure occurs only when there is a governmental termination of freedom of movement through means intentionally applied), the Court first had to resolve whether the plaintiff could state a claim under the substantive due process clause of the Fourteenth Amendment in the pursuit context, and, if so, whether the allegations set out by the plaintiff were sufficient to establish such a claim.

(*See also* ***Tubar v. Clift***, 2008 WL 1734196, at *2 (9th Cir. Apr. 11, 2008) ("Because both Morehouse and Tubar were suspects at the time that Clift shot at the vehicle, Clift's intent to stop the vehicle also constituted intent to seize both of them. Accordingly, we conclude that by shooting Tubar, Clift seized Tubar for purposes of the Fourth Amendment."); ***Fisher v. City of Memphis,*** 234 F.3d 312, 318, 319 (6th Cir. 2001) ("Here, Becton's car was the intended target of Defendant's intentionally applied exertion of force. By shooting at the driver of the moving car, he intended to stop the car, effectively seizing everyone inside, including the Plaintiff. Thus, because the Defendant 'seized' the Plaintiff by shooting at the car, the district court did not err in analyzing the Defendant's actions under the Fourth Amendment.")).

Justice Souter, writing the majority opinion, noted that the Court had recently expressed its view on the first question and pointed to the following language in ***United States v. Lanier***, 520 U.S. 259, 272 n.7 (1997):

> *Graham v. Connor*, 490 U.S. 386, 394,109 S.Ct. 1865, 1870-1871, 104 L.Ed.2d 443 (1989), does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.

Thus, given the facts of *Lewis* and the inapplicability of a more specific constitutional provision, the plaintiff could assert a claim under the substantive due process clause. *See also* ***Moran v. Clarke (Moran I),*** 296 F.3d 638, 646 (8th Cir. 2002) (en banc) ("[W]hen a person is damaged by outrageous police misconduct but the resulting injury does not neatly fit within a specific constitutional remedy, the injured party may, depending upon the circumstances, pursue a substantive due process claim under section 1983."); ***Petta v. Rivera***, 143 F.3d 895, 901 (5th Cir. 1998) ("[W]e conclude, as have all of the courts of appeals that have addressed the issue, that a plaintiff whose claim is not susceptible to proper analysis with reference to a specific constitutional right may still state a claim under § 1983 for a violation of his or her Fourteenth Amendment substantive due process right, and have the claim judged by the constitutional standard which governs that right."); ***Hemphill v. Schott***, 141 F.3d 412, 418-19 (2d Cir. 1998) ("This court has held that outside the context of an arrest, a plaintiff may make claims of excessive force under § 1983 under the Due Process Clause of the Fourteenth Amendment. . . . One embodiment of this still extant claim for relief from excessive force based in Due Process is the situation in which a state actor aids and abets a private party in subjecting a citizen to unwarranted physical harm. . . . *Graham* 's holding that excessive force claims in the context of an arrest are to be analyzed under the Fourth Amendment's objective standards does not extend to this unusual situation in which the police officers allegedly engaged in a deprivation of rights coincident with, but distinct from, their arrest of the suspect. Not only did the alleged aid necessarily begin before the Officers and Torrado reached the scene of the arrest, but Torrado, as a civilian, was not himself arresting Hemphill."); ***Sanchez v. Figueroa***, 996 F. Supp. 143, 147 (D.P.R. 1998) ("While substantive due process analysis has been rendered inapposite to situations to which specific constitutional amendments apply, . . . the factors set forth by Judge Friendly in *Glick* remain useful in analyzing claims of excessive force by innocent bystanders who have no Fourth or Eighth Amendment claims.").

See also ***Cain v. Rock***, 67 F. Supp.2d 544, 552-53 (D. Md. 1999) ("Whether a random act of violence by a prison guard constitutes 'cruel and unusual punishment' for Eighth Amendment purposes is a question of first impression in the Fourth Circuit. . . . This Court agrees with the reasoning of the Second and Fifth Circuits. The assault at issue in the present case plainly falls outside of 'cruel and unusual punishment' jurisprudence. Rock's alleged sexual acts were in direct violation of prison regulations, neither authorized nor condoned by prison officials, and completely removed from the purposes of the correctional facility. These acts, though regrettable, were random, and the Court holds that a random sexual assault by a prison guard--while cruel and not ordinary-- does not qualify as 'punishment' for Eighth Amendment purposes. Accordingly, the Court rejects Cain's Eighth Amendment claim. Prisoners who are the subject of unauthorized assaults, however, may still have a claim under the Fourteenth Amendment's Due Process Clause. . . . In the present case, the Court finds that Cain's allegations and evidence, if true, set forth a scenario that could shock the judicial conscience. Given the 'power arrangements' in the prison environment, . . . and the custodial role of correctional officers, a sexual assault by a guard is a shocking abuse of power, particularly where the inmate is mentally or physically incapacitated.").

See also ***Simi Investment Company, Inc. v. Harris County***, 236 F.3d 240, 248, 249 (5th Cir. 2000) ("*John Corp.* found that under *Albright /Graham*, a more explicit provision does not necessarily preempt due process protections, and that substantive due process claims can survive a related takings argument . . . . Our limited holding in *John Corp*. is similarly limited here; we find only that when a state interferes with property interests, a substantive due process claim may survive a takings analysis and, therefore, provide jurisdiction for a federal court.").

The Court expressly rejected as "unsound," 523 U.S. at 843, the contrary position taken by the Seventh Circuit in ***Mays v. City of East St. Louis***, 123 F.3d 999, 1002 (7th Cir. 1997) (where passengers in suspect's car sued for injuries sustained in context of high-speed pursuit, court held that "[c]aution in the creation of new rights leads us to conclude that the sort of claim plaintiffs make is not a proper invocation of substantive due process. . . .[O]nce the substantive criteria of the fourth amendment have been applied, there is neither need nor justification for another substantive inquiry--one based not on constitutional text but on an inference from structure.").

The more difficult question was the standard of culpability plaintiff would have to demonstrate to make out a substantive due process claim in the pursuit context. In *Lewis*, the Ninth Circuit had held that "deliberate indifference or reckless disregard" was the appropriate standard for a substantive due process claim arising from a high-speed pursuit. ***Lewis v. Sacramento County***, 98 F.3d 434, 441 (9th Cir.1996). The Ninth Circuit's holding was in direct conflict with decisions of other Circuits requiring conduct that "shocks the conscience" in high-speed pursuit cases. *See, e.g.,* ***Evans v. Avery***, 100 F.3d 1033, 1038 (1st Cir. 1996) (holding that "police officers' deliberate indifference to a victim's rights, standing alone, is not a sufficient predicate for a substantive due process claim in a police pursuit case. Rather, in such a case, the plaintiff must also show that the officers' conduct shocks the conscience."); ***Williams v. City and County of Denver***, 99 F.3d 1009, 1017 (10th Cir. 1996) (concluding that officer's "decision to speed against a red light through an intersection on a major boulevard in Denver without slowing down or activating his siren in non-emergency circumstances . . . could be viewed as reckless and conscience-shocking."), *vacated and remanded for further proceedings in light of County of Sacramento v. Lewis and Bd. of County Comm'rs of Bryan County v. Brown*, ***Williams v. City and County of Denver***, 153 F.3d 730 (10th Cir. 1998) (per curiam) (en banc); ***Fagan v. City of Vineland***, 22 F.3d 1296, 1303 (3d Cir. 1994) (en banc) (holding that "the appropriate standard by which to judge the police conduct [in a high speed pursuit case] is the 'shocks the conscience' standard.").

The Court first observed that "the core of the concept" of due process has always been the notion of "protection against arbitrary action." 523 U.S. at 845. What will be considered "fatally arbitrary," however, will "differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." *Id*. To establish an executive abuse of power that is "fatally arbitrary," the plaintiff will have to demonstrate conduct that "shocks the conscience." The Court acknowledged that "the measure of what is conscience-shocking is no calibrated yard stick," and "that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault." *Id.* at 848. Most likely to reach the conscience-shocking level would be "conduct intended to injure in some way unjustifiable by any government interest." *Id*. at 849.

Approving of the deliberate indifference standard applied to substantive due process claims of pretrial detainees complaining of inadequate attention to health and safety needs, the Court distinguished high-speed pursuits by law enforcement officers as presenting "markedly different circumstances." *Id.* at 851. The Court noted

substantial authority for different standards of culpability being applied to the same constitutional provision. Thus, in the Eighth Amendment prison context, while deliberate indifference to medical needs may establish constitutional liability, the Court has required prisoners asserting excessive force claims in the context of a prison riot to show that the force was used "maliciously and sadistically for the very purpose of causing harm." ***Whitley v. Albers***, 475 U.S. 312, 320-21 (1986). The Court analogized police officers engaged in sudden police chases to prison officials facing a riot and concluded:

> Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for Due Process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.

523 U.S. at 854. With no suggestion of improper or malicious motive on the part of the officer in *Lewis*, the alleged conduct could not be found "conscience-shocking." Thus, the Court reversed the judgment of the Court of Appeals.

While six of the Justices concurred in the judgment and opinion of the Court, Justices Stevens, Scalia and Thomas concurred only in the judgment. Justice Stevens would have reinstated the judgment of district court which had disposed of the case on qualified immunity grounds on the basis that the law was not clearly established at the time. He would have left resolution of the difficult constitutional question for a case against a municipality. 523 U.S. at 859 (Stevens, J., concurring in the judgment).

Justice Scalia, joined by Justice Thomas, suggested that the appropriate test for a substantive due process claim was "whether our Nation has traditionally protected the right respondents assert" rather than "whether the police conduct here at issue shocks my unelected conscience." *Id*. at 862 (Scalia, J., joined by Thomas, J., concurring in the judgment). Justice Scalia "would reverse the judgment of the Ninth Circuit, not on the ground that petitioners have failed to shock my still, soft voice within, but on the ground that respondents offer no textual or historical support for their alleged due process right." *Id.* at 865.

See also ***Daniels v. City of Dallas***, 272 Fed. Appx. 321, 323 (5th Cir. 2008) ("It matters not here whether we apply an intent-to-harm standard for chases or a lower standard of deliberate indifference; Wolverton's actions do not fall within the ambit of either. This is a case that, although tragic, involves negligence or even gross negligence but not deliberate indifference . . . The fact that a public official committed a common law tort with tragic results fails to rise to the level of a violation of substantive due process . . . . [M]otor vehicle accidents caused by public officials or employees do not rise to the threshold of a constitutional violation actionable under § 1983, absent a showing that the official knew an accident was imminent but consciously and culpably refused to prevent it. It is insufficient to show that a public official acted in the face of a recognizable but generic risk to the public at large. . . . In an unpublished opinion in *Smith v. Walden*, we similarly affirmed a deliberate indifference holding in the police context. The district court held that a police officer who was speeding without lights or a siren in response to a non-emergency call and killed an innocent passenger did not act with 'the level of arbitrary or intentional conduct that shocks the conscience in the constitutional sense.'. . We find no facts in the pleadings or the record, viewed in the light most favorable to Plaintiffs, showing that Wolverton acted with the recklessness required for deliberate indifference. . . Nor do we find error in the district court's treatment of Plaintiffs' facts and pleadings. No matter how favorably a court treats the Plaintiffs' facts and pleadings, they do not demonstrate the requisite factors for deliberate indifference."); ***Bingue v. Prunchak***, 512 F.3d 1169, 1177 (9th Cir. 2008) ("We agree with the Eighth Circuit and decline to try to draw a distinction between 'emergency' and 'non-emergency' situations involving high-speed chases aimed at apprehending a fleeing suspect. . . We, therefore, hold that the *Lewis* standard of 'intent to harm' applies to all high-speed police chases. . . . We conclude that high-speed police chases, by their very nature, do not give the officers involved adequate time to deliberate in either deciding to join the chase or how to drive while in pursuit of the fleeing suspect. We hold, therefore, that *Lewis* requires us to apply the 'intent to harm' standard to all high-speed chases."); ***Meals v. City of Memphis, Tenn***., 493 F.3d 720, 730 (6th Cir. 2007) ("It is clear from the record that Officer King did not intentionally cause Mr. Harris's vehicle to crash. Moreover, Officer King argues persuasively that even when the facts are viewed in the light most favorable to the appellee, they do not meet the shocks-the-conscience test. Although the police expert, Mr. Waller, opined that the pursuit reached an unacceptable level when Mr. Harris crossed into oncoming traffic when he first turned onto Covington Pike, and despite the fact that Officer King violated the police pursuit policy, the record does not establish that Officer King intended to harm the occupant of the

vehicle being pursued--or the victims of her actions. . . . We are therefore compelled to conclude, despite the tragic results stemming from Officer King's violation of the City's policy, that the facts in the present case do not make out a substantive due process violation under *Lewis*, *supra.*"); ***Slusarchuk v. Hoff,*** 346 F.3d 1178, 1183 (8th Cir. 2003) ("Appellees argue that officers Hoff and Faust evidenced the requisite intent to harm in pursuing Howard because they did not have probable cause to stop him and therefore the pursuit was unrelated to a legitimate object of arrest. This contention is without merit. When Howard refused to stop after the officers activated their emergency lights, they had probable cause to arrest him for committing a felony in their presence, regardless of their initial reasons for the attempted stop. . . . Alternatively, appellees argue that the officers are not entitled to qualified immunity because they intended 'to worsen [Howard's] legal plight.' . . . We decline to read the term expansively, as appellees urge, because every police pursuit is intended to 'worsen [the] legal plight' of the suspect by arresting him. Thus, a broad reading would eviscerate the intent-to-harm standard that the Court adopted, at least in part, to sharply limit substantive due process liability. Rather, we construe the term as applying only to a narrow category of pursuits that reflect a conscience-shocking motive beyond the realm of legitimate government action but do not involve an intent to inflict physical harm. The pursuit in this case reflects no such motive."); ***Helseth v. Burch***, 258 F.3d 867, 871 (8th Cir. 2001) (en banc) ("Since *Lewis,* all other circuits that have examined the issue have applied the intent-to-harm standard in high-speed police pursuits cases, without regard to . . .the length of the pursuit, the officer's training and experience, the severity of the suspect's misconduct, or the perceived danger to the public in continuing the pursuit.[citing cases] We now join those circuits and. . .hold that the intent-to-harm standard of *Lewis* applies to all § 1983 substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender.").

Lewis has been applied in other Fourteenth Amendment contexts where officers are confronted with sudden, tense, rapidly developing or emergency-type situations. *See, e.g.,* ***Porter v. Osborn***, 546 F.3d 1131, 1133, 1137-40 (9th Cir. 2008) (9th Cir. Oct. 20, 2008) ("[I]n an urgent situation of the kind involved here, the established standard is whether Osborn acted with a purpose to harm Casey without regard to legitimate law enforcement objectives. Whether a jury could find Osborn violated that standard is not clear on the record before us. Although Osborn appears to have helped create and even exacerbate the confrontation he then ended by deadly force, the parties and the district court will need to readdress Osborn's summary

judgment motion under the more stringent purpose to harm standard.. . . . We begin by clarifying the standard of culpability for a due process right to familial association claim. The parties mistakenly suggest that the choice is between 'shocks the conscience' and 'deliberate indifference' as the governing standard, when in fact the latter is one subset of the former. The Supreme Court has made it clear, as the district court correctly recognized, that only official conduct that 'shocks the conscience' is cognizable as a due process violation. . . The relevant question on the facts here is whether the shocks the conscience standard is met by showing that Trooper Osborn acted with *deliberate indifference* or requires a more demanding showing that he acted with a *purpose to harm* Casey for reasons unrelated to legitimate law enforcement objectives. . . . We hold, following Supreme Court precedent and our cases, that the purpose to harm standard must govern Osborn's conduct. . . . We recognize that the district court drew a principled distinction between police chase cases and the much less obvious public safety threat Casey posed during Osborn's roadside investigation, but our precedent entitles Osborn to the purpose to harm standard of culpability because the 'critical consideration [is] whether the circumstances are such that "actual deliberation is practical."'. . Due to the rapidly escalating nature of the confrontation between Osborn and Casey, we respectfully disagree with the district court that Osborn had an opportunity for the kind of deliberation that has been articulated by *Lewis* and its progeny. . . . We agree with Judge McKee's concurring opinion in *Davis*, a Third Circuit police chase case, which reasons that where force against a suspect is meant only to 'teach him a lesson' or to 'get even' then '*Lewis* would not shield the officers from liability even though they were ultimately effectuating an arrest.'"); ***Perez v. Unified Government of Wyandotte County/Kansas City, Kansas***, 432 F.3d 1163, 1167, 1168 (10th Cir. 2005) ("We have not had occasion to apply *Lewis* to a situation where a firefighter or police officer is involved in an automobile accident while responding to an emergency call. . . However, it is clear from *Lewis* that the intent to harm standard applies in this case. A firefighter responding to a house fire has no time to pause. He has no time to engage in calm, reflective deliberation in deciding how to respond to an emergency call. Doing so would risk lives. This case presents a paradigmatic example of a decision that must be made in haste and under pressure. Two other circuits and one state supreme court have addressed cases nearly identical to this one and have applied *Lewis* 's intent to harm standard as well. [citing *Carter v. Simpson*, 328 F.3d 948, 949 (7th Cir.2003) ; *Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir.2005) (*en banc*); *Norton v. Hall*, 834 A.3d 928 (Me.2003)]. . . . In holding that there was a question of material fact as to whether the deliberate indifference standard should apply the district court committed a mistake of law. . . Under *Lewis*,

the court should have applied the intent to harm standard. We may have remanded the case to the district court for application of the proper standard, but Becerra conceded at oral argument that there were no allegations and no facts in this case that supported a claim that Mots had an intent to harm. Because there is no such allegation in the complaint, we need not reach the question of what showing is necessary to evince an intent to harm. We simply hold that a bystander hit by an emergency response vehicle in the process of responding to an emergency call cannot sustain a claim under the substantive due process clause without alleging an intent to harm. As such, Mots should be granted qualified immunity."); ***Terrell v. Larson,*** 396 F.3d 975, 978-81 & n.2 (8th Cir. 2005) (en banc) ("In determining the requisite level of culpability in this case, we reject the panel majority's conclusion that the controlling force of *Lewis* is limited to high-speed police driving aimed at apprehending a suspected offender. The Supreme Court's analysis of the culpability issue in *Lewis* was framed in far broader terms. . . [W]e hold that the intent-to-harm standard of *Lewis* applies to an officer's decision to engage in high-speed driving in response to other types of emergencies, and to the manner in which the police car is then driven in proceeding to the scene of the emergency. . . . Because substantive due process liability is grounded on a government official's subjective intent, and because the intent-to-harm standard applies 'when unforeseen circumstances demand an officer's instant judgment' and 'decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance,' *Lewis,* 523 U.S. at 853, we conclude that this issue turns on whether the deputies subjectively believed that they were responding to an emergency. . . .We need not consider whether a different rule should apply if an official's claim of perceived emergency is so preposterous as to reflect bad faith. Here, it is undisputed that, prior to the accident, Larson and Longen only heard the initial dispatch that a young mother had locked herself in a bedroom and was threatening to harm her three-year-old child. From the perspective of a police officer deciding whether to respond, the dispatch without question described an emergency, that is, a situation needing the presence of law enforcement officers as rapidly as they could arrive, even if that entailed the risks inherent in high-speed driving. . . . On appeal, plaintiffs argue, as they did in the district court, that a jury could find that the situation was not reasonably regarded as an emergency by Larson and Longen because they 'volunteered' to provide back-up and then persisted in responding after being advised they were 'covered' and could 'cancel.' But whether Larson and Longen could reasonably have decided that they were not needed as additional back-up is irrelevant. Under *Lewis,* the intent-to-harm culpability standard applies if they believed they were responding to an emergency call. . . . Alternatively, we conclude that Deputies Larson and Longen are entitled to summary judgment

even under the deliberate indifference standard of fault adopted by the panel majority and the district court. To prevail on their substantive due process claim, plaintiffs must prove, not only that the deputies' behavior reflected deliberate indifference, but also that it was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' . . Not all deliberately indifferent conduct is conscience shocking in the constitutional sense of the term."); ***Dillon v. Brown County***, 380 F.3d 360, 364, 365 (8th Cir. 2004) ("In practice, therefore, the 'intent to harm' standard has not been confined to high-speed police chases aimed at apprehending a suspect. . . .It is undisputed that the officers in this case were confronted with a rapidly developing situation that arose quickly after their arrival on the property of the manufacturing plant. Whether or not they technically were in 'pursuit' of Dillon for purposes of Nebraska law, or whether they intended to make a formal arrest, there is no doubt that the officers were seeking to make investigative contact with Dillon concerning the alleged shoplifting and stolen license plates, and in response to the complaints from Dillon's mother. All agree that when Dillon appeared on the ATV from behind a building, the officers were afforded no more than ten seconds to react to the approaching vehicle. That the officers may have been driving at 'medium-speed' rather than 'high-speed' is not a constitutionally significant distinction. We believe the scenario plainly qualifies as a 'rapidly evolving, fluid, and dangerous situation[ ],' rather than one which allows for 'calm and reflective deliberation,' . . . and that the plaintiff must show an intent to harm in order to establish a violation of substantive due process."); ***Rivas v. City of Passaic,*** 365 F.3d 181, 195, 196 (3d Cir. 2004) ("Because conduct that 'shocks the conscience' under one set of circumstances may not have the same effect under a different set of circumstances, the standard of culpability for a substantive due process violation can vary depending on the situation. . . . We [have] held that the 'shock-the-conscience' standard 'applied to the actions of emergency medical personnel-who likewise have little time for reflection, typically making decisions in haste and under pressure.'. . Thus, the Rivas family can only meet the second element of the *Kneipp* test by presenting evidence that Garcia's and Rodriguez's conduct shocks the conscience by consciously disregarding a substantial risk that Mr. Rivas would be seriously harmed by their actions."); ***Bublitz v. Cottey,*** 327 F.3d 485, 490, 491 (7th Cir. 2003) (In this case, much of the argument goes to whether the shocks-the-conscience or the deliberate-indifference standard is the appropriate benchmark by which to determine if the defendant officers' conduct violates the Fourteenth Amendment. Mr. Bublitz attempts to distinguish *Lewis* by noting that Officer Durant had at least three to five minutes in which he had to decide whether to deploy the spikes, giving him adequate time to deliberate. The officers counter that the circumstances of a high-speed police

pursuit-- which entail constantly changing conditions--do not lend themselves to careful and considered deliberation. But we need not choose between the two formulations of the constitutional standard (even assuming they present different inquiries), as we believe that Mr. Bublitz has not presented facts which rise to either level. At most, Mr. Bublitz has described a scenario in which Durant may have been negligent in deciding to deploy his Stinger Spike System, but mere negligence is insufficient to give rise to a constitutional violation under the Fourteenth Amendment."); ***Brown v. Commonwealth of Pennsylvania Dept. of Health Emergency Medical Services Training Institute***, 318 F.3d 473, 480, 481(3d Cir. 2003) ("We derive from these cases the principle that the 'shocks the conscience' standard should apply in all substantive due process cases if the state actor had to act with urgency. This has been the law for police pursuit cases, *see, e.g., Fagan II,* and, social workers when they are acting with urgency to protect a child, *see, e.g., Miller; Croft v. Westmoreland County Children & Youth Services,* 103 F.3d 1123 (3d Cir.1997). We now hold that the same 'conscience shocking' standard applies to the actions of emergency medical personnel-who likewise have little time for reflection, typically making decisions in haste and under pressure. . . . Although Stewart and Caffey may have ultimately failed to rescue Shacquiel successfully from a pre-existing danger, we have already said that they had no constitutional obligation to do so. We cannot say that their actions in attempting a failed rescue shocks the conscience. Thus, Appellants have not demonstrated a viable state-created danger claim."); ***Darrah v. City of Oak Park,*** 255 F.3d 301, 306, 307 (6th Cir. 2001) ("[T]he Supreme Court has held that different conscience-shocking standards should be applied depending on the circumstances in which the governmental action occurred. . . . Officer Bragg, when grabbed from behind in a loud and unruly crowd of people, did not have time to deliberate the best possible course of action. Just the opposite is the case. . . . Given the facts of this case, the plaintiff simply cannot show that any reasonable jury could find that Officer Bragg's conduct was malicious, sadistic, and imposed not to restore order, but only to cause harm."); ***Neal v. St. Louis County Board of Police Commissioners***, 217 F.3d 955, 958, 959 (8th Cir. 2000) ("[I]n rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation, a state actor's action will shock the conscience only if the actor intended to cause harm. . . . Plaintiffs attempt to redirect this Court's focus to the hour and a half before the shootout to show that Officer Peterson had time to deliberate departmental policies and practices designed to protect officers involved in undercover operations. . . . Given the facts of this case, we believe that it is inappropriate to look outside the time period immediately preceding Peterson's decision to fire his gun to determine whether Peterson's conduct

was truly conscience shocking."); ***Claybrook v. Birchwell***, 199 F.3d 350, 360 (6th Cir. 2000) ("[E]ven if, as the plaintiffs have argued, the actions of the three defendant patrolmen violated departmental policy or were otherwise negligent, no rational fact finder could conclude, even after considering the evidence in the light most favorable to Quintana, that those peace enforcement operatives acted with conscience-shocking malice or sadism towards the unintended shooting victim."); ***Moreland v. Las Vegas Metropolitan Police Department***, 159 F.3d 365, 372-73 (9th Cir. 1998) ("The question we face today is whether [the *Lewis*] newly minted explanation of the 'shocks the conscience' standard also controls in cases where it is alleged that an officer inadvertently harmed a bystander while responding to a situation in which the officer was required to act quickly to prevent an individual from threatening the lives of others. We conclude that it does. While the Supreme Court limited its holding in *Lewis* to the facts of that case (i.e., to high-speed police chases), there is no principled way to distinguish such circumstances from this case. Reasoning by analogy from its previous recognition that different types of conduct implicate different culpability standards under the Eighth Amendment, the Court extensively discussed the question of what states of mind trigger the 'shocks the conscience' standard that governs substantive due process claims arising from executive action. . . . Expressly declining to draw a bright line rule, the Court described the critical consideration as whether the circumstances are such that 'actual deliberation is practical.'. . . [E]ach of the circuits that has interpreted and applied this aspect of the *Lewis* decision has recognized that the critical question in determining the appropriate standard of culpability is whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct. . . . Appellants do not contend Burns intended to harm Douglas, physically or otherwise. Nor do Appellants dispute that Burns was entitled to use deadly force to halt the gunfight occurring in the Chances Arr parking lot. Instead, Appellants simply contend that the officers shot a bystander, and that this creates a triable issue as to whether the officers acted recklessly or with gross negligence. Even if all this is true, Appellants have failed to state a viable substantive due process claim because these matters are not material to the controlling question of whether Burns acted with a purpose to harm Douglas that was unrelated to his attempt to stop the male in the parking lot from endangering others."); ***Schaefer v. Goch***, 153 F.3d 793, 798 (7th Cir. 1998) ("In our case . . . the officers who fired their weapons did intend to harm the suspect, John Nieslowski, but it is not John on whose behalf this suit was brought. . . . Nobody has suggested that the officers intended to harm Kathy Nieslowski, and so the straightforward application of the *Lewis* analysis yields a verdict in favor of defendants. On the other hand, firing a gun when an innocent party

who has just attempted to surrender is standing, by most accounts, only inches from the intended target seems even more dangerous a course than pursuing a suspect at high speeds through city or suburban streets. Under the analysis employed in *Lewis*, however, the officers' decision to fire does not 'inch close enough to harmful purpose' to shock the conscience, even assuming that John never swung his weapon in the direction of the officers. . . . The situation was fluid, uncertain, and above all dangerous, and the officers' decision to shoot, regrettable though its results turned out to be, does not shock the conscience."); ***Medeiros v. O'Connell***, 150 F.3d 164, 170 (2d Cir. 1998) (*Lewis* "shocks the conscience" standard not satisfied where bullet intended for suspect deflected and hit hostage); ***Radecki v. Barela***, 146 F.3d 1227, 1231-32 (10th Cir. 1998) ("[I]n assessing the constitutionality of law enforcement actions, we now distinguish between emergency action and actions taken after opportunity for reflection. Appropriately, we are required to give great deference to the decisions that necessarily occur in emergency situations. . . . Henceforth, we look to the nature of the official conduct on the spectrum of culpability that has tort liability at one end. On the opposite, far side of that spectrum is conduct in which the government official intended to cause harm and in which the state lacks any justifiable interest. In emergency situations, only conduct that reaches that far point will shock the conscience and result in constitutional liability. Where the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience."); ***White v. Polk County***, No. 8:04-cv-1227-T-26EAJ, 2006 WL 1063336, at *7 (M.D. Fla. Apr. 21, 2006) ("At some point, there comes a time, even in a high-speed chase, at which the abuse of the law enforcement officer is so clear that the judicial conscience is shocked. This Court will leave that determination for another day and another case with more egregious facts than this one. Here, there is no indication in the record that Jacoby or White had any idea Lawson intended to commit a crime on them, nor did Lawson admit that he intended to commit any crime upon them. Plaintiffs contend that the accident could have been avoided had Deputy Lawson simply turned on his lights and siren and pulled Jacoby over. Such is noted by a captain of the sheriff's office in his report. Whether the accident could have been avoided, however, is not part of the analysis with respect to shocking the conscience."); ***Logan v. City of Pullman***, 392 F.Supp.2d 1246, 1264, 1265 (E.D. Wash. 2005) ("Here, the Defendant Officers certainly weren't facing the 'extreme emergency of public gunfire' like the officers faced in *Moreland*. Therefore, arguably, the Defendant Officers had time to deliberate about how they were going to break up the fight before opening the door and spraying O.C. However, in *Lewis*, the Supreme Court held that actual deliberation was not practical where the defendant

officer, driving a patrol car, was simply pursuing a motorcyclist in a high-speed chase whose only offense was speeding. Further, the concerns of the Defendant Officers at the time of the incident were similar to those concerns of officers involved in dispersing a prison riot. Therefore, since 'deliberate indifference' was insufficient to show officer liability in both a prison riot and a high-speed chase of a motorcyclist who was speeding, the Court concludes that it is also insufficient to show officer liability in a situation such as that confronted by the Defendant Officers in this case. Consequently, the Court concludes that actual 'purpose to cause harm' unrelated to any legitimate use of O.C. must be shown to satisfy the 'shocks the conscience' standard necessary for a due process violation in this case. The Defendant Officers' use of O.C. inside the Top of China Restaurant and the fact that it dispersed throughout the building and affected the individuals inside does not meet the 'purpose to cause harm' standard. . . However, Plaintiffs have produced evidence that if proven, is adequate to meet this standard. Specifically, Plaintiffs allege the Defendant Officers refused to provide assistance to the injured Plaintiffs, refused to allow the Plaintiffs to assist one another, and tried to keep the Plaintiffs from exiting the building after O.C. was sprayed. . . If proven, these facts evidence a purpose to cause harm against all of the Plaintiffs unrelated to any legitimate use of force by the Defendant Officers, thereby satisfying the 'shocks the conscience' standard necessary for a substantive due process violation in this case."); ***White v. City of Philadelphia,*** 118 F. Supp.2d 564, 570, 572 (E.D. Pa. 2000) ("The Officers in this case were . . . facing conflicting responsibilities: on the one hand, according to the complaint, the Officers were being pressured by neighbors to break the door down; on the other hand, the Officers' reluctance to invade a seemingly peaceful residence pulled in the other direction. Under these circumstances, the Court concludes as a matter of law that the Officers' behavior was not conscience-shocking. . . . In response to the 911 call placed by Nadine White's neighbors, the Officers knocked on Nadine White's door several times. . .Upon hearing no response, the Officers refused the neighbors' request to break down the door and left the scene. . . .The Officers did nothing to place Nadine White in jeopardy-- they only failed to protect Nadine White from private violence. Such inaction does not create liability."); ***Lizardo v. Denny's Inc.***, No. 97-CV-1234 FJS GKD, 2000 WL 976808, at *12 (N.D.N.Y. July 13, 2000) (not reported)("At the time of the brawl, the parking lot was a volatile, violent environment. In that environment, Adams and Paninski were forced to decide whether it was best to call 911 and wait for back-up, and therefore expose the combatants to harm at the hands of other combatants, or to intervene in the numerous altercations, and therefore risk harm to themselves and others should they lose possession of their firearms. In making that decision, Adams and Paninski were not

afforded an opportunity to deliberate; rather, they were required to make a split-second decision under high pressure. In light of those circumstances, the Asian-American Plaintiffs must demonstrate that Adams' and Paninski's actions were motivated by an intent to harm."); ***Gillyard v. Stylios***, No. Civ.A. 97-6555, 1998 WL 966010, at *4, *5 (E.D. Pa. Dec. 23, 1998)(not reported)("Every court addressing police conduct since *Lewis* has found its reasoning extends beyond high-speed pursuit of suspected criminals. [citing cases]. . . . Plaintiff claims that the conduct of police officers responding to a fellow officer's radio call and killing two innocent bystanders differs from officers killing a suspect in a high-speed pursuit as in *Lewis*. Officers Stylios and Fussell were assisting a fellow officer they erroneously believed to be in peril; the officers were on-duty and responding to a police radio request. The fact that they were not pursuing a suspect does not foreclose the application of *Lewis*."); ***White v. Williams***, No. 94 C 3836, 1998 WL 729643, *5 (N.D. Ill. Oct. 16, 1998) (not reported) ("There are two substantive due process standards that have been applied to the conduct of law enforcement officers. The first is the deliberate indifference standard, which is generally applied to prison officials who 'subject an inmate under their authority to dangers that [the officials] might have prevented.'. . . The second is the 'shocks the conscience' standard, which is applied to situations like high-speed car chases in which actual deliberation is impractical. . . Though the situation in this case does not fall neatly into either category, it seems closer to the high-speed chase setting than to the prison setting. It is undisputed that Williams believed it was appropriate to arrest White, that Williams was attempting to do so when he leaned into White's car with his gun drawn, that White attempted to get away from Williams, rather than surrendering to him, and that Williams' gun accidentally fired in the process. . . It is also undisputed that all of these events 'happened really quickly.'. . Given the pace of these events and the unpredictability of White's reaction, Williams had little opportunity for deliberation before he leaned into White's car. As a result, we hold that the 'shocks the conscience' standard is more appropriate for this case than the deliberate indifference standard. . . . Because Williams did not intend to harm White, Williams' behavior does not shock the conscience."); ***Smith v. City of Plantation***, 19 F. Supp.2d 1323, 1330 (S.D. Fla. 1998) (Applying *Lewis* to find no substantive due process violation arising from hostage situation, where officer "was confronted by an emergency situation that he did not precipitate."), *aff'd*, 198 F.3d 262 (11th Cir. 1999); ***Jarrett v. Schubert***, No. 97-2628-GTV, 1998 WL 471992, *5 (D. Kan. July 31, 1998) (not reported) ("To help sort through the quagmire, the Supreme Court has adopted a fluctuating standard of review. In emergency situations, a government official will be liable only if he intended to inflict harm on the plaintiff and the government has no justifiable interest

in his particular conduct. . . If, on the other hand, the government official has the luxury of deliberating about the decision he is making, 'something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience.'").

See also ***Hunt v. Sycamore Community School Dist. Bd. of Educ***., 542 F.3d 529, 536, 541 (6th Cir. 2008) ("[W]hen executive action is worse than negligent but was not done for the purpose of injuring someone or in furtherance of invidious discrimination, . . . *Lewis* and later cases interpreting it have identified several considerations that bear on whether the action will be considered arbitrary, including: (1) the voluntariness of the relationship between the government and the plaintiff, especially whether the plaintiff was involuntarily in government custody or was voluntarily a government employee; (2) whether the executive actor was required to act in haste or had time for deliberation; and (3) whether the government actor was pursuing a legitimate governmental purpose. . . . Some authority from this Circuit indicates that whether the required culpability level is 'intent to harm' or subjective deliberate indifference depends entirely on whether the situation is an emergency or allows time to deliberate. . . . As the rule is articulated in these cases, if the situation is an emergency, the heightened intent standard would apply, and if there is time to deliberate, the lower deliberate indifference standard would apply. . . Superficially, this haste/leisure dichotomy might seem to preclude taking account of whether or not the government actor is or is not motivated by a countervailing legitimate purpose. If countervailing purposes could not be taken into account, in non-custodial, non-crisis situations, a government actor's choice could shock the conscience because he knowingly risked a person's life, even where he picked the lesser of two evils. By this reasoning, a policeman could not risk one person's life to save ten others. . . . The outcomes in our cases do not support such an interpretation. . . . Thus, even where the governmental actor is subjectively aware of a substantial risk of serious harm, we will be unlikely to find deliberate indifference if his action was motivated by a countervailing, legitimate governmental purpose."); ***Marino v. Mayger***, 118 Fed. Appx. 393, 402, 403, 2004 WL 2801795, at *8 (10th Cir. Dec. 7, 2004) ("[E]ven if sufficient affirmative conduct had been alleged, the ultimate measure of whether conduct by state actors violates due process is whether 'the challenged government action "shocks the conscience" of federal judges.' . . We consider the following three factors in making such a determination: '(1) the need for restraint in defining the scope of substantive due process claims; (2) the concern that § 1983 not replace state tort law; and (3) the need for deference to local policymaking bodies in making decisions impacting public safety.'. . 'These factors counsel that application of

danger creation as a basis for § 1983 claims is reserved for exceptional circumstances.'. . Lastly, '[w]e have noted that ordinary negligence does not shock the conscience, and that even permitting unreasonable risks to continue is not necessarily conscience shocking[.] Rather, a plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.'. . While we agree that the sheriff defendants' alleged conduct in this case, if accurately portrayed, was inconsistent with what we expect from public officials, we cannot conclude that their actions were so egregious or fraught with unreasonable risk as to 'shock the conscience.' To the extent that Hill, Waterman, and Hiler permitted a potentially volatile situation to persist, we do not believe their cumulative inaction rises above the level of negligence. Nor do we believe that the sheriff defendants created the danger that Michael Marino would be assaulted by Francis Hiemer with a shovel on that particular day. Therefore, because the Marinos have failed to allege affirmative conduct that shocks the conscience, we conclude that the district court properly dismissed the Marinos' substantive due process claim."); ***Coyne v. Cronin***, 386 F.3d 280, 288, 289 (1st Cir. 2004) ("The conscience-shocking standard is not a monolith; its rigorousness varies from context to context. . . In situations where a substantive due process claim might lie but where government officials must act in haste, under pressure, and without an opportunity for reflection, even applications of deadly force by those officials cannot be conscience-shocking unless undertaken maliciously and sadistically for the very purpose of causing harm. . .By contrast, in situations where a substantive due process claim might lie and where actual deliberation on the part of a governmental defendant is practical, the defendant may be held to have engaged in conscience-shocking activity even without actual malice (to take one familiar example, if a government official assumes custody of a person and then displays deliberate indifference to his ward's basic human needs). . . The spectrum is wide because substantive due process violations tend to come in various shapes and sizes and in a multitude of configurations. We need not probe too deeply where along this spectrum of levels of fault Coyne's claim against Cronin may lie because the complaint does not fairly allege deliberate indifference, let alone any more serious level of scienter. . . . If matters were at all different or there were any concrete suggestion as to what might plausibly be developed against Cronin that would suggest conscience-shocking behavior, we would be sympathetic to discovery. But everything we know from the complaint and Coyne's own allegations show that this is basically a negligence case to which the government must respond but for which Cronin may not be sued under the Due Process Clause."); ***Upsher v. Grosse Pointe Public School Systerm,*** 285 F.3d 448, 453, 454 (6th Cir. 2002) ("This court made clear in *Lewellen* . . .that in a non-custodial setting, in order

to establish liability for violations of substantive due process under § 1983, a plaintiff must prove that the governmental actor either intentionally injured the plaintiff or acted arbitrarily in the constitutional sense. . . The *Lewellen* court expressed doubt as to whether, in a non-custodial case, 'deliberate indifference' could give rise to a violation of substantive due process. . . . Similarly, here, we cannot find, nor was our attention invited to, any evidence in the record which suggests that any of the defendants made a deliberate decision to inflict pain or bodily injury on any of the plaintiffs. Neither is there proof that the defendants engaged in arbitrary conduct intentionally designed to punish the plaintiffs--conduct which we have recognized may result in the deprivation of a constitutionally protected interest. . .. Without more, we conclude that the plaintiffs' evidence establishes, at best, a case sounding in negligence and not a constitutional tort under § 1983."); ***Cummings v. McIntire,*** 271 F.3d 341, 345, 346 (1st Cir. 2001) (" This is a case whose factual context falls within the middle ground, neither so tense and rapidly evolving as a high-speed police pursuit nor so unhurried and predictable as the ordinary custodial situation. Some courts approach such cases by assessing the facts pursuant to a test formulated by Judge Friendly in *Johnson*, 481 F.2d at 1033, with which we substantially agree: In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. . . . While there is no doubt that McIntire unnecessarily utilized physical force, we agree with the district court that the record does not permit a finding that he did so 'maliciously and sadistically for the very purpose of causing harm,' . . . At the time he acted, McIntire was juggling drivers and runners in a busy location, swiveling his head to be sure no problems arose. . . In such circumstances, a hard shove accompanied by abusive language, whose evident purpose--as even appellant acknowledges--was to get Cummings out of the way, . . . does not in our view constitute the 'brutal' and 'inhumane' conduct necessary to establish a due process violation. The Due Process Clause is intended to prevent government officials 'from abusing [their] power, or employing it as an instrument of oppression,' . . . here, the officer's action was reactive rather than reflective, seemingly inspired by a 'careless or unwise excess of zeal' in communicating his displeasure with Cummings' interruption, rather than by a purpose to harm."); ***Cutter v. Metro Fugitive Squad***, No. CIV-06-1158-GKF, 2008 WL 4068188, at **18-20 (W.D. Okla. Aug. 29, 2008) ("Here, the defendants' conduct must be analyzed with respect to the particular circumstances the officers faced at the time. Based on the authorities discussed above, it is inappropriate for the

court to apply a blanket 'shock the conscience' standard to all of the defendants' conduct because some of the circumstances allowed for actual deliberation or reflection, while other circumstances required instant reactions. The conduct of the defendants, which allegedly placed Harris in danger, can be broken down into three general categories: (1) the defendants' decision to engage Harris as a civilian operative and the actual planning of the operation itself; (2) the defendants' decision to converge on Harris's vehicle 'swat-team' style soon after Barnett got inside and Harris drove away; and (3) the defendants' decision to engage in gunfire with Barnett in Harris's presence. The court concludes that the first category of conduct--i.e., the defendants' decision to engage Harris, a civilian, in an operation to apprehend Barnett and the plans underlying the operation--involved actual deliberation. . . . Where the defendants had the opportunity to truly deliberate, as they did here, deliberate indifference may suffice to shock the conscience. . ..With respect to the second category of conduct--i.e., converging on Harris's vehicle 'swat-team' style with guns drawn after the vehicle had traveled a short distance--the court concludes that this conduct also involved time for actual deliberation and should be analyzed under the deliberate indifference standard. . . . .Finally, the deliberative judgments in planning the operation and surrounding Harris's vehicle are distinguishable from the decisions the defendants had to make at the time they were faced with emergency circumstances. In considering the actions of the Sheriff Defendants after they converged on the vehicle, the court must apply the 'intent to harm' standard. . . .To the extent the plaintiffs' state-created danger claim is based on the defendants' decision to engage in gunfire with Barnett, such claims must be dismissed as to the Sheriff Defendants."); ***Purvis v. City of Orlando,*** 273 F.Supp.2d 1321, 1327, 1328 (M.D. Fla. 2003) ("Even though Reeve reacted to a situation that he allegedly caused, the Court cannot properly analogize Reeve to a prison official enjoying the luxuries of unhurried judgments. Logan was not detained in a jail cell. Similarly, given Reeve's knowledge of Logan's suicidal state, the flight risk he posed, and his alleged willingness to let him flee, the Court cannot properly analogize Reeve to an officer in the midst of a completely unexpected high-speed car chase. The Court, unable to find a situation in existing case law analogous to the instant case, finds that Logan's situation falls somewhere between these situations. Viewing the facts in the light most favorable to Plaintiff, Reeve allowed Logan to escape. This implies some degree of forethought by Reeve. Nevertheless, Reeve cannot be held accountable for Logan's actions subsequent to his escape. Reeve had no way of knowing Logan would jump the fences he jumped, or enter the retention pond where he drowned. There are no allegations that Reeve herded Logan over the fences and into the pond, or that he released Logan with the specific intention of causing Logan's death. The

allegations are simply that Reeve pursued Logan to the retention pond and failed to aid him. The question before the Court is one of Reeve's intent. . . . Plaintiff makes no specific factual allegations concerning Reeve's actions or intent in allowing Logan to escape. In the absence of such allegations, the Court cannot assume that Plaintiff can prove facts that she has not alleged. . . . Consequently, the Court finds that Plaintiff has not stated a Fourteenth Amendment violation. . . . If Reeve indeed herded or forced Logan into the pond, it could constitute conscience-shocking behavior. In the absence of such allegations, however, the Court will not hold that Reeve's failure to wade into a pond to apprehend a 'struggling' escaped prisoner violates the Constitution.").

But see ***McQueen v. Beecher Community Schools,*** 433 F.3d 460,469 (6th Cir. 2006)("Here, deliberate indifference is the appropriate standard because Judd had the opportunity to reflect and to deliberate before deciding to leave Smith and several children unsupervised in the classroom. Although public schools are busy places, Judd did not need to make a split-second decision that merits applying a higher standard."); ***Pena v. DePrisco***, 432 F.3d 98, 113, 114 (2d Cir. 2005) ("The case before us does not involve a chase of a suspect or a prison riot where we need to 'capture the importance of [state officials'] competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.' . . Not condoning egregious drunk driving 'does not ordinarily clash with other equally important governmental responsibilities.'. . The defendants here, on the facts as alleged, had ample opportunity, not only during the day in question, but also during the days, weeks and months that preceded it, in which to decide what to do and say in response to the alleged practice of drinking and driving by off-duty officers. Nor does it require a sophisticated exercise in judicial notice for us to acknowledge that the extreme danger of drinking and driving is widely known. We conclude that the alleged behavior of the pre-accident individual defendants here, over an extended period of time and in the face of action that presented obvious risk of severe consequences and extreme danger, falls within the realm of behavior that 'can properly be characterized as ... conscience shocking, in a constitutional sense.' . . . Accordingly, we think that the allegations in the complaints before us, even if they do not accuse the defendants of acting with specific intent or desire to cause physical injury, are sufficient to assert that the defendants created a serious danger by acting with deliberate indifference to it. Whether termed 'deliberate indifference' or 'recklessness,' this mental state is sufficient to establish liability in such cases 'because it requires proof that the defendant focused upon the risk of unconstitutional

conduct and deliberately assumed or acquiesced in such risk.'"); ***Estate of Owensby v. City of Cincinnati***, 414 F.3d 596, 603 (6th Cir. 2005) ("The Cincinnati police officers argue that this case is more analogous to vehicular chase cases than traditional prisoner or pretrial detainee cases, essentially because only about six minutes passed between the time Owensby was taken into custody and the time medical care was provided. This argument assumes, however, that actual deliberation was not possible within those six minutes. That assumption is erroneous. During the six minutes that Owensby was denied medical care after being taken into custody, the officers had time to do such things as greet each other, prepare for the arrival of their superiors, pick up dropped items and straighten their uniforms; some officers even had time to observe and discuss the apparent severity of Owensby's injuries. Under these circumstances, there is no question that the officers had 'time to fully consider the potential consequences of their conduct.'. . Accordingly, the district court properly applied the traditional deliberate indifference standard."); ***Terrell v. Larson,*** 396 F.3d 975, 981, 984 (8th Cir. 2005) (en banc) (Lay, J., joined by Heaney, J., and Bye, J., dissenting) ("Today's decision has the effect of giving police officers *un* qualified immunity when they demonstrate deliberate indifference to the safety of the general public. A police officer may now kill innocent bystanders through criminally reckless driving that blatantly violates state law, police department regulations, accepted professional standards of police conduct, and the community's traditional ideas of fair play and decency so long as the officer subjectively, though unreasonably, believed an emergency existed. The majority's holding extends *Lewis* 's high-speed pursuit rule from its intended purpose of protecting officers forced to make split-second decisions in the *field* to a per se rule that now shields officers even after they have had an actual opportunity to deliberate at the *police station.* Believing that 28 U.S.C. § 1983 gives citizens a remedy for egregious abuses of executive power that deprive citizens of their constitutional right to life, we dissent. . . . We submit there are significant distinctions between this high-speed response case and suspect pursuit cases such as *Lewis* and *Helseth.* First, while officers pursuing suspected offenders generally find themselves, when acting in their official duties, in situations which are thrust upon them, *see Lewis,* 523 U.S. at 853, here Larson made a conscious, voluntary decision to respond to the domestic disturbance call even after he was informed that other deputies were responding and he could cancel. Second, while suspect pursuits require instantaneous decisions and on-the-spot reactions, *see id.,* Larson and Longen were eating dinner and doing paperwork when they received the call and were afforded the opportunity to deliberate their response before leaving the police station. Finally, officers involved in suspect pursuits may be required to violate traffic laws or risk losing the suspect. In contrast, Larson and

Longen were not in danger of losing a suspect or of leaving the primary officers in this case without adequate backup, as they were aware other deputies were on their way to the scene. In view of these distinctions, we conclude the obvious lack of exigent circumstances convince us that the intent-to-harm standard is inappropriate in non-emergency response situations."); ***A.M. v. Luzerne County Juvenile Detention Center,*** 372 F.3d 572, 579 (3d Cir. 2004) ("As in a prison setting, we believe the custodial setting of a juvenile detention center presents a situation where 'forethought about [a resident's] welfare is not only feasible but obligatory.'. . We therefore conclude that this case is properly analyzed using the deliberate indifference standard. The circumstances of this case present a situation where the persons responsible for A.M. during his detention at the Center had time to deliberate concerning his welfare."); ***Bukowski v. City of Akron,*** 326 F.3d 702, 710(6th Cir. 2003) ("After reviewing the Supreme Court's decision in *City of Sacramento v. Lewis,*. . .we have come to view the justification for a heightened standard in noncustodial cases as coming from the fact that the reasoning in noncustodial situations is often, by necessity, rushed. . . The guiding principle seems to be that a deliberate-indifference standard is appropriate in 'settings [that] provide the opportunity for reflection and unhurried judgments,' but that a higher bar may be necessary when opportunities for reasoned deliberation are not present. . . For the case at bar, a deliberate-indifference standard is clearly the appropriate one, given the fact that the defendants not only had time to deliberate on what to do with Bukowski but actually did deliberate on this point. The plaintiffs here, however, cannot meet that standard."); ***Estate of Smith v. Marasco,*** 318 F.3d 497, 508, 509 (3d Cir. 2003) (***Smith I***) ("In this case, the officers were confronted with what Fetterolf described as a 'barricaded gunman'situation. This case, however, did not involve the 'hyperpressurized environment' of an in-progress prison riot or a high-speed chase. . . Indeed, the official incident report shows that at least one hour passed between the time Marasco and Scianna approached Smith's residence and the time Fetterolf authorized a request to activate SERT. During that time no shots were fired and the officers did not see a firearm brandished. Moreover, at least after the police arrived at the Smith residence, the police had no reason to be concerned about the safety of third parties. Thus, this case does not involve a 'hyperpressurized environment'such that the Smiths to recover would have to demonstrate that the defendants had an actual purpose to cause harm. At the same time, however, this case is not one in which the police had 'the luxury of proceeding in a deliberate fashion, as prison medical officials can.' . . Because the urgency and timing involved in this case is more like the situation in *Miller*, the Smiths here must demonstrate 'a level of gross negligence or arbitrariness that indeed "shocks the conscience ."'. . . We think based

on our reading of the precedents in this elusive area of the law that, except in those cases involving either true split-second decisions or, on the other end of the spectrum, those in which officials have the luxury of relaxed deliberation, an official's conduct may create state-created danger liability if it exhibits a level of gross negligence or arbitrariness that shocks the conscience."); ***Ewolski v. City of Brunswick,*** 287 F.3d 492, 511 & n.5, 513 (6th Cir. 2002) ("Applying this framework, we agree with the district court that this case 'falls within the "middle-range" between custodial settings and high-speed chases,' and likewise conclude that, on balance, 'the more appropriate standard of review is "deliberate indifference."' . . . Although the Brunswick police officers conducting the standoff undoubtedly faced competing obligations and intense pressures in making their decisions, the facts viewed most favorably to the plaintiffs reveal that this was a situation where actual deliberation was practical. The police waited five hours to initiate the first 'tactical solution,' which strongly suggests that split-second decision making was not required. Many more hours passed before the decision was made to deploy the armored vehicle. Indeed, in his deposition, Chief Beyer indicated that the decision to initiate a tactical assault was made after consulting two mental health professionals and requesting input from the officers on the scene. Beyer also indicated that he discussed the pros and cons of using tear gas. Clearly, this testimony demonstrates not only that deliberation was practical, but that some effort at deliberation was in fact made. . . . . Nevertheless, even under the more exacting deliberate indifference standard, we conclude that the Appellant has not shown a genuine issue of material fact as to whether the conduct of the police rose to the level of the conscience shocking under the particular circumstances presented. . . . We note that although the issue has never been decided, cases from this circuit decided before *Lewis* have 'expressed doubt' as to whether the deliberate indifference standard should apply in noncustodial settings. . . Such doubt, we believe, has been resolved by the Court's opinion in *Lewis,* which made clear that the key variable is whether actual deliberation is practical, not whether the claimant was in state custody. As the Court explained, deliberate indifference applies in custodial settings because these settings provide the opportunity for reflection and unhurried judgments. . . Custodial settings, however, are not the only situations in which officials may have a reasonable opportunity to deliberate."); ***Wilson v. Lawrence County,*** 260 F.3d 946, 956 & n.9 (8th Cir. 2001) ("The general test of whether executive action denying a liberty interest [footnote omitted] is egregious enough to violate due process is whether it shocks the conscience. . . The Supreme Court has taken a context specific approach to determining whether intermediate culpable states of mind, such as recklessness, support a section 1983 claim by shocking the conscience and, thus,

violating due process. . . . In *Neal* . . . , we stated, based on *Lewis,* that in situations where state actors have the opportunity to deliberate various alternatives prior to selecting a course of conduct, such action violates due process if it is done recklessly. . . This statement from *Neal* certainly applies to the present claim. . . . In the present situation, officers conducting the post-arrest investigation certainly had the luxury of unhurried judgments and repeated reflections, which make a reckless standard appropriate. . . . It is important to recall that this reckless standard normally contains a subjective component similar to criminal recklessness."); ***Young v. City of Mount Ranier***, 238 F.3d 567, 574-77 (4th Cir. 2001) ("Although the original complaint refers to 'malicious abuse' by the law enforcement officers, the Parents' claims are not grounded in the Fourth Amendment--in their brief and during oral argument they specifically disavowed any contention that the law enforcement officers improperly took Young into custody or that they used excessive force when taking him into custody. Instead, the Parents proceed solely under the Fourteenth Amendment, contending that the defendants violated Young's constitutional rights by failing to protect him from a known risk of harm (the risk of asphyxiation when restrained in a prone position, particularly after being sprayed with pepper spray), or, stated somewhat differently, that the defendants violated Young's constitutional rights by their indifference to his serious medical needs brought about by the pepper spray, restraints, and face-down positioning. . . . These claims fall within the limited circumstances where conduct in the 'middle range' of culpability--specifically, conduct that amounts to 'deliberate indifference'--is viewed as sufficiently shocking to the conscience that it can support a Fourteenth Amendment claim. . . . Reading the original complaint in the light most favorable to the Parents and giving the Parents the benefit of all reasonable inferences, . . . the complaint simply establishes that Young struggled with law enforcement officers, was sprayed with pepper spray, restrained, transported to a hospital in a prone position, and died sometime thereafter. While the complaint alleges that the officers knew or should have known about the potential problems with the use of pepper spray and restraints on PCP users, these allegations, particularly absent any suggestion that Young exhibited any distress during the time he was in the custody of the officers, at most support an inference that the defendants were negligent in some unidentified way. Negligence, however, is insufficient to support a claim of a Fourteenth Amendment violation."); ***Butera v. District of Columbia,*** 235 F.3d 637, 652 (D.C. Cir. 2001) ("As in the context of State custody, the State also owes a duty of protection when its agents create or increase the danger to an individual. Like prison officials who are charged with overseeing an inmate's welfare, State officials who create or enhance danger to citizens may also be in a position where 'actual deliberation is practical.'. . . In the

instant case, the officers had the opportunity to plan the undercover operation with care. In view of the officers' duty to protect Eric Butera, he may prove that the officers' treatment of him in connection with the attempted undercover drug buy 'shocked the conscience' by meeting the lower threshold of 'deliberate indifference.'"); ***Claybrook v. Birchwell***, 199 F.3d 350, 362, 363 (6th Cir. 2000) (Clay, J., concurring in part and dissenting in part) ("When conducting an 'exact analysis' of the facts of this case in the light most favorable to Ms. Claybrook, it is clear that the officers had sufficient time to make an unhurried judgment about their conduct upon seeing Mr. Claybrook with his weapon such that a lower level of fault should be applied. As the officers testified, they were aware of department rules requiring them to radio for a marked car and uniformed officers, and they made a conscious decision to request such support. The officers were also aware that the department rules mandated that they refrain from investigating the situation unless emergency circumstances arose. Significantly, at the point when they discovered Mr. Claybrook standing outside with this gun, Officer Birchwell testified that he did not believe that the officers were in imminent danger or that exigent circumstances requiring the use of force existed. However, after having made a decision to request backup, the officers inexplicably proceeded to engage Mr. Claybrook in a violent confrontation without awaiting the arrival of the uniformed officers. Contrary to the majority's assertion, the officers here were hardly involved in a high-speed pursuit or any high-pressure confrontation at the time that they decided to act, as were the officers in Lewis. . . As such, Ms. Claybook's claims should be analyzed using the 'deliberate indifference' standard; which is to say, her claim should be viewed in the context of whether the officers had time to make a reasoned judgment about their conduct. . . . Notably, there were no emergency circumstances present so as to require the officers to begin shooting without following protocol and without making a reasoned decision as to whether the vehicle was occupied. Accordingly, under these circumstances, a jury should decide whether the officers acted with deliberate indifference to Ms. Claybrook's rights."); ***Brown v. Nationsbank Corp.***, 188 F.3d 579, 592 (5th Cir. 1999) ("Applying the *Lewis* analysis to the FBI's alleged activity in this case, we conclude that the FBI made decisions which harmed the Plaintiffs after ample opportunity for cool reflection. In fact, they invested almost two years and thousands of man hours in developing the sting operation. Thus, the due process clause protects the Plaintiffs from any harm that arose from the officers' deliberate indifference. The facts, as pleaded, establish at least that level of federal agent culpability as Operation Lightning Strike evolved into a disastrous boondoggle. We therefore hold that Hodgson's allegations that federal agents inflicted damages on him, an innocent non-target, during this particular undercover operation and refused

him compensation states a claim under *Bivens*."); ***Armstrong v. Squadrito***, 152 F.3d 564, 576 (7th Cir. 1998) ("[T]he Court [in *Lewis*] endorsed the use of the deliberately indifferent standard for cases in which the defendants have the luxury of forethought . . . . The Court explained that prison is the quintessential setting for the deliberately indifferent standard."); ***Green v. Post***, No. 07-cv-01522-WYD-MEH, 2008 WL 707338, at *4 (D. Colo. Mar. 14, 2008) ("As the Defendants point out, some circuits have since held that the 'intent to harm' standard applies to all high speed pursuits, regardless of opportunity to deliberate. . . Defendants also point out that the Tenth Circuit has held that the intent to harm standard applies any time law enforcement officials are responding to emergency situations. . . However, Plaintiffs have alleged and brought forth specific evidence to create a genuine dispute as to whether Deputy Post was engaged in a high speed pursuit or responding to an emergency situation. . . . I also find that the Decedent's right was clearly established at the time of Defendant Post's conduct. The Tenth Circuit's decision in *Williams* found that it could be conscious shocking where a decedent died after his vehicle was struck by a vehicle driven by a police officer who sped through an intersection against a red light while operating his emergency lights but without using his siren while responding to a non-emergency call for back up. Though that decision was vacated and remanded to the District of Colorado in light of the *Lewis* decision, the district court essentially affirmed the Tenth Circuit's holding on remand. Like the Tenth Circuit, Judge Nottingham specifically found that a jury could find that the officer's conduct was conscious shocking and in violation of the decedent's due process rights. . . Taking the facts in the light most favorable to the Plaintiffs, Deputy Post's conduct was arguably more egregious than the officer's in Williams, because Deputy Post was not operating his overhead lights. I therefore find that Defendant Post is not entitled to dismissal on qualified immunity grounds because the Plaintiffs have alleged sufficient facts from which a jury could find that decedent's due process rights were violated, a right which was clearly established at the time of the collision on June 16, 2006."); ***Leisure v. City of Cincinnati,*** 267 F. Supp.2d 848, 853, 854 (S.D. Ohio 2003) ("The Court . . . finds that Plaintiffs have also sufficiently alleged a violation of Thomas' due process rights. Such allegation can also serve as the basis for the case to proceed on an alternatively pleaded constitutional violation. The Supreme Court, in *County of Sacramento v. Lewis,* established that although substantive due process claims based upon clearly deliberate decisions intended to harm or injure are 'most likely to rise to the conscience-shocking level,' those claims are not exclusive. . . . Claims based upon 'something more than negligence but less than intentional conduct, such as recklessness or gross negligence' or 'mid-level fault' could also be actionable in some circumstances. . . . Plaintiffs allege that Defendant Roach pursued

Thomas with 'his gun out and his hand on the trigger'. . ., contrary to the policy of the Cincinnati Police Department . . . Such conduct, even if only the result of 'mid-level fault,' inches close enough to harmful purpose to spark shock under *County of Sacramento.* Though Defendants read *County of Sacramento* to foreclose due process liability in a pursuit case absent purpose to cause harm . . . , the Court finds that the specific holding of the case pertains to high-speed chases. . . Defendants further try to frame a pursuit on foot as high-speed, but the Court does not find this proposition convincing, as a person on foot cannot travel as fast as a person on a motorcycle. The urgency and the obvious danger to the public is not the same. For these reasons, the Court finds that consonant with *County of Sacramento,* Plaintiffs' allegations of violation of due process can serve as an alternative basis for a constitutional violation."); ***Sanders v. Bd. Of County Commissioners of Jefferson County,*** 192 F. Supp.2d 1094**,** 1114, 1115 (D. Colo. 2001) ("[I]n assessing the constitutionality of law enforcement actions, I must distinguish between emergency action and actions taken after opportunity for reflection. Appropriately, I must give great deference to the decisions that necessarily occur in emergency situations. With that caveat in mind, I look to the nature of the official conduct on the spectrum of culpability that has tort liability at one end; conduct in which the state actor intended to cause harm and in which the state lacks any justifiable interest on the other. In emergency situations, only conduct that reaches that far point will shock the conscience and result in constitutional liability. Where the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience. . . . The result here comes clear when focused through the lens of the *Lewis* standard. From the time when the attack on Columbine High School began on April 20, 1999 at approximately 11:15 a.m. until approximately 12:30 p.m. when the hostile gunfire ceased and the Command Defendants knew that Harris and Klebold were dead, the competing interests of public and officer safety outweighed the rescue needs of the students and staff inside Columbine High School, including Dave Sanders. This first hour and fifteen minutes of the attack is closely analogous to the prison riot discussed in *Lewis* during which state officials were forced to make 'split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving.' . . . Under such circumstances, unless an intent to harm a victim is alleged, there is no liability under the Fourteenth Amendment redressible by an action under § 1983. . . . In this case, the pertinent time frame falls between approximately 12:30 p.m. when the Command Defendants learned that Harris and Klebold were dead and 4:00 p.m. when a SWAT team finally reached Dave Sanders in Science Room 3. Pursuant to Plaintiff's allegations, during that time, the Command Defendants knew Dave

Sanders' exact location and the nature of his wounds. Yet they took repeated affirmative actions to block access to or rescue of Dave Sanders by private citizens or other state actors not withstanding his readily-accessible location. Under the factual allegations of Plaintiff's complaint I cannot say precisely at what moment between 12:30 p.m. and 4:00 p.m., the circumstances facing the Command Defendants changed. I do conclude that at some point during the afternoon, the Command Defendants gained the time to reflect and deliberate on their decisions. At that point, the Command Defendants demonstrated a deliberate indifference towards Dave Sanders' plight shocking to the conscience of this federal court."); ***Glaspy v. Malicoat,*** 134 F. Supp.2d 890, 896 (W.D. Mich. 2001) ("The Court concludes that the deliberate indifference test rather than the higher 'malicious or sadistic' test is appropriate in this case because Glaspy's request to Malicoat to use the restroom did not involve a 'rapidly evolving, fluid, and dangerous predicament which preclude[d] the luxury of calm and reflective pre-response deliberation.' [citing *Claybrook*] Rather, Malicoat had sufficient time to consider different alternatives and act on them. While it is true that prisoner count, an important prison function, was being conducted at the time, unlike a prison riot, prisoner count is a routine procedure that does not require snap judgments requiring balancing of competing interests. Furthermore, although no more than 22-24 minutes elapsed between William's first request that Glaspy be permitted to use the restroom and the end of count, Malicoat had sufficient time to determine how to accommodate Glaspy's need. Applying the deliberate indifference standard to the facts of this case, the Court concludes that Malicoat's conduct shocks the conscience because Malicoat was deliberately indifferent to Glaspy's federally protected rights."); ***Williams v. City and County of Denver***, No. 90 N 1176, slip op. at *17 (D. Colo. Sept. 27, 1999) (on remand) ("I find that a reasonable juror could conclude that Murawski's back-up call did not require an emergency response and, thus, Williams need not satisfy the intent to harm culpability requirement. Further, I find that a reasonable juror could conclude that, under the totality of the circumstances, Farr's conduct was sufficiently reckless to shock the conscience.").

See also ***Childress v. City of Arapaho***, 210 F.3d 1154, 1157, 1158 (10th Cir. 2000) ("The *Lewis* principles therefore apply whether the claimant is a police suspect or an innocent victim."); ***Onossian v. Block***, 175 F.3d 1169, 1171 (9th Cir. 1999) ("As we read the Court's opinion [in *Lewis*], if a police officer is justified in giving chase, that justification insulates the officer from constitutional attack, irrespective of who might be harmed or killed as a consequence of the chase.").

See also ***Phillips v. County of Allegheny***, 515 F.3d 224, 241 (3rd Cir. 2008) ("[U]nder *Sanford,* three possible standards can be used to determine whether state action shocked the conscience: (1) deliberate indifference; (2) gross negligence or arbitrariness that indeed shocks the conscience; or (3) intent to cause harm. . . . Taking the allegations as true, the complaint leads us to conclude that defendants Tush and Craig were not acting in a 'hyperpressurized environment.' Instead, they had sufficient time to proceed deliberately. . . . Hence, to 'shock the conscience,' they have to have behaved with deliberate indifference to the results of their actions."); ***Sanford v. Stiles***, 456 F.3d 298, 310 & n.15 (3d Cir. 2006) ("[I]n a state-created danger case, when a state actor is not confronted with a 'hyperpressurized environment' but nonetheless does not have the luxury of proceeding in a deliberate fashion, the relevant question is whether the officer consciously disregarded a great risk of harm. Again, it is possible that actual knowledge of the risk may not be necessary where the risk is 'obvious.' . . . We recognize that in some instances these standards may become arduous to apply. Other circuits have taken a more straightforward approach to the fault requirement. For example, the Ninth Circuit has held that 'deliberate indifference to [a] known or obvious danger' is the uniform standard in all state-created danger cases. . . The Sixth and Eighth Circuits have suggested a two-tiered standard under which deliberate indifference will apply if an opportunity for reflection exists while intent to harm will apply to 'split-second decision[s] .' . . However, unlike these courts, we are constrained by *Miller* and subsequent cases to recognize our three existing tests to identify conscience-shocking behavior."); ***Fraternal Order of Police Department of Corrections Labor Committee v. Williams***, 375 F.3d 1141, 1145, 1146 (D.C. Cir. 2004) ("As we explained in *Butera*, . . . the 'lower threshold' for meeting the shock the conscience test by showing deliberately indifferent as opposed to intentional conduct applies only in 'circumstances where the State has a heightened obligation toward the individual.' . . . . The opportunity for deliberation alone is not sufficient to apply the lower threshold to substantive due process claims. Instead, it is '[b]ecause of ... special circumstances' like custody that 'a State official's deliberate indifference ... can be "truly shocking."'"); ***Waddell v. Hendry County Sheriff's Office,*** 329 F.3d 1300, 1306 & n.5, 1309 (11th Cir. 2003) ("In this non-custodial setting, a substantive due process violation would, at the very least, require a showing of deliberate indifference to an extremely great risk of serious injury to someone in Plaintiffs' position. . . . We stress the phrase 'at the very least.' We do not rule out today that the correct legal threshold for substantive due process liability in a case like this one is actually far higher. For example, the standard could be that the government official acted with 'deliberate indifference to a substantial certainty of serious injury'

or maybe that the government official acted 'maliciously and sadistically for the very purpose of creating a serious injury' or perhaps some different standard. We feel comfortable today that the standard we use today is the low point--may well be too low a point--for a possible standard in a case like this one and that we can decide this case without being more definite about the law as an academic matter. . . . To act with deliberate indifference, a state actor must know of and disregard an excessive--that is, an extremely great--risk to the victim's health or safety. . . . In summary, we, in circumstances such as these, are unwilling to expand constitutional law to hold police departments responsible for the tortious acts of their confidential informants. No decision by Defendants in this case involved such an obviously extremely great risk that Garnto would become intoxicated and then drive an automobile and then crash into another automobile causing serious injury as to shock the conscience. We conclude that the district court properly determined that Plaintiffs failed to establish a substantive due process violation."); ***Schieber v. City of Philadelphia,*** 320 F.3d 409, 417, 420, 423 (3d Cir. 2003) ("Whether executive action is conscience shocking and thus 'arbitrary in the constitutional sense' depends on the context in which the action takes place. In particular, the degree of culpability required to meet the 'shock the conscience' standard depends upon the particular circumstances that confront those acting on the state's behalf. . . . While it is true that Woods and Scherff were not required to exercise an instantaneous judgment, like an officer in a chase situation, this was nevertheless far from the situation of prison doctors where 'extended opportunities to do better [may be] teamed with protracted failure even to care.' . . Woods and Scherff were required to make a decision without delay and under the pressure that comes from knowing that the decision must be made on necessarily limited information. . . . I believe that a comparison of the situation confronting Officers Woods and Scherff with those confronting the social worker in *Miller* and the paramedics in *Ziccardi* suggests that liability could exist here only if Woods and Scherff subjectively appreciated and consciously ignored a great, i.e., more than substantial, risk that the failure to break down Schieber's door would result in significant harm to her. Clearly, the record would not support such a finding. Nevertheless, just as I have found it unnecessary to determine whether the Lewis 'intent to harm' standard is applicable, I also find it unnecessary to adopt the *Miller/Ziccardi* standard. Because the record would not support a finding of more than negligence on the part of Woods and Scherff, the result we reach follows a fortiori from that reached in *Miller* and *Ziccardi*."); ***Ziccardi v. City of Philadelphia,*** 288 F.3d 57, 66, 67 (3d Cir. 2002) ("In summary, then, we understand *Miller* to require in a case such as the one before us, proof that the defendants consciously disregarded, not just a substantial risk, but a great risk that serious harm would result

if, knowing Smith was seriously injured, they moved Smith without support for his back and neck. On remand in the present case, we believe that the district court should apply this standard and instruct the jury accordingly if one is empaneled."); ***Gottlieb v. Laurel Highlands School District,*** 272 F.3d 168, 173 (3d Cir. 2001) (applying "shocks the conscience" standard to claim of excessive force in school context and analyzing claim in terms of following four elements: "a) Was there a pedagogical justification for the use of force?; b) Was the force utilized excessive to meet the legitimate objective in this situation?; c) Was the force applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm?; and d) Was there a serious injury?"); ***Shrum v. Kluck,*** 249 F.3d 773, 778, 779 (8th Cir. 2001) ("Shrum accuses Elwood of maintaining a policy or custom which deprived her son of his constitutional right to bodily integrity. She defines that infringing policy or custom as Elwood's official decision to terminate Kluck and enter into a confidential settlement agreement with him, even though Kluck should have been terminated for his sexually inappropriate behavior with students. Because Shrum's claim against Elwood depends upon her son's constitutionally-protected liberty interest in his bodily integrity--a substantive due process theory--the district court correctly applied the culpability standard for a § 1983 substantive due process claim as mandated by *Lewis.* . . . [I]n some circumstances, official policy that is deliberately indifferent to unconstitutional conduct may satisfy the 'shocks the conscience' standard required by *Lewis.* . . . We therefore must consider whether Elwood's official decision to enter into the confidential settlement agreement with Kluck is a policy that is so deliberately indifferent to a predictable constitutional violation that it shocks the conscience. . . . In the present case, Elwood's actions--entering into a confidential settlement agreement with Kluck rather than terminating him outright, and providing him with a neutral letter of recommendation--do not rise to the level of deliberate indifference. . . . We agree with the district court that Kluck's subsequent sexual misconduct was not so obvious a consequence as to impute § 1983 liability to Elwood for its deliberate indifference to that consequence."); ***Neal v. Fulton County Bd. of Educ.,*** 229 F.3d 1069, 1074-76 (11th Cir. 2000) ("[W]e think for a number of reasons that a student-plaintiff alleging excessive corporal punishment can in certain circumstances assert a cause of action for a violation of his rights under the Fourteenth Amendment's Due Process Clause. . . .[A]lmost all of the Courts of Appeals to address the issue squarely have said that a plaintiff alleging excessive corporal punishment may in certain circumstances state a claim under the substantive Due Process Clause. [citing cases] We agree, and join the vast majority of Circuits in confirming that excessive corporal punishment, at least where not administered in

conformity with a valid school policy authorizing corporal punishment as in *Ingraham*, may be actionable under the Due Process Clause when it is tantamount to arbitrary, egregious, and conscience-shocking behavior. . . . Consistent with the cases, we hold that, at a minimum, the plaintiff must allege facts demonstrating that (1) a school official intentionally used an amount of force that was obviously excessive under the circumstances, and (2) the force used presented a reasonably foreseeable risk of serious bodily injury. . . In determining whether the amount of force used is obviously excessive, we consider the totality of the circumstances. In particular, we examine: (1) the need for the application of corporal punishment, (2) the relationship between the need and amount of punishment administered, and (3) the extent of the injury inflicted. . . We need not decide today how 'serious' an injury must be to support a claim. The injury alleged by Plaintiff here--the utter destruction of an eye--clearly was serious. Moreover, courts elsewhere treat the extent and nature of the injury as simply one factor (although an important one) to be considered in the totality of the circumstances. . . . The test we adopt today will, we think, properly ensure that students will be able to state a claim only where the alleged corporal punishment truly reflects the kind of egregious official abuse of force that would violate substantive due process protections in other, non-school contexts. We do not open the door to a flood of complaints by students objecting to traditional and reasonable corporal punishment."); ***Nicini v. Morra***, 212 F.3d 798, 810-12 (3d Cir. 2000) ("*Lewis* therefore makes clear that a plaintiff seeking to establish a constitutional violation must demonstrate that the official's conduct 'shocks the conscience' in the particular setting in which that conduct occurred. In some circumstances, conduct that is deliberately indifferent will shock the conscience. Indeed, in the foster care context, most of the courts of appeals have applied the deliberate indifference standard, although they have defined that standard in slightly different ways. . . . Cyrus, unlike the social worker in *Miller*, had time 'to make unhurried judgments' in investigating whether to permit Nicini to remain with the Morras. . . In the context of this case, we agree that Cyrus's actions in investigating the Morra home should be judged under the deliberate indifference standard. . . . This case does not require us to determine whether an official's failure to act in light of a risk of which the official should have known, as opposed to failure to act in light of an actually known risk, constitutes deliberately indifferent conduct in this setting. We will assume arguendo that Nicini's proposed standard of 'should have known' is applicable. Nevertheless, as *Lewis* makes clear, the relevant inquiry is whether the defendant's conduct 'shocks the conscience.' Under the circumstances of this case, we cannot agree that Cyrus's conduct meets that standard. To the contrary, we conclude that Cyrus's conduct in investigating the Morras amounted, at most, to

negligence. For the same reason, we need not consider whether failure to perform a specific duty can ever amount to deliberate indifference, . . . as there is no evidence that Cyrus failed to perform any required duty."); ***Davis v. Township of Hillside***, 190 F.3d 167, 171 (3d Cir. 1999) ("Here, the chase ended when the pursuing police car bumped into the rear of Cook's car, causing him to lose control of the car, which led to the collision in which plaintiff was injured. Plaintiff argues that the deliberate ramming of Cook's car by the police vehicle amounted to use of a deadly weapon, which permits the drawing of an inference that the police acted with the intent to cause physical injury. We disagree. *Lewis* does not permit an inference of intent to harm simply because a chase eventuates in deliberate physical contact causing injury. Rather, it is 'conduct intended to injure in some way unjustifiable by any government interest [that] is the sort of official action most likely to rise to the conscienceshocking level.'"); ***White v. Lemacks***, 183 F.3d 1253, 1258 (11th Cir. 1999) ("Although *Lewis* leaves open the possibility that deliberate indifference on the part of the state will 'shock the conscience' in some circumstances, . . . it is clear after *Collins* that such indifference in the context of routine decisions about employee or workplace safety cannot carry a plaintiff's case across that high threshold."); ***Miller v. City of Philadelphia***, 174 F.3d 368, 375 (3d Cir. 1999) ("We recognize that a social worker acting to separate parent and child does not usually act in the hyperpressurized environment of a prison riot or a high- speed chase. However, he or she rarely will have the luxury of proceeding in a deliberate fashion, as prison medical officials can. As a result, in order for liability to attach, a social worker need not have acted with the 'purpose to cause harm,' but the standard of culpability for substantive due process purposes must exceed both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed 'shocks the conscience.'"); ***Culberson v. Doan***, 125 F. Supp.2d 252, 272 (S.D. Ohio 2000) ("Having reviewed this matter, the Court finds that the 'shocks the conscience' test is applicable to Chief Payton's alleged conduct, and that Chief Payton's alleged intentional or reckless actions in allowing the pond in question to be unguarded for 24 hours, in order to allow the Baker Family or Doan enough time to permanently remove and secrete Carrie's body, are sufficiently brutal, demeaning, and harmful as to 'shock the conscience' of this Court."); ***Leddy v. Township of Lower Merion***, 114 F. Supp.2d 372, 376 (E.D. Pa. 2000) ("The circumstances of the present case lie between the parameters of deliberate and spontaneous. Unlike the police officer in *Lewis* who was engaged in a pursuit, Officer Bedzela was on a non-emergency call, albeit one that required immediate attention. Also unlike the *Nicini* caseworker, he did not have time to make unhurried judgments. More akin to *Miller* and *Cannon*, while full deliberation may not have been practicable, the needs of the situation were

not so exigent that only a purpose to cause harm would shock the conscience. As articulated in *Miller*, culpability in an intermediate setting requires at least 'gross negligence or arbitrariness.' . . . Under this criterion, if Officer Bedzela was driving between 57 and 61 miles per hour without lights and sirens, his conduct, while not condonable, cannot be said to have shocked the conscience."); ***Cannon v. City of Philadelphia***, 86 F. Supp. 2d 460, 469-71 (E.D. Pa. 2000) ("*Lewis* and *Miller* require that the actions of the state actor must shock the conscience to trigger § 1983 liability. Therefore, under *Lewis* and *Miller*, in order for the plaintiff to prevail on the second *Kneipp* prong, a plaintiff must prove that the state actor's behavior shocks the conscience. A determination of whether the actions of the state actor shock the conscience requires an evaluation of the context in which they acted. In other words, because *Lewis* and *Miller* hold that a determination of what shocks the conscience depends on the circumstances in which the incident occurred, identical actions of a state actor may be sufficient to set forth a state-created danger claim in one context, while it will not suffice in another context. . . . As in *Lewis* and *Miller*, the officers in this case did not have the luxury of proceeding in a deliberate fashion. Although the police activity in this case may not rise to the level of the 'hyperpressurized' environment of a police chase, the situation did not unfold in a vacuum. The police radio transmissions during the relevant time reveal that the events took place while officers were searching for alleged suspects and while officers were attempting to secure a crime scene. The officers' actions must be considered within the context of this surrounding police activity. As *Lewis* indicates, police officers frequently have obligations that tug in different directions. . . Here, the officers were attempting to apprehend a suspect and secure a crime scene and at the same time address the plaintiff's request for transportation to the hospital."), *aff'd by Cannon v. Beal*, 261 F.3d 490 (3d Cir. 2001); ***Pickard v. City of Girard***, 70 F. Supp.2d 802, 808 (N.D. Ohio 1999) ("[T]he Sixth Circuit has cautioned against applying the 'shocks the conscience' standard for cases not involving physical abuse or excessive force. *Cassady v. Tackett*, 938 F.2d 693, 698 (6th Cir.1991) . . . Consequently, Plaintiffs' remaining claims that the Girard Defendants did not subject Estes to a field sobriety test, or arrest Estes for assault, simply do not rise to the level of 'physical abuse' and, thus, do not state a substantive due process claim.").

See also ***City of Cuyahoga Falls v. Buckeye Community Hope Foundation,*** 123 S.Ct. 1389, 1396 (2003) ("The subjection of the site-plan ordinance to the City's referendum process, regardless of whether that ordinance reflected an administrative or legislative decision, did not constitute *per se* arbitrary government conduct in violation of [substantive] due process."); ***Clark v. Boscher***, 514 F.3d 107, 112 , 113

(1st Cir. 2008) ("In order to assert a valid substantive due process claim, Appellants have to prove that they suffered the deprivation of an established life, liberty, or property interest, and that such deprivation occurred through governmental action that shocks the conscience. . . In the instant case, whether Appellants have a recognized property interest in developing their land is ultimately immaterial because they have failed to prove that Westfield engaged in behavior that shocks the conscience. . . . [A] run-of-the-mill land-use case such as this one does not rise to the level of behavior that shocks the conscience. Here, Appellants do not allege any 'fundamental procedural irregularity, racial animus, or the like.'. . Nor do they contend that a fundamental principle has been violated. . . Appellants merely complain that they were denied the necessary permits to develop residential subdivisions on the Clark and Pérez land, and that the City of Westfield denied such permits in furtherance of its own interests.Indeed, the regulatory actions Appellants complain of are virtually indistinguishable from others we have declined to find actionable in the past."); ***Aguilar v. U.S. Immigration and Customs Enforcement Div. of Dept. of Homeland Sec.***, 510 F.3d 1, 23, 24 (1st Cir. 2007) ("While the 'shock the conscience' test comprises the threshold inquiry with respect to substantive due process violations, the petitioners also must show that the government deprived them of a protected interest in life, liberty, or property. . . Here, the nature of the underlying right asserted by the petitioners reinforces our conclusion that they have not stated a viable substantive due process claim. We see the matter this way. Although the interest of parents in the care, custody, and control of their offspring is among the most venerable of the liberty interests protected by the Fifth Amendment, . . . the petitioners have not demonstrated that this guarantee of substantive due process encompasses their assertions. After all, the right to family integrity has been recognized in only a narrow subset of circumstances. To be sure, the petitioners cite cursorily to cases that deal with this right but they conspicuously fail to build any bridge between these cases and the facts that they allege. We do not think that this is an accident. The petitioners' claims seem markedly different from those scenarios that courts heretofore have recognized under the rubric of family integrity. They have not alleged that the government has interfered permanently with their custodial rights. . . Nor have they alleged that the government has meddled with their right to make fundamental decisions regarding their children's education, . . . or religious affiliation . . . .Taken most favorably to the petitioners, the interference alleged here is transitory in nature and in no way impinges on parental prerogatives to direct the upbringing of their children. We have scoured the case law for any authority suggesting that claims similar to those asserted here are actionable under the substantive component of the Due Process Clause, and we have found none. . .

That chasm is important because, given the scarcity of 'guideposts for responsible decisionmaking in this unchartered area,' courts must be 'reluctant to expand the concept of substantive due process.' . . . This unfortunate case is a paradigmatic example of an instance in which the prudential principle announced by the *Collins* Court should be heeded. Accordingly, we dismiss the petitioners' substantive due process claims for failure to satisfy the prerequisites of Federal Rule of Civil Procedure 12(b)(6)."); ***Mongeau v. City of Marlborough***,492 F.3d 14, 18, 19 (1st Cir. 2007) ("We have never precluded a plaintiff from arguing that conduct that is the product of a deliberate and premeditated decision might be conscience-shocking whereas the same conduct might not be if it was undertaken in the heat of the moment. Ultimately such an argument would not affect our conclusion that only conscience-shocking behavior will constitute a substantive due process violation. . . . [O]ur precedent on this issue is both clear and binding on this case: in order to state a substantive due process claim of any ilk, a plaintiff must allege behavior on the part of the defendant that is so outrageous that it shocks the conscience. . . . Taking all of Mongeau's allegations as true, we do not see such a conscience-shocking situation; we can discern nothing more than a run-of-the-mill dispute between a developer and a town official."); ***Marco Outdoor Advertising, Inc. v. Regional Transit Authority***, 2007 WL 1723107, at * (5th Cir. 2007) (Wiener J., dissenting) ("It smacks of Lewis Carroll to say that the RTA did not act arbitrarily and capriciously despite (1) self-servingly declaring itself free of the restrictions of the bid laws, (2) conducting its bid process in knowing disregard of its own announced procedures, (3) colluding with the third best of six bidders to enhance that bidder's proposal post-submission, i.e., after 'going to school' on Marco's bid, and (4) ultimately awarding the contract to its favored bidder, regardless of its own pre-award guidelines. I cannot see how this willful ---- and thus arbitrary and capricious ---- behavior does not shock the majority's conscience: Even as jaded as I have become from living in New Orleans and seeing almost daily media reports of this kind of behavior by local agencies, the RTA has managed to shock my conscience in this instance."); ***Pagan v. Calderon***, 448 F.3d 16, 32 (1st Cir. 2006) ("ARCAM is in error when it posits that it can prevail on its substantive due process claim either by showing that Calderon's conduct was conscience-shocking or by showing that her conduct deprived it of a protected liberty or property interest. This disjunctive proposition is incorrect. Where, as here, a plaintiff's substantive due process claim challenges the specific acts of a state officer, the plaintiff must show both that the acts were so egregious as to shock the conscience and that they deprived him of a protected interest in life, liberty, or property."); ***O'Connor v. Pierson***, 426 F.3d 187, 204 (2d Cir. 2005) ("*County of Sacramento* did not distinguish between

different types of substantive due process claims, so 'constitutionally arbitrary' action for purposes of a property-based substantive due process claim is action that shocks the conscience."); ***DePoutot v. Raffaelly***, 424 F.3d 112, 118 & n.4 (1st Cir.2005) ("This case involves executive branch action. Thus, we must proceed incrementally. First, we must determine whether the official's conduct shocks the conscience. . . Only if we answer that question affirmatively can we examine what, if any, constitutional right may have been violated by the conscience-shocking conduct and identify the level of protection afforded to that right by the Due Process Clause. . . . The parties correctly note that our pre-*Lewis* jurisprudence paved two avenues that a plaintiff might travel in pursuing a substantive due process claim. *See, e.g., Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 531 (1st Cir.1995) (indicating that a plaintiff may establish a violation of substantive due process by showing either the deprivation of a fundamental right or conduct that shocks the conscience). *Lewis*, however, clarified the law of substantive due process and made pellucid that conscience-shocking conduct is an indispensable element of a substantive due process challenge to executive action."); ***Eichenlaub v. Township of Indiana***, 385 F.3d 274, 286 (3d Cir. 2004) ("[T]he misconduct alleged here does not rise sufficiently above that at issue in a normal zoning dispute to pass the 'shocks the conscience test.'"); ***Levin v. Upper Makefield Township,*** No. 03-1860, 90 Fed.Appx. 653, 2004 WL 449189, at *7 n.2 (3d Cir. Mar. 8, 2004) ("Levin argues that the 'shocks the conscience' test only applies where the state executive actor had to act with urgency. . .But, says Levin, because the Township did not have to act, and did not in fact act, with any urgency, the 'shocks the conscience' test does not apply to his substantive due process claim. Consequently, the less-stringent *Bello* 'improper motive' test applies. However, there's nothing in *United Artist* that supports the distinction Levin urges upon us. In fact, *United Artist* makes it clear that the 'shocks the conscience' test applies to all substantive due process claims. Levin also 'takes issue' with the *United Artist* decision, claiming that it does not afford an individual any 'protection from the irrational and arbitrary actions of the government and its officials.'. . However, *United Artist* is the law of this circuit and, therefore, his distaste for it is irrelevant. Moreover, the *United Artist* 'shocks the conscience standard' is precisely designed to protect an individual from arbitrary and irrational executive action."); ***Galdikas v. Fagan***, 342 F.3d 684, 690 n.3 (7th Cir. 2003) ("As noted by many courts and commentators, the majority opinion in *Lewis* leaves a number of questions unresolved. The principal ambiguity is whether the 'shocks the conscience' standard replaces the fundamental rights analysis set forth in *Glucksberg* whenever executive conduct is challenged or whether the 'shocks the conscience' standard supplements or informs the *Glucksberg* paradigm in such situations. Certain

language in the majority opinion in *Lewis* suggests that the 'shocks theconscience' standard should be applied as an antecedent or threshold inquiry in all cases of executive conduct. . . Other passages suggest that the 'shocks the conscience' inquiry may be employed to inform the historical inquiry into the nature of the asserted liberty interest. . . .This ambiguity has been noted as well in our own earlier cases. [discussing cases]Our case law on this point seems to reflect a more generally perceived confusion as to the interrelationship of *Lewis* and *Glucksberg*. . . Resolution of this ambiguity is not necessary to our decision today. For the reasons set forth in the text, the plaintiffs' substantive due process claim fails under any reading of *Lewis.* The Supreme Court has not recognized a fundamental right to education. It certainly has not recognized a fundamental right to a post-secondary accredited degree program. Taking the plaintiffs' allegations that the defendants acted improperly by misleading them about the accreditation status of the MSW program as true, such conduct is not sufficiently egregious to shock the conscience."); ***Bowers v. City of Flint,*** 325 F.3d 758, 764 (6th Cir. 2003) (Moore, J., concurring) ("[T]his court should undertake a three-step analysis of the residents' substantive due process claim. First, we should consider whether the asserted interest constitutes a fundamental constitutional right. [footnote omitted] If the asserted interest is not a fundamental right, we then must evaluate whether Flint's conduct depriving the residents of that interest shocks the conscience. Finally, if Flint's conduct does not shock the conscience, then this court must consider whether that conduct is rationally related to a legitimate state interest."); ***United Artists Theatre Circuit, Inc. v. Township of Warrington,*** 316 F.3d 392, 400, 401 (3d Cir. 2003) ("Despite *Lewis* and the post-*Lewis* Third Circuit cases cited above, United Artists maintains that this case is not governed by the 'shocks the conscience' standard, but by the less demanding 'improper motive' test that originated with *Bello v. Walker*, 840 F.2d 1124 (3d Cir.1988), and was subsequently applied by our court in a line of land-use cases. In these cases, we held that a municipal land use decision violates substantive due process if it was made for any reason 'unrelated to the merits,' *Herr v. Pequea Township*, 274 F.3d 109, 111 (3d Cir.2001) (citing cases), or with any 'improper motive.'[citing cases] These cases, however, cannot be reconciled with *Lewis*'s explanation of substantive due process analysis. Instead of demanding conscience-shocking conduct, the *Bello* line of cases endorses a much less demanding 'improper motive' test for governmental behavior. Although the District Court opined that there are 'few differences between the [shocks the conscience] standard and improper motive standard,' we must respectfully disagree. . . The 'shocks the conscience' standard encompasses 'only the most egregious official conduct.' . . In ordinary parlance, the term 'improper' sweeps much more broadly,

and neither *Bello* nor the cases that it spawned ever suggested that conduct could be 'improper' only if it shocked the conscience. We thus agree with the Supervisors that the *Bello* line of cases is in direct conflict with *Lewis*. . . . [W]e see no reason why the present case should be exempted from the *Lewis* shocks-the-conscience test simply because the case concerns a land use dispute. . . . . We thus hold that, in light of *Lewis*, *Bello* and its progeny are no longer good law."), *reh'g en banc denied,* 324 F.3d 133 (3d Cir. 2003); ***Moran v. Clarke (Moran I),*** 296 F.3d 638, 651 (8th Cir. 2002) (en banc) (Bye, J., concurring) ("In *County of Sacramento v. Lewis*, the Court held that all substantive due process claims against executive officials proceed under one theory, not two separate theories. . . In every case in which a plaintiff challenges the actions of an executive official under the substantive component of the Due Process Clause, he must demonstrate both that the official's conduct was conscience-shocking, . . . and that the official violated one or more fundamental rights that are 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'"); ***Gurik v. Mitchell,*** No. 00-4068, 2002 WL 59641, at *4 (6th Cir. Jan. 15, 2002) (not published) (**"**Our requirement that terminated public employees allege violations of fundamental rights in order to allege violation of a substantive due process property interest in their employment simply standardizes the 'shocks the conscience' test for purposes of termination from public employment. In other words, a public employee's termination does not 'shock the conscience' in this court if it was not based on the violation of some fundamental right. Thus, Gurik's criticism of this court's precedent based on *Lewis* is inappropriate, and Gurik must allege violation of a fundamental right in order to allege violation of his substantive due process interest in public employment."); ***Hawkins v. Freeman***, 195 F.3d 732, 738, 739, 741, 750 (4th Cir. 1999) (en banc) ("Depending upon whether the claimed violation is by executive act or legislative enactment, different methods of judicial analysis are appropriate. . . This is so because there are different 'criteria' for determining whether executive acts and legislative enactments are 'fatally arbitrary,' an essential element of any substantive due process claim. . . In executive act cases, the issue of fatal arbitrariness should be addressed as a 'threshold question,' asking whether the challenged conduct was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' . . If it does not meet that test, the claim fails on that account, with no need to inquire into the nature of the asserted liberty interest. If it does meet the threshold test of culpability, inquiry must turn to the nature of the asserted interest, hence to the level of protection to which it is entitled. . . If the claimed violation is by legislative enactment (either facially or as applied), analysis proceeds by a different two-step process that does not involve any

threshold 'conscience-shocking' inquiry. The first step in this process is to determine whether the claimed violation involves one of 'those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition,"' [citing *Glucksberg*], and ' "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."' . . The next step depends for its nature upon the result of the first. If the asserted interest has been determined to be 'fundamental,' it is entitled in the second step to the protection of strict scrutiny judicial review of the challenged legislation. . . . If the interest is determined not to be 'fundamental,' it is entitled only to the protection of rational-basis judicial review. . . . [W]e are satisfied that whether the claim is analyzed under the *Lewis* or *Glucksberg* methodologies, it fails as a matter of law. . . . Specifically, we hold that the precise liberty interest asserted here-- that of continuing in a state of freedom erroneously granted by government and enjoyed for a significant time by a convict who yet remains under an unexpired lawful sentence--cannot be found one of 'those fundamental rights and liberties which are objectively "deeply rooted in this Nation's history and tradition."' . . . Nor, unless possibly when solely animated by a vindictive or oppressive purpose that is not suggested here, could the executive act of re-imprisoning under such circumstances be declared 'shock[ing to] the contemporary conscience.'").

See also ***Cherry Hill Towers, LLC v. Township of Cherry Hill,*** 407 F.Supp.2d 648, 655, 656 (D.N.J. 2006) ("Even if the Court accepts Plaintiff's statement of the facts as true, what happened here does not rise to the level of 'the kinds of gross misconduct that have shocked the judicial conscience.'. . Whether union officials unconnected to the Township attempted to persuade, or even threaten, the parties involved in the Cherry Hill Towers project to use union labor is not relevant to the question of whether these Defendants deprived Plaintiff of a property right in a manner that shocks the conscience. Nor is it surprising that a high-profile project such as this would attract the attention of the unions, or that Township officials would recognize this and point it out to Plaintiff. Defendants' actions do not reflect the egregious abuse of power that substantive due process was intended to correct."); ***Robinson v. Limerick Township,*** No. 04-3758, 005 WL 15469, at * (E.D. Pa. Jan. 4, 2005) (not reported) ("The Robinsons allege the Township has taken action motivated by bias, bad faith, and improper motives and intended to threaten, intimidate, and harass them. There are no allegations of self dealing, or unjust enrichment of the Township Supervisors or anyone related to them. . . Instead, the Robinsons argue that the Township's conduct is automatically conscience shocking due to its improper motive. I am unable to agree. . . . [T]he Robinsons must go

considerably further than mere allegations that the Township's conduct was taken with an improper motive. . . . The latest jurisprudence of the Third Circuit Court of Appeals evinces a preference for evidence of self dealing or other unjust enrichment of the municipal decision makers as a way to meet the shocks the conscience standard."); ***Nicolette v. Caruso,*** Civil Action 02-1368, 2003 WL 23475027, at *9 (W.D. Pa. Nov. 4, 2003) ("The United States Court of Appeals for the Third Circuit specifically extended the *Lewis* 'shocks the conscience' test to cases alleging that a municipal land-use decision violated substantive due process. . . *United Artists* was decided in January, 2003 and there have not been many subsequent municipal land-use decisions applying the new 'shocks the conscience' standard. There, however, is at least one court which dealt with that standard. In *Associates in Obstetrics & Gynecology v. Upper Merion Township*, 270 F.Supp.2d 633, 656 (E.D .Pa.2003), the court held that the plaintiff stated a claim under section 1983 that met the 'shocks the conscience' standard by alleging that zoning regulations were enforced with the intent to harm and/or restrict the business interests of the plaintiff who was a lessee. . . . [T]he court finds that, albeit this is a close question, plaintiff's complaint implicated the 'shocks the conscience' test sufficiently to survive the motion to dismiss."). *But see* ***Kamaole Pointe Development LP v. Hokama***, 2008 WL 2622819, at *21 (D. Hawai'i July 3, 2008) ("Plaintiffs are correct that County Defendants misapprehend the relevant standard for a due process challenge to legislation. This standard is not, as County Defendants urge, whether the legislation 'shocks the conscience.' As mentioned above, this standard applies in situations of allegedly abusive executive actions, such as police abuse cases. . . Rather, a substantive due process challenge to legislation that neither utilizes a suspect classification nor draws distinctions implicating fundamental rights is reviewed pursuant to the 'arbitrary and irrational' standard. *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1162 (9th Cir.1997). County Defendants' reliance on the incorrect standard as a basis for the Motion on Plaintiffs' substantive due process claim renders their argument legally unsound. As such, County Defendants' Motion is DENIED as to Plaintiffs' substantive due process claim.").

See also ***Williams v. Berney***, 519 F.3d 1216, 1221, 1223-25 (10th Cir. 2008) ("Plaintiffs' case presents a narrow issue that has generated a surprising dearth of reported authority: whether a § 1983 plaintiff can successfully assert a substantive due process right to be free from intentional use of force by a state actor *not authorized* to use force. . . .The inquiry is thus in what circumstances will a physical assault transcend ordinary state tort law and rise to the level of a constitutional tort. . . . An assault--standing alone--does not suffice to make out a constitutional

substantive due process claim. But an assault under a stated threat, a threat the victim knows an assaulting government official has the authority to carry out, can separate the ordinary common law tort from the substantive due process claim. The combination of serious physical abuse and the assaulting official's use of official authority to force the victim to submit can shock the conscience. . . . Combining these principles, the following legal framework emerges: to state a substantive due process claim against government officials not authorized to use force, litigants must show an abuse of governmental authority as an integral element of the attack.. . . .Berney was not authorized to use force, whether reasonably or not. Denver does not represent to licensees that its inspectors can lawfully use force against non-compliant business owners. . . . Berney, in other words, did not have *discretion* to use force. . . . His only responsibilities were to inspect and enforce dog kennel regulations. Based on the undisputed facts in this record, Berney's assault appeared to be an emotional overreaction made in anger. But nothing about Berney's position with the City or his duties as an inspector authorized him to use force-- rather, he lost it on the job. While deplorable, this assault is not obviously distinguishable from an ordinary tort in myriad situations. It was not a situation where Plaintiffs' injuries were caused by an abuse of Berney's authority as a license inspector. And, as we have said, Berney's official position alone is not enough to create a substantive due process claim. As a result, we cannot conclude Berney's conduct violated Plaintiffs' constitutional rights.").

Lewis did not settle the question of who makes the determination of "conscience-shocking." *See, e.g.,* ***Terrell v. Larson,*** 396 F.3d 975, 981 (8th Cir. 2005) (en banc) ("Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury."); ***Moran v. Clarke (Moran I),*** 296 F.3d 638, 643 (8th Cir. 2002) (en banc) ("[W]hether the plaintiff has presented sufficient evidence to support a claimed violation of a substantive due process right is a question for the fact-finder, here the jury."); ***Armstrong v. Squadrito***, 152 F.3d 564, 577 (7th Cir. 1998) ("[T]he question of whether the defendants' conduct constituted deliberate indifference is a classic issue for the fact finder. We know that the submission of the issue to the fact finder may create some confusion because, technically, the question is the second consideration in our inquiry into the existence of a violation of substantive due process. Nevertheless, because this question is a factual mainstay of actions under § 1983, we do not believe it should receive consideration as a question of law. Any concern about allowing the fact finder to determine a constitutional question is ameliorated by the overlap between this inquiry and the third step in our analysis--an

examination of the totality of the circumstances--which is a question of law."); ***Bovari v. Town of Saugus***, 113 F.3d 4, 6 (1st Cir. 1997) ("Under *Evans* [*v. Avery*], the question is not whether the officers' decision to dog the Honda was sound--decisions of this sort always involve matters of degree--but, rather, whether a rational jury could say it was conscience-shocking."); ***CBS Outdoor Inc. v. New Jersey Transit Corp***., 2007 WL 2509633, at *19 (D.N.J. 2007) ("At the outset, CBS Outdoor argues that whether the alleged conduct shocks the conscience should at least be a factual issue for a jury and therefore is inappropriate to resolve on a motion to dismiss. However, '[b]ecause the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury.' *Terrell v. Larson*, 396 F.3d 975, 981 (8th Cir.2005); *see also United States v. Engler*, 806 F.2d 425, 430 (3d Cir.1986) ('The question whether government conduct was so outrageous as to constitute a violation of due process is a question of law to be determined by the court, not the jury.')"); ***Crowe v. County of San Diego***, 359 F.Supp.2d 994, 1030 (S.D. Cal. 2005) ("Although Michael contends that whether defendants' conduct 'shocks the conscience' is an issue for the jury, he has failed to cite any case law in support of his contention, and the court's own research reveals case law holding that this determination is an issue of law for the court."); ***Busch v. City of New York,*** No. 00 CV 5211(SJ), 2003 WL 22171896, at *6 (E.D.N.Y. Sept. 11, 2003) (not reported) (whether conduct shocks the conscience is a question for jury); ***Johnson v. Freeburn,*** No. 96-74996, 2002 WL 1009572, at *4, *5 (E.D. Mich. April 24, 2002) (not reported) ("The concerns of Justices O'Connor, Scalia, and Thomas, suggest that the risks of unrestrained and unelected subjectivity--the antithesis of a rule of law--would be far greater if the nearly unreviewable personal sentiments of jurors are added to the mix in the application of this substantive due process standard. While courts have routinely submitted this standard to juries, *see, e.g., Walker v. Bain,* 257 F.3d 660, 671-73 (6th Cir.2001); *United States v. Walsh,* 194 F.3d 37 (2d Cir.1999); *Boveri v. Town of Saugus,* 113 F.3d 4, 6-7 (1st Cir.1997), much can be said that this should be accompanied by judicial guidance, if not preempted totally by judges once a jury has resolved all the material disputed issues of fact, as is often done in the qualified immunity area under [*Harlow*]. . . . It may be that the tradition of generally giving 'shocks the conscience' issues to the jury will continue notwithstanding many arguments against it. Nonetheless, on facts such as those in this case, a judge would have been warranted in directing the jury that after ruling for Plaintiff on the disputed factual questions (answered in jury question 1), the gratuitous threat or instruction to armed guards to have an inmate shot if he moves--given by a corrections officer who earlier that day threatened to have the inmate killed, and given for no legitimate

penological purpose, but to retaliate against the inmate for reporting to authorities the correction officer's earlier threat on the inmate's life--does 'shock the conscience' as a matter of law."); ***Escatel v. Atherton,*** No. 96 C 8589, 2001 WL 755280, at *6 n. 14 (N.D. Ill. July 2, 2001) (not reported) ("The Supreme Court has not made clear whether the 'shocks the conscience' analysis is normally a question for the jury or whether it is a question of law for the court. . . The Seventh Circuit has said that it is a question of law. . . Other courts have indicated it is a decision for the court, not the jury, to decide."); ***Mason v. Stock***, 955 F. Supp. 1293, 1308-09 (D. Kan. 1997) ("[T]he "shock the conscience" determination is not a jury question. . . . Under the rules pertaining to summary judgment, a plaintiff who wishes to assert a *Collins*' claim must, at minimum, point to conduct or policies which would require the court to make a 'conscience shocking' determination."); ***Mellott v. Heemer***, 1997 WL 447844, *15 (M.D. Pa. July 23, 1997) (not reported) ("The question of whether conduct is 'truly conscience shocking' is one for the jury."), *rev'd on other grounds*, 161 F.3d 117 (3d Cir. 1998).

NOTE: *See* ***Thaddeus-X v. Blatter***, 175 F.3d 378, 387, 388 (6th Cir. 1999) (en banc) ("In various instances since *Graham*, this circuit (mainly in unpublished opinions) has subjected prisoners claiming retaliation in violation of an enumerated constitutional right to a heightened requirement that the retaliatory act 'shock the conscience.' *See McLaurin v. Cole*, 115 F.3d 408, 411 (6th Cir.1997). . . . To the extent that our prior decisions have imposed the 'shocks the conscience' test when prisoners claim retaliation in violation of an enumerated constitutional right, they are in conflict with the Supreme Court's decisions in *Graham* and its progeny and are no longer the law of this Circuit.").

9. Derivative Nature of Liability

In ***City of Los Angeles v. Heller***, 475 U.S. 796 (1986), the Court held that if there is no constitutional violation, there can be no liability on the part of the individual officer or the government body. "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *Id*. at 799 (emphasis in original). To borrow an analogy from Judge Rosenn, where there is no "kick," neither the foot nor the head can be inculpated. ***Andrews v. City of Philadelphia***, 895 F.2d 1469, 1481 (3d Cir. 1990).

See also ***Estate of Bennett v. Wainwright***, 548 F.3d 155, 168, 175, 176 (1st Cir. 2008) ("With respect to the County, it is worth noting as a threshold matter that 'it is not impossible for a municipality to be held liable for the actions of lower-level officers who are themselves entitled to qualified immunity.' . . . The establishment of § 1983 liability against either Herrick or the County would ultimately depend on plaintiff proving the commission of an underlying constitutional violation by the subordinate officers. . . Because we hold that the subordinate officers are entitled to qualified immunity under the third prong of the *Saucier* analysis, we did not reach, in our foregoing analysis, the merits of whether actions taken during the attempt to place Bennett in protective custody amounted to a constitutional violation. We need not reach this question here either. Even if an underlying substantive constitutional violation by subordinate officers were stated by plaintiffs, we nevertheless agree with the district court that plaintiffs offer insufficient evidence to allow a reasonable factfinder to find a policy, custom, practice or any deliberate indifference on the part of either Herrick or the County that bears the requisite causal relationship to the alleged constitutional deprivation to establish liability under a supervisory theory. . . . The estate can point to no proper record evidence that suggests deficient training or supervision."); ***Willis v. Neal***, 2007 WL 2616918, at *5, *6 (6th Cir. 2007) ("The conclusion that Willis's arrest was supported by probable cause necessarily means that her § 1983 claim against all of the defendants fails because she has not established that her constitutional rights were violated, and the district court properly granted the defendants' summary judgment motions. Because Willis has failed to establish a deprivation of her constitutional rights, she cannot establish liability against the defendant municipalities. . . Our judgment in the case should not be read as condoning either the actions of the Task Force or the apparent willingness of the defendant municipalities to participate in Task Force operations based on little information in cases where time is not of the essence. However, Willis has not presented any argument to this court other than one based on the physical participation of the individual officers in her arrest."); ***Best v. Cobb County, Ga.***, 2007 WL 1892148, at **1-3 (11th Cir. July 3, 2007) ("The plaintiffs presented expert testimony regarding police pursuits in Cobb County. Their expert testified that 87.5% of all pursuits in Cobb County involve misdemeanor offenses or traffic violations. Out of more than 650 pursuits initiated, officers terminated only 11 during the course of the pursuit. The expert also testified that Cobb County officers are not required to balance the need to apprehend a suspect against the public's safety, and no action is taken against them for policy violations during pursuits. Of the 650 pursuits reviewed, 380(58%) resulted in accidents, including 93(14%) with injuries and at least 4 fatalities. In 2001, a Cobb County grand jury recommended that the county

revise its vehicle pursuit policy to make the safety of the public and police officers a top priority. The grand jury noted that if the suspect's identity is readily ascertainable through a license tag or other means and the suspect is not a dangerous felon, police should discontinue the pursuit. The grand jury also recommended that the county use helicopters to aid in vehicle pursuits. Cobb County did not implement any of the grand jury's specific recommendations. The preamble to the county's vehicle pursuit policy provides:

> The Department recognizes that it is the duty and responsibility of an officer to apprehend a violator. Criminals often attempt to flee to escape apprehension for their crime. The exact crime for which the violator is fleeing from, may or may not be known to the pursuing officer. The policy of the Department is to use all reasonable means to apprehend a fleeing violator. The primary consideration during a vehicle pursuit will be that of safety, both the officer and the community.

The plaintiffs assert that Cobb County has a 'pursue at all costs' policy. They further assert that, while the county may teach pursuit maneuvers, it does not properly train officers on when to initiate and when to call off a pursuit or give corrective instruction when accidents occur. In sum, the plaintiffs contend that Cobb County was deliberately indifferent in training its officers because its policy does not require officers to limit pursuits to situations where the need to apprehend the suspect justifies the grave risk to innocent motorists and pedestrians. . . . This case is unique because the plaintiffs did not name the police officer involved in the pursuit as a defendant, nor do they claim that he personally violated their constitutional rights. Instead, the plaintiffs focus on the county's vehicle pursuit policy, arguing that the defendants were deliberately indifferent to their constitutional rights, and therefore the county is responsible for their injuries. . . . .[I]in order to hold Cobb County liable for the plaintiffs' injuries, the plaintiffs must establish a constitutional violation, municipal culpability, and causation. If the plaintiffs are unable to prove any of the three, their challenge necessarily fails. The plaintiffs rightfully concede that under the facts of this case Officer Smith did not violate their Fourth Amendment or Fourteenth Amendment rights. . . Although the police pursuit ended tragically, there was no constitutional violation. Consequently, the plaintiffs' claim against the county cannot survive summary judgment."); ***Hicks v. Moore***, 422 F.3d 1246, 1251, 1252 (11th Cir. 2005) ("Plaintiff contends Clouatre (pursuant to the Jail's practice) violated Plaintiff's rights under the Fourth Amendment by strip searching her without reasonable suspicion. She also claims that Sheriff Moore, Captain Ausburn, and Sergeant Gosnell are liable to her based on a theory of supervisory liability because

they failed to train jailers properly about when to conduct strip searches, instead adhering to the general practice that required strip searches of all detainees regardless of the charge or circumstances. We will assume that it was the practice of Habersham County to strip search every detainee who was to be placed in the general population of the Jail. . . And given the Circuit's precedent, we must conclude the search of Plaintiff cannot be justified under the Constitution on the single ground that Plaintiff was about to be placed in the Jail's general population. . .That conclusion, however, does not mean that Plaintiff's own constitutional rights were violated when she was searched: just because she was strip searched at a jail that had a search practice that would generally violate the Constitution does not mean every search that was conducted actually violated the Constitution. . . We said in *Skurstenis* that ' "reasonable suspicion" may justify a strip search of a pretrial detainee.'. . Because we conclude that reasonable suspicion existed for this particular strip search, we also must conclude that no constitutional right was violated by the search."); ***Young v. City of Providence***, 404 F.3d 4, 26, 27 (1st Cir. 2005) ("At the outset, we agree with the district court's reasoning that any proper allegation of failure to train must be aimed at Solitro's lack of training and not at the deficiencies in Saraiva's or Cornel's training, and must allege that Solitro's lack of training caused him to take actions that were objectively unreasonable and constituted excessive force on the night he shot Cornel. Such a theory, when the evidence is looked at most favorably to the plaintiff, can be made out in this case: a jury could find that Solitro's shooting of Cornel was unreasonable, *inter alia,* because he should have recognized Cornel as an off-duty officer (due to Cornel's demeanor and verbal commands) or not shot Cornel so rapidly without making sure of his identity. A jury could find that Solitro made such mistakes because of the PPD's lack of training on on-duty/off-duty interactions, avoiding misidentifications of off-duty officers, and other issues relating to the City's always armed/always on-duty policy. Further, a jury could find that this training deficiency constituted deliberate indifference to Cornel's rights."); ***Crocker v. County of Macomb***, No. 03-2423, 2005 WL 19473, at *5, *6 (6th Cir. Jan. 4, 2005) (unpublished) ("If the plaintiff fails to establish a constitutional violation by an individual officer, the local government unit cannot be held liable for a failure to train under § 1983. . . More specifically, where there exists no constitutional violation for failure to take special precautions to prevent suicide, then there can be no constitutional violation on the part of a local government unit based on its failure to promulgate policies and to better train personnel to detect and deter jail suicides. . .Because no individual defendant violated Tarzwell's constitutional rights, Macomb County necessarily is not liable to plaintiff under a failure to train theory or on the theory that the County failed to promulgate effective policies for suicide prevention.

Even if the County could be held liable absent liability on the part of an individual defendant, plaintiff has not identified any policy or custom that evidences deliberate indifference on the County's part either to the risk that Tarzwell would try to kill himself or to the problem of suicide attempts by pretrial detainees in general. The court notes in this regard that the alleged failure to comply with a regulation governing the visibility of holding cells alone does not rise to the level of a constitutional violation. . . Finally, plaintiff has not shown that defendant had a deliberate and discernible county policy to maintain a jail that was inadequately designed and equipped for the prevention of suicides. For these reasons, the district court did not err by granting summary judgment in favor of Macomb County."); ***Bowman v. Corrections Corporation of America,*** 350 F.3d 537, 546, 547 (6th Cir. 2003) ("In *Speer*, the Eighth Circuit held that there must be a violation of the plaintiff's constitutional rights in order for liability to attach to either the individual defendants or to the municipal authority under §1983. In *Speer*, the plaintiff's constitutional rights were violated, but not by the Mayor. Here, if we uphold the jury's findings as to Dr. Coble and Warden Myers, there was no violation of Bowman's rights by anyone, even if CCA's policy implicitly authorized such a violation. The similarity between this case and *Heller* is that the constitutional violation claimed either occurred or did not occur as a direct result of the actions of at least one person, in this case Dr. Coble. This is not a scenario in which the 'combined actions of multiple officials' could give rise to the violation at issue. For these reasons, we affirm the district court's denial of Bowman's motion for a judgment as a matter of law against the defendants in this case."); ***Jarrett v. Town of Yarmouth,*** 331 F.3d140, 151 (1st Cir. 2003) (per curiam) ("[I]t appears that the jury initially concluded that the Town of Yarmouth's bite and hold policy was unconstitutional, and reasoned that any application of that policy must be unconstitutional per se. Their reasoning was erroneous as a matter of law. We conclude after conducting the *Graham* balancing test that Officer McClelland's release of a dog trained to bite and hold did not violate Jarrett's Fourth Amendment rights as a matter of law. Our determination that Jarrett suffered no constitutional injury is dispositive of his municipal liability claim against the Town of Yarmouth."); ***Cuesta v. School Bd. Of Miami Dade County,*** 285 F.3d 962, 970 n.8 (11th Cir. 2002) ("Because we hold that Cuesta suffered no deprivation of her constitutional rights, we need not decide the question of whether the County's policy, in which all felony arrestees are strip searched, might deprive others of their constitutional rights."); ***Curley v. Village of Suffern,*** 268 F.3d 65, 71 (2d Cir.2001) ("Following *Heller,* we have recognized that a municipality cannot be liable for inadequate training or supervision when the officers involved in making an arrest did not violate

the plaintiff's constitutional rights. . . . Further, the verdict form in this case reveals the jury found no deprivation of rights in the first instance, without ever reaching the question of whether qualified immunity insulated defendants' conduct as objectively legally reasonable. This point is significant because case law further suggests *Heller* will not save a defendant municipality from liability where an individual officer is found not liable because of qualified immunity."); ***Trigalet v. City of Tulsa***, 239 F.3d 1150, 1154-56 (10th Cir. 2001) ("[W]e consider whether a municipality can be held liable for the actions of its employees if those actions do not constitute a violation of a plaintiff's constitutional rights. We conclude, based on *Lewis* and *Brown*, as well as decisions from this and other circuits, . . . that a municipality cannot be held liable under these circumstances. . . . Here, the threshold issue is whether the action causing the harm (police pursuit resulting in death of innocent bystander) states a constitutional violation at all. Because there was no evidence that the officer intended to harm the decedents, *Lewis* dictates that no constitutional harm has been committed. Therefore, plaintiffs cannot meet the first prong of the test set forth in *Collins v. City of Harker Heights*. . . . Thus, even if it could be said that Tulsa's policies, training, and supervision were unconstitutional, the City cannot be held liable where, as here, the officers did not commit a constitutional violation. . . . In sum, we hold that absent a constitutional violation by the individual police officers whose conduct directly caused plaintiffs' injuries, there can be no municipal liability imposed on the City of Tulsa on account of its policies, customs, and/or supervision with regard to the individual defendants."); ***Young v. City of Mount Ranier***, 238 F.3d 567, 579 (4th Cir. 2001) ("The law is quite clear in this circuit that a section 1983 failure-to-train claim cannot be maintained against a governmental employer in a case where there is no underlying constitutional violation by the employee. . . . Because the Parents have failed to allege a constitutional violation on the part of any law enforcement officer, the district court properly dismissed the failure-to-train claims asserted against the governmental employers."); ***Treece v. Hochstetler***, 213 F.3d 360, 364 (7th Cir. 2000) ("[B]ecause a jury has determined that Hochstetler was not liable for committing a constitutional deprivation (tort) against Treece, it is impossible under existing case law for the City to be held liable for its knowledge or inaction concerning its officer's activity."); ***Hayden v. Grayson***, 134 F.3d 449, 455 (1st Cir. 1998) ("Normally . . . a municipality cannot be held liable unless its agent actually violated the victim's constitutional rights."); ***S.P. v. City of Takoma Park***, 134 F.3d 260, 272, 274 (4th Cir. 1998) ("Even assuming for the purposes of summary judgment that the training of its officers was unconstitutional, Takoma Park cannot be held liable when, as here, no constitutional violation occurred because the officers had probable cause to detain Peller. . . . Because the

officers had probable cause to detain Peller for the limited purpose of transporting her to WAH for an emergency mental evaluation, no constitutional violation occurred. As such, Takoma Park necessarily is not liable for any alleged injuries."); ***Wyke v. Polk County School Board***, 129 F.3d 560, 568-69 (11th Cir. 1997) ("[T]o prevail on a § 1983 claim against a local government entity, a plaintiff must prove both that her harm was caused by a constitutional violation and that the government entity is responsible for that violation. . . *Canton* discussed only the second issue, i.e., whether the city's 'policy' was responsible for its employee's violation of the plaintiff's constitutional rights. For purposes of its discussion, the Court assumed that those rights had indeed been violated. . . . We cannot make the same assumption. Before addressing whether the School Board can be held liable for a failure to train its employees, we must first determine whether those employees violated any of Wyke's constitutional rights by failing to discharge some constitutional duty owed directly to Shawn (and thus indirectly owed to Wyke), or some constitutional duty owed directly to Wyke. . . *DeShaney*, at least in part, mandates that we answer that question in the negative."); ***Estate of Phillips v. City of Milwaukee***, 123 F.3d 586, 597 (7th Cir. 1997) ("Neither the City nor the police officers' supervisor can be held liable on a failure to train theory or on a municipal policy theory absent a finding that the individual police officers are liable on the underlying substantive claim."); ***Hunt v. Applegate***, No. 95-1062, 1996 WL 748158, *2 (6th Cir. Dec. 31, 1996) (unpublished) (Panel decision on petition to rehear) ("It is impossible to establish deliberate indifference to a constitutional violation through the failure to train when the constitutional violation itself does not exist or is left completely undefined and unformed and when the municipal policy makers at fault are not identified. Thus, in the absence of a constitutional injury committed by municipal employees and caused by a lack of training, there is no viable 'failure to train' theory under *City of Canton v. Harris*."); ***Wilson v. Meeks***, 98 F.3d 1247, 1255 (10th Cir. 1996) ("The district court correctly concluded no municipal liability could be found in this case because there was no constitutional violation committed by any of the individual defendants."); ***Quintanilla v. City of Downey***, 84 F.3d 353, 355 (9th Cir. 1996) ("Plaintiff cites [*Chew* and *Hopkins v. Andaya*] for the proposition that a police department may be liable under §1983 for damages caused by unconstitutional policies notwithstanding the exoneration of the individual officer whose actions were the immediate cause of the constitutional injury. While this may be true if the plaintiff established that he suffered a constitutional injury, and the officer's exoneration resulted from qualified immunity, . . . this proposition has no applicability here. Plaintiff failed to establish that he suffered a constitutional injury."); ***Hinkle v. City of Clarksburg***, 81 F.3d 416, 420 (4th Cir. 1996) ("In the

absence of any underlying use of excessive force against [plaintiff], liability cannot be placed on either the non-shooting officers, a supervisor, or the City."); ***Thompson v. City of Lawrence***, 58 F.3d 1511, 1517 (10th Cir. 1995) (no municipal liability where no underlying constitutional violation by officers); ***Webber v. Mefford***, 43 F.3d 1340, 1344 (10th Cir. 1994) ("Because Defendant Griffin did not violate Plaintiffs' constitutional rights, the district court correctly dismissed Plaintiffs' claims against the City of Sapulpa for inadequate training, supervision, and pursuit policies. A claim of inadequate training, supervision, and policies under § 1983 cannot be made out against a supervisory authority absent a finding of constitutional violation by the person supervised."); ***Scott v. Henrich***, 39 F.3d 912, 916 (9th Cir. 1994) ("[Plaintiff] contends that even if the conduct of the individual officers was objectively reasonable, the municipal defendants may still face liability under *City of Canton v. Harris*, 489 U.S. 378 (1989). While the liability of municipalities doesn't turn on the liability of individual officers, it is contingent on a violation of constitutional rights. Here, the municipal defendants cannot be held liable because no constitutional violation occurred."); ***Thompson v. Boggs***, 33 F.3d 847, 859 (7th Cir. 1994) (where no underlying constitutional violation by officer, no liability on the part of the City or Police Chief); ***Abbott v. City of Crocker***, 30 F.3d 994, 998 (8th Cir. 1994) ("The City cannot be liable in connection with either the excessive force claim or the invalid arrest claim, whether on a failure to train theory or a municipal custom or policy theory, unless Officer Stone is found liable on the underlying substantive claim."); ***Spears v. City of Louisville***, 27 F.3d 567 (Table), 1994 WL 262054, *3 (6th Cir. June 14, 1994) ("[T]here must be a constitutional violation for there to be § 1983 municipal liability ... Because there was no deprivation of constitutional rights here, there is no basis for liability under § 1983, municipal or otherwise. Whether Louisville had an 'informal' policy of permitting its police officers to engage in high-speed pursuits for non-hazardous misdemeanors is irrelevant to the question of whether there was a deprivation of constitutional rights, a prerequisite to the imposition of § 1983 liability."); ***Temkin v. Frederick County Commissioners***, 945 F.2d 716, 724 (4th Cir. 1991) (no claim of inadequate training can be made against supervisory authority, absent finding of constitutional wrong on part of person being supervised); ***Apodaca v. Rio Arriba County Sheriff's Dept.***, 905 F.2d 1445, 1447 (10th Cir. 1990) (when no underlying constitutional violation by a county officer, no action for failing to train or supervise the officer); ***Belcher v. Oliver***, 898 F.2d 32, 36 (4th Cir. 1990) (where it was clear there was no constitutional violation, no need to reach question of whether a municipal policy was responsible for the officers' action); ***Williams v. Borough of West Chester***, 891 F.2d 458, 467 (3d Cir. 1989) (where no viable claim against any individual officer, no

Monell claim against the Borough); ***Wilkins v. City of Oakland***, No. C 01-1402 MMC, 2006 WL 305972, at *1 n.2 (N.D. Cal. Feb. 8, 2006) ("Relying on *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir.1992), plaintiffs argue that even if an individual officer is found not to have committed a Fourth Amendment violation, a municipality nevertheless can be held liable on an improper training and/or supervision theory. The language in *Hopkins* on which plaintiffs rely is dicta, however, as the individual officer therein was not exonerated. Moreover, in light of the Supreme Court's decision in *Heller* as well as the Ninth Circuit cases, cited *infra*, expressly holding to the contrary, *Hopkins* should not be read as standing for the proposition that a municipality may be held liable in the absence of a constitutional violation by the individual defendant."); ***Dye v. City of Warren,*** 367 F.Supp.2d 1175, 1189, 1190 (N.D. Ohio 2005) ("As the United States Supreme Court explained in *City of Canton v. Harris*,. . . a municipality's failure to train is in general not enough to prove a constitutional violation. . . Instead, Section 1983 plaintiffs can use a municipality's failure to train as one way to make the required showing that a municipal policy or custom was the 'moving force' behind an already established constitutional deprivation. . . Therefore, Mr. Dye's failure-to-train claim, like his basic excessive force claim against the Chief, requires a predicate showing that Chief Mandopoulos did violate Mr. Dye's Fourth Amendment right to be free from excessive force. Accordingly, this Court's finding that the Chief was not liable for any constitutional deprivation against Mr. Dye forecloses the plaintiff's Fourth Amendment claims against the City."); ***Butler v. Coitsville Township Police Dep't***, 93 F. Supp.2d 862, 868 (N.D. Ohio 2000) ("Because the Court has found insufficient evidence of any constitutional violation by the defendant law enforcement officers, the defendant government entities cannot be held liable under § 1983 and are therefore entitled to judgment as a matter of law."); ***Sanchez v. Figueroa***, 996 F. Supp. 143, 147 (D.P.R. 1998) (In action against supervisory official for failure to train and failure to screen/supervise, plaintiff must first establish that non-supervisory officer violated plaintiff's decedent's constitutional rights.); ***Friedman v. City of Overland***, 935 F. Supp. 1015, 1018 (E.D. Mo. 1996) ("It is clearly established that a municipality cannot be held liable under s 1983, whether on a failure to train theory or a municipal custom and policy theory, unless the municipal/state employee is found liable on the underlying substantive constitutional claim."); ***Dismukes v. Hackathorn***, 802 F. Supp. 1442, 1448 (N.D. Miss. 1992) ("[T]he court's conclusion that there is insufficient evidence to raise a factual issue as to the officer's recklessness [in high speed pursuit] requires summary judgment in the claims against Starkville and the police chief. If Officer...did not violate plaintiffs' constitutional rights, the same applies to the police chief and the city of Starkville."); ***Montgomery***

v. County of Clinton, Michigan, 743 F. Supp. 1253, 1257 (W.D. Mich. 1990) ("If [officers] inflicted no constitutional injury, though their conduct was enabled by policy, custom or deficient training, the County and Sheriff could bear no liability."), *aff'd*, 940 F.2d 661 (6th Cir. 1991) (Table).

But see ***Willis v. Neal***, 2007 WL 2616918, at *8, *9 (6th Cir. 2007)(Dowd, J., dissenting) ("I read *Heller* to prohibit municipal liability only when the victim suffers no constitutional injury at all, not when the victim fails to trace that constitutional injury to an individual police officer. . . . My concern is focused on what may be the separate official policies of the *City of Dunlap*, *Sequatchie County*, and *Rhea County,* to permit their law enforcement personnel to participate in 'takedowns' by the Task Force without any attempt to ascertain for themselves whether there is a factual basis to believe there is probable cause for an arrest. . . . In my view, the problem here is not so much what happened at the airport but what happened at a policy level before October 7, 2003. As explained above, it is the apparent policy of these governmental entities to permit their officers and deputies to rather blindly participate in activities initiated by the Task Force without any independent assurance that there is a factual basis for those activities."); ***Gray v. City of Detroit,*** 399 F.3d 612, 617-19 (6th Cir. 2005) ("When an officer violates a plaintiff's rights that are not 'clearly established,' but a city's policy was the 'moving force' behind the constitutional violation, the municipality may be liable even though the individual officer is immune. . . . It is arguable, therefore, that the District Court erred in its conclusion that '[i]f no constitutional violation by the individual defendants is established, the municipal defendants cannot be held liable under S 1983.' Assuming for the sake of argument that this Circuit permits a municipality to be held liable in the absence of any employee's committing a constitutional violation, the remaining question for us then is whether the City's policy makers' decisions regarding suicide prevention were themselves constitutional violations, as plaintiff contends. . . . A municipality may be liable under §1983 where the risks from its decision not to train its officers were 'so obvious' as to constitute deliberate indifference to the rights of its citizens. . . As applied to suicide claims, the case law imposes a duty on the part of municipalities to recognize, or at least not to ignore, obvious risks of suicide that are foreseeable. Where such a risk is clear, the municipality has a duty to take reasonable steps to prevent the suicide. Very few cases have upheld municipality liability for the suicide of a pre-trial detainee. . . . Pre-trial detainees do not have a constitutional right for cities to ensure, through supervision and discipline, that every possible measure be taken to prevent their suicidal efforts. Detainees have a right that city policies, training and discipline do

not result in deliberate indifference to foreseeable and preventable suicide attempts. Here, the plaintiff never made any statements that could reasonably be interpreted as threatening to harm himself, and none of his destructive acts were self-directed. There was no indication that he would turn his anger and agitation upon himself. The city's agents complied with city policies regarding medical care. Gray was transferred to the Receiving Hospital because of his physical complaints. He was screened by an intake nurse before being placed in a cell. . . . Plaintiff has documented twenty in-custody deaths, other than Gray's, that occurred in the city's various holding facilities over the eight year period between June 24, 1993, and August 3, 2001. Of these, only two were suicides, with one occurring in 1998 and one in 1999. Plaintiff argues that policymakers failed to adequately discipline or enforce their policies with respect to monitoring, but as of Gray's death no other inmate had ever committed suicide in a Receiving Hospital cell."); ***Epps v. Lauderdale County,*** No. 00-6737, 2002 WL 1869434, at *2, *3 (6th Cir. Aug. 13, 2002) (Cole, J., concurring)(unpublished) ("I concur with the majority that this high speed pursuit is governed by *County of Sacramento v. Lewis,* 523 U.S. 833 (1998), and that Appellants fail to allege facts sufficient to establish individual officer liability for injuries pursuant to the substantive due process doctrine. I also agree that no municipal liability exists in the present case. I write separately, however, to clarify my understanding of *City of Los Angeles v. Heller,* 475 U.S. 796 (1986) (per curiam), that a municipality may still be held liable for a substantive due process violation even when the individual officer is absolved of liability. . . . I read *Heller* to prohibit municipal liability only when the victim suffers no constitutional injury at all, not when the victim fails to trace that constitutional injury to an individual police officer. . . . A given constitutional violation may be attributable to a municipality's acts alone and not to those of its employees--as when a government actor in good faith follows a faulty municipal policy. . . A municipality also may be liable even when the individual government actor is exonerated, including where municipal liability is based on the actions of individual government actors other than those who are named as parties. . . Moreover, it is possible that no one individual government actor may violate a victim's constitutional rights, but that the 'combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights.'"); ***Gibson v. County of Washoe,*** 290 F.3d 1175, 1186 n.7, 1188, 1189 n.9 & n.10 (9th Cir. 2002) ("The municipal defendants . . . assert that if we conclude, as we do, . . . that the individual deputy defendants are not liable for violating Gibson's constitutional rights, then they are correspondingly absolved of liability. Although there are certainly circumstances in which this proposition is correct, . . . it has been rejected as an inflexible requirement by both

this court and the Supreme Court. For example, a municipality may be liable if an individual officer is exonerated on the basis of the defense of qualified immunity, because even if an officer is entitled to immunity a constitutional violation might still have occurred. . . Or a municipality may be liable even if liability cannot be ascribed to a single individual officer. . . And in *Fairley v. Luman*, 281 F.3d 913 (9th Cir.2002), we explicitly rejected a municipality's argument that it could not be held liable as a matter of law because the jury had determined that the individual officers had inflicted no constitutional injury. . .In any event, in this case, the constitutional violations for which we hold the County may be liable occurred *before* the actions of the individual defendants at the jail, so the County is not being held liable for what those deputies did. The County's violations . . . involved the decision to commit Gibson to the custody of the jail deputies despite his mental illness, and to do so with no direction to treat that illness while he was in jail or to handle him specially because of it. . . . When viewed in the light most favorable to Ms. Gibson, the record demonstrates that the County's failure to respond to Gibson's urgent need for medical attention was a direct result of an affirmative County policy that was deliberately indifferent, under the *Farmer* standard, to this need. . . Because that is so, we do not address whether it is necessary to prove the subjective *Farmer* state of mind in suits against entities rather than individuals. . . . [T]he Supreme Court has commented that it is difficult to determine the subjective state of mind of a government entity. . . This statement does not, however, preclude the possibility that a municipality can possess the subjective state of mind required by *Farmer*. First, it is certainly possible that a municipality's policies explicitly acknowledge that substantial risks of serious harm exist. Second, numerous cases have held that municipalities act through their policymakers, who are, of course, natural persons, whose state of mind can be determined. . . .To find the County liable under *Farmer*, the County must have (1) had a policy that posed a substantial risk of serious harm to Gibson; and (2) known that its policy posed this risk."); ***Fairley v. Luman***, 281 F.3d 913, 916, 917 (9th Cir. 2002) (per curiam) ("The City claims the Supreme Court's decision in *City of Los Angeles v. Heller,* 475 U.S. 796 (1986), and this court's decisions in *Scott v. Henrich,* 39 F.3d 912 (9th Cir.1994), and *Quintanilla v. City of Downey,* 84 F.3d 353 (9th Cir.1996), preclude municipal liability as a matter of law under § 1983 when the jury exonerates the individual officers of constitutional wrongdoing. . . . *Heller, Scott* and *Quintanilla* control John's excessive force claim. Exoneration of Officer Romero of the charge of excessive force precludes municipal liability for the alleged unconstitutional use of such force. To hold the City liable for Officer Romero's actions, we would have to rely on the § 1983 *respondeat superior* liability specifically rejected by *Monell.* However, these decisions have no bearing on John's

Fourth and Fourteenth Amendment claims against the City for arrest without probable cause and deprivation of liberty without due process. These alleged constitutional deprivations were not suffered as a result of actions of the individual officers, but as a result of the collective inaction of the Long Beach Police Department. . . . The district court did not err by denying the City's motion for' judgment as a matter of law on the *Monell* claim based on the jury's exoneration of the individual officers alone. If a plaintiff establishes he suffered a constitutional injury *by the City,* the fact that individual officers are exonerated is immaterial to liability under § 1983. . . Otherwise, municipal liability may attach where a constitutional deprivation is suffered as a result of an official city policy but no individual officer is named as a defendant, *see City of Canton,* but not where named individual officers are exonerated but a constitutional deprivation was in fact suffered. In either case, a constitutional deprivation--the touchstone of § 1983 liability--was a consequence of city policy."); ***Speer v. City of Wynne,*** 276 F.3d 980, 985-87 (8th Cir. 2002) ("Our court has previously rejected the argument that *Heller* establishes a rule that there must be a finding that a municipal employee is liable in his individual capacity as a predicate to municipal liability. . . . The appropriate question under *Heller* is whether a verdict or decision exonerating the individual governmental actors can be harmonized with a concomitant verdict or decision imposing liability on the municipal entity. The outcome of the inquiry depends on the nature of the constitutional violation alleged, the theory of municipal liability asserted by the plaintiff, and the defenses set forth by the individual actors. We do not suggest that municipal liability may be sustained where there has been no violation of the plaintiff's constitutional rights as a result of action by the municipality's officials or employees. *Cf. Trigalet v. City of Tulsa,* 239 F.3d 1150, 1156 (10th Cir.2001) (concluding that a municipality may be held liable only if the conduct of its employees directly caused a violation of a plaintiff's constitutional rights); *Schulz v. Long,* 44 F.3d 643, 650 (8th Cir.1995) ("It is the law in this circuit ... that a municipality may not be held liable on a failure to train theory unless an underlying Constitutional violation is located."). After all, a municipality can act only through its officials and employees. However, situations may arise where the combined actions of multiple officials or employees may give rise to a constitutional violation, supporting municipal liability, but where no one individual's actions are sufficient to establish personal liability for the violation. . . . The district court's decision to impose liability on the City here is *potentially* reconcilable with its judgment in favor of Mayor Green. The district court found that Mayor Green publicized the allegations against Speer, but the constitutional violation accrues only when an employee is denied the opportunity to clear his name. It is possible, for

instance, that the district court relied on the fact that some other city official or officials with final employment-policymaking authority (such as the city council) refused Speer the opportunity to clear his name. If so, Mayor Green's conduct would have been insufficient to support individual liability, yet the City would be liable for the act of its policymaker who did deny Speer that opportunity. Municipal liability may attach based on the single act or decision of a municipal decisionmaker if the decisionmaker possesses final authority to establish municipal policy over the subject matter in question. . . It may also be possible that the district court found that a final policymaker ratified the decision to discharge Speer without a hearing, which could also form the basis for municipal liability. . . . Because the district court did not make findings concerning which City policymakers violated Speer's rights and did not make specific conclusions of law concerning the theory of municipal liability supporting its judgment against the City, we cannot say with any certainty that the court's decisions can or cannot be harmonized. We therefore find it necessary to remand this case to the district court to make specific findings of fact and conclusions of law explaining the basis for the City's liability and explaining the basis for Mayor Green's dismissal."); ***Kneipp v. Tedder***, 95 F.3d 1199, 1213 (3d Cir. 1996) ("The precedent in our circuit requires the district court to review the plaintiffs' municipal liability claims independently of the section 1983 claims against the individual police officers, as the City's liability for a substantive due process violation does not depend upon the liability of any police officer."); ***Chew v. Gates***, 27 F.3d 1432, 1438 (9th Cir. 1994) ("A judgment that [police officer] is not liable for releasing [police dog], given all of the circumstances, would not preclude a judgment that by implementing a policy of training and using the police dogs to attack unarmed, non-resisting suspects, including [plaintiff], the remaining defendants caused a violation of [plaintiff's] constitutional rights. Supervisorial liability may be imposed under section 1983 notwithstanding the exoneration of the officer whose actions are the immediate or precipitating cause of the constitutional injury."); ***Fagan v. City of Vineland***, 22 F.3d 1283, 1292 (3d Cir. 1994) ***(Fagan I)*** (holding, in context of "a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution . . . . A finding of municipal liability does not depend automatically or necessarily on the liability of any police officer. Even if an officer's actions caused death or injury, he can only be liable under section 1983 and the Fourteenth Amendment if his conduct 'shocks the conscience.' [footnote omitted] The fact that the officer's conduct may not meet that standard does not negate the injury suffered by the plaintiff as a result. If it can be shown that the plaintiff suffered that injury, which amounts to deprivation of life or liberty, because the officer was following a

city policy reflecting the city policymakers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights. The pursuing police officer is merely the causal conduit for the constitutional violation committed by the City."); ***Simmons v. City of Philadelphia***, 947 F.2d 1042, 1058-65 (3d Cir. 1991) (no inconsistency in jury's determination that police officer's actions did not amount to constitutional violation, while city was found liable under § 1983 on theory of policy of deliberate indifference to serious medical needs of intoxicated and potentially suicidal detainees and failure to train officers to detect and meet such needs); ***Parrish v. Luckie***, 963 F.2d 201, 207 (8th Cir. 1992) ("A public entity or supervisory official may be liable under § 1983, even though no government individuals were personally liable."); ***Rivas v. Freeman***, 940 F.2d 1491, 1495-96 (11th Cir. 1991) (Sheriff found liable in his official capacity for failure to train officers regarding identification techniques and failure to properly account for incarcerated suspects, while deputies' actions which flowed from lack of procedures were deemed mere negligence); ***Gibson v. City of Chicago***, 910 F.2d 1510, 1519 (7th Cir. 1990) (dismissal of claim against officer on grounds that he did not act under color of state law not dispositive of claim against City where allegations of municipal policy of allowing mentally unfit officers to retain service revolvers); ***Arnold v. City of York***, 340 F.Supp.2d 550, 552, 553 (M.D. Pa.2004) ("We find that Plaintiffs have properly pled a Section 1983 claim against Defendants by alleging that they acted with deliberate indifference in failing to provide adequate training for handling encounters with mentally ill and emotionally disturbed persons, and that this failure to train resulted in Decedent's death. . . Defendants argue that because Plaintiffs are not suing the individual officers involved in the incident, this fact somehow establishes that the officers did not violate Decedent's constitutional rights and, in turn, the City and its Police Chief cannot be held liable. We disagree. As Magistrate Judge Mannion correctly noted, the Third Circuit has held that a municipality can be liable under Section 1983 and the Fourteenth Amendment for a failure to train its police officers, even if no individual officer violated the Constitution. . . The Third Circuit so held because claims against officers at the scene differ from claims against a municipality in that they 'require proof of different actions and mental states.'. . Even if we were to agree with Defendants' argument that *Fagan's* holding is on dubious grounds,. . . based on Plaintiffs' allegations and at this early stage in the litigation, we are unwilling to hold that no constitutional violation occurred."); ***Thomas v. City of Philadelphia,*** No. Civ.A. 01-CV-2572, 2002 WL 32350019, at *3, *4 (E.D. Pa. Feb. 7, 2002) (not reported) ("In this case, the fact that no individual police officer may be liable under § 1983 for lack of the requisite intent under *Lewis* does not necessarily mean that

Plaintiff has not suffered a constitutional injury for which the municipality may be held independently liable. . . . Other circuit courts have explicitly disagreed with the decision in *Fagan* regarding independent municipal liability, and some Third Circuit case law subsequent to *Fagan* appears to cast doubt upon its analysis.Until the Court of Appeals decides to the contrary, however, the Court must follow the law in this circuit as laid out in *Fagan*." [footnotes omitted])); ***Estate of Cills v. Kaftan***, 105 F. Supp.2d 391, 402, 403 (D.N.J. 2000) (In the context of a prison suicide case, the court relied on *Simmons* and *Fagan* to conclude that "in the present case, the fact that the Court finds that none of the Low-Level Employees violated Cills' constitutional rights does not preclude the Court from finding that the Department may be independently liable for an unconstitutional policy. . . . A reasonable factfinder could conclude that the absence of qualified mental health personnel who could assist the Department employees in making an assessment of an inmate's suicidal vulnerability was a serious deficiency in the Department's suicide policy that created a serious risk that injury or death would result from an inmate's attempted or successful suicide."); ***Kurilla v. Callahan***, 68 F. Supp.2d 556, 557, 565 (M.D. Pa. 1999) ("I find that the momentary use of force by a school teacher is to be judged by the shocks the conscience standard. I also find that Callahan's conduct, which consisted of striking a blow to Kurilla's chest that resulted in bruising but otherwise did not require medical care, was not so '"brutal" and "offensive to human dignity"' as to shock the judicial conscience. . . . While Callahan's conduct did not violate substantive due [process] standards, Mid-Valley School District may nonetheless be held accountable for having established a policy or custom that caused the injury allegedly sustained by Kurilla. . . . . Consistent with the reasoning of *Fagan, Kneipp*, and *Simmons*, Mid-Valley School District may be held liable if it had a custom or policy condoning use of excessive force by teachers that evidenced a deliberate indifference to the student's constitutional rights in bodily integrity protected by the Due Process Clause of the Fourteenth Amendment."); ***Burke v. Mahanoy City***, 40 F. Supp.2d 274, 285, 286 (E.D. Pa. 1999) ("This court finds that we are required to follow Third Circuit law and examine the possibility of municipal liability under § 1983, although the individual officers have not been held liable in this situation. The present case is close in identity to *Fagan* because Plaintiff has alleged substantive due process claims. . . Moreover, Plaintiff has also independently alleged constitutional claims against the City, Police Department and Chief of Police. . . . Under either scenario for municipal liability, the deliberate indifference or policy and custom of the municipality must inflict constitutional injury. . . . Thus, the mere existence of a policy of inaction or inadequate training of officers with respect to drinking and disorderly conduct is not actionable under § 1983 if such conduct does

not inflict constitutional injury. . . . Even if we accept that the existence of a municipal policy or custom resulted in the failure of individual officers to address the city's problems of underage drinking, loitering and fighting, such municipal inaction cannot be said to inflict constitutional injury. Thus, we need not reach the issue of whether Defendants are subject to *Monell* liability where, as here, we have concluded that no constitutional right was violated."), *aff'd*, 213 F.3d 628 (3d Cir. 2000); ***Gillyard v. Stylios***, No. Civ.A. 97-6555, 1998 WL 966010, at **6-8 (E.D. Pa. Dec. 23, 1998) (not reported) ("The City maintains that, if the individual officers are not liable under § 1983, then the municipality is not liable. [citing cases] But in the Third Circuit a municipality can be liable for 'failure to train its police officers with respect to high-speed automobile chases, even if no individual officer participating in the chase violated the Constitution,' [*citing Kneipp* and *Fagan*] The City of Philadelphia may be liable for its failure to train police officers with respect to emergency use of their vehicles even if Stylios and Fussell did not individually violate the Constitution for lack of the requisite intent. The Court of Appeals may reexamine municipal liability; language in *Lewis* casts doubt on the continued tenability of this position. . . But until the Court of Appeals decides to the contrary, this court must follow the clearly established law in this circuit. Defendants correctly assert that there is no municipal liability absent a constitutional violation but that does not mean an individual officer must be liable for that violation. . .A municipal body may violate the Constitution if its policies reflect deliberate indifference towards the constitutional rights of those with whom its agents have contact. . . . The court cannot say that a reasonable jury could not find the City of Philadelphia deliberately indifferent to the harm to private citizens caused by its failure to prevent the reckless driving of its police officers; summary judgment will be denied."); ***Lawson v. Walp***, 4:CV-94-1629, 1995 WL 355733, *4 (M.D. Pa. June 6, 1995) (not reported) ("[A] municipality may be held liable for a policy or failure to train which causes one of its employees to deprive a person of a constitutional right. Regardless of whether the individual employee is liable for the independent constitutional tort or whether the policy itself is unconstitutional, the municipality may be liable under a theory of a substantive due process violation for its policy or failure to train. The elements of the cause of action are: (1) an individual is deprived of a constitutional right (2) through the action of an officer or employee of the municipality (3) caused by (4) a policy or failure to train on the part of the municipality (5) if the policy was implemented with deliberate indifference to constitutional rights."); ***Carroll v. Borough of State College***, 854 F. Supp. 1184, 1195 (M.D. Pa. 1994) ("The absence of individual liability on the part of [defendant police officer] is not a bar to plaintiff's proceeding with his claim against the Borough."), *aff'd*, 47 F.3d 1160 (3d Cir. 1995);

Plasko v. City of Pottsville, 852 F. Supp. 1258, 1265 (E.D. Pa. 1994) ("Although we acknowledge that plaintiff can fail to state a cause of action under Section 1983 as to individual municipal employees while properly pleading a case with respect to the municipality directly, we nonetheless find that this action cannot be maintained against the City on the basis of the bare allegations that Pottsville's safety policies and failure to train officers amount to deliberate indifference to the needs of a detainee."); ***Andrade v. City of Burlingame***, 847 F. Supp. 760, 767 (N.D. Cal. 1994) ("In certain circumstances, a municipality may also be held liable under section 1983 even if no individual employee can be held liable."), *aff'd by Marquez v. Andrade*, 79 F.3d 1153 (9th Cir. 1996); ***Fulkerson v. City of Lancester***, 801 F. Supp. 1476, 1485 (E.D. Pa. 1992) (acknowledging in high speed pursuit context that "the individual police officer named as a defendant could be a causal conduit for the constitutional violation, without committing such a violation himself."), *aff'd*, 993 F.2d 876 (3d Cir. 1993) (Table).

See also ***Barrett v. Orange County Human Rights Commission***, 194 F.3d 341, 349, 350 (2d Cir. 1999) ("Barrett argues that under the Supreme Court's decision in *Monell* a municipality may be found liable for constitutional violations under 42 U.S.C. § 1983 even if no named individual defendants are found to be liable. He asserts that it was therefore error for the district court to remove the question of municipal liability from the jury once the jury determined that Lee and Colonna were not liable. We agree. Other circuits have recognized that a municipality may be found liable under § 1983 even in the absence of individual liability. [citing cases] We agree with our sister circuits that under *Monell* municipal liability for constitutional injuries may be found to exist even in the absence of individual liability, at least so long as the injuries complained of are not solely attributable to the actions of named individual defendants. *Cf. City of Los Angeles v. Heller*, 475 U.S. 796, 798-99, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (per curiam) (where alleged constitutional injury is caused solely by named individual defendant who is found not liable, municipal liability cannot lie). It is therefore possible that a jury could find the Commission and the County of Orange liable for the alleged violations of Barrett's First Amendment rights even after finding that Lee and Colonna are not liable. Lee and Colonna may have been the most prominent figures in Barrett's termination; they may have issued plaintiff's termination letter. But the Commission is a multi- member body that makes its determinations as a group, and many of the adverse employment actions complained of by Barrett, including the decision to terminate him as Executive Director of the Commission, were taken by the Commission as a whole, not by Lee and Colonna by themselves. It is therefore

possible that the defendant commissioners did not as individuals violate Barrett's rights, but that the Commission did."); ***Phillips ex rel. Green v. City of New York***, No. 03 Civ. 4887(VM), 2006 WL 2739321, at *26 ((S.D.N.Y. Sept. 25, 2006) ("The Court first must address an erroneous contention by the City Defendants. The City Defendants argue that because Plaintiffs have failed to establish a constitutional violation by any of the named individual City defendants, the City itself cannot be liable. According to the City Defendants, absent a constitutional violation by a named defendant, there can be no municipal liability under *Monell*. In support of this argument, the City Defendants cite *City of Los Angeles v. Heller*, which held that a municipality could not be liable for the actions of one of its officers when the jury concluded that the officer inflicted no constitutional harm. . . However, the Second Circuit has, since *Heller*, expressly held that 'under *Monell* municipal liability for constitutional injuries may be found to exist even in the absence of individual liability, at least so long as the injuries complained of are not solely attributable to the actions of named individual defendants.' *Barrett v. Orange County Human Rights Comm'n*, 194 F.3d 341, 350 (2d Cir.1999) (emphasis added). . . Thus, the absence of a constitutional violation by a named defendant does not mandate summary judgment for the City if the allegedly unconstitutional injuries Antonia, Green, and Phillip complain of were based in part on the actions of other persons under the City's employ or control but not named as defendants. Here, Plaintiffs have alleged that Antonia was injured while at the ACS pre-placement facility . . .and that those involved in Antonia's care--including those not named as defendants--collectively failed to supervise, protect, or provide adequate medical treatment, causing Antonia's injuries. Thus, the injuries Plaintiffs complain of are not solely attributable to the named individual defendants, but instead arise from all those involved in Antonia's care while she was at the ACS facility. As a result, Plaintiffs' *Monell* claim against the City cannot be dismissed on this basis.").

See also ***Lopez v. LeMaster***, 172 F.3d 756, 763 (10th Cir. 1999) ("The district court determined that appellant failed to establish causation sufficient to hold the county liable for conditions at the jail. The district court relied on the principle that to hold the county liable, a plaintiff must demonstrate that its policy was the moving force behind the injury alleged; that is, that the county took official action with a requisite degree of culpability and there is a direct causal link between the action and deprivation of federal rights. [citing *Brown*] While these rigid standards of proof clearly apply to appellant's claim that an improperly-trained jailer returned him to a cell with inmates who attacked him, they do not govern his claim that the county maintained a policy of understaffing its jails which resulted in his injury. If

appellant's summary judgment materials demonstrate the existence of an official municipal policy which itself violated federal law, this will satisfy his burden as to culpability, and the heightened standard applicable to causation for unauthorized actions by a municipal employee will not apply . . . .Appellant has made a sufficient showing, for purposes of summary judgment, that the county maintains an unconstitutional policy of understaffing its jail and of failing to monitor inmates. He must also show, however, that this policy is maintained with the requisite degree of culpable intent. . . The requisite degree of intent in this case is, of course, deliberate indifference to inmate health or safety. . . Appellant has shown the requisite deliberate indifference in this case in two different ways. First, there is evidence that the county's legislative body was itself deliberately indifferent to conditions at the jail. As mentioned, Sheriff LeMaster told a jail investigator that the county commissioners failed to provide funding for correction of deficiencies at the jail likely to lead to assaults against inmates even though such funding was required by the Oklahoma statutes. . . . Alternatively, the county may be liable on the basis that Sheriff LeMaster is a final policymaker with regard to its jail, such that his actions 'may fairly be said to be those of the municipality.'. . There is evidence sufficient to survive summary judgment showing that Sheriff LeMaster's failure to provide adequate staffing and monitoring of inmates constitutes a policy attributable to the county, and that he was deliberately indifferent to conditions at the jail.").

See generally the following discussion of this problem in ***Mark v. Borough of Hatboro***, 51 F.3d 1137, 1153 (3d Cir. 1995):

> In *Monell*, the Supreme Court held that "when execution of a government's policy or custom, whether by its lawmakers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the injury then the government as an entity is responsible under § 1983." [cite omitted] Post-*Monell* cases often have reflected confusion with the actual standard governing the imposition of liability, but two subsequent Supreme Court cases have delineated those situations more clearly. In *City of Canton v. Harris*, ... the Court held that 'the inadequacy of police training may serve as the basis for § 1983 liability ... where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.' In that case, however, the Court 'assume[d] that respondent's constitutional right ... was denied by city employees,' ... and went on to assess whether the failure to train ever could give rise

> to municipal responsibility. Thus, the case cannot be read to stand for the proposition that a policy evincing willful disregard, though not causing a constitutional violation, can be the basis for section 1983 liability. In short, *City of Canton* dealt with responsibility for an assumed constitutional violation. In *Collins v. City of Harker Heights* ... the Court clarified still further the issue of when a municipality may be liable. In that case, the plaintiff's decedent, a city employee, died of asphyxia after entering a manhole. The plaintiff claimed that her decedent 'had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees.'... The Court this time assumed that the municipality was responsible for the injury and asked whether the injury was of constitutional proportions. Thus, it reversed its focus from that in *City of Canton*. In so doing, it inquired into: (1) whether 'the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause,'...; and (2) whether 'the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense.'... Reasoning that there was no affirmative constitutional duty, and that the city's actions were not conscience-shocking or arbitrary, a unanimous Court held that there could be no section 1983 liability. It did not matter whether a policy enacted with deliberate indifference to city employees caused the injury, because the injury could not be characterized as constitutional in scope. Thus, *Collins* made clear that in a *Monell* case, the 'proper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and if so, (2) whether the city is responsible for that violation.'

The panel opinion in *Mark* made this observation about *Fagan*:

> [T]he *Fagan* panel opinion appeared to hold that a plaintiff can establish a constitutional violation predicate to a claim of municipal

> liability simply by demonstrating that the policymakers, acting with deliberate indifference, enacted an inadequate policy that caused an injury. It appears that, by focusing almost exclusively on the 'deliberate indifference' prong of the *Collins* test, the panel opinion did not apply the first prong-establishing an underlying constitutional violation.

51 F.3d at 1153 n.13.

See also ***Grazier v. City of Philadelphia,*** 328 F.3d 120, 124 n.5 (3d Cir. 2003) ("Our Court has distinguished *Heller* in a substantive due process context, *Fagan v. City of Vineland*, 22 F.3d 1283, 1291-94 (3d Cir.1994), but not in a way relevant to this case. In *Fagan*, we observed that a municipality could remain liable, even though its employees are not, where the City's action itself is independently alleged as a violation and the officer is merely the conduit for causing constitutional harm. . . We were concerned in *Fagan* that, where the standard for liability is whether state action 'shocks the conscience,' a city could escape liability for deliberately malicious conduct by carrying out its misdeeds through officers who do not recognize that their orders are unconstitutional and whose actions therefore do not shock the conscience. . . Here, however, like *Heller* and unlike *Fagan*, the question is whether the City is liable for causing its officers to commit constitutional violations, albeit no one contends that the City directly ordered the constitutional violations. Therefore, once the jury found that Hood and Swinton did not cause any constitutional harm, it no longer makes sense to ask whether the City caused them to do it. Additionally, recognizing that *Heller* had addressed a closely related issue, we carefully confined *Fagan* to its facts: a substantive due process claim resulting from a police pursuit. . . By contrast, both this case and *Heller* involve primarily a Fourth Amendment excessive force claim."); ***Brown v. Commonwealth of Pennsylvania Dept. of Health Emergency Medical Services Training Institute***, 318 F.3d 473, 482 & n.3, 483 (3d Cir. 2003) ("It is possible for a municipality to be held independently liable for a substantive due process violation even in situations where none of its employees are liable. [citing *Fagan* and noting in footnote that there is a split among the courts of appeals on this issue] . . . . However, for there to be municipal liability, there still must be a violation of the plaintiff's constitutional rights. . . . It is not enough that a municipality adopted with deliberate indifference a policy of inadequately training its officers. There must be a 'direct causal link' between the policy and a constitutional violation. . . This is where Appellants' municipal liability claim fails. They allege that the City of Philadelphia had a number of policies involving EMTs

which were enacted with deliberate indifference and which caused harm to them and their son. Even if we accept everything Appellants allege as true, they will have still failed to establish that the City's policies caused *constitutional* harm. The City was under no constitutional obligation to provide competent rescue services. The failure of the City and its EMTs to rescue Shacquiel Douglas from privately-caused harm was not an infringement of Appellants' constitutional rights. [footnote omitted] There has been no constitutional harm alleged. Hence, there is no municipal liability under § 1983."); ***Hansberry v. City of Philadelphia,*** 232 F. Supp.2d 404, 412, 413 (E.D. Pa. 2002) ("[L]ocal government bodies may be held liable if a state actor acts unconstitutionally pursuant to a government policy or custom. . . Plaintiffs do not, however, have to demonstrate unconstitutional actions by Lt. Herring or Officers Schneider and Hood to make our their claim under § 1983. The Third Circuit has held that plaintiffs can establish liability based solely on a municipal policy or custom if the plaintiffs have both connected the policy to a constitutional injury and 'adduced evidence of scienter on the part of a municipal actor [with] final policymaking authority in the areas in question.' *Simmons v. City of Philadelphia,* 947 F.2d 1042, 1062 (3d Cir.1991). . . . Plaintiffs cannot establish municipal liability based on *Monell* for two reasons. First, they cannot demonstrate that a municipal policy or custom, as carried out by the individual defendants, inflicted an unconstitutional injury because they have presented no evidence that the officers violated Raymond's 14th Amendment rights. Second, were they to argue under *Simmons* that a municipal policy by itself deprived Raymond of his substantive due process rights, they would have needed to present evidence of a constitutional violation, a particular policy, and an identifiable policymaker. *See Simmons,* 947 F.2d at 1062. They have presented no such evidence. Consequently, they cannot satisfy the requirements of *Monell.*"); ***White v. City of Philadelphia,*** 118 F. Supp.2d 564, 575, 576 (E.D. Pa. 2000) ("In this case, plaintiffs allege separate, independent claims against the City, claiming that the City was deliberately indifferent in its (1) failure to adopt and implement a 911 policy to handle Priority 1 calls and (2) failure to train. . . . Regardless of the theory under which suit is brought against the City, the first inquiry in any § 1983 claim 'is to identify the specific constitutional right allegedly infringed.' [citing *Albright* and *Collins*] . . . .As the Court determined above, this claim fails to identify a cognizable constitutional injury because the Officers' conduct did not satisfy the four part test set forth in *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir.1995). In addition, even if the Court assumes that the City has a policy or custom of providing poor 911 service or failing to train officers to perform adequate rescue services, this failure did not inflict constitutional injury--substantive due process under the Fourteenth Amendment does not secure a right to rescue

services under the facts of this case."); ***Russoli v. Salisbury Tp.***, 126 F. Supp.2d 821, 863 n.26 (E.D. Pa. 2000) (*Fagan* applies only to "acts challenged under substantive due process."); ***Leddy v. Township of Lower Merion***, 114 F. Supp.2d 372, 377 (E.D. Pa. 2000) ("As *Mark* suggests, the first prong is essential to the rationale of *Monell*--that a municipality should be held accountable not on the basis of vicarious liability, but only for misconduct it has approved or fostered. Or as succinctly and metaphorically couched in *Andrews*: [I]t is impossible on the delivery of a kick to inculpate the head and find no fault with the foot." Andrews, 895 F.2d at 1481."); ***Cannon v. City of Philadelphia***, 86 F. Supp. 2d 460, 475, 476 (E.D. Pa. 2000)("In sum, I am presented with various conflicting interpretations of the appropriate level of culpability applicable in a § 1983 case against a municipality in which the individual state actors are not liable. The confusion regarding how to evaluate a municipality's liability is buttressed by the seeming disagreement between present Chief Judge Becker and past Chief Judge Sloviter in *Simmons* and the Third Circuit's recognition in *Mark* of *Fagan* I's failure to evaluate the applicable standard for the underlying constitutional violation. . . . While *Lewis* did not address municipal liability, the instruction of *Lewis* arguably intimates that a contextual approach may be applied in evaluating a municipality's liability in the absence of an individual state actor's liability. In order for a municipality to commit the necessary underlying constitutional tort, an expansive reading of *Lewis* may suggest that the municipality's policy, custom or failure to train, viewed contextually, must shock the conscience. The conduct that satisfies this standard may differ depending on the circumstances. Therefore, while a state actor's behavior may not shock the conscience, the municipality's policy, custom or failure to train may be conscience shocking. . . . [R]egardless of which standard applies plaintiff fails to demonstrate that the City's policies, customs, or failure to train are deliberately indifferent or shock the conscience. Therefore, even assuming the existence of an underlying constitutional violation and that the City need only be deliberately indifferent to trigger municipal liability, I will grant the defendants' summary judgment motion.").

See also ***Contreras v. City of Chicago***, 119 F.3d 1286, 1294 (7th Cir. 1997) ("We would first note that much of the plaintiffs' argument reflects a confusion between what constitutes a constitutional violation and what makes a municipality liable for constitutional violations. Both in the District Court and here on appeal, the plaintiffs invoked 'failure to train' and 'deliberate indifference' theories as the basis for the substantive due process claim. . . . Notions of 'deliberate indifference' and 'failure to train,' however, are derived from municipal liability cases such as [*Monell*, *Canton*] and most recently [*Bryan County.]* Those cases presume that a constitutional

violation has occurred (typically by a municipal employee) and then ask whether the municipality itself may be liable for the violations. . . . The liability of the City of Chicago for any deliberate indifference or for failing to train DCS inspectors is therefore secondary to the basic issue of whether a constitutional guarantee has been violated."); ***Evans v. Avery***, 100 F.3d 1033, 1039 (1st Cir. 1996) (declining invitation to adopt *Fagan* analysis "because we believe that the *Fagan* panel improperly applied the Supreme Court's teachings."); ***Regalbuto v. City of Philadelphia***, No. CIV. A. 95-5629, 1995 WL 739501, *4 (E.D. Pa. Dec. 12, 1995) (not reported) ("In [*Mark*], . . . the [Court] reiterated the *Collins* standard that unless plaintiff first establishes that he or she has suffered a constitutional injury, it is irrelevant for purposes of § 1983 liability whether the city's policies, enacted with deliberate indifference, caused an injury.").

See also ***Williams v. City and County of Denver***, 99 F.3d 1009, 1019 (10th Cir. 1996), *vacated and remanded for further proceedings in light of County of Sacramento v. Lewis and Bd. of County Comm'rs of Bryan County v. Brown*, ***Williams v. City and County of Denver***, 153 F.3d 730 (10th Cir. 1998) (per curiam) (en banc), where the court explains:

> In holding that the City may be liable for its own unconstitutional policy even if Officer Farr is ultimately exonerated, we emphasize the distinction between cases in which a plaintiff seeks to hold a municipality liable for failing to train an employee who as a result acts unconstitutionally, and cases in which the city's failure is itself an unconstitutional denial of substantive due process. *Heller* and *Hinton* are cases belonging in the first category. In those cases, the unconstitutional acts were committed by individual officers. Derivative liability against the city was predicated upon a municipal policy under which the city was allegedly legally responsible for the individual officer's unconstitutional conduct. In order to impose liability in such cases, the policy need not itself be unconstitutional. . . Rather, the inquiry is whether an otherwise constitutional policy is the moving force behind unconstitutional conduct by a municipal employee. . .In the second category of cases, liability against the city is sought not derivatively on the basis of unconstitutional conduct by an individual officer, but directly on the basis of the unconstitutional nature of the city's policy itself. *Collins* belongs in this category. . . . Municipal policy thus performs two separate functions, as the court

> in *Collins* attempted to clarify. In a *Heller/Hinton* case and in *Canton*, the inquiry is whether the policy may impose liability on the city solely for the unconstitutional acts of its employee. In such cases, the policy, even if constitutional, will nonetheless be a basis for municipal liability if that policy amounts to deliberate indifference to the rights of the public with whom the municipal employee comes in contact. In a *Collins* case, on the other hand, the inquiry is whether the policy or custom itself is unconstitutional so as to impose liability on the city for its own unconstitutional conduct in implementing an unconstitutional policy.

See also ***Williams v. City and County of Denver***, No. 90 N 1176, slip op. at *28, *29 (D. Colo. Sept. 27, 1999) (on remand):

> Williams renews her argument that the City's policies are unconstitutional by asserting that (1) the Supreme Court's decisions in *Lewis* and *Brown* mandate that the City's liability must be considered under the less stringent standard of deliberate indifference . . . . I disagree. First, neither *Lewis* nor *Brown* alters the conscience-shocking standard required to establish direct municipal liability. *Brown* dealt with whether a municipality could be held liable on a single decision to hire when the hired employee violated the plaintiff's constitutional rights. . . *Lewis*, on the other hand, did not even deal with direct municipal liability. To the contrary, the issue before the *Lewis* court was whether an individual police officer's deliberate or reckless indifference to life in a high-speed automobile chase which caused a death amounted to violation of substantive due process under the Fourteenth Amendment. . . . [W]hile Williams may pursue her deliberate-indifference claims against the City under *Canton* based on the unconstitutional conduct of Farr, she may not pursue her deliberate-indifference claims under a *Collins* theory of direct municipal liability.

D. Liability Based on Conduct of Policymaking Officials Attributed to Governmental Entity

Under ***Monell***, government liability attaches when the constitutional injury results from the implementation or "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* . . . ." 436 U.S. at 694 (emphasis added).

Since ***Monell***, the Court has struggled with the questions left open by that decision. In subsequent cases, there have been attempts to provide clarification on the important issues of (1) whose "edicts or acts," beyond those of the official lawmakers, may be attributed to the government, and (2) which "edicts or acts" will constitute "policy."

1. In ***Pembaur v. City of Cincinnati***, 475 U.S. 469 (1986), a majority of the Court held that a single decision by an official with policymaking authority in a given area could constitute official policy and be attributed to the government itself under certain circumstances. Thus, in ***Pembaur***, the County could be held liable for a single decision by a County prosecutor which authorized an unconstitutional entry into the plaintiff's clinic. *See, e.g.,* ***Hampton Co. Nat. Sur., LLC v. Tunica County, Miss.***, 543 F.3d 221, 227 (5th Cir. 2008) (**"**As to this Sheriff's policy role in the liability analysis, this Circuit has already held 'Sheriffs in Mississippi are final policymakers with respect to all law enforcement decisions made within their counties.' . . Determining which bonding companies were authorized to write bonds at the Tunica County jail logically is part of that law enforcement authority. The Sheriff's decision to deny the Plaintiffs the right to issue bonds is the kind of single decision by the relevant policymaker that can be the basis of liability."); ***Welch v. Ciampa***, 542 F.3d 927, 942 (1st Cir. 2008) ("We are bound by *Pembaur* and conclude that a single decision by a final policymaker can result in municipal liability. Here, the parties agree that Ciampa, as Chief of Police, is the final policymaking official with respect to the reappointment of specialists. Accepting the parties' representations as true, liability can be imposed on the Town for Ciampa's decision not to reappoint Welch if that decision violated Welch's constitutional rights. Hence, summary judgment for the Town must be reversed."); ***Bruce v. Beary***, 498 F.3d 1232, 1249 (11th Cir. 2007) ("With respect to the failure to return Bruce's property to him after appeal, despite the state court order to do so, we emphasize that even a single decision by its policymaker may subject the county to liability for a constitutional violation. . . As the final decision-maker in the Sheriff's Department,

. . . the Sheriff had the responsibility to see that Bruce's property was returned--all of it. As such, the district court erroneously held that Bruce is required to demonstrate that the Sheriff had some policy of retention in order to establish a constitutional violation."); ***Brooks v. Rothe,*** 2007 WL 3203761, at *7 (E.D. Mich. Oct. 31, 2007) ("Here, the uncontested facts show that final decision makers, the chief of police and the county prosecutor, Defendants Bodis and Gaertner, reached a decision and then directed its execution. Based on the police report, Defendant Bodis consulted with Defendant Gaertner, who advised that Defendant Rothe enter the shelter and arrest Plaintiff. Consequently, under *Pembaur*, Defendants city and county can be held liable for the consequences of their decision makers' directive. Thus, the claim against Defendant city and Defendant county remains.").

In ***Jones v. Wellham***, 104 F.3d 620, 625 (4th Cir. 1997), the court noted:

> Critically, *Pembaur* dealt only with a "policy" decision by a municipal official that directly commanded a constitutional violation . . . (Fourth Amendment search). Its specific holding did not, therefore, touch official "acts or edicts" that, though not themselves unconstitutional, hence not the immediate cause of constitutional injury, might be shown to have caused a constitutional violation by others. That, of course is the factual situation presented in the case at issue, and for *Pembaur's* theory of municipal liability to apply here, it must be considered to reach such decisions as well as those directly commanding or effecting constitutional violations. We have not, apparently, ever directly addressed that issue, though we have, of course, applied *Pembaur* to single policy decisions that were themselves unconstitutional, hence were the immediate causes of constitutional violations. *See, e.g., Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183 (4th Cir.1994) (unconstitutional firing by school board). Other circuits have, however, simply assumed *Pembaur's* application to single policy maker decisions which though not themselves unconstitutional were the ultimate causes of constitutional violations.
>
> Because the Supreme Court recently has granted certiorari in *Bryan County v. Brown* . . . to consider issues that may touch upon whether *Pembaur* applies at all to such situations, we will reserve decision on that threshold question and simply assume for purposes of this case that, in otherwise appropriate circumstances, *Pembaur's*

> single-decision principle can apply to single policy maker decisions not themselves unconstitutional, such as those of Chief Frye here in issue. In making that assumption, we also assume (as did the district court) that in applying *Pembaur* to this type situation, the imposition of municipal liability would require . . . proof of deliberate indifference of the decision maker to the possible consequences of his decision, hence a "conscious choice" of the course of action taken, . . . and a close causal connection between the decision and the ultimate constitutional injury inflicted.

Justice Brennan, writing for a plurality in *Pembaur*, concluded that "[m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." 475 U.S. at 483. Whether an official possesses policymaking authority with respect to particular matters will be determined by state law. *Id.* Policymaking authority may be bestowed by legislative enactment or may be delegated by an official possessing such authority under state law. *Id*.

Justice White, wrote separately to make clear his position (concurred in by Justice O'Connor) that a decision of a policymaking official could not result in municipal liability if that decision were contrary to controlling federal, state or local law. *Id*. at 485-87 (White, J., concurring). Since the law was not settled at the time of the County prosecutor's action in ***Pembaur***, the decision of the policymaking official would constitute the official policy for ***Monell*** purposes.

Justice Powell (joined by Burger, C.J., and Rehnquist, J.) dissented, criticizing the Court for its focus upon the "status of the decisionmaker" rather than "the nature of the decision reached ... and ... the process by which the decision was reached." *Id*. at 492-502. *See also* ***Collins v. Stasiuk***, 56 F. Supp.2d 344, 345 (S.D.N.Y. 1999) (" While [defendants] may well have had final authority to make an individual personnel decision concerning plaintiff (who was himself a relatively high-ranking official at DEP), the hiring, promotion, demotion or termination of a single individual is NOT a 'municipal policy.'. . .The decision to fire one man, for whatever reason, is neither a course or method of action to help guide and determine present and future decisions nor a high-level overall plan. It is a singular act, applicable to one individual, in the unique circumstances of his case. It is, in short, a personnel decision and nothing more. It is hard to imagine any decision that falls farther outside the common understanding of the word 'policy.' Of course, an

individual personnel decision carried out by a final policymaker pursuant to a definite course or method of action that was designed to guide future decision making, or in furtherance of some governmental body's high-level overall plan, would qualify for the *Monell* exception. But not every personnel decision made by a senior policymaker falls into that category.")*.*

2. In ***City of St. Louis v. Praprotnik***, 485 U.S. 112 (1988), the Court made another attempt "to determin[e] when isolated decisions by municipal officials or employees may expose the municipality itself to liability under [section] 1983." 485 U.S. at 113. Seven Justices (J. Kennedy did not participate; J. Stevens dissented) joined in reversing a decision by the Eighth Circuit which had found the City liable for the transfer and layoff of a city architect in violation of his First Amendment rights.

The Court of Appeals had allowed the plaintiff to attribute to the City adverse personnel decisions made by the plaintiff's supervisors where such decisions were considered "final" in the sense that they were not subject to *de novo* review by higher-ranking officials. 798 F.2d 1168, 1173-75 (8th Cir. 1986).

Justice O'Connor reinforced the principle articulated in ***Pembaur***, that state law will be used to determine who are policymaking officials. 485 U.S. at 124. Furthermore, the plurality makes clear its position that the question of who is a policymaking official is one of law, for the court to decide by reference to state law, not one of fact to be submitted to a jury. *Id*.

In ***Praprotnik***, the relevant law was found in the St. Louis City Charter, which gave policymaking authority in matters of personnel to the mayor, aldermen and Civil Service Commission. *Id*. at 126.

See also ***Lytle v. Doyle,*** 326 F.3d 463, 472 (4th Cir. 2003) ("The Norfolk City Charter provides that the City Manager, acting as the director of public safety, is in charge of the police department. All orders, rules, and regulations applicable to the entire police department must be approved by the City Manager. The City Manager is therefore clearly the final policymaker for purposes of § 1983 liability. Some policies for the police department, so called standard operating procedures, may be approved by the Chief of Police rather that the City Manager. At most, then, the Chief of Police could be considered a final policymaker for the police department. And no one lower in rank than the Chief of Police is authorized to issue

any written directives."); ***Jeffes v. Barnes***, 208 F.3d 49, 57, 58, 60, 61 (2d Cir. 2000) ("In sum, the question of whether a given official is the municipality's final policymaking official in a given area is a matter of law to be decided by the court. Where a plaintiff relies not on a formally declared or ratified policy, but rather on the theory that the conduct of a given official represents official policy, it is incumbent on the plaintiff to establish that element as a matter of law. We thus reject plaintiffs' contention that the district court erred in imposing that burden on them; and we turn to the question of whether, as to the particular area at issue here, the burden was met. . . . The principal area in question in this suit involves the duties and obligations of the sheriff's staff members toward each other with respect to their exercise of First Amendment rights in breach of the Jail's code of silence. The following review of New York State ("State") law leads us to the conclusion that the Schenectady County sheriff was the County's final policymaker with respect to most of the conduct that plaintiffs challenge. . . . In sum, State law requires that the Schenectady County sheriff be elected; County law provides that elected officials are not subject to supervision or control by the County's chief executive officer; there is only routine civil service supervision over the sheriff's appointments; State law places the sheriff in charge of the Jail; and the County's chief executive officer, advised by the County's attorneys, treats the sheriff, insofar as Jail operations are concerned, as "autonomous." . . . . The County has pointed us to no provision of State or local law that requires a sheriff to answer to any other entity in the management of his jail staff with respect to the existence or enforcement of a code of silence. We conclude that Sheriff Barnes was, as a matter of law, the County's final policymaking official with respect to the conduct of his staff members toward fellow officers who exercise their First Amendment rights to speak publicly or to inform government investigators of their co-workers' wrongdoing."); ***Dotson v. Chester***, 937 F.2d 920 (4th Cir. 1991) (court examines state law and county code to find Sheriff final policymaker as to operation of county jail).

See also ***Wilson v. City of Boston***, 421 F.3d 45, 59, 60 (1st Cir. 2005) ("Not every police operation is a municipal policy; Wilson has the burden of establishing that this particular operation was City policy. She argues that Operation Goodwin was City policy because it was (1) a large operation involving arrest warrants from all over Boston, (2) commanded by a high-ranking officer, and (3) videotaped for national distribution. Those facts, however, do not make it an official City policy. Wilson offers no evidence that Dunford-- then a captain assigned to a station in Dorchester, subject to the hierarchical supervision of a Deputy Superintendent, Superintendent, and Police Commissioner--had the authority to set municipal policy

for the City of Boston. We therefore affirm the district court's grant of summary judgment for the City."); ***Barry v. New York City Police Department,*** No. 01 Civ.10627 CBM, 2004 WL 758299, at *15 (S.D.N.Y. Apr. 7, 2004) ("While it seems likely, therefore, that the Police Commissioner bore final policymaking authority in the areas implicated by the adverse acts taken against plaintiff, and that he would have to have ordered or ratified the adverse acts in question, or at least known that Mullane, Reiss, and Fox had a retaliatory motive for carrying them out, the court needs more information about the power and authority of the police officers in question beyond the information provided by the parties before it can make a final determination as a matter of law."); ***Stein v. Janos,*** 269 F. Supp.2d 256, 261 (S.D.N.Y. 2003) ("I cannot determine who had final authority to make policy concerning Stein's employment for the Village of Tarrytown, because, as usual, neither party has briefed the issue--not defendants as movants and not plaintiff in rebuttal. Common sense suggests that either the Mayor, Village Trustees, or Village Administrator is likely to have such authority--if not, there would appear to be a gaping hole in the Village's administrative organization. But I cannot make decisions in a vacuum. The Village's motion for summary judgment is denied without prejudice; when someone bothers to direct me to the appropriate law (at trial), I will address it.").

The plurality also underscored the importance of "finality" to the concept of policymaking and reiterated the distinction set out in ***Pembaur*** between authority to make final policy and authority to make discretionary decisions. "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Id*. at 127.

See, e.g, ***Ford v. County of Grand Traverse***, 535 F.3d 483, 496-99 (6th Cir. 2008) ("We recognize that Sheriff Hall's trial testimony is in substantial tension with the plain language of the County's written policy, requiring that corrections officers must 'contact' the medical staff when an inmate claims a need for medication. But Hall testified that he had policymaking authority and that he had the responsibility to 'review and tweak [written policies], where needed.' The County has never challenged Ford's assertion that Hall has final policymaking authority for the jail, and there exists no evidence in the record to suggest otherwise. . . . We therefore conclude that a reasonable juror could find that Sheriff Hall's interpretation represented the County's policy with respect to weekend medical treatment and that, when viewed in the light most favorable to Ford, the County's policy permitted jail

officials to 'contact' medical staff by simply leaving a medical form in the nurse's inbox, even though this means that the nurse might not see the form until up to 48 hours later. . . . We believe that, when viewing the evidence in the light most favorable to Ford, a reasonable jury could conclude that there was a direct causal link between the County's policy and the injuries that Ford suffered from her seizure and resulting fall. . . . As a final matter, we feel constrained to note that the County has missed the mark on appeal by focusing on the alleged lack of a causal link between the County's policy and Ford's injuries. A more promising defense would have been to challenge whether there was a direct causal link between the County's policy and an injury of constitutional magnitude suffered by Ford. . . . [A]lthough we conclude that there is sufficient evidence for a reasonable jury to find that the County's policy caused Ford's injuries, we are much less certain that the policy in question meets the stringent standard of deliberate indifference required to establish municipal liability in the first instance. . .In short, the County abandoned its strongest argument--that the County's policy did not constitute deliberate indifference to Ford's serious medical needs. . . The County instead chose to rest its appeal on the alleged lack of a causal link between its policy and Ford's injuries. But the jury found otherwise, and we decline to disrupt the jury's verdict in the present case."); ***Harper v. City of Los Angeles***, 533 F.3d 1010, 1025, 1026 (9th Cir. 2008) ("The jury reasonably could have concluded that Chief Parks' telephonic statements to District Attorney Garcetti, in which Parks expressed confidence in Perez and pressured Garcetti to file criminal charges without a complete or fully corroborated investigation, were indicative of an official policy whereby the City 'impliedly or tacitly authorized, approved, or encouraged illegal conduct by its police officers.' . . Indeed, the Task Force's chain-of-command reported regularly to Parks and the jury was entitled to believe that Chief Parks' expressions as the official policymaker accurately reflected the direction and quality of the Task Force investigation, which was to ready cases for the filing of charges as quickly as possible, with or without probable cause. . . . The jury also could have supported their determination of an official policy from the failure of Parks to take any remedial steps after the officers were acquitted on all charges related to the Lobos arrest and it became clear that the Task Force investigation was flawed. . . .[T]he jury could have reasonably concluded that this was not a case where Task Force investigators deviated from the official policy, but rather one in which the policy was effectively carried out. . . . There is substantial evidence to support the jury's verdict. . .Chief Parks and the Task Force were instrumental in causing legal proceedings against the Officers and the Task Force's policy of readying cases for the filing of charges as quickly as possible, with or without probable cause had the patently foreseeable consequence of causing the

Officers' arrest without probable cause. The unconstitutional policy at issue and the particular injury alleged are not only 'closely related,' *City of Canton v. Harris*, 489 U.S. 378, 391 (1989), they are cause and effect."); ***Milligan-Hitt v. Board of Trustees of Sheridan County School Dist. No. 2***, 523 F.3d 1219, 1223-29 (10th Cir. 2008) ("Because the Sheridan County School District had no official policy of sexual-orientation discrimination, these plaintiffs must show that their rights were violated by one of the district's final policymakers. . .Although the board made the final decision not to hire Ms. Milligan-Hitt and Ms. Roberts, the plaintiffs contend that final policymaking authority over the hiring decisions was delegated to the superintendent, who exercised it in an intentionally discriminatory manner. The plaintiffs do not contend that the hiring committees themselves were discriminatory, apart from any involvement from the superintendent. The district court treated the superintendent's policymaking authority as a question of fact and presented it to the jury, which concluded that Mr. Dougherty was the final policymaker of the district. . . We must reverse this judgment because the question of Mr. Dougherty's final policymaking authority is a question of law, which should not have gone to the jury. The district court should have concluded that as a matter of law, Mr. Dougherty did not make district hiring policy. . . . Under Wyoming law, the Board of Trustees is vested with the authority to make personnel decisions. The statute governing school trustees gives them the power to '[e]mploy and determine the salaries and duties of' superintendents, principals, teachers, and all other school personnel. . . The plaintiffs do not dispute this, but argue that because the school board did not adequately supervise Mr. Dougherty, it delegated this authority to him and gave him the school board's status as final policymaker. In light of the legal--not factual--nature of the municipal liability inquiry, however, we are interested only in delegations of legal power, not in whether the board's actual exercise of its power of review was sufficiently aggressive. . .With this in mind, we conclude that the board's delegation of administrative power to the superintendent did not turn him into the final policymaker. The school board has adopted a policy entitled 'Board/Superintendent Relationship' explicitly delegating 'its executive powers' to the school superintendent. . . . The ultimate authority to hire employees and to decide what rules govern hiring is retained by the board. The superintendent's power to recommend is simply a component of the board's hiring power, not a separate source of district policy--indeed, the recommendation power has meaning only within the hiring system run by the board. Thus, any complaint about the superintendent's failure to properly recommend candidates to the board belongs in a suit against him personally, not the district. Alternatively, the plaintiffs complain that in practice the board's supervision of the superintendent's role in the hiring process was so deferential that

he was functionally unreviewed. But this appears to confuse the legal question of the locus of final decisionmaking authority with the factual question of how aggressively or independently the board tends to exercise the power it has. . . . Regardless of whether plaintiffs are right that the board did not aggressively supervise Mr. Dougherty's decisions, the board had the authority to do so. Whether it used it or not, that authority makes the board, not the superintendent, the proper target in a municipal liability suit. To hold otherwise and attempt to dig into the details of the board's supervisory activities in this case would be to make the '[un]justified ... assump[tion] that municipal policymaking authority lies somewhere other than where the applicable law purports to put it.'. . That would subject school boards to 'capricious' review by federal juries for every municipal squabble."); ***Arendale v. City of Memphis***, 519 F.3d 587, 602 & n.12 (6th Cir. 2008) ("[I]it is clear that the City may be held liable for the final decision of Chief Wright. Although the Memphis City Charter allows a disciplined City employee who is suspended for more than ten days to appeal this decision to the Civil Service Commission, neither the charter nor the city code provides an appeal beyond the MPD when a police officer receives a suspension of ten days or less. . . . Although Plaintiff failed to include the MPD's policy manual in the record, 'whether a particular official has final policymaking authority is a question of *state law*,' and thus must be determined by a judge. . . Because the question of whether an official has final policy making authority is a question of law, this Court is no more constrained by the record than it is forbidden to cite a Supreme Court case not relied upon by the parties. . . . As the Appeal Authority, Chief Wright has final decision making power within the Memphis Police Department. . . Furthermore, as neither the Memphis Charter nor the Memphis City Code provide for further review of Plaintiff's suspension, Chief Wright had 'final policy making authority' with respect to Plaintiff's disciplinary charge. . . Accordingly, insofar as Plaintiff's suspension was unconstitutional, the City may be held liable under § 1983 for the final disciplinary decision of Chief Wright."); ***Davison v. City of Minneapolis, Minn***., 490 F.3d 648, 661 (8th Cir. 2007) ("Our review of the Minneapolis Charter and Code of Ordinances reveals that the Fire Chief has not been delegated final policymaking authority regarding employment practices for the Fire Department. Rather, it reveals that the City Coordinator and Civil Service Commission are vested with final policymaking authority regarding employment practices for the entire city, including the Fire Department."); ***Hill v. Borough of Kutztown***, 455 F.3d 225, 246 (3d Cir. 2006) ("Here, Hill alleges that Marino constructively discharged him. As Hill points out, as a matter of state law, *no* government employee or body *is permitted to* constructively discharge an employee by making his working environment intolerable. As we discussed, however, Hill has

alleged that the Mayor *had the power to* constructively discharge him, though he (Marino) lacked the power as Mayor to fire him outright. Moreover, Marino's constructive discharge of Hill was final in the sense that it was not reviewable by any other person or any other body or agency in the Borough. That is, there was no one 'above' the Mayor who had the power to curtail his conduct or prevent him from harassing Hill to the point where Hill had no alternative but to leave his position . . . In this sense, Marino was a final policy-maker for the purpose of constructively discharging Hill."); ***Gelin v. Housing Authority of News Orleans,*** 456 F.3d 525, 527, 528 (5th Cir. 2006) ("The parties have not identified, through citations to state or local law, the entity or individual with final policymaking authority for HANO personnel matters. They both assume that the HANO Board of Commissioners ('Board') had such policymaking authority, but disagree as to whether the Board delegated that authority to Lamberg. We have remanded in similar cases to allow the parties to fully brief the sources of state law. . .We find remand unnecessary here because the evidence of 'custom or usage' provided by the parties--including deposition testimony, personnel manual provisions, and affidavits--establish that Lamberg, at least, did not wield such policymaking authority for the agency. Lamberg was the administrative receiver responsible for the 'day to day operations of HANO.'. . The Board also designated her the 'appointing authority,' with the power to terminate an employee on the agency's behalf. The evidence indicates that these positions do not have an inherent policymaking function. . . . Lamberg may have wielded decisionmaking authority; her position alone, however, did not bestow any final policymaking authority"); ***McGreevy v. Stroup***, 413 F.3d 359, 368, 369 (3d Cir. 2005) ("The fact that the Pennsylvania Code provides that the school board is the final policymaker regarding dismissal of employees does not mean that a school board action is a prerequisite for imposition of liability on the District. . . . In this case, defendants argued, and the District Court agreed, that under *Kneipp* the School Board is the final policymaker because the Board would have had the power to review McGreevy's rating if she had appealed. We disagree. McGreevy did not appeal to the School Board with respect to her 40 rating, and she was not required to take such an appeal under either the Pennsylvania statute or §1983. There is no exhaustion requirement under §1983. . . Absent an appeal, the School Board has no input with respect to an employee's rating. In such cases, the superintendent has final unreviewable authority to issue employment ratings, an authority he can, and did in this case, delegate to the principal. . . . A reasonable jury could find that the 40 rating given to McGreevy by the principal and adopted by the Superintendent was in retaliation for the exercise of her First Amendment rights. If the jury so found, the District would be subject to liability."); ***Bennett v. City of Eastpointe***, 410 F.3d

810, 816, 819(6th Cir. 2005) ("The plaintiffs claim that they were subjected to racial discrimination when they crossed Eight Mile Road into Eastpointe. Against the backdrop of each individual Fourteenth Amendment claim is reference to the 'DeWeese Memorandum.' This memorandum was drafted by Eastpointe's current Chief of Police, Fred DeWeese, following a meeting he had with Charles King, Sr., the plaintiff and next friend to his minor-son-plaintiffs in *King*. In that memo, distributed only to the city manager, DeWeese wrote that when he was a Lieutenant, '[f]rom May of 1995 to August of 95 .... I was assigned as a Shift Commander on the Afternoon Shift .... My instructions to the officers were to investigate any black youths riding through our subdivisions .... I would expect that our officers would investigate younger black males riding bicycles.' . . . . Here, the plaintiffs rely on the DeWeese Memorandum as the policy that wrought the constitutional violations upon them. For the plaintiffs to prevail, therefore, they must demonstrate that DeWeese had policymaking authority. The plaintiffs have failed, however, to account for the fact that at the time of the instructions, now-Chief of Police DeWeese was simply a lieutenant, and not a policy-making official. . . The plaintiffs argue that when DeWeese became Chief of Police, he did not rescind his earlier instructions, and therefore the Memorandum became city policy. We decline to adopt such a broad reading of the Memorandum without any evidence to support the assertion. The Memorandum, though arguably discriminatory, was only memorializing prior and limited instructions, made to four or five officers under his command on an afternoon shift. There is no evidence whatsoever, that after becoming Chief of Police, DeWeese renewed these instructions or that they motivated the conduct of the officers, who were not on the afternoon shift, years later. In sum, we hold that the DeWeese Memorandum did not constitute official city policy and therefore affirm the district court's grant of summary judgment in favor of the City of Eastpointe."); ***Miller v. Calhoun County***, 408 F.3d 803, 816-18 (6th Cir. 2005) ("In the final equation, Miller bases her argument entirely on the circumstances surrounding her brother's death, but a single act may establish municipal liability only where the actor is a municipal 'policymaker'" . . . .Miller argues that Dr. Ismailoglu was a municipal policymaker, and that in holding to the contrary, the District Court focused exclusively on the County's written policies while ignoring *de facto* customs and practices. Accordingly, Miller does not appear to dispute the District Court's finding that state law confers final policymaking authority for county jails on the sheriff and jail administrator. Rather, Miller's position on appeal is that the sheriff and jail administrator 'delegated *de facto* decision-making to the shift commander and on-call doctor.' . . . Miller's argument with respect to Dr. Ismailoglu suffers from the same deficiencies as her argument with respect to Lindsay. In particular, Miller does not

differentiate between policymaking and 'mere authority to exercise discretion.'. . . . A policymaker's decisions 'are final and unreviewable and are not constrained by the official policies of superior officials.' . . Miller makes no argument and advances no evidence that Dr. Ismailoglu possessed authority to set broad goals with respect to the medical treatment of inmates at the Correctional Facility. To the contrary, the record reflects that Dr. Ismailoglu contracted to provide on-site services for approximately eight hours per week, and to be on call 24 hours a day. . . .The record leaves no doubt that *de facto* policymaking authority resided with the sheriff, not with Dr. Ismailoglu."); ***Monistere v. City of Memphis,*** 115 Fed. Appx. 845, 2004 WL 2913348, at *5 & n.6, *6 (6th Cir. Dec. 17, 2004) ("Although the City Code arguably establishes that the Director of Police Services has the final policymaking authority for all police department activities, this Court need not end its inquiry here. As we stated in *Feliciano v. City of Cleveland*, 988 F.2d 649, 655 (6th Cir.1993), in order to determine whether final authority to make municipal policy is vested in a particular official, it is imperative that we examine the applicable state law, including 'statutes, ordinances, and regulations,' as well as 'less formal sources of law, such as local practice and custom.' Notwithstanding the operative language within the Code, this Court concludes that there is sufficient evidence to demonstrate that Embrey had the requisite policymaking authority inasmuch as he had been delegated the authority to control his own investigations. While there were no written procedures which govern these investigations, the Executive Commander of the ISB testified that it was the 'unwritten manner' of her unit to allow the lead investigator to have full control over the conduct of an investigation. Embrey also opined that, although his challenged directive relating to the removal of the officers' clothing was not specifically addressed in the police manual, it was his belief that he, as the lead investigator, had the authority to order the strip search. . . . The City also argues that Embrey did not have final policymaking authority. . . . Contrary to the City's position on this issue, the facts presented during the trial demonstrate that Embrey did not merely exercise discretion but rather acted as a final policymaker within the context of this case. During the trial, Embrey testified that, in his capacity as the lead investigator, he had the right to make decisions regarding his investigation of Monistere and Jones. His decision was final. There is no evidence in this record that he received any direction from his supervisors until after the strip search had been completed. Pilot neither reviewed nor challenged his decision-making authority. In fact, Embrey testified that she rarely intervened in his investigations. Furthermore, there is no evidence that Embrey was constrained by the City's 'unwritten' policy which governed internal investigations because it was the practice within the Police Department to give unfettered discretion to its ISB members. In sum, the record

clearly supports the conclusion that Embrey's decision was (1) final, (2) not reviewable, and (3) unconstrained by the existing policies and practices of his supervisory officers. It is our judgment that, when applying the standards of *Feliciano*, Embrey was delegated final policymaking authority which is sufficient to impose municipal liability upon the City under §1983. . . .Thus, when evaluating the evidence in the light most favorable to Monistere and Jones, this Court concludes that the City's policy of allowing its sergeants unfettered discretion to conduct administrative investigations directly caused the constitutional deprivations that were suffered by these two officers. For the reasons that are stated above, this Court affirms the district court's denial of the City's motion for judgment as a matter of law. . . . . Since this Court finds that Embrey was delegated final policymaking authority with respect to the conduct of ISB investigations, it need not determine whether the City ratified Embrey's conduct."); ***Lytle v. Carl***, 382 F.3d 978, 985, 986 (9th Cir. 2004) ("The District argues that because Lytle could have filed grievances under the collective bargaining agreement, which would ultimately be subject to review by an arbitrator from the American Arbitration Association, Goldman was not a final policymaker with respect to any decision that could have been the proper subject of a grievance. The first step of the grievance procedure is for an employee to file a grievance with her immediate supervisor and with Goldman, as the 'Assistant Superintendent, Administrative Operations and Staff Relations,' or with his designee. The second step involves filing a grievance with Goldman or his designee and meeting with Goldman to discuss the issue. The third step is to submit the grievance to a neutral outside arbitrator. The District's argument mistakes the meaning of 'final policymaker' and the role of an independent arbitrator. The arbitrator does not work for the District. In determining who was a final policymaker for the District, we focus on whether the official's decisions were subject to review by the District's authorized policymakers. . . . That someone outside of the District may reverse the District official's decision does not mean that the official does not speak for the District when he or she initially makes that decision . . . The delegation of final policymaking authority by the Board in this case distinguishes it from cases in which we and other circuits have found school superintendents and other officials to lack final policymaking authority."); ***Rivera v. Houston Independent School District,*** 349 F.3d 244, 248 (5th Cir. 2003) (School Board is the "one and only policymaker for HISD."); ***Quinn v. Monroe County,*** 330 F.3d 1320, 1326-28 (11th Cir. 2003) ("Because the Career Service Council has the power to reverse any termination decision made by Roberts, he is not a final policymaker with respect to termination decisions at the library. . . . Although County Administrator Roberts was not the 'final *policymaker* ' with respect to Quinn's termination, he was clearly the official

'*decisionmaker* ' with respect to her termination. The district court did not distinguish between these two concepts. The 'final policymaker' inquiry addresses who takes actions that may cause the municipality (here, Defendant Monroe County) to be held liable for a custom or policy. The 'decisionmaker' inquiry addresses who has the power to make official decisions and, thus, be held *individually* liable. . . . The district court's conflation of the "final policymaker" and "decisionmaker" inquiries would lead to untenable legal consequences. Under such a theory, a city manager could intentionally discriminate by terminating an employee without fear of liability so long as, at some point, the decision was reviewed by an unbiased board. While such a manager should not be able to create *municipal* liability when violating official policy, he should not be able to elude *individual* liability for his own unlawful actions. The district court erred by concluding to the contrary."); ***Tharling v. City of Port Lavaca,*** 329 F.3d 422, 427 (5th Cir. 2003) (local law requiring approval of City Council for employment decisions made by City Manager rendered City Council the final policymaker); ***Laverdure v. County of Montgomery,*** 324 F.3d 123, 126 (3d Cir. 2003) ("LaVerdure argues that the District Court's holding that Marino was immune under § 8546, which turns on whether he is a policymaker, is inconsistent with the Court's holding that he was not a policymaker for § 1983 purposes. We perceive no inconsistency. Sections 1983 and 8546 are different statutes, one state and one federal, and they define 'policymaker' differently. To be a policymaker for § 1983 purposes, an official must have *final* policymaking authority. By contrast, to have § 8546 immunity, one need only be *a* policymaker."); ***Miranda v. Clark County, Nevada***, 319 F.3d 465, 469, 470 (9th Cir. 2003) (en banc) ("We thus conclude that Harris was acting on behalf of Clark County in determining how the overall resources of the [Public Defender's] office were to be spent, and he qualifies as a state actor for purposes of § 1983. . . . Here, according to the plaintiff, if the criminal defendant appeared on the basis of the polygraph test to be guilty, the office sharply curtailed the quality of the representation by limiting the investigatory and legal resources provided. The policy, while falling short of complete denial of counsel, is a policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt.")***; Gernetzke v. Kenosha Unified School District No. 1,*** 274 F.3d 464, 468, 469 (7th Cir. 2001) ("It doesn't matter what form the action of the responsible authority that injures the plaintiff takes. It might be an ordinance, a regulation, an executive policy, or an executive act (such as firing the plaintiff). The question is whether the promulgator, or the actor, as the case may be--in other words, the decisionmaker--was at the apex of authority for the action in question. . . . . The bearing of delegation on the principle of *Monell* turns out to be critical in this case.

The final decisionmaking authority of the school district is lodged in the district's school board, but the board has promulgated regulations that delegate the administration of the five high schools in the school district to the principal of each school. This delegation, the plaintiffs argue, makes the principal the final decisionmaker so far as the mural and the request to be allowed to distribute literature are concerned. That cannot be right. It would collapse direct and derivative liability. Every public employee, including the policeman on the beat and the teacher in the public school, exercises authority ultimately delegated to him or her by their public employer's supreme governing organs. A police officer has authority to arrest, and that authority is 'final' in the practical sense that he doesn't have to consult anyone before making an arrest; likewise a teacher does not have to consult anyone before flunking a student. That is a perfectly good use of the word 'final' in ordinary conversation but it does not fit the cases; for if a police department or a school district were liable for employees' actions that it authorized but did not direct, we would be back in the world of respondeat superior. To avoid this the cases limit municipal liability under section 1983 to situations in which the official who commits the alleged violation of the plaintiff's rights has authority that is final in the special sense that there is no higher authority. . . . Delegation is not direction; authorization is not command; permission does not constitute the permittee the final policymaking authority. . . . The plaintiffs argue that ratification occurred here when after they brought this suit the school board refused to direct the principal of their school to alter his response to their demand. The argument if accepted would convert every public employee's action that a plaintiff wished to challenge into the action of the employer. . . . Deliberate inaction might be convincing evidence of delegation of final decisionmaking authority, or of ratification, . . . but there is no evidence of that here."); ***Seamons v. Snow***, 206 F.3d 1021, 1029 (10th Cir. 2000) ("In this case, the record indicates that Coach Snow, and only Coach Snow, was vested by the school district with the authority to make final decisions regarding membership on the Sky View football team. . . Because of this delegation of authority, the school district can be held liable for Coach Snow's actions on team membership."); ***Robinson v. Balog***, 160 F.3d 183, 190 (4th Cir. 1998) ("The fact that Balog had the power to choose whom to hire, promote, discharge, and transfer within the department he directed simply cannot establish that he had the broader authority to craft municipal policy."); ***Ware v. Jackson County***, 150 F.3d 873, 886 (8th Cir. 1998) ("The County argues that, because Megerman's decisions were subject to review and at times were reviewed by both the County Executive and the Director of Administration, he is not a final policymaker. The County asserts that Megerman merely possessed discretionary authority that was constrained by policies of the County. . . . [W]e hold

that the district court correctly identified Megerman as a final policymaker on JCDC personnel matters on the following bases: Megerman's position as director of the JCDC which has approximately 262 employees; his authority to promulgate JCDC policy, which sets forth, among other things, the rules of conduct for JCDC personnel; his authority to implement such policy; his exclusive handling of the disciplinary actions in this case; and the absence of a proven mechanism through which the Jackson County Executive and the Merit System Committee can review his decisions not to discipline officers or fully investigate allegations of misconduct."); ***Brady v. Fort Bend County***, 145 F.3d 691, 700, 702 (5th Cir. 1998) ("Sheriffs under Texas law are unlike the hypothetical sheriff discussed in *Pembaur* because a Texas sheriff is not merely granted 'discretion to hire and fire employees' by the commissioners court. . . Rather, the Texas legislature has vested sheriffs with such discretion, and the sheriff's exercise of that discretion is unreviewable by any other official or governmental body in the county. Texas sheriffs therefore exercise final policymaking authority with respect to the determination of how to fill employment positions in the county sheriff's department. . . . [T]he fact that under Texas law, no other official or governmental entity of the county exerts any control over the sheriff's discretion in filling available deputy positions is what indicates that the sheriff constitutes the county's final policymaker in this area."); ***Adkins v. Board of Education of Magoffin County***, 982 F.2d 952, 959 (6th Cir. 1993) ("The fact that a person who has authority only to recommend, and whose recommendations can be implemented only upon subsequent approval by a governing body, decides to make no recommendation does not convert the recommender into a final policymaker."); ***Ejchorszt v. Daigle***, No. 3:02CV1350(CFD), 2007 WL 879132, at **3-5 (D. Conn. Mar. 21, 2007) ("Ejchorszt argues that Norwich is liable for Daigle's conduct because it delegated policymaking authority to Daigle for the liquor investigation program, and that, through Daigle, Norwich established a policy or custom of exploiting volunteers. . . . Daigle's decisions cannot be viewed as final because he was still subject to overall supervision by his superiors. Daigle's decisions were at all times subject to review by several layers within his chain of command. Further, Daigle was subject to department policy that was not of his own making. Indeed, after his conduct came to light Daigle was investigated and discharged for violating official policy including the department's strip search policy, the police code and canon of ethics, and for inappropriate use of his official position. . . . It would seem that tactical decisions by unit leaders on operational aspects of law enforcement would not ordinarily confer policymaker status on those unit leaders. . . . Accordingly, Ejchorszt has failed to establish that Daigle was a final policymaker for Norwich concerning the liquor law enforcement program.")***; Stearns-Groseclose v. Chelan***

County Sheriff's Dep't., No. CV-04-0312-RHW, 2006 WL 195788, at *22 (E.D. Wash. Jan. 17, 2006) (". . . Sheriff Harum and other Washington county sheriffs are the official policymakers for law enforcement and peace officer training, but not for hiring and personnel decisions. That function falls with the Civil Service Commission. Because Sheriff Harum was not the official policymaker for Chelan County regarding hiring decision, but was instead allegedly acting outside and contrary to County policy, municipal liability cannot be imputed to Chelan County for his actions. . . .Sheriff Harum was not the official policymaker of Chelan County for hiring decisions at CCSO, so his decision that Plaintiff failed her background investigation was not a municipal action by the County, let alone deliberate conduct. Moreover, Plaintiff has not established that the County Civil Service Commission 'ratified' Sheriff Harum's decision that Plaintiff failed her background investigation."); ***Cacciatore v. County of Bergen***, No. Civ.02-1404 WGB, 2005 WL 3588489, at *5 (D.N.J. Dec. 30, 2005) ("It is clear under New Jersey law that the Sheriff has the authority to make employment decisions in his office, including hiring, firing and promoting employees. . . .The Sheriff's power pertaining to employees, however, is not beyond review. . . . Plaintiffs maintain that Defendants effectively have decreased Plaintiffs' compensation by transferring them into positions where they do not receive overtime, refusing to offer overtime and forcing them to take compensatory time in lieu of overtime because Plaintiffs refused to provide campaign contributions. The Court finds that the Sheriff's employment decisions regarding these matters are not 'final and unreviewable' to make him a policymaker for the County."); ***Raphael v. County of Nassau***, 387 F.Supp.2d 127, 132 (E.D.N.Y. 2005) ("Even if Sergeant Mulcahy may have been the ranking officer on the scene and thus may have had some decision-making authority over the conduct of the other officers, the mere exercise of discretion is insufficient to establish municipal liability. *See Anthony v. City of New York,* 339 F.3d 129, 139 (2d Cir.2003); *Jeffes v. Barnes,* 208 F.3d 49, 57 (2d Cir.2000). Moreover, the Second Circuit, in the *Anthony* case, specifically rejected the argument that a Sergeant's orders on the scene constitute official municipal policy. . . Thus the court finds as a matter of law that Sergeant Mulcahy was not a policymaker for purposes of § 1983 municipal liability."); ***Reed v. City of Lavonia***, 390 F.Supp.2d 1347, 1365 (M.D. Ga. 2005) ("Here, Reed seeks to impose liability upon the City of Lavonia for Chief Shirley's actions in hiring and retaining Officer Masionet. Reed argues that Masionet's previous employment history provided Shirley with actual and constructive knowledge Masionet was predisposed to using excessive force during arrests and that Shirley further failed to properly discipline, and thereby negligently retained, Masionet after he was hired--despite disciplinary infractions committed. It

is not disputed, however, that the City of Lavonia's Employee Handbook and the Police Department's Policy and Procedures Manual both provide that all disciplinary action taken against City employees is subject to review through a City Grievance Procedure. Thus, apparently, any decisions made by Chief Shirley with respect to disciplinary action taken (or not taken) against Officer Masionet were subject to 'meaningful administrative' review as contemplated by the Eleventh Circuit in *Scala*. It is further undisputed that, pursuant to the Charter for the City of Lavonia, 'all non-department head employees are hired and fired by the City Council of the City of Lavonia, Georgia.' Plaintiffs even concede that 'the mayor and city counsel had authority to review [Shirley's] disciplinary and hiring decisions.'. . In light of these undisputed facts, this Court must find that, as a matter of law, Chief Shirley may not be considered a 'policymaker possessing the final authority to establish policy' with respect to the hiring, discipline, and retention of his officers. Obviously, the City allows Chief Shirley to make these hiring and disciplinary decisions on a daily basis; yet, as discussed above, this fact alone would not make Shirley the 'final authority' on such decisions. 'The delegation of policymaking authority requires more than a showing of mere discretion or decisionmaking authority on the part of the delegee.' . . Here, because the City undisputedly retains the power to review Chief Shirley's exercise of discretion in hiring and disciplining his officers, Shirley may not be considered 'policymaker possessing the final authority' on such matters, so as to permit the imposition of municipal liability under §1983."); ***Panaderia La Diana, Inc. v. Salt Lake City Corp.,*** 342 F.Supp.2d 1013, 1037, 1038 (D. Utah 2004) ("In sum, the defendants do not dispute that the search warrant was executed according to standard operating procedure for a Category C warrant; or in other words, according to the policy of the City. Moreover, the final decision to execute the warrant as a Category C warrant was made by Carroll Mayes, who himself testified that he was the tactical commander who had 'overall control' of the operation. As such, Officer Mayes appears to be a person with final policy-making authority on the matters at issue here. The court therefore holds, as a matter of law, that the decision on how to execute the warrant was made by persons with final policy-making authority. This is a question for the court, not the jury. The court also holds that there is a genuine issue of material fact as to whether a City policy or procedure led to the alleged constitutional violations. . . . Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether their decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur ... or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local government. In sum, a reasonable jury could find that the City is liable

for alleged constitutional violations occurring during the raid." [footnotes omitted]); ***Schroeder v. Maumee Bd. of Educ.,*** 296 F.Supp.2d 869, 875, 876 (N.D. Ohio 2003) ("Defendants argue that the Board of Education had a sexual harassment policy and states that '[o]bviously, the policy of the Board of Education was to eliminate sexual harassment in all forms.' . . However, it is not necessarily dispositive under *Monell* that the Board had a general policy prohibiting sexual harassment. As the Sixth Circuit explained in *Meyers v. City of Cincinnati,* 14 F.3d 1115 (6th Cir.1994), it does not matter if the municipality in question has a general policy disfavoring an action taken by a municipal policy-maker, because 'it is plain that municipal liability may be imposed for a single decision by municipal policy-makers under appropriate circumstances.' . . In the instant case, if the decision to ignore harassment and abuse of plaintiff 'was made by the government's authorized decisionmakers the [Board] is responsible.' [citing *Meyers*] . . . Plaintiff, however, offers no evidence that Defendants Conroy and Wilson were authorized decision makers for the Board of Education or that the Board is 'actually responsible' for their actions. . . Certainly, Conroy and Wilson, as Principal and Assistant Principal of Gateway, were responsible for implementing policies and customs at their school, but it does not appear that their alleged deliberate indifference to plaintiff's complaints of harassment and physical violence represented the policy or custom of the Board of Education. Plaintiff offers no evidence that the Board of Education knew about, condoned, or was deliberately indifferent to Conroy's and Wilson's alleged discriminatory treatment of plaintiff."); ***Engelleiter v. Brevard County Sheriff's Dep't.,*** 290 F.Supp.2d 1300, 1314 (M.D. Fla. 2003) ("Engelleiter has not proved a 'policy or custom' based on treatment decisions by the Brevard County Sheriff's Office or the nurses at the Detention Center. Nothing in the record shows that Brevard County has made its nurses into 'policy-makers' who possess final authority to establish municipal policy for the Brevard County Sheriff's Office with respect to the care of pretrial detainees. Indeed, Engelleiter has not proved that policymaking authority has been delegated to any nurse. A doctor's delegation of authority to a nurse to exercise nursing discretion is hardly sufficient to give the nurse policy-making authority. Indeed, it would be a severe stretch of the term 'policy or custom' to find that each nurse establishes a 'policy or custom' for the Brevard County Sheriff's Office every time she administers insulin to a detainee. . . . The delegation of nursing care to nurses is very different from asking nurses to establish public policy for a Sheriff's Office. The delegation of policymaking authority described in *Monell* requires delegation such that the subordinate's discretionary decisions are not constrained by official policies, and are not subject to review. Engelleiter has not proved that the nurses at the Brevard County Detention Center were free to ignore the

official policies of the Brevard County Sheriff's Office, and were free from review or supervision by the responsible doctor. Engelleiter has submitted absolutely no medical opinion or proof that such a delegation of routine nursing tasks is in any way contrary to the express policy of the Brevard County Sheriff's Office that every inmate receive quality medical care throughout his incarceration and never be denied needed medical care."); ***Lewis v. City of Boston,*** No. CIV.A.00-11548-DPW, 2002 WL 523910, at *10 (D. Mass. March 29, 2002) (not reported) ("I find that the decisions in question--to eliminate the Music Director position and not to hire Lewis as Roland Hayes director--are fairly characterized as municipal actions for which the city itself is liable. It was the City of Boston as employer, and not any particular individual, that eliminated the position of Music Director. The decision was made as part of the budgetary process and constituted a deliberate policy determination with respect to the structure of the music education program in the public schools. Moreover, the decision was made by the City's education policymakers--the superintendent, the deputy superintendent, and the head of the curriculum department--who together act as the municipality itself with respect to issues of education. Thus, the City was the moving force behind the decision and the degree of culpability possessed by these individual policymakers can be attributed to the City itself."); ***Hill v. New York City Bd. of Ed.***, 808 F. Supp. 141, 151 (E.D.N.Y. 1992) (Although Director of Pupil Transportation had discretion to decertify drivers, he did not have authority to set policies relating to such decertification; since he "was empowered to act only within the parameters of certain policies set by the Chancellor of the Board of Education and the Board itself," he was not a final policymaker.)

For a subordinate's decision to be attributable to the government entity, "the authorized policymakers [must] approve [the] decision and the basis for it. . . .[s]imply going along with discretionary decisions made by one's subordinates . . . is not a delegation to them of authority to make policy." 485 U.S. at 129-30. *See, e.g.,* ***Gillette v. Delmore***, 979 F.2d 1342, 1348 (9th Cir. 1992) (mere inaction does not amount to "ratification"); ***Tubar v. Clift***, No. C05-1154-JCC, 2008 WL 5142932, at *7 (W.D. Wash. Dec. 5, 2008) ("Viewed in Plaintiff's favor, the evidence sufficiently establishes that Chief Crawford ratified the alleged unconstitutional conduct when, after reviewing the internal investigation and just like on prior occasions, he expressly approved of and officially endorsed Officer Clift's actions. Because Chief Crawford had final policymaking authority and ratified Officer Clift's use of deadly force, Plaintiff has sufficiently established ratification to avoid summary judgment on municipal liability for his constitutional claims.").

But see ***Kujawski v. Bd. Of Commissioners of Bartholomew County***, 183 F.3d 734, 739, 740 n.4 (7th Cir. 1999) ("[T]he County relies on the well established principle that the mere unreviewed discretion to make hiring and firing decisions does not amount to policymaking authority. There must be a delegation of authority to set policy for hiring and firing, not a delegation of only the final authority to hire and fire. . . We confirm the validity of this principle. Nevertheless, reviewing this record in the context of a summary judgment motion, we believe that there remains a genuine issue of fact as to whether the Board had, as a matter of custom, delegated final policymaking authority to Parker with respect to community corrections employees. . . . The Supreme Court has made it clear that, in examining delegation issues, we must take into account both state positive law and state custom that has the force of law. . . A municipal body ought not be able to avoid its constitutional responsibilities by delegating, in violation of state law, its responsibilities."); ***Chew v. Gates***, 27 F.3d 1432, 1445 (9th Cir. 1994) ("A city cannot escape liability for the consequences of established and ongoing departmental policy regarding the use of force simply by permitting such basic policy decisions to be made by lower level officials who are not ordinarily considered policymakers. Los Angeles could not, for example, distance itself from policy regarding the use of firearms by *de facto* delegating the formulation of firearms policy to the commander of the police academy. So too here: if the city in fact permitted departmental policy regarding the use of canine force to be designed and implemented at lower levels of the department, a jury could, and should, nevertheless find that the policy constituted an established municipal 'custom or usage' regarding the use of police dogs for which the city is responsible."); ***Myers v. City of Cincinnati***, 14 F.3d 1115, 1118 (6th Cir. 1994) ("A municipality may not escape *Monell* liability . . . by simply delegating decisionmaking authority to a subordinate official and thereafter studiously refusing to review his unconstitutional action on the merits. That the Commission reached a final conclusion distinguishes this case from *Praprotnik*, in which the local Civil Service Commission stayed any action on the plaintiff's complaint pending the outcome of federal litigation on the matter."); ***Bowler v. Town of Hudson,*** 514 F.Supp.2d 168, 184 (D. Mass. 2007) ("Plaintiffs contend that their § 1983 claims trigger *Monell* liability because the Hudson School Committee adopted policy 1701 (club posters may not include URL's) in July of 2005 in response to the poster controversy. Plaintiffs contend that these policy adoptions constitute ratification of the school's censorship and that municipal liability should therefore attach. . . . Here, the adoption of policies forbidding any web addresses from being listed on posters is, without more, insufficient evidence that the School Committee was ratifying the unconstitutional decision of the principal to censor the posters in violation of the

students' First Amendment rights. However, there is also evidence that Superintendent Berman had knowledge of the unconstitutional censorship and ratified it on arguably unconstitutional grounds. Accordingly, summary judgment with respect to the municipality must be DENIED.”); ***Albright v. City of New Orleans,*** Nos. Civ.A. 96-0679, 97-2523, 2001 WL 725354, at *10 (E.D.La. June 26, 2001) (not reported) (“While the Court's research revealed no case that discussed *Monell* liability in a context like that of this case, the Court is of the opinion that Superintendent Pennington's decision to rely fully and unquestioningly upon the recommendations of others cannot serve to shelter the City from the liability it would otherwise surely face. Notwithstanding that the deputy chiefs' actions cannot be imputed to Superintendent Pennington for purposes of personal liability, for purposes of *Monell* liability, the Court finds that the acts of the deputy chiefs may be fairly considered as those of Superintendent Pennington rendering the City liable under section 1983.”).

Some courts have held that if plaintiff is relying on ***Praprotnik's*** "ratification" theory for attributing liability to the municipality, such ratification must precede the subordinate's unconstitutional conduct. *See, e.g.,* ***Thomas v. Roberts,*** 261 F.3d 1160, 1174, 1175 (11th Cir. 2001) (“Because the District had no opportunity to ratify the decision to search the children before the searches occurred, the students' reliance on *Praprotnik* to support their claim that the District ratified the unconstitutional conduct is misplaced.”), *opinion reinstated and supplemented by* ***Thomas v. Roberts,*** 323 F.3d 950 (11th Cir. 2003); ***Hill v. Carroll County, Miss.***, No. 4:06CV104, 2008 WL 2066526, at *8, *9 (N.D. Miss. May 13, 2008) (hogtying case) (“In a deposition almost two years after the incident, Sheriff Gray merely stated that he did not have a problem with how Spellman handled the scene. This statement (in a deposition well after the incident) should not be considered ratification. Even assuming a violation, the simple act of ratification (in a deposition well after the incident) did not cause the violation.”); ***Mitchell v. City of Cleveland***, No. 1:03CV2179, 2005 WL 2233226, at *5 (N.D. Ohio Sept. 12, 2005) (“In the instant case, Plaintiff was interviewed by an OPS individual within two weeks of filing the Complaint form. During the interview, the Plaintiff described the treatment she received from the officers while she was incarcerated, and the officers that were involved. It is undisputed that the OPS then conducted an investigation in which only some of the officers described by the Plaintiff were sent forms to fill out describing the events. Surprisingly, Sergeant Kennedy, the officer in charge of the First District jail where Plaintiff was incarcerated, was not sent a form to fill out, and furthermore, was not even questioned regarding Plaintiff's allegations. Once the investigation was

finished, no further action was taken against the officers. The Plaintiff argues that the OPS decision and its inadequate investigation were final actions by a policymaker. Plaintiff is wrong on this point. The City Charter of Cleveland, reveals that the OPS is 'under the general direction' of the Chief of Police who is, in turn, under the direction of the Director of Public Safety. . . . . It is the Director of Public Safety to whom final policymaking authority has been delegated with respect to police matters, including the investigation of allegations of misconduct. . . Given this fact, the Plaintiff must establish that the Director of Public Safety ratified the OPS's actions before she can establish that the City is liable for those actions. . . .To survive summary judgment on this issue, therefore, Plaintiff must offer proof that the official charged with making final policymaking authority regarding police behavior (i.e., the Director of Public Safety) expressly approved the OPS decision. Plaintiff has failed to do so. . . . Even if Plaintiff could prove that the OPS had final policymaking authority in the area of investigations, or that the Director of Public Safety ratified the OPS's actions in this case, moreover, she would still have to prove that the OPS decision was a 'moving force' behind her constitutional violation. . . Here, the violation she alleges arises from her improper treatment while incarcerated. OPS's investigation occurred after-the-fact. Plaintiff has neither alleged nor offered evidence establishing that past OPS investigations or no-fault decisions somehow inspired the officers in this case to act inappropriately, or without fear of reprisal. Indeed, Plaintiff has offered no evidence that the OPS ever investigated complaints regarding jail personnel in the past. Absent this causal link, no claim of municipal liability could lie."); ***Gainor v. Douglas County***, 59 F. Supp.2d 1259, 1293 (N.D. Ga. 1999) ("A post hoc approval of an action already taken could not possibly be the motivating force for causing the action to be taken. . . Thus, in order to impose liability under a ratification based theory, it is necessary to show prior ratification of the policy giving rise to the action alleged to have violated the plaintiff's federal rights, such that the ratification of that policy could be said to be the moving force behind the alleged constitutional violation."); ***Looney v. City of Wilmington, Del.***, 723 F. Supp. 1025 (D. Del. 1989) (Supreme Court's emphasis on element of causation in municipal liability cases, leads to conclusion that ratification must occur *prior* to employee acts).

While Justice Brennan agreed that the supervisors involved possessed no policymaking authority that could be attributed to the City, he disagreed with the plurality on certain key principles of attribution. For Justice Brennan, state law should serve as the "appropriate starting point" in the determination of who is a policymaking official, "but ultimately the factfinder must determine where such

policymaking authority actually resides . . . . " 485 U.S. at 143 (Brennan, J., concurring).

Justice Brennan was concerned about the cases that would fall through the "gaping hole" created by the plurality's attribution rules. There would be no government liability in the case of an isolated unconstitutional act by an official who was delegated *de facto* final policymaking authority, but who was not identified under formal state law as a policymaker. *Id*. at 144.

Justice Brennan also criticized the plurality for the adoption of a "mechanical 'finality' test," which would preclude the finding of "final" policymaking authority whenever an official's decisions "are subject to some form of review--however limited." 485 U.S. at 147.

See, e.g., ***Bannum, Inc. v. City of Fort Lauderdale***, 901 F.2d 989, 998-999 (11th Cir. 1990) (decision to abrogate previously issued occupational license and to prohibit continued use of property for community treatment center became official city decision when Board of Adjustment, highest city policymaking body as to zoning matters, affirmed decision of Code Enforcement Board); ***Carr v. Town of Dewey Beach***, 730 F. Supp. 591, 608 (D. Del. 1990) (while Building Inspector and Mayor could issue stop work orders, their actions could not be considered final where, according to Town Charter, Board of Adjustment could hear appeals from any orders).

Justice Brennan would allow a jury to decide whether, despite the availability of some form of review, an official's decision "is in effect the final municipal pronouncement on the subject." 485 U.S. at 145.

See also ***Abbott v. Village of Winthrop Harbor***, 205 F.3d 976, 982 (7th Cir. 2000) (“[T]he District Court determined that Miller had final policymaking authority to connect the 3868 line into the 911 system. Relying on a local ordinance which gives the police chief the authority to "make or describe such rules and regulations for the internal operation of the police department as he sees fita and proper," the Judge found that the decision to connect the 3868 line to the 911 recording system affected the internal operation of the police department, and was not something that the chief needed to have approved by other Village authorities. The Court cited as support the fact that on neither occasion, either when connecting or disconnecting the 3868 line to the 911 recorder, did Miller seek the Board's approval. The Judge also

was persuaded by Miller's testimony that, pursuant to his authority to run the police department, he made decisions on all matters except personnel and the budget. These facts, however, have little to do with where the law places the authority for the decision. . . . Here, the Illinois legislature has placed the final policymaking authority with the ETSB [Emergency Telephone System Board], not with the police chief. . . . [W]e find that the final policymaking authority to authorize the connection of a telephone line to the 911 system rested with the ETSB and not the police chief. Although the police chief may have sweeping powers to conduct his department as he sees fit, those powers are limited, in this case by the Illinois Commerce Commission's and the ETSB's authority to regulate the content of Winthrop Harbor's 911 emergency system."); ***Ashby v. Isle of Wight County School Board***, 354 F.Supp.2d 616, 628, 629 (E.D. Va. 2004) ("Defendant argues that Plaintiff did not follow the proper procedure for raising a complaint to the school board level, in that Plaintiff never asked for Owen's decision to be overturned, did not file a formal appeal, and did not request three days in advance to be placed on the agenda. . .Even if Plaintiff did satisfy the procedural requirements for appealing Owen's decision, Plaintiff did not seek resolution by official action of the Board. The Board acts through votes. The opinions of the individual members of the Board, even as given at a meeting of the Board, do not constitute the opinion of the Board, itself. For the Court to find that there was Board ratification of Principal Owen's actions, there must have been some cognizable action taken by the official body that is the school board. Plaintiff has not provided any evidence that the Board took any action on this matter. The Board did not participate with Owen in reviewing the lyrics to Plaintiff's song or any other student presentation for the graduation. Plaintiff's airing of grievances before the board members is not enough to satisfy the requirements of ratification. While it might be clear how the Board would have voted had it done so, the fact that the Board did not act is the determining factor in this analysis. Any concern that the Board might avoid liability by refusing to vote in such instances is adequately addressed by the 'custom and usage' portion of the *Praprotnik* analysis. The Board's repeated tacit approval of such actions would rise to the level of policy through custom and usage. As noted above, Plaintiff has not shown any facts that would support a finding of a custom or usage in the school district. Defendant did not ratify the decision and basis of Principal Owen's decision, therefore no policy has been made for the school district. To hold Defendant liable under § 1983 in this case would be to do so on a theory of *respondeat superior*, which is clearly not permissible at law").

3. In ***Jett v. Dallas Independent School District***, 491 U.S. 701 (1989), a former athletic director/head football coach at a public high school sued the principal and school district under sections 1981 and 1983, claiming loss of his position due to his race and his exercise of First Amendment rights.

The Fifth Circuit upheld the finding of liability as to the principal, concluding there was sufficient evidence from which the jury could find that he had discriminated against the plaintiff on account of race and in violation of plaintiff's First Amendment rights. 798 F.2d 748, 756-58 (5th Cir. 1986).

As to the school district, however, the court determined there was insufficient evidence of any wrongful motivation on the part of the superintendent whose conduct was being attributed to the school district. Thus, even if the superintendent "had the requisite policymaking authority," there was no wrongful conduct to be attributed to the school district. *Id*. at 760.

In addition, the jury instruction as to municipal liability was found deficient "because it did not state that the city could be bound by the principal or superintendent only if he was delegated policymaking authority (or if he participated in a well settled custom that fairly represented official policy and actual or constructive knowledge of the custom was attributable to the governing body or an official delegated policymaking authority)." *Id*. at 759.

In affirming the Fifth Circuit's determination that the jury instruction was manifest error, the Supreme Court referred to the principles to be applied in deciding whether either the principal or superintendent could be considered a "policymaker" whose acts or edicts might be attributed to the school district.

The Court reaffirmed the view that the identification of final policymaking authority is a question of *state law*. The majority rejected any role for the jury in this identification process, stressing that this is "a legal question to be resolved by the trial judge *before* the case is submitted to the jury." *Id*. at 737. The Court also noted that the "relevant legal materials" to be reviewed by the trial judge in identifying official policymakers included "'custom or usage' having the force of law." *Id*.

See, e.g., ***Gros v. City of Grand Prarie (Gros III)***, 181 F.3d 613, 616 617 (5th Cir. 1999) ("To the extent that the district court relied upon a presumption concerning the locus of final policymaking authority in the City of Grand Prairie

instead of looking to state law as the sole determinant, we find that it erred. . . . It was. . . incumbent upon the district court to consider state and local positive law as well as evidence of the City's customs and usages in determining which City officials or bodies had final policymaking authority over the policies at issue in this case. We also disagree with the district court's assertion that even if Chief Crum did not possess final policymaking authority as a matter of state law, Gros and Sikes could nonetheless survive summary judgment if there was an issue of material fact whether Crum had been delegated final policymaking authority. In *Jett,* . . . the Supreme Court established that whether an official has been delegated final policymaking authority is a question of law for the judge, not of fact for the jury."); ***Miller v. Kennard***, 74 F. Supp.2d 1050, 1063, 1065 (D. Utah 1999) ("During discovery, Salt Lake County admitted that 'Sheriff Kennard is Salt Lake County's final policy maker regarding employment decisions in the [Sheriff's Office],' and that 'the Sheriff is a policy maker regarding transfers....' . . . . While the admission provides factual evidence supporting Miller's argument that Kennard is a policy maker, the ultimate determination of Kennard's status is a question of law to be determined by the court. . . . Since neither Utah law nor the Merit Commission policies submitted by Salt Lake County, on their face, demonstrate that Kennard is restricted in his ability to transfer or investigate officers or that these decisions are subject to meaningful review, the court cannot determine, as a matter of law, whether or not Kennard is a policy maker in these areas. The court will determine the question of Kennard's policy maker status at trial after a full presentation of the relevant evidence."); ***Mirelez v. Bay City Independent School Dist.***, 992 F. Supp. 916, 919 (S.D. Tex. 1998) ("Under Texas law, final policy-making authority of an independent school district generally rests with the district's Board of Trustees. . . Understanding the general rule, the Court notes that this case presents a unique situation in which the summary judgment evidence overwhelmingly reveals that the District's Board of Trustees expressly delegated final policy-making authority to the District superintendent.").

Compare ***Ricketts v. City of Columbia***, 856 F. Supp. 1337, 1344 (W.D. Mo. 1993) ("At trial, plaintiffs produced no evidence which identified the final policymaker for the defendant on these matters . . . . Plaintiffs merely assumed the final policymaker (whoever it was) had actual or constructive knowledge of the de facto policy to treat domestic disputes less seriously. In this regard, the jury instruction identifying the chief of police as the final policymaker was in error. The court implicitly took judicial notice that the chief of police was the city's final policymaker. The court had no authority to do so." footnotes omitted), *aff'd on other*

grounds, 36 F.3d 775 (8th Cir. 1994) *with* ***Nichols v. City of Jackson***, 848 F. Supp. 718, 726 (S.D. Miss. 1994) ("[A]lthough plaintiff has failed to identify the state law which grants the fire chief policymaking authority, the court has determined that it exists.").

See also ***Wardell v. City of Chicago,*** No. 98 C 8002, 2001 WL 1345960, at *4 (N.D. Ill. Oct. 31, 2001) (not reported) ("[P]laintiffs ignore the uncontradicted case law of the Seventh Circuit that has consistently held that police superintendents are never policymakers for the purpose of assigning municipal liability. [citing *Latuszkin* and *Auriemma*] Instead, only the City Council and Chicago Police Board are imbued with authority to make policy for the City of Chicago Police department."); ***Comfort v. Town of Pittsfield***, 924 F. Supp. 1219, 1234-35 (D. Me. 1996) ("While Comfort's pleadings lack both specificity and focus, he nonetheless provides sufficient evidence to cast Chief Lawrence as a policymaker for the purposes of summary judgment. Comfort raises factual issues as to whether Chief Lawrence 'had complete authority and control over the hiring, training and supervision of police officers at the Pittsfield Police Department.' . . . . If Chief Lawrence's decisions were not reviewable by other Pittsfield Officials, a jury could infer that his decisions were attributable to the town itself. The law saddles Pittsfield with the burden of demonstrating the absence of any genuine issues of material fact at summary judgment. The Town has failed in this responsibility. Plaintiff's evidence . . . raises factual disputes as to the constitutionality of Chief Lawrence's policies, and questions remain as to his status as a policymaker.").

Jett also noted that once the court has identified the policymakers in the given area, "it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur . . . or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." 491 U.S. at 737 (emphasis original).

NOTE: On remand, the Court of Appeals held "that Superintendent Wright may have been delegated the final decision in the cases of protested individual employee transfers does not mean that he had or had been delegated the status of policymaker, much less final policymaker, respecting employee transfers." ***Jett v. Dallas Independent School District***, 7 F.3d 1241, 1246 (5th Cir. 1993).

In ***Morro v. City of Birmingham***, 117 F.3d 508, 515, 516 & n.3 (11th Cir. 1997), the court made the following observations:

> Based on the City's governing regulations and evidence of its actual practices, it seems that local law makes the Jefferson County Personnel Board, and not the police chief, the final policymaker with respect to police dismissals, demotions, or suspensions. If the City had preserved that issue for trial in the district court, and thus for our review on appeal, we have little doubt that the City would be entitled to escape the judgment against it on that basis. However, as the district court noted in its memorandum opinion, the City failed to identify its potentially available *Monell* defense as an issue at the pretrial conference or to obtain a modification of the pretrial order to permit it to raise the issue later in the proceedings.
>
> [W]e cannot say that the district court abused its discretion by failing to modify the pretrial order to accommodate presentation of the *Monell* defense at the late stage of the case at which the City chose to press it. That is particularly so in view of the fact that the City successfully convinced the district court to exclude Morro's pattern and practice witnesses on grounds of relevancy and then stood silent in the face of the district court's observation that the City had conceded at the pretrial conference that the Chief was a final policymaker.
>
> We note that the City's failure to preserve its *Monell* defense for trial is not excused by the fact that. . . the issue of final policymaker status is a legal question for the court, not the jury. Counsel may waive the right to have an issue decided by failing to identify the issue to the court at the pretrial conference, regardless of whether the issue is a legal or factual one.

4. Illustrative Lower Federal Court Cases

The perception that the Supreme Court failed to provide clear guidelines on attribution is illustrated vividly by two Eighth Circuit opinions following ***Praprotnik***. In ***Praprotnik***, **on remand**, 879 F.2d 1573 (8th Cir. 1989), the panel could not agree on who had final policymaking authority. While the majority concluded that under

the City's charter, "[o]nly the Civil Service Commission had *final* policymaking authority for that area of the city's business," *id*. at 1576, Chief Judge Lay would have held that Praprotnik's layoff "resulted from the actions of an improperly motivated final policymaker-the mayor." *Id*. at 1581.

See also ***Browning-Ferris Industries v. City of Maryland Heights***, 747 F. Supp. 1340, 1345 (E.D. Mo. 1990) ("Attempts to define the extent of liability in cases before the Supreme Court have met with only mixed results . . . on the crucial question of exactly when municipal liability attaches under § 1983.").

In ***Williams v. Butler***, 863 F.2d 1398 (8th Cir. 1988) (*en banc*), *cert. denied*, 492 U.S. 906 (1989), the Eighth Circuit affirmed, for the third time, a decision of the federal district court holding the City of Little Rock liable for the unconstitutional discharge of a municipal court clerk by a municipal judge. The judgment of the *en banc* court had been twice vacated and remanded by the Supreme Court, once in light of ***Pembaur*** and once in light of ***Praprotnik***.

With five judges dissenting, the majority in ***Williams*** found that under state law, there had been an "absolute delegation of authority" to the municipal judge "[r]egarding employment matters in his court"; he was exercising final policymaking authority when he hired and fired court clerks. *Id*. at 1402.

The dissent took the position that, while the municipal judge had final decision-making authority with respect to hiring and firing court clerks, he did not possess final policymaking authority in the "employment field." *Id*. at 1405 (Gibson, J., dissenting).

Compare ***Granda v. City of St. Louis***, 472 F.3d 565, 569 (8th Cir. 2007) (“Granda asserts that a city can also be held liable for the decision of a municipal judge, relying on *Williams v. Butler*, 863 F.2d 1398. That case involved the administrative decision of a municipal judge to terminate his law clerks, rather than a judicial decision that is subject to review or reversal by higher state courts. . . Granda's argument that the city is liable because the other municipal judges should have prevented her incarceration is unavailing. The municipal court is a division of the state circuit court, and review of a judge's decisions is to be sought in that court. Judge Sullivan's decision to release the minor was a judicial act in recognition of a lack of jurisdiction, and Judge Walsh reassigned Judge Turner after she succeeded her as administrative judge pursuant to the local rules of the 22nd judicial circuit

court. Judge Turner's order was a judicial decision made in a case that came before her on a court docket, and Granda does not appeal the district court's holding that the judge was entitled to judicial immunity. Granda fails to cite a single case where a municipality has been held liable for such a decision. We conclude that the judicial order incarcerating Granda was not a final policy decision of a type creating municipal liability under § 1983.").

In ***Davis v. Mason County***, 927 F.2d 1473 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 275 (1991), there was similar disagreement as to the question of whether a county sheriff was the final policymaker of the County as to the "matter" in issue. While the majority considered the "matter" to be one of training in law enforcement practices, as to which the sheriff would have final authority, *id*. at 1480-81, the dissent saw the "matter" as a more general one of personnel administration, over which the Civil Service Commission had final policymaking authority. *Id*. at 1491.

See also ***Gillette v. Delmore***, 979 F.2d 1342, 1350 (9th Cir. 1992) (Fire Chief's discretionary authority to hire and fire employees did not make him final policymaker with respect to City's employment policy); ***Spina v. Forest Preserve of Cook County,*** No. 98 C 1393, 2001 WL 1491524, at *7 (N.D. Ill. Nov. 23, 2001) (not reported) ("In this case, however, the Chief's ability to hire and fire employees has little bearing on the issue of whether he was a policymaker with respect to the administration of the Department's sexual harassment policy. It is the administration of the sexual harassment policy--or lack thereofthat allegedly caused Officer Spina's injury, not the exercise of authority to hire or fire. Because the evidence demonstrates that the Chief of Police has the authority to investigate and discipline accused harassers, and otherwise set policy with regard to the Department's stance on sexual harassment, the Chief of Police is a policymaker for purposes of this case.").

Comment: The dispute between the majority and the dissent in ***Williams*** does not reflect disagreement as to the *authority* of the judge to make the employment decision made or the *finality* of the decision. Rather, the disagreement seems to turn on the question of when "a decision," even by a final policymaker, is tantamount to "a policy." That this is the real source of contention is apparent from the dissent's acknowledgement that "[e]ven if Butler had somehow been given authority to make employment policy for the City, the facts in this case do not support a conclusion that Butler's vengeful and self-motivated decision to fire Williams actually created employment policy for the City." 863 F.2d at 1409.

See also ***Wooten v. Logan,*** No. 02-5753, 2004 WL 68541, at *3 (6th Cir. Jan. 14, 2004) (unpublished) ("On appeal, Wooten renews her argument that, under *Pembaur,* the County is liable for Logan's conduct. Though opaque, Wooten's argument appears to proceed as follows: (1) as sheriff, Logan was the County's final policymaker with regard to the enforcement of the law: (2) Logan was able to detain and rape Wooten only 'because he was the sheriff of Pickett County' and had access to 'the instruments of his power-his patrol car, his blue lights, his uniform, his badge'; and, therefore, (3) the County is liable for Logan's actions. Fatally, Wooten has not demonstrated that Logan's conduct represented the 'official policy' of the County, as she has not shown that Logan was acting in a policymaking capacity when he detained and assaulted her. Logan conspired with a non-employee to commit a felonious act, and his conduct cannot conceivably be characterized as exercising a power to set policy. Moreover, though he allegedly used his 'blue lights and police lights' to pull over Dale's car, and utilized his 'uniform, badge, and gun' to effectuate the rape, Logan acted in the guise of a patrol officer making a traffic stop-not as chief law enforcement officer. . . . Given these alleged facts, Wooten can state a claim against the County only if every 'law enforcement' activity (*e.g.,* stop, arrest, etc.) by a sheriff (or other chief law enforcement official)-whether a matter of official business or a misuse of power to advance a private agenda-represents the 'official policy' of the local government. Such a rule would contravene *Pembaur's* attempt 'to distinguish acts of the *municipality* from acts of *employees* of the municipality.' . . . and would institute the doctrine of *respondeat superior.* Accordingly. Logan's conduct cannot represent 'official policy,' and the County is not liable for Logan's conduct."); ***Lankford v. City of Hobart***, 73 F.3d 283, 287 (10th Cir. 1996) (Relying on *Starrett* to conclude that the City could not be held liable for its police chief's "private, rather than public, acts of sexual harassment."); ***Mansfield Apartment Owners Association v. City of Mansfield***, 988 F.2d 1469, 1475 (6th Cir. 1993) ("[T]he City is not liable for the conduct of its non-policymaking employees who act contrary to the policies of the City."); ***Manor Healthcare Corp. v. Lomelo***, 929 F.2d 633, 638 (11th Cir. 1991) (Mayor was not executing municipal policy when he acted contrary to controlling law regarding bribery and extortion); ***Starrett v. Wadley***, 876 F.2d 808, 819-20 (10th Cir. 1989) (where County official had power to establish final policy as to hiring and firing personnel in his department, such decisions would be attributable to the County; official's acts of sexual harassment, however, were "private rather than official acts" and the County would not be liable for them unless so widespread and pervasive so as to establish a "custom" in official's department); ***Carrero v. New York City Housing Authority***, 890 F.2d 569, 576-77 (2d Cir. 1989) (although supervisor could be individually liable for sexual harassment, his actions

could not be attributed to Housing Authority policy, particularly where entity's stated policies were expressly non-discriminatory.); ***Van Domelen v. Menominee County***, 935 F. Supp. 918, 923-24 (W.D. Mich. 1996) ("Holding a county liable for any and all unconstitutional acts committed by a person with final policy-making authority would simply reinstate the doctrine of respondeat superior with respect to § 1983, a position which has been flatly rejected by the Supreme Court. . . . Defendant Gurosh's alleged actions were not taken within his role as a policy making official, but were rather isolated acts taken in a private capacity which cannot be attributed to the county."); ***Spratlin v. Montgomery County, Maryland***, 772 F. Supp. 1545, 1553 (D. Md. 1990) ("Liability of the municipality itself does not automatically attach to every decision made by a municipal officer charged with policymaking authority."), *aff'd*, 941 F.2d 1207 (4th Cir. 1991) (Table).

But see ***Howard v. Town of Jonesville***, 935 F. Supp. 855, 860 (W.D. La. 1996) (concluding that municipal liability might be found where "plaintiff has alleged that the Town of Jonesville's ultimate policymaker, the Mayor himself, engaged in acts of sexual harassment and discrimination.").

An important decision addressing the question of "what it means to be a municipal 'policymaker'" is ***Auriemma v. Rice***, 957 F.2d 397 (7th Cir. 1992). Plaintiffs in ***Auriemma*** asserted liability against the City of Chicago based on racially discriminatory promotion and demotion decisions made by the Superintendent of Police in Chicago. Judge Easterbrook concluded

> [t]hat a particular agent is the apex of a bureaucracy makes the decision 'final' but does not forge a link between 'finality' and 'policy' . . . . Unless today's decision ought to govern tomorrow's case under a law or a custom with the force of law, it cannot be said to carry out the municipality's policy . . . . Liability for unauthorized acts is personal; to hold the municipality liable . . . the agent's action must implement rather than frustrate the government's policy.

977 F.2d at 400. *Accord* ***Roe v. City of Waterbury***, 542 F.3d 31, 40, 41 (2d Cir. 2008) ("Giordano had no authority to make policy authorizing, condoning, or promoting the sexual abuse of children. Regardless of what broad powers he had as a mayor, the state of Connecticut has made the policy (and the laws) prohibiting such conduct. . . . A finding of municipal liability in this case would amount to a finding of *respondeat superior* and would be an unwarranted expansion of the single-act rule

set forth in *Pembaur*. It would also conflate the color of law inquiry with the official policy inquiry. An official acts within his official policymaking capacity when he acts in accordance with the responsibility delegated him under state law for making policy in that area of the municipality's business. . .An official acts wholly outside his official policymaking capacity when he misuses his power to advance a purely personal agenda. Here, Giordano acted neither pursuant to nor within the authority delegated to him when he committed the acts of sexual abuse. . . . Although we ruled that Giordano was acting under color of law when he molested the Plaintiffs, the claims here fail under the 'official policy' element."); ***Bolton v. City of Dallas, Tex***., 541 F.3d 545, 551 (5th Cir. 2008) ("Chapter XII, § 5, of the Charter--the relevant local law quoted earlier--prohibits the specific action taken by Benavides. Thus, absent some contrary custom not shown here, Benavides's action clearly does not represent final policy with respect to the removal of city officials like Bolton. It is the Charter that announces the City's policy in this regard. . . . There is no argument that Benavides was generally free to disregard the Charter, . . . or that the City had a custom of permitting such disregard. And Bolton has not shown that Benavides was vested with policymaking authority such that municipal liability should attach despite the existence of a contrary city policy. . . Benavides was therefore not the final policymaker with respect to his decision to terminate Bolton and municipal liability cannot attach to that decision."); ***Thomas v. Roberts,*** 261 F.3d 1160, 1172, 1173 (11th Cir. 2001) ("Although Roberts was provided with the discretion to order searches within the school, she had no authority to alter the District's explicit policy that searches could not be conducted absent reasonable suspicion. . . . In this case, . . . it is irrelevant that Roberts's decision was not subject to review because it was contrary to the District's official written policy. . . When an official's exercise of her discretionary duties is 'constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the [local government].' [citing *Praprotnik*] Roberts's decision to search the children without reasonable suspicion therefore cannot be said to fairly represent the District's policy."),*opinion reinstated and supplemented by* ***Thomas v. Roberts,*** 323 F.3d 950 (11th Cir. 2003); ***Myers v. Delaware County, Ohio***, No. 2:07-cv-844, 2008 WL 4862512, at *13 (S.D. Ohio Nov. 7, 2008) ("In the Court's view, because Defendants' discretionary decision to issue the press release was contrary to established county policies that forbid the sheriff from making public comments on a pending investigation, and because Defendants acted contrary to the legal advice of the county prosecutor, the conduct in question cannot be attributable to Delaware County regardless of whether Defendants were the final policymakers with respect to matters of law enforcement. The Court therefore finds that the County Defendants are

entitled to judgment on the pleadings with respect to Plaintiff's substantive due process claim."); ***Miller v. City of East Orange***, 509 F.Supp.2d 452, 458, 459 (D.N.J. 2007) ("[T]he fact that Grimes is a policymaker for some purposes, does not mean that all acts committed by Grimes fall within the scope of his final decision-making authority and are City 'policy.' . . . The question is whether when Chief Grimes intentionally lied before the grand jury he was making 'policy' for the City of East Orange. The isolated incident at issue is an intentional tort and a criminal violation of New Jersey law, N.J.S.A 2C:28-1; N.J.S.A. 2C:228-2. It is an act for which, if proven, Chief Grimes could be criminally prosecuted in state court. While neither side has put forth any municipal or state laws setting out the limits of the policymaking authority granted to the East Orange Police Chief, clearly that authority includes an implicit limitation to abide by state and federal law. When Chief Grimes committed this criminal act and lied before the grand jury, he was acting outside the scope of his policymaking authority for the City. Since his act cannot be considered City policy, the City of East Orange is not liable for his conduct."); ***Beal v. City of Chicago***, No. 04 C 2039, 2007 WL 1029364, at *14 (N.D. Ill. Mar. 30, 2007) ("Unlike the practices of a municipality's lower-level employees, the single act of high-level policy maker can render a local government liable under § 1983. . . . Plaintiffs contend that the Command Personnel had policymaking authority. Whether an official has 'final policymaking authority' over a certain issue is a question answered by state or local law. Generally speaking, the City Council and Police Board set municipal policy for the CPD. . . Plaintiffs have not identified any authority for CPD's Command Personnel to 'countermand the statutes regulating the department' or adopt rules for the conduct of the department. . . Accordingly, to the extent that Command Personnel or Officers operated contrary to the express policy and practice of the City, no municipal liability is created."); ***Kohler v. City of Wapakoneta***, 381 F.Supp.2d 692, 712 (N.D. Ohio 2005) ("Kohler cannot show that Harrison had authority to establish a municipal policy that her bathroom activity would be tape recorded for his own, personal use. Harrison's unauthorized, private action frustrated, rather than implemented the City's stated policy regarding appropriate activity in the workplace. His action was not taken in the course of any official function, as were the individual acts found to represent municipal policy in the Sixth Circuit cases Kohler cites. [citing *Monistere* and *O'Brien*] Additionally, as soon as the City's officials learned about Harrison's actions, they decided to suspend him, accepted his resignation when it was proffered, and referred the matter to the state for investigation. Harrison's acts were therefore not 'final and unreviewable' and were subject to the City's superior official policies. Kohler cannot maintain her claim that Harrison's acts rose to the level of official policy."); ***Travis v. The Village***

of Dobbs Ferry, 355 F.Supp.2d 740, 755 (S.D.N.Y. 2005) (". . . . Chief Longworth, Lt. Gelardi and Det. Bailey violated their own policy by strip searching plaintiff. Since *Monell* claims are predicated on illegal activity committed pursuant to a policy or practice, no *Monell* claim can lie against the Village for a strip search that violated policy. Nor does the fact that Chief Longworth--the Police Department's highest policy-maker--authorized the search make it 'pursuant to policy.' While even one action by a chief policy maker can constitute a 'policy' for *Monell* purposes, . . . not every action of a chief policy maker automatically becomes 'policy' for *Monell* purposes. This case is the paradigmatic example of that proposition. Longworth had already made a policy concerning strip searches. He then violated his own policy by authorizing a strip search in the absence of reasonable suspicion to believe that Travis was carrying contraband. The only other way Dobbs Ferry could be held liable is if plaintiff adduced evidence showing that the Dobbs Ferry Police Department routinely strip searches individuals without reasonable suspicion of contraband carriage. But there is no such evidence in the record. Indeed, there is no evidence in the record before me about any strip search except the strip search of plaintiff. That puts this case squarely in the category of cases where we are dealing with a single incident of unconstitutional activity that is not attributable to an existing, unconstitutional municipal policy. . . The fact that it is a particularly outrageous incident does not make the Village liable for it--though it may make the offending officers liable to plaintiff in punitive damages."); ***Zoch v. City of Chicago***, 1997 WL 89231, *43 (N.D. Ill. Feb. 4, 1997) (not reported) ("In *Auriemma*, the Seventh Circuit held that the Superintendent of the CPD was not the final municipal 'policymaker' in the context of the plaintiffs' racial and political discrimination claims under § 1983 in that case. . . In particular, the Seventh Circuit in *Auriemma* reasoned that since the Superintendent of the CPD did not have the power to countermand City ordinances which unequivocally banned racial and political discrimination, he was not the final municipal policymaker in the context of the plaintiffs' claims. . . Similarly, in the instant case, Rodriguez does not have the power to countermand the municipal ordinance which unequivocally bans gender discrimination or the City's official policy against harassing employees because of the person's First Amendment conduct.").

But see ***Simmons v. Uintah Health Care Special Dist.***, 506 F.3d 1281, 1283-87 (10th Cir. 2007) ("[W]hile municipalities are rightly held liable for those actions taken by employees in conformance with official policy, this is hardly the only basis available for assigning municipal liability. Municipalities are equally answerable for actions undertaken by their final policymakers, whether or not those actions conform

to their own preexisting rules. Were the law otherwise, a municipality's leaders would have the very strange incentive to flout their own policies. Or perhaps even enact policies with the deliberate purpose of disregarding them. While the law is often subtle and sometimes complex, it is rarely so unreasonable. . . . The district court's primary holding turns on a question of law--namely, whether the District may be held liable only for actions by its employees in compliance with official policy--and thus requires *de novo* review in this court. We are in full accord with the District that actions taken by employees in compliance with official policy or custom are one way to establish liability on the part of a municipality. . . . We part ways with the District and the district court, however, when it comes to the question whether showing compliance with a preexisting policy or longstanding custom is the only way to demonstrate that an action is properly viewed as the municipality's own. While *Monell* found liability on the basis of an 'official policy as the moving force of the constitutional violation,' 436 U.S. at 694, it fell to the Court in *Pembaur* to establish that actions taken by a municipality's final policymakers also represent acts of 'official policy' giving rise to municipal liability. . . . Accordingly, a municipality is responsible for *both* actions taken by subordinate employees in conformance with preexisting official policies or customs *and* actions taken by final policymakers, whose conduct can be no less described as the 'official policy' of a municipality. This must include even actions by final policymakers taken in defiance of a policy or custom that they themselves adopted. . . Were the rule of law different, we would invite irrational results. Holding municipalities immune from liability whenever their final policymakers disregard their own written policies would serve to encourage city leaders to flout such rules. Policymakers, like the members of the Board before us, would have little reason to abide by their own mandates, like the RIF policy, and indeed an incentive to adopt and then proceed deliberately to ignore them. Such a rule of law would thus serve to undermine rather than enhance Section 1983's purposes. Actions taken by a municipality's final policymakers, even in contravention of their own written policies, are fairly attributable to the municipality and can give rise to liability.").

See also ***Greensboro Professional Fire Fighters Ass'n., Local 3157 v. City of Greensboro***, 64 F.3d 962, 965-66 (4th Cir. 1995) ("While it is true that Fire Chief Jones had the authority to select particular individuals for promotion and even to design the procedures governing promotions within his department, this authority did not include responsibility for establishing substantive personnel policy governing the exercise of his authority. His power to appoint and to establish procedures for making appointments was always subject to the parameters established by the City.

Appellants confuse the authority to make final policy with the authority to make final implementing decisions."); ***Lawshe v. Simpson***, 16 F.3d 1475, 1484 (7th Cir. 1994) (Gary Health Department Board's termination of plaintiff without due process did not constitute municipal policy where Board's discretion in this area was subordinated to Mayor's policy.); ***Martineau v. Kurland***, 36 F. Supp.2d 39, 43 (D. Mass. 1999) ("[A]uthority to hire and fire in itself does not carry with it the authority to create an employment policy of retaliating against employee exercise of free speech."); ***Izquierdo v. Sills***, 68 F. Supp.2d 392, 408, 409 (D.Del. 1999) ("Izquierdo does not contend that Pratcher acted pursuant to official municipal policy; rather, he contends Pratcher acted pursuant to rules other than those established by the written policies. Thus, if Pratcher were the official policymaker with respect to the areas cited by Izquierdo, the actions and patterns to which Izquierdo points would be official policies of the municipality. However, Izquierdo has not shown Pratcher had final policymaking authority with respect to any aspect of the alleged activities. . . . Thus any actions he allegedly took in contravention of the language of the Manual did not establish a new municipal policy but would be contrary to the written policy."); ***McMillan v. City of Chicago***, No. 92 C 3746, 1993 WL 462835, *1 (N.D. Ill. Nov. 9, 1993) (not reported) ("Neither Mayor Daley nor Commissioner Carr set policy regarding dismissals or reclassifications of job titles in Chicago. At most, they are alleged to have wielded final authority over the decisions to reclassify and dismiss [plaintiff]. If, in making these decisions, Mayor Daley and Commissioner Carr discriminated on account of politics or in retaliation, Mayor Daley and Commissioner Carr are accountable as individuals for violating not implementing the policy of Chicago."); ***Rubeck v. Sheriff of Wabash County***, 824 F. Supp. 1291, 1301 (N.D. Ind. 1993) ("[S]omeone with executive authority whose actions fly in the face of state or local law is not a policymaker under *Monell* and its progeny.").

See also ***Evans v. City of Chicago***, No. 04C3570, 2006 WL 463041, at *14, *15 (N.D. Ill. Jan. 6, 2006)("The City argues that Plaintiff has no competent evidence to support the alleged municipal policy of systematically suppressing *Brady* material or of framing innocent people and securing false criminal convictions through witness coercion and evidence fabrication. Specifically, the City relies on the Muncipal Code of Chicago, the City of Chicago's Department of Police Rules and Regulations, and training bulletins that were effective in 1976 to demonstrate that the City's express policies contradict Plaintiff's allegations. The CPD Rules and Regulations prohibited police officers from failing to report promptly any information regarding any crime or unlawful action. The inference is that police officers therefore were forbidden from sequestering information or evidence in

so-called street files, rather than immediately reporting it through official CPD channels. Police officers thus were likewise forbidden to pursue and secure false criminal convictions. The Standards of Conduct in the CPD Rules and Regulations expressly forbade making a false written or oral report. . . According to the City, there was no evidence that its policymaking authorities knew or should have known of any policy or practice of suppressing exculpatory material or framing innocent people. Plaintiff asserts that the customs or practices of maintaining 'street files' and fabricating evidence to secure false convictions was so wide-spread, of such long-standing, and so well-known throughout the Department that it rose to the level of official policy. Multiple court decisions in this District and the Seventh Circuit have noted that evidence of the street files practice has been clearly established. . . . . Evidence that the CPD had a practice of maintaining street files in 1982 may be suggestive of a similar practice in 1976. This Court notes that the Seventh Circuit has stated that '[t]he Superintendent of Police in Chicago had no power to countermand the statutes regulating the operation of the department.'[citing *Auriemma*] The difference between countermanding a statute and issuing general orders pertaining to daily operations remains an open question, however, not amenable to summary judgment. Neither party has adduced evidence clearly showing what authority the Superintendent or supervisory staff at CPD had over implementing mandates from City Council. Plaintiff has raised questions about the apparent discrepancy between official CPD policy and actual CPD practice with respect to case file creation and maintenance, which the City has failed to address in more than conclusory fashion. Whether CPD followed its official policy--and what that policy specifically meant to the Department--is a key issue in the instant litigation and, based on the evidence before the court at this point, not an issue that can be resolved as a matter of law.").

But see ***Wooten v. Logan,*** No. 02-5753, 2004 WL 68541, at *4 (6th Cir. Jan. 14, 2004) (Moore, J., dissenting) (unpublished) ("That Logan committed the alleged assault himself makes no difference; the chief law- enforcement officer of Pickett County, Tennessee, is alleged to have ratified a policy of using the power of law enforcement to effectuate rape, and the County should be responsible for such a policy."); ***Bennett v. Pippin***, 74 F.3d 578, 586 & n.5 (5th Cir. 1996) ("In this case, the Sheriff's actions were those of the County because his relationship with [Plaintiff] grew out of the attempted murder investigation and because. . . he used his authority over the investigation to coerce sex with her. The fact that rape is not a legitimate law enforcement goal does not prevent the Sheriff's act from falling within his law enforcement function. . . . Under the Archer County power structure, no one had state law authority to contest the Sheriff's use of his power to place himself in a position

to rape [Plaintiff]."); ***Gonzalez v. Ysleta Independent School District***, 996 F.2d 745, 754 (5th Cir. 1993) ("[T]he existence of a well-established, officially-adopted policy will not insulate the municipality from liability where the policy-maker herself departs from these formal rules. [cite omitted] The Board of Trustees' conscious decision to transfer [teacher] rather than remove him from the classroom or report the incident to the Department of Human Resources--the response its past practice might have portended and its own sexual abuse policy would seem to have required--plainly constitutes a 'policy' attributable to the school district."); ***Culberson v. Doan***, 125 F. Supp.2d 252, 276 (S.D. Ohio 2000) ("[T]his Court finds Chief Payton is the policymaker for the Village of Blanchester regarding his duties as the municipality's top law enforcement officer and any official actions representing deliberate indifference, a policy or a custom that is promulgated by him, is held to be a policy or custom of the Village of Blanchester, for which liability can be imposed on it."); ***Corp. of Pres. of Church of Jesus Christ of Latter Day Saints v. Environmental Protection Commission of Hillsborough County***, 837 F. Supp. 413, 417 (M.D. Fla. 1993) ("Although [defendant's] action may have only been a one-time deviation from the written rules by which the EPC operates, such deviation could amount to agency policy. . . .").

See also ***Putnam v. Town of Saugus***, 365 F.Supp.2d 151, 189-93 (D. Mass. 2005) ("Despite the appointment authority given to the Town Manager, one could argue that it is not final authority under *Praprotnik* because the Town Manager is constrained by polices not of his or her making. . . That is, because the Town Manager's appointment authority must be exercised based on 'merit and fitness alone,' one could argue that the Town Manager's disregard of that directive is not the Town's final policy but a subordinate's departure from it. . . In *Praprotnik*, the plurality addressed this point in response to Justice Brennan's concern that a municipal charter's inclusion of 'merit and fitness' language would effectively insulate the municipality from liability. . . The plurality denied that assertion and observed that refusals to abide by a 'merit and fitness' standard could help to show that a municipality's policies were in reality, different from those in the charter. . . This seems to suggest that a 'merit and fitness' standard would not preclude a finding of final policymaking authority in the official to whom that standard applies, if that policy is frequently disregarded. . . One could then argue that Vasapolli's single alleged departure from the 'merit and fitness' policy is insufficient. This reasoning, however, is contradicted by other portions of the plurality's opinion which suggest that a 'merit and fitness' standard does not automatically preclude a finding of final policymaking authority. The town charter involved in *Praprotnik* required

appointment decisions as well as 'all measures for the control and regulation of employment' be 'on the sole basis of merit and fitness.' . . Despite its recognition that the mayor was constrained by the directives of the charter, the plurality acknowledged that 'one would have to conclude' that the mayor's policy decisions would be 'attributable to the city itself' so long as applicable law does not make the mayor's decisions reviewable by the municipality's civil service commission. . . Thus, the 'merit and fitness' provision did not automatically preclude a ruling of the mayor had final policymaking authority. . . Rather, the civil service commission must have the power to enforce the 'merit and fitness' provision by reviewing the mayor's decisions in order to prevent such a finding. . . Thus, the plurality's reasoning appears internally contradictory. One portion of the opinion implies that a 'merit and fitness' standard preempts a finding of final authority, . . . while another part suggests it does not so long as the official's decisions are not subject to review by other municipal policymakers. . . One way that this apparent inconsistency can be resolved is through a closer examination of *Praprotnik* 's reasoning. Such an examination suggests that the two-step framework for determining final policymaking authority may not have been intended to apply to those policymakers who are legislatively authorized to act but only to those subordinate officials to whom the legislatively empowered decision-makers have delegated their authority. . . . This Court is mindful of the fact that this interpretation has the unusual effect of according different legal significance to the same legislative language depending on the person to whom it is applied. That is, as applied to the official who is legislatively empowered, it does not prevent a ruling that the individual has final policymaking authority; as applied to a subordinate to whom that policymaker delegates her authority, however, it precludes a ruling that the subordinate has final authority. This interpretation, however, avoids reading *Praprotnik* as internally contradictory, a far more unusual result. Moreover, this understanding is better able to comply with the policy underlying municipal liability which seeks to hold the municipality accountable for the conduct of those whose acts may fairly be said to be those of the municipality. . . When a local government official's decisions are unreviewable within the governing structure, those decisions may fairly be said to represent official as well as final policy because within that official's sphere of discretion, she is the vessel through which the municipality acts. . . That authorizing legislation requires an official to make her decisions based on 'merit and fitness alone' makes her authority no less final when that official herself is the sole determiner of whether that standard has been met.. . . When a subordinate has only delegated authority, her acts are not as obviously attributable to the municipality. Presumably, if a subordinate failed to adhere to a 'merit and fitness' standard, the delegating official could easily

rescind that authority. Conversely, limiting the scope of a legislatively authorized official's authority would require the more cumbersome process of either amending or repealing the authorizing legislation. Because a subordinate's authority can be more readily taken back, her departures from required standards are not as easily characterized as those of the municipality. . . . . Similar to the issue of *Praprotnik* 's precedential force, whether its method for determining final policymaking authority applies equally to 'authorized' decision-makers and 'subordinates' is no doubt crucial to the ultimate resolution of this case. At this stage, however, this Court need not determine those issues conclusively. As mentioned above, even if *Praprotnik* is governing precedent and even if its framework applies beyond instances of delegation, *Praprotnik* does not foreclose a finding that the Saugus Town Manager has final policymaking authority so as to warrant summary judgment. It is sufficient that *Praprotnik* can be read to hold that a 'merit and fitness' standard does not by itself cut off an official's final policymaking authority. . . Under this interpretation of *Praprotnik*, foreclosure of final policymaking authority also requires an official's decisions to be reviewable by separate municipal officials.. . Because there has been no indication that the Town Manager's appointment decisions are subject to review by other municipal officials such as the Board of Selectmen, summary judgment is not appropriate. The record includes only a portion of the Saugus Town Charter. Within that portion the charter grants the Town Manager broad authority to 'supervise and direct' the police department's administration. . . The Town Manager is specifically empowered to make personnel decisions including the appointment of police chief. . . Thus far, there has been no indication that other provisions of the charter (or any other source of law) subject the Town Manager's personnel decisions to any type of review within the municipality. To the contrary, the record evidence discussed above indicates the autonomy the Town Manager enjoys in making these decisions. Moreover, the Town has not refuted Putnam's claim that the Town Manager has final policymaking authority and neither party has addressed the requirements of that element. . . Accordingly, given the evidence in the record, this Court finds that the absence of final policymaking authority has not been established as matter of law.").

Note that even where a plaintiff is unsuccessful in making out municipal liability based on a final policymaker theory, on grounds that the policy was contrary to some formal municipal law or ordinance, plaintiff may still successfully plead government liability by alleging a "persistent and widespread practice which was inconsistent with any such announced policy of the city." ***Wetzel v. Hoffman***, 928 F.2d 376, 378 (11th Cir. 1991). *Accord*, ***K.M. v. School Bd. of Lee County Florida***,

No. 03-12358, 2005 WL 2475729, at *4 (11th Cir. Oct. 7, 2005) (not published) ("Because Florida law identifies the School Board as the policymaker for the School District, a single decision by the Board may constitute School Board policy, even if not phrased as a formal policy statement. . . If, before a decision becomes final, the School Board ratified the decision of a subordinate who did not have final policymaking authority, the Board will be liable for that decision. . . The School Board will also be responsible for multiple acts by subordinates that constitute a custom, if that custom caused the plaintiff's injury. . . A custom is a practice that has not received official approval, but is 'so settled and permanent that it takes on the force of the law.'"); ***Auriemma***, *supra*, 957 F.2d at 399 ("[E]ven executive action in the teeth of municipal law could be called policy . . . . A practice undertaken by the executive power and suffered by the legislative power may be said to reflect a custom with the force of legislation."); ***Dirksen v. City of Springfield***, 842 F. Supp. 1117, 1123-34 (C.D. Ill. 1994) ("[E]ven though Springfield and the Springfield Police Department had regulations to combat sexual harassment, Plaintiff's allegations suggest that it was the custom or practice of the top officials at the Springfield Police Department to circumvent these regulations."); ***Lopez v. Shines***, No. 93 C 1243, 1993 WL 437450, *3 (N.D. Ill. Oct. 27, 1993) (not reported) ("[W]hen a city's legislature condones unconstitutional personnel practices of an official, the official's acts regarding the condoned subject matter may constitute the city's policy.... because such acts are permitted, or, . . . encouraged."). Indeed, in ***Mandel v. Doe***, 888 F.2d 783 (11th Cir. 1989), the court read ***Jett*** as requiring the examination of "not only the relevant positive law, including ordinances, rules and regulations, but also the relevant customs and practices having the force of law." *Id*. at 793. The court affirmed the district judge's conclusion that the deliberate indifference of a physician's assistant could be attributed to the County, where it was shown that "[a]lthough it was initially contemplated that the physician's assistant would be supervised by a medical doctor, the evidence revealed that a custom and practice developed so that the policy was that [the physician's assistant] was authorized to function without any supervision or review at all." *Id*. at 794.

See also ***Manor Healthcare Corp. v. Lomelo***, 929 F.2d 633, 638 (11th Cir. 1991) (In rejecting liability of City, court considered whether City had developed custom or practice of allowing mayor to function without any supervision or review as to zoning matters).

In ***Wulf v. City of Wichita***, 883 F.2d 842 (10th Cir. 1989), a former police officer brought a § 1983 action against the city, city manager and chief of police,

claiming that his employment was terminated in violation of his first amendment rights. The chief of police had testified that he had been given "carte blanche" authority as to hiring and firing of police officers.

The court affirmed the finding of individual liability on the part of the police chief, where his recommendation of plaintiff's termination was unlawfully motivated, but rejected a finding of municipal liability where the city manager retained the power to make the "actual and ultimate decision" to fire the plaintiff and where the city manager's decision was not unlawfully motivated, and "therefore did not amount to approval of the impermissible basis. . . for [the chief's] decision." *Id*. at 868.

The court felt compelled to reach this result by ***Monell***, which rejects municipal liability on a respondeat superior basis, and ***Praprotnik***, which "directs us to look only at where statutory policymaking authority lies, rather than where *de facto* authority may reside. Thus, a subordinate who wields considerable *actual* power, yet who lacks the legal power to terminate an employee, may, in the circumstances of this case, be liable, while the City is not." *Id*. at 869.

See also ***Feliciano v. City of Cleveland***, 988 F.2d 649, 656 (6th Cir. 1993) ("Although the plaintiffs have shown that Cleveland chiefs of police have issued policy statements on drug use and drug testing, the plaintiffs have not produced evidence to show that there exists a custom with the force of law that makes the chief of police the final policymaking official with respect to the drug testing of police."); ***Payung v. Williamson***, 747 F. Supp. 705, 709 (M.D. Ga. 1990) (Mayor was not final policymaker as to decision to terminate fire chief, when all employment decisions were subject to review by City Council); ***Herhold v. City of Chicago***, 723 F. Supp. 20, 33 (N.D. Ill. 1989) (refusing to consider "realities of municipal decisionmaking," court looked only to state positive law for the vesting of final policymaking authority).

In ***Flanagan v. Munger***, 890 F.2d 1557, 1567 (10th Cir. 1989), a police chief's reprimand of officers for selling or renting sexually explicit videotapes from a video store in which they had a partial ownership interest, was held to violate the officers' First Amendment rights. Although the Court of Appeals affirmed summary judgment for the police chief on qualified immunity grounds, summary judgment in favor of the City was reversed.

The City argued that it had not delegated *final* disciplinary authority to the Chief because the City Manager had "*general* management and supervision of all matters relating to the police department, its subordinate officers and employees." *Id*. at 1568 Furthermore, the City argued that the Chief was not the final policymaker as to disciplinary matters because his authority was always reviewable by the City Manager and City Council. *Id*.

The court found that, although the City Manager had *general* management and supervision powers, the Chief was *directly* responsible for discipline and supervision over the Department. *Id*. The court was equally unpersuaded by the City's "reviewability" argument. "Although the City argues that departmental decisions *may* ultimately be reviewed by the City Manager or City Council, for all intents and purposes the Chief's discipline decisions are final, and any meaningful administrative review is illusory." *Id*. at 1569. *See also* ***Sivulich-Boddy v. Clearfield City***, 365 F.Supp.2d 1174, 1185 (D. Utah 2005)(" Under Tenth Circuit case law, even if Sparks' actions were subject to review by a committee, facts discovered during this litigation could demonstrate that he has sufficient decision making authority.").

In ***Ware v. Unified School District No. 492***, 902 F.2d 815, 818 (10th Cir. 1990), the court concluded that evidence that the school board had delegated policymaking authority to the superintendent was no longer significant after ***Jett***'s directive to identify the final decisionmaker by consulting local positive law, custom or usage.

Ware was distinguished from ***Flanagan***, where the government admitted delegation of final policymaking authority to the Chief of Police, a provision of the relevant municipal code gave direct authority to the Chief as to disciplinary matters, and discipline decisions of the Chief were unreviewable.

See also ***Randle v. City of Aurora***, 69 F.3d 441, 448 (10th Cir. 1995) ("[W]e can identify three elements that help determine whether an individual is a 'final policymaker': (1) whether the official is meaningfully constrained 'by policies not of that official's own making;' (2) whether the official's decision are final--i.e., are they subject to any meaningful review; and (3) whether the policy decision purportedly made by the official is within the realm of the official's grant of authority." (citations omitted)).

In ***Worsham v. City of Pasadena***, 881 F.2d 1336 (5th Cir. 1989), plaintiff was suspended from his job as construction-site inspector by the Mayor. Although the plaintiff was successful in his appeal to the City Council, and was reinstated within one month of his suspension, plaintiff brought a § 1983 action against the city and other defendants, claiming his constitutional rights were violated by the suspension. Following a complicated procedural path, *see id*. at 1336, the case was finally heard by the Fifth Circuit on the propriety of a 12(b) (6) dismissal of the claim against the only defendant left, the City of Pasadena.The majority of the panel, relying on the plurality opinion in ***Praprotnik***, concluded that "meaningful review by the City Council indicate[d] that the city officials who discharged Worsham were not . . . final policymakers." *Id*. at 1340-41.

See also ***Gros v. City of Grand Prairie***, No. Civ.A. 3:96-CV-2897, 2000 WL 1842421, at *3 (N.D. Tex. Dec. 12, 2000) (not reported) ("The record shows that although the City Manager delegated certain duties to the Police Chief, he maintained responsibility for setting policy for the Police Department. . . Accordingly, the court holds as a matter of law that Chief Crum did not exercise policymaking authority for the City, at least in any respect that would permit plaintiffs' to recover against the City on the claims at issue in this case. Because plaintiffs have not identified any other potential policymaker who participated in the violations of their constitutional rights, the court holds that the City is not liable under § 1983."); ***Smith v. City of Holland Board of Public Works***, 102 F. Supp.2d 422, 427 (W.D. Mich. 2000) ("Morawski had authority to hire and fire BPW employees, those decisions were reviewed by no one at the BPW or the City, and those decisions were not constrained by any mandatory City employment policy. As such, the Court concludes that Morawski possessed official policymaking authority for the BPW and the City. As such, neither the BPW nor Morawski in his official capacity are protected from liability by *Monell*."); ***Vincent v. City of Talledega***, 980 F. Supp. 410, 418 (N.D. Ala. 1997) ("If there is a review board with the power to take another look at the decision, the employee can forget suing the city under § 1983. Whether the review board agrees or disagrees with the discipline meted out makes no difference. Of course, the employee could undertake the Herculean task of suing the city and its review board, challenging the motivation of the board under *Pembaur* and *Praprotnik* as the city's ultimate policymaker. But, having to prove that a quasi-judicial body had a proscribed motive for its deliberative decision does not sound like something that would induce a smart lawyer to jump to the ready. A personnel board does not make an inviting target for alleged constitutional torts. The net effect will be to eliminate § 1983 liability for municipalities, because those cities that don't have a

personnel board will establish one. As a practical matter, it will be impossible to prove to a jury that a personnel board that affirms an adverse employment decision did not believe the initiating municipal official's always available, legitimate, articulated non-discriminatory reason for his decision, although the very same jury may have laughed at the articulated reason if expressed on the stand by the municipal official himself.").

In ***Worsham***, Judge Goldberg noted the division of the Court in ***Praprotnik*** on the method of identifying final policymakers, contrasting Justice Brennan's "fact-specific views" with Justice O'Connor's "positive law orientation." *Id*. at 1343. Judge Goldberg then looked to ***Jett*** and concluded:

> ***Jett*** clarifies that the ***Praprotnik*** plurality uses the phrase 'custom or usage' in two contexts in the municipal liability area. First, the plurality uses the phrase . . . in its original meaning: that a city policy giving rise to liability, although not authorized by written law, may exist in the form of a custom, usage or practice having the force of law . . . . In this regard, the focus is upon whether a custom, usage or practice by formally nonpolicymaking officials . . . allows a factfinder to infer that the city's policymakers have acquiesced in such conduct so as to give rise to municipal liability.
>
> The ***Praprotnik*** plurality also uses the phrase 'custom or usage' in a transformative manner as a method of proof. By proving a 'custom or usage,' a plaintiff may demonstrate as a matter of fact that an official is invested with final policymaking authority. This method of proof concerns the official's *status*, which implicates the basis for municipal liability in the executive context addressed in both ***Praprotnik*** and ***Pembaur***.

881 F.2d at 1343 (Goldberg, J., concurring in part and dissenting in part).

Thus, by invoking "custom or usage" as a manner of proof, a plaintiff may be able to avoid ***Praprotnik's*** "gaping hole" if plaintiff can demonstrate that, even in the face of contrary positive law, formal policymakers have in fact delegated final policymaking authority to formal nonpolicymakers. Where such a delegation is made out, "the city may be liable for the delegatee's act on a single occasion that violates federal law." *Id*. at 1344.

Finally, Judge Goldberg noted that ***Jett*** does empower the judge to resolve issues of fact as part of the court's initial inquiry. "***Jett*** thus envisions a role for the trial judge in this context similar ... to the role a judge plays in determining admissibility of certain evidence, or whether a matter is of public concern in the First Amendment context." *Id*.

See also ***Riddick v. School Board of the City of Portsmouth***, 238 F.3d 518, 527, 528 (4th Cir. 2000) (Luttig, J., dissenting) ("In this case, the majority's (and the district court's) inquiry into who could be deemed a policymaker begins and ends with a determination that the School Board never formally delegated its statutorily-conferred final review authority over disciplinary decisions. Based upon this determination of the absence of formal delegation, and this determination alone, the majority concludes that the School Board cannot be liable for the actions of its subordinate employees. However, such is to pretermit the inquiry. For, as explained, even if a governmental entity with final policymaking authority has technically retained its formal policymaking authority, it may yet be liable if, through a custom or practice of acquiescence in the decisions of its subordinates, it has effectively delegated its authority to those subordinates. [citing *Jett* and *Proprotnik*] Were it otherwise, a municipality could essentially insulate itself from all liability merely by vesting ultimate review authority in its governing body, while at the same time surrendering all effective authority to its subordinate officials. . . Most assuredly, this was not congressional intent in enacting section 1983, nor would I so constrict that provision, the very purpose of which is to ensure accountability for official denial of constitutional right."); ***O'Brien v. City of Grand Rapids***, 23 F.3d 990, 1005 (6th Cir. 1994) ("[O]n the record before us, it is not enough for the city to attempt to negate the official character of the policy in question by pointing to some obscure charter provision that identifies the supervisor of the department whose conduct gave rise to the suit. If there is a genuine issue in dispute, we must not only look at the provisions of the charter, but also must examine the knowledge and actions of these persons in the development of the policies."); ***Bouman v. Block***, 940 F.2d 1211 (9th Cir. 1991) (question of delegation of authority to make employment policy decisions involves unresolved issues of fact).

III. FAILURE TO PROTECT AND STATE-CREATED-DANGER CLAIMS AFTER *DESHANEY*

A. Liability Based on Failure to Provide Protective Services

While it is generally settled that there is no constitutional duty on the part of the state to protect members of the public at large from crime, *see* ***Martinez v. California***, 444 U.S. 277, 284-85 (1980), there has been considerable disagreement among the lower federal courts as to whether and when a duty to protect may arise by virtue of a "special relationship," outside of the custodial context, between the state and a particular individual or group.

1. *DeShaney v. Winnebago County Dept. of Social Services*

In ***DeShaney v. Winnebago County Dept. of Social Services***, 489 U.S. 189, 109 S. Ct. 998 (1989), a majority of the Supreme Court held that nothing in the due process clause of the Fourteenth Amendment creates an affirmative duty on the part of the state to "protect the life liberty, and property of its citizens against invasion by private actors." 109 S. Ct. at 1003. The Court concluded that "[a]s a general matter,... a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id*. at 1004. *See also* ***Bennett, ex rel. Irvine v. City of Philadelphia***, 499 F.3d 281, 289, 290 (3rd Cir. 2007) ("If a municipality, state or other public body is to be liable under the Constitution for harm caused by private parties to persons not in custody, the liability would be unlimited. There is no legal doctrine that supports imposition of such liability. Without legislative activity, we are not prepared to hold that a city that fails to respond promptly to a 911 call must pay for the harm that befalls the caller as a result of the failure. The fact is that most 911 calls are answered, that the police use their best efforts in many cases, and that they prevent egregious harm. We have less personal experience with DHS but are willing to assume, for this purpose, that this is also true of DHS social workers, notwithstanding the well-publicized cases of failures in that connection. However, it is not the role of the courts, certainly not the federal courts, to rectify the failures that do happen. That is the responsibility of the citizens of the body politic, who elect the leaders of the executive branch of the respective city, state or municipality. If the public raises its voice and demands accountability, and is willing to use the ballot to support those demands, then change and improvement can and will occur. Unfortunately, it will be too late for Porchia Bennett.").

Chief Justice Rehnquist, writing for the majority, expressly rejected the argument "that once the State learns that a third party poses a special danger to an identified victim, and indicates its willingness to protect the victim against that danger, a 'special relationship' arises between State and victim, giving rise to an affirmative duty, enforceable through the Due Process Clause, to render adequate protection." 109 S.Ct. at 1004 n.4.

DeShaney may be read narrowly to limit any affirmative duty to protect to situations in which "the State takes a person into its custody and holds him there against his will . . . . [t]he affirmative duty to protect aris[ing] not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id*. at 1005.

See,e.g., ***Youngberg v. Romeo***, 457 U.S. 307 (1982) (substantive due process component of Fourteenth Amendment Due Process Clause imposes duty on state to provide for safety and medical needs of involuntarily committed mental patients); ***Estelle v. Gamble***, 429 U.S. 97 (1976) (state has constitutional duty to provide adequate medical care to incarcerated prisoners). *See also* ***Carver v. City of Cincinnati***, 474 F.3d 283, 286 (6th Cir. 2007) ("The mere fact that the police exercise control over an environment is alone insufficient to demonstrate that a person is seized. . . . Here, there was no physical restraint over Carver by the officers, nor did the officers direct any actions toward him. Carver's incapacity, like that of the plaintiff in *Jackson*, was self-induced. The officers did not place a restraint on Carver's personal liberty when they secured the area to conduct an investigation into the death of Smith-Sandusky. Perhaps the officers had probable cause to restrain Carver if they had wanted, but that is not what happened. The custody exception is inapplicable because the officers never restrained Carver's personal liberty in any fashion."); ***Jackson v. Schultz***, 429 F.3d 586, 590, 591 (6th Cir. 2005) ("It is not a constitutional violation for a state actor to render incompetent medical assistance or fail to rescue those in need. . . . The 'custody exception' does not apply because the decedent was never in custody. The 'custody exception' triggers a constitutional duty to provide adequate medical care to incarcerated prisoners, those involuntarily committed to mental institutions, foster children, pre-trial detainees, and those under 'other similar restraint of personal liberty.'. . . The overarching prerequisite for custody is an affirmative act by the state that restrains the ability of an individual to act on his own behalf.. . The district court improperly held that moving an unconscious patient into an ambulance is custody. This court's precedent has made

clear that *DeShaney* 's concept of custody does not extend this far. This court has never held that one merely placed in an ambulance is in custody. . . . Decedent's liberty was 'constrained' by his incapacity, and his incapacity was in no way caused by the defendants. In sum, no set of facts consistent with the allegations shows that the EMTs did anything to restrain the decedent's liberty. Thus, no set of facts consistent with the allegations supports a finding that the EMTs took decedent into custody. Based on the facts alleged, there is no constitutional violation under the custody exception."); ***Hamilton v. Cannon***, 80 F.3d 1525, 1531 n.5 (11th Cir. 1996) ("This Court and others have extended the state custody exception beyond actual incarceration or involuntary institutionalization only when there is some kind of physical restraint by the state that triggers an affirmative constitutional duty of care and protection."); ***Smith v. Myers***, No. 94-3605, 1995 WL 521158, *5 (6th Cir. Sept. 1, 1995) (unpublished) ("[T]his Circuit has held that the state's duty to protect any particular citizen arises only where a 'special relationship' exists between the state and that citizen. [cites omitted] Thus far, we have determined that a 'special relationship' exists only where the state legally restricts the liberty of a person, such as when the state incarcerates someone or involuntary commits a person to a healthcare facility."); ***Foy v. City of Berea***, 58 F.3d 227, 231 (6th Cir. 1995) ("When the state limits an individual's ability to care for himself by, for example, incarceration in a prison or involuntary confinement in a mental hospital, the Constitution does impose an affirmative duty of care and protection. There is no such affirmative duty, however, absent such restraint."); ***Garrett v. Gilless***, 47 F.3d 1168 (Table), 1995 WL 16810, *1 (6th Cir. Jan. 17, 1995) (holding defendants had no duty to provide police protection to victim of domestic violence and her children in absence of special relationship); ***Pinder v. Johnson***, 54 F.3d 1169, 1175 (4th Cir. 1995) (*en banc*) ("Some sort of confinement of the injured party--incarceration, institutionalization, or the like--is needed to trigger the affirmative duty . . . This Court has consistently read *DeShaney* to require a custodial context before any affirmative duty can arise under the Due Process Clause."); ***Lovins v. Lee***, 53 F.3d 1208, 1210 (11th Cir. 1995) ("Attempting to escape the clear language of *DeShaney*, plaintiff argues that this case fits within the "special relationship" exception to the general rule that the Due Process Clause does not entitle a citizen to be protected from violence at the hands of non-governmental actors. Unfortunately for plaintiff, that exception is limited to circumstances in which there is a special relationship between the government and the victim of violence or mistreatment, a circumstance that is lacking in the present case. Examples of special relationship cases include those involving incarcerated prisoners and involuntarily committed mental patients."); ***Souza v. Pina***, 53 F.3d 423, 426 (1st Cir. 1995) ("Absent the kind of

custodial relationship apparently contemplated by the Court [in *DeShaney*], the Due Process Clause does not require the state to protect citizens from 'private violence' in whatever form, including suicide."); ***Ying Jing Gan v. City of New York***, 996 F.2d 522, 534-35 (2d Cir. 1993) (complainant who agreed to identify suspects was owed no duty of protection by City); ***Nobles v. Brown***, 980 F.2d 730 (6th Cir. 1992) (Table) ("[T]he people of Michigan are free to create a system under which the state and its officials would be subjected to liability for failure to accord prison guards reasonable protection against harms inflicted by dangerous prisoners. This court, however, is not free to create such a system by turning the Due Process Clause into a Michigan Tort Claims Act."); ***Salazar v. City of Chicago***, 940 F.2d 233, 237 (7th Cir. 1991) (government has no constitutional duty to provide competent rescue services to people not in its custody); ***Piechowicz v. U.S.***, 885 F.2d 1207, 1215 (4th Cir. 1989) (federal witnesses murdered by hired killer were owed no duty of protection under Fifth Amendment substantive due process where witnesses were not "in custody" of United States); ***de Jesus Benavides v. Santos***, 883 F.2d 385, 388 (5th Cir. 1989) (affirmative duty to protect a prisoner arises from State's restraint on individual's liberty; prison guard injured by prisoner is owed no constitutional duty by the State to protection from inmates' violence); ***Beltran v. City of El Paso,*** 367 F.3d 299, 307 (5th Cir.2004) ("Beltran argues that by encouraging Sonye to stay in the bathroom and telling her that the police were on the way, Amador became the custodian of Sonye's safety. This argument falls outside of the special relationships described by the Supreme Court, which are limited to cases concerning 'incarceration, institutionalization, or other similar restraint of personal liberty.'. . In this case, Amador offered advice to Sonye, but she did not *affirmatively* place Sonye in custody by restraining her in the bathroom."); ***Clarke v. Sweeney,*** 312 F.Supp.2d 277, 296 (D. Conn. 2004) ("As with the state created danger exception to *DeShaney,* the contours of the special relationship exception are not well defined. However, it would not seem to apply when a fact witness to a crime that has already been committed voluntarily approaches the police and makes a statement, and then a subpoena is issued for that witness-even if the police provide the witness with visible police protection that is later withdrawn. Such a circumstance does not constitute a situation where the 'state restrains an individual's freedom to act to protect himself or herself through a restraint on that individual's personal liberty.' Thus, even looking at the facts in a light most favorable to Clarke, the special relationship exception to *DeShaney* is also inapplicable here."); ***Miller v. Hubbard,*** No. NA 022-133-C H/H, 2004 WL 392957, at *5 (S.D. Ind. Feb. 17, 2004) ("In the briefing on the court's order to show cause on the claims against the shooting victim--Officer Dexter--and in the briefing on this summary judgment motion,

plaintiff has not yet identified any case law providing support for finding either (1) that jail officials owe a constitutional duty to inmates to prevent them from escaping, or (2) that jail officials have a constitutional duty to prevent escaped prisoners from committing suicide. In general, there is no constitutional duty on the part of the state to protect someone from private violence. . . The Supreme Court in *DeShaney* recognized an exception to this general rule in situations where the state has custody or is 'restraining the individual's freedom to act on his own behalf,' which can trigger a duty to provide for the individual's safety. . But in this case, Miller did not die while he was in custody. He shot himself after shooting Officer Dexter and escaping from custody. No state officials restrained his individual freedom to act when he pulled the trigger."); ***Ramirez v. City of Chicago***, 82 F. Supp.2d 836, 839 (N.D. Ill. 1999) ("The paramedics cite *DeShaney* . . . for the proposition that there is no federal constitutional duty of care where the plaintiff is not in custody or control of the state actor. The paramedics argue that because Mr. Ramirez was not in their custody but that of the Chicago Police Department, they did not 'suddenly acquire a duty to treat a man who was not in their custody,' an argument of breathtaking cynicism. I agree with the plaintiffs, however, that the paramedics, public employees who were dispatched specifically to aid Mr. Ramirez, 'suddenly acquired' a constitutional obligation to aid him when the police defendants, also public employees, took him into custody on behalf of the City of Chicago, and he was injured in the process. Chicago Fire Department paramedics have a duty to aid persons who are injured while in custody of the Chicago Police, or indeed, the Cook County Sheriff or the Illinois State Police. State action cannot be diluted by being dispersed over several departments.").

See also ***Lipscomb v. Simmons***, 962 F.2d 1374, 1379 (9th Cir. 1992) (*en banc*) ("In our view, custody cases such as *DeShaney* and *Youngberg* stand for the proposition that the government has an affirmative obligation to facilitate the exercise of constitutional rights by those in its custody only when the circumstances of the custodial relationship directly prevent individual exercise of those rights."); ***Harris v. District of Columbia***, 932 F.2d 10 (D.C. Cir. 1991) (suggesting that plaintiff who died of drug overdose while in police custody was owed no constitutional duty by police to refrain from deliberate indifference to his medical needs, where plaintiff "had not been formally committed, either by conviction, involuntary commitment, or arrest, to the charge of the District. . . .").

In ***Shaw by Strain v. Strackhouse***, 920 F.2d 1135 (3d Cir. 1990), a profoundly retarded resident of a state mental institution, brought a § 1983 action

against state employees, asserting a failure to protect him from abuse and sexual assault. On appeals from a grant of summary judgment in favor of defendants, the Third Circuit addressed the standard of care owed by state officials to those in their custody, and determined that the standard might vary depending upon the nature of the physical custody involved. *Id*. at 1144.

The court concluded that while a deliberate indifference standard governed the liability of the nonprofessional employee-defendants, "the ***Youngberg*** professional judgment standard should have been applied to the primary care professionals, supervisors and administrators named as defendants." *Id*. at 1139.

In the court's opinion, professional judgment is a relatively deferential standard which, like recklessness and gross negligence, would fall somewhere between simple negligence and intentional misconduct. *Id*. at 1146. The plaintiff's burden is somewhat greater when trying to establish deliberate indifference than when trying to establish a failure to exercise professional judgment. *Id*. at 1150. *But see* ***Collignon v. Milwaukee County***, 163 F.3d 982, 988-89 (7th Cir. 1998) (comparing deliberate indifference and professional judgment standards, concluding that "[i]n the context of a claim for inadequate medical care, the professional judgment standard requires essentially the same analysis as the Eighth Amendment standard.").

See also ***Lanman v. Hinson***, 529 F.3d 673, 681, 682, 684 (6th Cir. 2008) ("The Fourth Amendment is inapplicable here because defendants did not 'seize' Lanman when they bodily restrained him. By requesting voluntary admission to Kalamazoo Psychiatric Hospital, Lanman consented to defendants providing him medical treatment. Defendants physically restrained Lanman to prevent him from harming himself or others and to administer medication to calm him down. . . . We find that the appropriate source for Lanman's excessive force claim is the Fourteenth Amendment, which provides him, as a patient of a state care institution, with the constitutional right recognized in *Youngberg* to freedom from undue bodily restraint in the course of his treatment. Basing this right in substantive due process, rather than the Fourth Amendment, allows for balancing the individual's liberty interest against the State's asserted reasons for restraining the individual's liberty while in its care. It also gives proper deference to the decisions of institutional professionals concerning medical treatment. . . . While the actions of professional decisionmakers, defined as 'person[s] competent, whether by education training or experience, to make the particular decision at issue,' *Youngberg*, 457 U.S. at 323 n. 30, are held to this

professional judgment standard, the defendant resident care aides are non-professional employees and are held only to a deliberate indifference standard.”); ***Estate of Porter by Nelson v. State of Illinois***, 36 F.3d 684, 688 (7th Cir. 1994) ("In determining whether an involuntarily committed patient's right to reasonable safety has been violated, courts may only 'make certain that professional judgment in fact was exercised.'"); ***Yvonne L. v. New Mexico Department of Human Services***, 959 F.2d 883, 893-94 (10th Cir. 1992) (adopting professional judgment standard, rather than deliberate indifference, in foster care setting); ***Clark v. Donahue***, 885 F. Supp. 1164, 1168 (S.D. Ind. 1995) (finding the reasoning of ***Shaw by Strain*** to be persuasive, holding nonprofessional employees subject to deliberate indifference standard); ***Wendy H. v. City of Philadelphia***, 849 F. Supp. 367, 368-69 (E.D. Pa. 1994) (holding minimum standards of "professional judgment" as "standard of care owed to a child in foster care by a city worker responsible for supervising the foster home placement and welfare of the child . . . ."). *Accord* ***K.H. v. Morgan***, 914 F.2d 846 (7th Cir. 1990); ***T.M. by and through Cox v. Carson***, 93 F. Supp.2d 1179, 1187 (D. Wyo. 2000).

2. "Getting Around" *DeShaney*

Plaintiffs have been successful in avoiding dismissals under ***DeShaney*** where the case has been presented as one of the following:

a. “special relationship” or custody case
b. "snake pit" or "state-created-danger" case
c. entitlement case
d. equal protection case

a. “special relationship” or custody cases

In ***Horton v. Flenory***, 889 F.2d 454 (3d Cir. 1989), plaintiff's decedent died as a result of a severe beating administered by the owner of a private club who was investigating a burglary of the club. The City of New Kensington had an official, written "hands-off" policy with respect to incidents occurring in private clubs. *Id*. at 456. The owner of the club in question was an ex-police officer. He called the police in connection with the reported burglary. The officer who responded ignored pleas of the employee/suspect to provide protection from the club owner, indicating to both the club owner and the employee that the owner was free to conduct and continue his interrogation. *Id*. at 458. The suspect was beaten to death.

The Court of Appeals affirmed the judgment denying defendants' motion for a j.n.o.v., reasoning that when the police officer affirmed the right of the club owner to detain and question the suspect, the interrogation became "custodial." Furthermore, through the city's delegation of traditional police functions to a private actor, the club owner could be viewed as a state actor.

Thus, the court concluded that when the state is involved, as either a custodian or as an actor, ***DeShaney*** is not controlling. *Id*. at 457. *Accord* ***Nishiyama v. Dickson County***, 814 F.2d 277 (6th Cir. 1987) (prisoner allowed to operate police vehicle unsupervised was clothed with state authority and became *de facto* state actor). *See also* ***Sanders v. Bd. Of County Commissioners of Jefferson County,*** 192 F. Supp.2d 1094, 1119 (D. Colo. 2001) ("Based on Plaintiff's complaint, it is reasonable to infer that from approximately 12:30 p.m. to 4:00 p.m., the Command Defendants acted affirmatively to restrain the freedom of the occupants of Science Room 3, including Dave Sanders, to act on their own behalf. Thus, pursuant to *DeShaney* and *Armijo,* the Command Defendants entered into a special relationship with Dave Sanders during that time giving rise to a constitutional duty to protect and provide care. Therefore, I conclude Ms. Sanders has properly asserted in Claim Two a violation of the Fourteenth Amendment right to substantive due process under the special relationship doctrine."); ***Culberson v. Doan***, 125 F. Supp.2d 252, 270 (S.D. Ohio 2000) ("If Plaintiffs' facts are viewed in a favorable light, it is also reasonable to conclude that, because Chief Payton had 'complete control' of the potential crime scene, he also had 'constructive and functional' possession, control or custody of Carrie's body. By potentially abandoning that control, custody or possession to her murderer and the Baker Family, we conclude that Chief Payton's actions may have violated Plaintiffs' substantive due process.").

Some courts have linked the affirmative duty to protect to a requirement that the plaintiff be *involuntarily* in custody. *See, e.g.,* ***Lanman v. Hinson***, 529 F.3d 673, 682 n.1(6th Cir. 2008) ("The district court found the involuntariness argument determinative by reading *DeShaney* to mean that the Constitution only imposes a duty on the State to assume responsibility for the safety of an individual when it has 'take[n] a person into its custody and holds him there against his will.'. . But *DeShaney* decided only that the State is not responsible for the actions of third-party private actors against individuals unless it had imposed restraints on the individuals' liberty to render them unable to care for themselves. . . . This is unlike the present case in which Plaintiff alleges that the State, through the affirmative acts of

Defendants, infringed on Lanman's substantive due process right in freedom from undue restraint while in the State's custody. His status as voluntary or involuntary is irrelevant as to his constitutional right to be free from the State depriving him of liberty without due process. At this time, we do not need to decide whether the State owes the same affirmative constitutional duties of care and protection to its voluntarily admitted residents as it owes to its involuntarily committed residents under *Youngberg*. In an unpublished disposition, however, a panel of this Court held that because the plaintiff had been voluntarily admitted to the state mental hospital, the State's constitutional duty to protect those it renders helpless by confinement was not triggered. *Higgs v. Latham*, No. 91-5273, 1991 WL 21646, at *4 (6th Cir. Oct. 24, 1991) (unpublished). Our sister circuits are split on this issue."); ***Torisky ex rel. Torisky v. Schweiker***, 446 F.3d 438, 445, 446-48 (3d Cir. 2006) ("In the instant case, the District Court erred in concluding that the voluntary nature of one's custody and continued confinement does not impact the availability of the rights to care and protection mandated by *Youngberg v. Romeo*, 457 U.S. 307 (1982). *Youngberg* dealt with an involuntarily committed inmate, and *Fialkowski* holds that the same principles do not apply to individuals who are free to leave state custody 'if they wish[ ].'. . . We conclude that appellants go too far, however, when they insist that a court commitment to state custody is a necessary characteristic of a deprivation of liberty sufficient to trigger *Youngberg'* s protections. . . . The existing case law supports the District Court's approach of looking beyond the label of an individual's confinement to ascertain whether the state has deprived an individual of liberty in such a way as to trigger *Youngberg*' s protections. . . . Count V of the complaint alleges that each plaintiff was in state custody and was injured physically and psychologically in the course, and as a result, of a transfer to an inappropriate institution. It further alleges that the plaintiffs were separated from their guardians and loved ones by a police blockade, and were transferred '[a]gainst their will,' and that '[p]hysical and psychological force was utilized by state employees ... in the course of the transfer.'. . . We conclude that plaintiffs may be able to prove facts consistent with these allegations that would establish a deprivation of liberty and a violation of *Youngberg*'s duty of care and protection."); ***Christiansen v. City of Tulsa***, 332 F.3d 1270, 1281(10th Cir. 2005) ("[T]he TPD's quarantine neither involuntarily restrained Christiansen nor limited his freedom to act on his own behalf. Thus, no special relationship or attendant affirmative duty to protect Christiansen arose under *Armijo* and *Uhlrig.*"); ***DeAnzona v. City and County of Denver***, 222 F.3d 1229, 1234 (10th Cir. 2000) ("A plaintiff must show involuntary restraint by the government to have a claim under a special relationship theory, if there is no custodial relationship there can be no constitutional duty.");

Santamorena v. Georgia Military College, 147 F.3d 1337, 1341 & n.10 (11th Cir. 1998) (noting in context of qualified immunity that "some preexisting case law may have particularly suggested to Defendants (or to be more precise, to every reasonable school official standing in Defendants' place) that no duty would arise in a voluntary situation, despite representations by Defendants that protection would be provided." Also noting that "only restraints of freedom imposed by the State, not by a student's parents, can give rise to a constitutional duty requiring the State to protect that student."); ***Randolph v. Cervantes***, 130 F.3d 727, 730-31 (5th Cir. 1997) ("[T]he mere fact that Randolph's mental condition may have made her functionally dependant on Pine Belt and Cervantes does not transform her voluntary tenancy at Pine Hill Apartments into an involuntary confinement creating a 'special relationship.'. . In this case, the defendants never took the affirmative step of restraining Randolph's liberty so that she was rendered unable to care for herself, and the defendants never held her involuntarily or against her will. Accordingly, a 'special relationship' did not exist between Randolph and the defendants."); ***Suffolk Parents of Handicapped Adult v. Wingate***, 101 F.3d 818, 824 (2d Cir. 1996) ("In sum, the plaintiffs here, like the plaintiffs in *Brooks*, are not involuntarily institutionalized. The plaintiffs here have no entitlement under New York law to TCF funding from either Suffolk County or the State Defendants. . . Nor can they claim any such entitlement from any of the defendants under the Due Process Clause of the Fourteenth Amendment."); ***Brooks v. Giuliani***, 84 F.3d 1454, 1466-67 (2d Cir. 1996) ("Plaintiffs here are under no state-imposed restraint. The whole effort of the guardians, here and in state court, has been to prolong the involvement of the City and the State in the funding of institutional placements as to which the City and the State have washed their hands. *DeShaney* therefore subverts the district court's conclusion that the State Defendants had assumed "by word and by deed," . . . a duty to provide plaintiffs a smooth and orderly transition to in-state care, including continuous full funding of out-of-state care prior to their transfer. *DeShaney* flatly rejected as the sole ground for a due process right an expressed intent to provide assistance, or even a failed initiative to do so. . . . Therefore, the injunction cannot be premised on a duty to 'exercise professional judgment' under *Youngberg* and *Society for Good Will*, because there is no such duty here.); ***Walton v. Alexander***, 44 F.3d 1297, 1304 (5th Cir. 1995) (*en banc*) ("Recurring throughout [the] cases that we have decided since *DeShaney* is the iteration of the principle that if the person claiming the right of state protection is voluntarily within the care or custody of a state agency, he has no substantive due process right to the state's protection from harm inflicted by third party non-state actors. We thus conclude that *DeShaney* stands for the proposition that the state creates a "special relationship" with a person only when the

person is involuntarily taken into state custody and held against his will through the affirmative power of the state . . . ."); ***Wilson v. Formigoni***, 42 F.3d 1060, 1067 (7th Cir. 1994) (Wilson does not complain that she was held at [Mental Health Center] against her will, and thus cannot maintain that the state did not do enough to ensure her safety while she was committed there."); ***Monahan v. Dorchester Counseling Center, Inc.***, 961 F.2d 987, 993 (1st Cir. 1992) ("Because the state did not commit [plaintiff] involuntarily, it did not take an 'affirmative act' of restraining his liberty, an act which may trigger a corresponding duty to assume special responsibility for his protection."); ***Higgs v. Latham***, 946 F.2d 895 (6th Cir. 1991) (text in WESTLAW) (If district court was correct in concluding that plaintiff was a voluntary patient at state hospital, then she had no constitutionally based right of action against any defendants under § 1983); ***Fialkowski v. Greenwich Home for Children, Inc.***, 921 F.2d 459, 465 (3d Cir. 1990) (state acquires an affirmative duty under the Fourteenth Amendment to provide safe conditions only where mentally retarded person is taken into custody without his consent); ***Milburn v. Anne Arundel County Dept. of Social Services***, 871 F.2d 474, 476-78 (4th Cir. 1989), *cert. denied*, 493 U.S. 850 (1989) (where child was voluntarily placed by parents in a foster home, court found ***DeShaney*** directly controlling; state had no constitutional duty to protect child against private violence); ***Estate of Emmons v. Peet***, 950 F. Supp. 15, 18, 19 (D.Me. 1996) ("For Emmons to have had the substantive due process right to receive adequate medical care ... he must have been an involuntary patient at AMHI who would have been barred from leaving AMHI upon request. . . . The Court is aware of the fact that there may be some circumstances when a patient is labeled voluntary for administrative purposes but is in fact involuntary by virtue of his inability to leave the hospital upon request. Plaintiffs, however, have not raised sufficient facts from which a reasonable factfinder could determine that Emmons was not free to leave AMHI upon request."); ***Bushey v. Derboven***, 946 F. Supp. 96, 99 (D.Me. 1996) ("The sole fact that Dobson was admitted ostensibly as a voluntary patient on the admission form is not determinative. The voluntary or involuntary status of the patient must be determined by the underlying facts. The admission form, in and of itself, is not determinative. Consequently, Dobson may have had the substantive due process right to receive adequate medical care under *Youngberg* and *DeShaney*."); ***K.L. v. Edgar***, 941 F. Supp. 706, 716 (N.D. Ill. 1996) ("When the state discharges patients, it gives up its custody of them. At that point, the state's obligations under *Youngberg* to provide plaintiffs with safe conditions of confinement and freedom from unnecessary bodily restraints end. Moreover, simply because the state once provided plaintiffs with shelter and care does not bind it always to provide them with shelter and care."); ***Duval v. Cabinet for Human Resources***, 920 F. Supp. 111, 114

(E.D. Ky. 1996) ("In contrast to the constitutional protection afforded to individuals who are involuntarily committed to a state mental health facility, patients who have voluntarily placed themselves in such a facility are not afforded the substantive limits on state action set by the Eighth Amendment and the Due Process Clause."); ***Martin v. Voinovich***, 840 F. Supp. 1175, 1207 (S.D. Ohio 1993) (In a class action brought on behalf of people in Ohio with mental retardation or other developmental disabilities, the court concluded "that only those members of the plaintiffs' class who are involuntarily institutionalized may assert a *Youngberg* claim."); ***Rogers v. City of Port Huron***, 833 F. Supp. 1212, 1217 (E.D. Mich. 1993) ("[I]f a person's attendance at an event or area is voluntary, ... , and that person was not physically placed there by the state, the person cannot be considered to be in 'functional custody.'"); ***Jordan v. State of Texas***, 738 F. Supp. 258, 259 (M.D. Tenn. 1990) (mentally retarded child, *voluntarily* committed to state institution, had no substantive due process right to safe conditions).

See also ***Kennedy v. Schafer***, 71 F.3d 292, 294 (8th Cir. 1995) ("[W]e agree with the District Court that defendants are entitled to the defense of qualified immunity if Kathleen is properly classified as a voluntary patient. We need not and do not decide whether *Parwatikar's* holding in favor of voluntary patients' due-process rights remains good law. We do decide that an action for damages brought by a voluntary patient is subject to a qualified-immunity defense.").

But see ***Smith v. District of Columbia***, 413 F.3d 86, 94-97 (D.C. Cir. 2005) ("For starters, the District's legal custody over Tron is a good indicator that it had a duty to look after him. Because the District, rather than Tron's family, had primary legal control over him, the District had legal responsibility for his daily care. . . The District downplays the significance of this point, but our case law recognizes the relevance of formal indicia in assessing whether custody attaches for *DeShaney* purposes. . . . Just as important, the District's control over Tron restrained his liberty against his will. An adjudicated delinquent placed at ESA by a restrictive court order, Tron had to participate in the program. To be sure, Tron had more freedom than a prisoner--subject to ESA rules, he could come and go, and take ESA-approved weekend home visits. ESA's failure to crack down on Tron's curfew violations also left him with a longer leash than he was formally entitled to under the program's rules. But such flexibility hardly amounts to freedom from state restraints. Tron had to live at Queenstown Apartments. He had no choice. He risked punishment, including the possibility of returning to Oak Hill, when he failed to obey ESA restrictions on how and where he spent his time. . . . [W]here the government

assumes full responsibility for a child by stripping control from the family and placing the child in a government-controlled setting, the government has a duty not to treat the child with deliberate indifference. . . . [W]e see no reason to treat Tron differently because he was a juvenile delinquent rather than a foster child. . . . Unhappy with the foster-child analogy, the District urges us to look instead to decisions holding that public schoolchildren, despite compulsory education laws, are not in state custody for *DeShaney* purposes. . . . At least on the surface, we see some tension between the foster care and public school cases. Both involve state constriction of a child's liberty--the child must live with the foster parents and the child must receive schooling-- yet only the former triggers *DeShaney* custody. Courts have typically distinguished these cases by treating the custody analysis as an all-or-nothing inquiry: the government has either assumed primary responsibility for controlling and caring for a child (and thus, as in the foster care context, the child is always in government custody) or it has assumed only limited responsibilities for parts of the day (and thus, as in the school cases, the child is never in government custody). . . . But we need not explore the ins and outs of this issue. . . . The District served as Tron's legal custodian and primary caregiver. It placed him in a program that constrained his liberty by limiting, among other things, where he lived and what he could do. Indeed, Tron was murdered while subject to these constraints-- at Queenstown Apartments, at night, and during curfew. For *DeShaney* purposes, then, Tron remained in District custody, and if the District was indeed deliberately indifferent to his welfare in a way that led to his murder, then the District committed a constitutional violation--the issue to which we now turn."); ***Camp v. Gregory***, 67 F.3d 1286, 1296 (7th Cir. 1995) ("We are unwilling to decree that simply because Camp, as opposed to the state, initiated the transfer of guardianship, under no set of facts could a state official be liable for a subsequent deprivation of due process."); ***Walton v. Alexander***, 44 F.3d 1297, 1308-09 (5th Cir. 1995) (Parker, Robert. M., J., joined by Politz, C.J., and Stewart, J., concurring specially) ("The majority's holding that custody must be 'involuntary' and 'against [a person's] will' is so restrictive that it precludes any type of custody short of incarceration or institutionalization giving rise to the duty of protection. In effect, the majority has confined the duty of protection to the circumstances found in *Estelle* and *Youngberg*. Such a narrow application of this duty clearly was not contemplated in *DeShaney*. . . .The question is not so much how the individual got into state custody, but to what extent the State exercises dominion and control over that individual."); ***Johnson v. Grinberg***, No. Civ.A. 98CV10662-RGS, 1999 WL 1072645, at *5 (D. Mass. July 2, 1999) (not reported) ("Whether or not Johnson was a custodial patient at the time of the alleged assault is a matter of some significance. . . . Johnson argues that under *DeShaney* and

Zinermon . . . the DMH was constitutionally obligated to tend to her medical needs. . . . The problem with the argument is plaintiff's misconception (shared by defendants) that the question of custody is in some way definitively answered by an inquiry into Johnson's competence. The one is not necessarily a function of the other. A person may be incompetent and not necessarily in custody, or in custody and be perfectly competent. Here plaintiff may well have been in custody, or its functional equivalent, whatever form she signed. But this is not an issue that can be decided by her competency alone (although it is certainly relevant)."); ***Buffington v. Baltimore County, Maryland***, 913 F.2d 113, 119 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1106 (1991) (refusing to find that affirmative duty owed to someone in custody turns on either the reason for taking custody or on whether a state or private actor brought the need for custody to the state's attention); ***McMahon v. Tompkins County***, No. 95-CV-1134(RSP/GJD), 1998 WL 187421, *3 (N.D.N.Y. Apr. 14, 1998) (unreported) ("Unlike the situation in *DeShaney*, where the abused child was always in the care of the biological parent, the Department removed the Payne girls from their biological parents' home and controlled their access to their biological parents. While in foster care, the Payne girls had a constitutional right to protection from harm. . . Defendants attempt to avoid this outcome by arguing that the Payne girls were not involuntarily placed in foster care because their court-appointed attorney requested their placement in foster care. . . I reject this argument. To reach the result advocated by defendants would create an alarming precedent in which children involuntarily placed in foster care would be entitled to the full panoply of due process rights, while those voluntarily placed would not. This result is neither acceptable nor constitutionally sound."); ***Brown, by Brown v. Kennedy Kreiger Institute***, 997 F. Supp. 661, 668 (D.Md. 1998) ("It is specious to suggest that Jake, who is severely mentally retarded, could walk out of a KKI home on his own at any time. Moreover, even if Jake could be considered to be technically a 'voluntary' resident of KKI's homes, the jury could reasonably find from the evidence that because of his incompetence, he was a 'de facto involuntary' resident."); ***Miracle v. Spooner***, 978 F. Supp. 1161, 1169-70 (N.D. Ga. 1997) ("Without the protection of the state, a child who is in foster care is at the mercy of the foster parents whether or not its natural parents consented to the placement of the child into foster care. From the child's point of view, foster care will always constitute involuntary custody because the state does not give the child an alternative to the foster home the state has chosen. Accordingly, the Court finds that the state's duty of care recognized in *Taylor* applies in this case notwithstanding the parents's consent to placement of the children into foster care."); ***Ringuette v. City of Fall River***, 888 F. Supp. 258, 268 (D. Mass. 1995) ("This court concludes that the state has a duty under the constitution to protect

persons who are taken into protective custody because of incapacitation and who lack the capacity to give knowing, intelligent and voluntary consent to protective custody."); ***Connecticut Traumatic Brain Injury Ass'n v. Hogan***, 161 F.R.D. 8, 10 (D. Conn. 1995) ("The issue is not whether individuals placed in state institutions are within the custody of the State, but once there, with the state in complete control of the environment, whether "voluntarily" placed patients are constitutionally entitled to a level of basic rights. . . . *Deshaney* does not address a situation, as here, in which the State has agreed to provide care for completely dependent individuals. Once the State has accepted this responsibility, and the individual is physically in state custody, it has also agreed to provide an environment that is consistent with and does not transgress the individuals' basic rights. . . . The mechanism which brought the individuals to the various facilities, whether considered "voluntary" or "involuntary," is not controlling; 'in either case they are entitled to safe conditions and freedom from undue restraint.' [cite omitted]"); ***Clark v. Donahue***, 885 F. Supp. 1159, 1162 (S.D. Ind. 1995) (recognizing that several courts have held that "institutionalization which originated voluntarily may at some point involve restraint of personal liberty sufficient to trigger the protections of the due process clause."); ***McNamara v. Dukakis***, 1990 WL 235439 (D. Mass. Dec. 27, 1990) (not reported) (court refused to treat outpatient recipients of mental health care as in "constructive custody," viewed those in community residences as comparable to state-placed foster children, and accepted expert testimony as to the status of "unconditional voluntary patients," suggesting "little practical difference between voluntarily and involuntarily committed patients as to their ability to act on their own behalf.").

See also ***Estate of Cassara v. State of Illinois***, 853 F. Supp. 273, 279 (N.D. Ill. 1994) ("[T]his court holds that voluntary institutionalization may involve a restraint of personal liberty sufficient to trigger the due process clause. . . . The right to leave . . . does not guaranty the power to leave."); ***United States v. Commonwealth of Pennsylvania***, 832 F. Supp. 122, 125 (E.D. Pa. 1993) ("[T]his court rejects defendants' argument that voluntarily confined patients are not entitled to the constitutional right to treatment and care by virtue of the 'voluntariness' of their initial confinement. Where there is an instance of state-propounded curtailment of liberty, due process standards must be upheld. In this case, the constitutional right to treatment or habilitation extends to both involuntarily and voluntarily confined residents alike."); ***Halderman v. Pennhurst State School and Hospital***, 834 F. Supp. 757, 761-62 (E.D. Pa. 1993) (*DeShaney* supported finding that residents of Pennhurst were involuntary where "the Commonwealth defendants had affirmatively

acted in accepting the residents ... and in depriving them of their constitutional right to minimally adequate habilitation....").

At least one circuit has suggested that the concept of "in custody" for *DeShaney* purposes of triggering an affirmative duty to protect entails more than a "simple criminal arrest." *See* ***Estate of Stevens v. City of Green Bay***, 105 F.3d 1169, 1175 (7th Cir. 1997) ("In this case, the district court, magistrate judge, and the estate assumed, without citation to authority, that Fourth Amendment criminal case law correctly elucidates the phrase 'in custody.' Given the authority expressly relied upon by the Supreme Court when it recognized this constitutional duty, we are not at all sure this is correct. The Supreme Court's express rationale in *DeShaney* for recognizing a constitutional duty does not match the circumstances of a simple criminal arrest . . . . This rationale on its face requires more than a person riding in the back seat of an unlocked police car for a few minutes."). *See also* ***Schoenfield v. City of Toledo,*** 223 F.Supp.2d 925, 930 (N.D. Ohio 2002) ("In the instant action, decedent did not come to harm through Defendants' actions. This is not an instance in which the Defendants selected an individual from the public at large and placed him in a position of danger. Defendants did not place decedent at the K Mart or at the hotel room. Defendants did not release decedent into greater harm than that in which they found him, nor was decedent in detention, characterized as 'custody' or otherwise, when he committed suicide. The harm to decedent, while perhaps identifiable by Defendants, was not created by Defendants. Nor was decedent's liberty constrained by Defendants so as to eviscerate his own freedom of choice or ability to care for himself. Ultimately, Plaintiff's attempt to characterize the instant investigatory traffic stop as a type of 'custody' giving rise to the alleged constitutional rights and/or obligations of medical care, hospitalization, incarceration, and/or continued detention is unpersuasive in light of *DeShaney* and the Supreme Court's repeated reluctance to further 'expand the concept of substantive due process.'").

But see ***Jacobs v. Ramirez***, 400 F.3d 105, 107 (2d Cir. 2005) ("Having agreed to parole Jacobs to the home to which he sought to be paroled, the state assumed the very limited duty of ensuring that it did not require him to remain in a place that turned out, at least according to his allegations, to be uninhabitable. Because we think that Jacobs has stated a claim under Section 1983 with respect to the state's decision to parole him to allegedly unsuitable housing and its alleged refusal to allow him to move, we reverse the district court's dismissal of that portion of his complaint and remand this case for further proceedings with respect thereto."); ***Davis v. Brady***, 143

F.3d 1021, 1027 (6th Cir. 1998) ("When a plaintiff alleges that state actors violated substantive due process by placing him at risk of harm from a third party, he must demonstrate, first, that the defendants owed him a duty not to subject him to danger and, second, that the defendants violated this duty by exhibiting deliberate indifference to the plaintiff's well-being. In this case, the taking of Davis into custody triggered the defendant officers' duty to protect Davis. There is sufficient evidence in the record to demonstrate that the defendant officers violated this duty when they exhibited deliberate indifference to Davis's well-being by abandoning him, in his inebriated state, on an unfamiliar, dark, and busy highway."); ***Stemler v. City of Florence***, 126 F.3d 856, 868 (6th Cir. 1997) ("In the present case, Black was rendered unable to protect herself by virtue of both the threat of arrest and her physical placement in the truck by the officers. Unlike *Foy*, Black never had the opportunity to make a voluntary choice to continue driving with Kritis beyond the span of time that the police had in effect ordered her to do so; her fatal accident occurred about five minutes after the truck left the police stop. Furthermore, unlike *Walton*, Black was in the custody of the defendant officers in the sense that they had affirmatively acted to deprive her of her liberty, rather than merely negligently refused to act to protect her. . . In sum, neither *Foy* nor *Walton* did anything to alter the clear and simple rule that state actors owe a duty of care to those individuals of whom they deprive their liberty, and a reasonable jury could conclude that the officers had deprived Black of her liberty by placing her in the truck or by threatening her with an arrest that would have been unwarranted under Kentucky law.").

b. workplace cases

The Supreme Court has held that "the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace . . . ." ***Collins v. City of Harker Heights, Tex.***, 112 S. Ct. 1061, 1071 (1992).

See also ***Hunt v. Sycamore Community School Dist. Bd. of Educ***., 542 F.3d 529, 537, 538, 543, 544 (6th Cir. 2008) ("While it has not proved impossible for government employees to establish arbitrariness of their employer, such claims have, for the most part, not succeeded in this Circuit. In a state-created danger case in which public employees prevailed against their employer, we determined that police had a due process claim against the City for endangering them by releasing information that would make it easier for third persons to harm them. [citing *Kallstrom*] In contrast, in other cases in which the harm to a government employee

was inflicted by third persons, we have held that there was no state-created danger. . . . We believe the more exact standard, announced in *Lewellen*, is that *in order to succeed on a § 1983 claim in a non-custodial setting, a plaintiff must prove either intentional injury or 'arbitrary conduct intentionally designed to punish someone*--e.g., giving a worker a particularly dangerous assignment in retaliation for a political speech ... or because of his or her gender.' Or, as stated in *Stemler*, . . .a plaintiff must prove 'conscience shocking' behavior. . . . Our review of *Lewis* and our own substantive due process cases indicates that where the governmental actor does not intentionally harm the victim or invidiously discriminate against him, conduct endangering the victim will not shock the conscience if the victim has voluntarily undertaken public employment involving the kind of risk at issue and the risk results from the governmental actor's attempt to carry out its mandatory duties to the public. This holds true even where the governmental actor is not forced to act in a crisis, but has time to deliberate. In order to comply with the Individuals with Disabilities Education Act, the school district is, of course, obliged to provide a free appropriate public education to children with disabilities, 20 U.S.C. § 1412(a)(1)."); ***Waybright v. Frederick County, MD***, 528 F.3d 199, 207, 208 (4th Cir. 2008) ("Here, plaintiffs argue, the training session should qualify as a state-created danger because a state actor, Coombe, 'used his authority to create an opportunity for danger that otherwise would not have existed,' and thereby knowingly put Waybright in harm's way. . .To apply the state-created danger theory in this context, however, would run afoul of the Supreme Court's unanimous decision in *Collins*, . . . which held that due process does not impose a duty on municipalities to provide their employees with a safe workplace or warn them against risks of harm (though state tort law may). The case is right on point, for plaintiffs' state-created danger claim, in essence, is that Coombe created an unsafe workplace that caused a prospective employee harm. And while we recognize that *Collins* involved a municipal rather than an individual defendant, the case speaks decisively to the situation here. . . . by finding a state-created danger here, we might well inject federal authority into public school playground incidents, football (or even ballet) practice sessions, and class field trips, not to mention training sessions for government jobs that require some degree of physical fitness."); ***Lombardi v. Whitman***, 485 F.3d 73, 79, 80, 82, 83 (2d Cir. 2007) ("[T]o the extent the plaintiffs here allege that the defendants had an affirmative duty to prevent them from suffering exposure to environmental contaminants, their claims must fail. They cannot rely on the EPA's failure to instruct workers to wear particular equipment, its failure to explain the exact limitations of its knowledge of the health effects of the airborne substances that were present, or its failure to explain the limitations of its testing technologies. But the complaint goes further; it alleges that defendants' affirmative

assurances that the air in Lower Manhattan was safe to breathe created a false sense of security that induced site workers to forgo protective measures, thereby creating a danger where otherwise one would not have existed.. . . . The plaintiffs allege no 'special relationship' between them and federal officials. . . They plead that their reliance on the government's misrepresentations induced them to forgo available safeguards, and thus characterize the harm as a state created danger. . . . . The plaintiffs do not allege that the defendants acted with an evil intent to harm; but they argue that the defendants' deliberate indifference shocks the conscience because the defendants made their decisions in an 'unhurried' fashion with 'hours, days, weeks and even months to contemplate, deliberate, discuss and decide what to do and say about the health hazards posed to thousands of people who were coming onto and working at Ground Zero.' . . . . The decisions alleged were made by the defendants over a period of time rather than in the rush of a car chase; but the decisions cannot on that account be fairly characterized as 'unhurried' or leisured. . . . Accepting as we must the allegation that the defendants made the wrong decision by disclosing information they knew to be inaccurate, and that this had tragic consequences for the plaintiffs, we conclude that a poor choice made by an executive official between or among the harms risked by the available options is not conscience-shocking merely because for some persons it resulted in grave consequences that a correct decision could have avoided. . . . When great harm is likely to befall someone no matter what a government official does, the allocation of risk may be a burden on the conscience of the one who must make such decisions, but does not shock the contemporary conscience. . . . These principles apply notwithstanding the great service rendered by those who repaired New York, the heroism of those who entered the site when it was unstable and on fire, and the serious health consequences that are plausibly alleged in the complaint. . . . Because the conduct at issue here does not shock the conscience, there was no constitutional violation. We therefore need not decide whether the conduct alleged violated law that was then clearly established, or whether any special factors counsel hesitation in the recognition of a *Bivens* action against the defendants."); ***Witkowski v. Milwaukee County***, 480 F.3d 511, 513, 514 (7th Cir. 2007) ("[S]omeone who chooses to enter a snake pit or a lion's den for compensation cannot complain. Powerful evidence shows that higher wages compensate people whose jobs are risky. . . That evidence is not what undercuts Witkowski's claim, however; what is dispositive against him is the fact that he is a volunteer rather than a conscript. The state did not force him into a position of danger.This is not to say that public employees are beyond the Constitution's protection. Suppose Witkowski had alleged that Milwaukee County exposed him to extra risks because he had campaigned against the County's political leaders or

because of his race. Such allegations would state a legally sufficient claim under the first amendment or the equal protection clause of the fourteenth. . . That is not Witkowski's theory, however. He invokes only the due process cause, the domain of *Collins*, *DeShaney*, and *Walker*. Allowing Ball into court without the stunbelt imperiled everyone there: judge, jurors, and spectators were at more risk than Witkowski, who could have protected himself (and everyone else) had he kept control of his weapon. All Witkowski meant by alleging that Gunn and Halstead acted intentionally or recklessly is that they knew about Ball's willingness and desire to wreak havoc, not that they had some ulterior motive for wanting Witkowski dead or wounded. Disregarding a known risk to a public employee does not violate the Constitution whether or not the risk comes to pass."); ***Kaucher v. County of Bucks***, 455 F.3d 418, 435, 436 (3d Cir. 2006) ("The Kauchers have not alleged an affirmative, culpable act on the part of defendants sufficient to implicate the state created danger doctrine. Nor have they alleged conscience-shocking conduct on the part of defendants that could transform a workplace safety claim into a substantive due process claim. At base, the Kauchers contend defendants failed to provide a working environment free from risk of infection--a claim precluded by *Collins*. . . .We conclude the Kauchers' claims relate to a failure to remedy conditions at the jail. The Kauchers allege defendants failed to prevent MRSA from spreading through the jail, took insufficient action to protect the jail's corrections officers from contracting an infection, and failed to warn and educate corrections officers in infection prevention. Despite their attempts to characterize defendants' actions as affirmatively creating dangerous conditions, they allege a failure to act to prevent dangerous conditions. Under *Collins*, this claim must fail."); ***Estate of Phillips v. District of Columbia***,455 F.3d 397, 407, 408 (D.C. Cir. 2006) ("As in *Washington*, Edwards's deliberate indifference may have increased the Firefighters' exposure to risk, but the risk itself--injury or death suffered in a fire--is inherent in their profession. As both *Washington* and *FOP* make clear, the District is not constitutionally obliged by the Due Process Clause to protect public employees from inherent job-related risks. . . . The Firefighters point to a recent case of ours, *Smith v. District of Columbia*, 413 F.3d 86 (D.C.Cir.2005), as a holding counter to our bright-line application of the custody requirement. . . . Emphasizing the *Smith* victim's relative freedom of movement yet restricted place of residence (similar to the restraints the D.C.Code provisions allegedly placed on them), the Firefighters claim that *Smith* supports their contention that a heightened obligation can exist absent custody. But in *Smith* we found that the District had a heightened obligation because its *in loco parentis* status significantly restrained the victim's liberty. . . . The restrictions on his liberty--imposed on him by the District--are plainly distinguishable from those

restrictions the D.C.Code imposes on the Firefighters' liberty--restrictions voluntarily assumed by the Firefighters as conditions of employment by the Department."); ***Moore v. Guthrie***, 438 F.3d 1036, 1042, 1043 (10th Cir. 2006) (10th Cir. 2006) ("We have identified the 'classic' danger creation case to be *Wood v. Ostrander*, 879 F.2d 583 (9th Cir.1989), where police officers impounded the plaintiff's car and abandoned her in the middle of the night in a high crime area where she was raped. . . . This is a narrow exception, . . . which applies only when a state actor 'affirmatively acts to create, or increases a plaintiff's vulnerability to, danger from private violence,' *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir.2001). It does not apply when the injury occurs due to the action of another state actor. In the instant case, since Plaintiff was injured by a Simunition bullet fired by a fellow police officer and not a private third party, the danger creation doctrine is inapplicable. Plaintiff also contends that he has sufficiently pleaded a violation of his right to bodily integrity under the 'special relationship' doctrine. The special relationship doctrine is another exception to the general principle that government actors are not responsible for private acts of violence. . . As just discussed, however, because this case does not involve a private act of violence by a third party, this theory is also inapplicable to the facts alleged by Plaintiff. More importantly, we have specifically held that the special relationship doctrine is not triggered in an employment relationship, which is presumed consensual. . . Last, it should be noted that, even if either the danger creation or special relationship theory were applicable, it would not relieve Plaintiff of his duty to allege actions that shock the conscience. As required under the second prong to defeat a qualified immunity defense, Plaintiff argues that his violated right was clearly established at the time of his injury. . . . Although Plaintiff does not need to find a case with an identical factual situation, he still must show legal authority which makes it 'apparent' that 'in the light of pre-existing law' a reasonable official, in Chief Guthrie's position, would have known that having police officers wear riot helmets rather than Simunition face masks would violate their substantive due process right of bodily integrity. . . First, as discussed earlier, the Supreme Court has only recognized a right to bodily integrity under the Fourteenth Amendment in very limited circumstances, not including working in a safe environment. Second, courts have declined to find a violation of substantive due process in circumstances similar to, or more shocking than, that alleged by Plaintiff. Therefore, we cannot say that it was clearly established that Chief Guthrie and the City of Evans violated Plaintiff's constitutional right to bodily integrity by requiring him to wear his riot helmet during training."); ***Young v. City of Providence***, 404 F.3d 4, 27 (1st Cir. 2005) ("The district court is correct in saying that the issue is not whether Cornel's death was caused by his own lack of proper training in identifying

himself or otherwise in conducting himself while off-duty. . . *Collins* establishes that a city worker has no constitutional right at all to adequate training; thus, there can be no independent claim of constitutional violation separate from Solitro's use of excessive force."); ***Fraternal Order of Police Department of Corrections Labor Committee v. Williams***, 375 F.3d 1141, 1144 & n.3, 1145 (D.C. Cir. 2004)(relying on *Collins* to reject Union's claim that its members have "a substantive due process right that would compel the District ... to hire additional employees to staff the [D.C.] Jail in order to address what, they assert, is an unreasonably dangerous workplace."); ***McKinney v. Irving Independent School District,*** 309 F.3d 308, 314 (5th Cir. 2002) ("As the district court recognized, there is no doubt that the McKinneys described a dangerous working environment in their pleadings-that of uncontrolled and disruptive special-education students on a moving school bus in heavy traffic. They do not, however, allege any facts showing that defendants took any affirmative action to increase the risk over the dangers inherent in this working environment. . . . McKinney faced nothing more than the ordinary risks of driving the school bus that transported the special-education students to and from Gilbert. The McKinneys' real complaint is that defendants did not take an affirmative step, namely, provide a bus monitor to supervise the students or other safeguards for McKinney's protection while driving the bus. We hold that the due process clause did not require that defendants place a monitor on the school bus."); ***Sperle v. Michigan Dep't of Corrections,*** 297 F.3d 483, 492-93 (6th Cir. 2002) ("The key factor in custodial environments and other situations where deliberate indifference renders state actors liable for substantive due process violations is the ability of the officials to consider their actions in an unhurried, deliberative manner. . . . Tammy Sperle worked in a 'custodial setting,' an environment where the defendants had the opportunity to design the security precautions at the HVMF and to respond to any general dangers that existed. We therefore conclude that the 'deliberate-indifference' standard is an appropriate one for evaluating her § 1983 claim. . . . Even if the individual defendants could have made the working conditions safer for Tammy Sperle by providing PPDs to school building employees, adding extra security guards, or insuring greater supervision of Herndon, they did not act in an arbitrary manner that 'shocks the conscience' or that indicates any intent to injure her. . . . Our conclusion does not change when we apply the deliberate-indifference standard. 'Deliberate indifference has been equated with subjective recklessness, and requires the § 1983 plaintiff to show that the state "official knows of and disregards an excessive risk to [the victim's] health or safety."'"); ***White v. Lemacks***, 183 F.3d 1253, 1257 (11th Cir. 1999) ("*Collins* makes it clear that the fact a government employee would risk losing her job if she did not submit to unsafe job conditions does not convert a voluntary

employment relationship into a custodial relationship, and therefore does not entitle the employee to constitutional protection from workplace hazards, one of which can be harm caused by third parties. . . . Thus, *Collins* directly conflicts with and overrules the part of *Cornelius* [*v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989)] holding that a government employment relationship, in and of itself, is a 'special relationship' giving rise to a constitutional duty to protect individuals from harm by third parties. As a result, the part of *Cornelius* adopting, or perpetuating, a 'special relationship' doctrine that guarantees government employees constitutional protection from unreasonable risks of harm in the workplace is no longer good law."); ***Wallace v. Adkins***, 115 F.3d 427, 429 (7th Cir. 1997) ("Unlike a prisoner, a person involuntarily committed to a mental institution, or a child placed by state authorities in a foster home, Wallace was free to walk out the door any time he wanted. This may seem to pose a harsh choice for prison guards, but the consequences of the opposite rule for prison administration generally would be even more unacceptable. . . . We therefore hold that prison guards ordered to stay at their posts are not in the kind of custodial setting required to create a special relationship for 14th Amendment substantive due process purposes."); ***Liebson v. New Mexico Corrections Dep't***, 73 F.3d 274, 276 (10th Cir. 1996) (librarian assigned to provide library services to inmates housed in maximum security unit of the New Mexico State Penitentiary was not in state's custody or held against her will; employment relationship was "completely voluntary."); ***Skinner v. City of Miami***, 62 F.3d 344, 348 n.2 (11th Cir. 1995) (in case involving hazing incident by firefighters, court determined that the "record does not support the dissent's implication that the City committed any deliberate acts to injure [plaintiff]. At most, the evidence suggests that certain fire department officials knew that hazing incidents had occurred at some points in the past. This, however, falls short of demonstrating that the City violated a substantive constitutional right."); ***Lewellen v. Metropolitan Government of Nashville***, 34 F.3d 345 (6th Cir. 1994) (workman accidentally injured on school construction project has no ubstantive due process claim); ***Figueroa v. United States***, 7 F.3d 1405, 1413 (9th Cir. 1993) ("While we acknowledge that a broader understanding of deprivation of liberty may have emerged later . . .in 1987 there was no clearly established constitutional right not to be placed in a position of danger by a government employer absent some sort of governmental restriction on an individual's physical freedom to act to avert potential harm."); ***Walls v. City of Detroit***, 993 F.2d 1548 (6th Cir. 1993) (Table, Text in Westlaw) ("Plaintiff's artful attempt to recast his complaint in terms distinguishable from *City of Harker Heights* is unavailing, because it misunderstands one of the central tenets of the Supreme Court's holding in that case: the Constitution does not guarantee police officers and

other municipal employees a workplace free of unreasonable risks of harm."); ***Searles v. SEPTA***, 990 F.2d 789, 792 (3d Cir. 1993) (rejecting plaintiff's argument "that the Constitution imposes a duty on a municipal transit authority to provide its passengers with minimal levels of safety and security during transportation."); ***Golthy v. Alabama,*** 287 F.Supp.2d 1259, 1265, 1266 (M.D. Ala. 2003) ("The court has been pointed to no, and is not aware of any, cases which stand for the proposition that either equal protection or § 1981 impose a duty in the employment relationship to protect from threats of violence by third parties.. . . The Plaintiff in this case is not asserting. . .that the Individual Defendants violated Freddie Golthy Jr.'s rights because they allowed for the creation of a racially hostile environment which impacted the terms and conditions of his employment. Instead, they are asserting that the Individual Defendants violated Freddie Golthy Jr.'s rights because they did not prevent a racially-based assault. Under *DeShaney* and *White,* such conduct by the Individual Defendants does not violate the constitution."); ***Pahler v. City of Wilkes-Barre,*** 207 F. Supp.2d 341, 349, 351 (M.D. Pa. 2001) ("Regardless of the degree of culpability that should be applied, the defendants contend that the 'state created danger' theory does not apply to law enforcement officers who are injured while performing duties associated with their employment. . . The court agrees. . . . Drawing on the legal principles set forth in *Collins, Rutherford*, and *Hartman*, it is concluded that the 'state created danger' theory, arising out of the substantive due process clause of the Fourteenth Amendment, is inapplicable to law enforcement personnel who are injured during the course of their employment."), *aff'd ,* 31 Fed.Appx. 69, 71 (3d Cir. Mar. 12, 2002) (on grounds that even if state created danger doctrine applied to police officers injured on job, conduct of defendants could not be shown to be "conscience-shocking"); ***Cerka v. Salt Lake County***, 988 F. Supp. 1420, 1424 (D. Utah 1997) ("In the case at bar. . . defendants did not increase plaintiff's vulnerability to the jail's conditions by misrepresenting the risks in the jail. To the contrary, plaintiff and other employees were advised of the Health Department's concerns about the jail's potential sewer and air problems and possible health threats. In addition, unlike *L.W.*, plaintiff is not attempting to recover damages for injuries resulting from actions of a third party. . . . [W]e are not confronted with an intentional government act deliberately calculated to injure plaintiff. The Supreme Court has consistently held that due process is only violated by intentional acts of government officials, not by negligence or carelessness. . . . Based on the principles of *Collins, Lewellen, Daniels,* and *Uhlrig* this Court holds that plaintiff does not have a substantive life, liberty, or property due process claim. There is no constitutionally protected interest in a safe work environment under *Collins* and its progeny."), *aff'd*, 172 F.3d 878 (10th Cir. 1999); ***Rutherford v. City of Newport***

News, 919 F. Supp. 885, 895 (E.D. Va. 1996) (rejecting claim "that police officials owe an affirmative duty, based on the Constitution, to ensure that police officers dispatched on dangerous operations are specially trained, fully prepared, and adequately supported in undertaking such a mission."), *aff'd*, 107 F.3d 867 (Table), (4th Cir. 1997); ***Hartman v. Bachert***, 880 F. Supp. 342, 351-52 (E.D. Pa. 1995) (state has no constitutional obligation to protect deputy sheriff from dangers inherent in occupation).

See also ***Benzman v. Whitman***, 523 F.3d 119, 127, 128 (2nd Cir. 2008) ("We recently ruled that a claim similar to the Plaintiffs' did not allege the denial of a right to substantive due process. *See Lombardi v. Whitman*, 485 F.3d 73 (2d Cir.2007). The claim in *Lombardi* was brought against Whitman by emergency responders to the ground zero site in the immediate aftermath of the terrorist attack and by workers at the site in the weeks thereafter. Like the Plaintiffs here, they claimed that many of the same statements at issue here violated their right to substantive due process by assuring them that it was safe to work at the site where they were subject to the same dangers from contaminated air alleged in the pending case. We rejected the claim, primarily on the ground that, absent an allegation of intent to harm, a viable substantive due process violation could not be asserted against government officials, who, in the aftermath of an unprecedented disaster, were obliged to make operational decisions in a context where they were subject to competing considerations. . . The Plaintiffs here seek to distinguish *Lombardi* on the ground that the considerations favoring prompt appearance at ground zero by first responders and other workers in order to minimize loss of life and injury and to clear debris find no analogue in the decision of Whitman to assure area residents that it was safe to return. We agree that the considerations weighing upon Government officials in the two cases differ. While it was obviously important to have the *Lombardi* plaintiffs at ground zero promptly even if health risks would be encountered, the balance of competing governmental interests faced in reassuring people that it was safe to return to their homes and offices was materially different from that faced in *Lombardi*. A flaw in the Plaintiffs' claim, however, is that, from the face of their complaint, it is apparent that Whitman did face a choice between competing considerations, although not the stark choice between telling a deliberate falsehood about health risks and issuing an accurate warning about them. As the Complaint alleges, quoting a report from the EPA's Office of Inspector General, the White House Council on Environmental Quality ("CEQ") ' "influenced, through the collaboration process, the information that EPA communicated to the public through its early press releases when it convinced EPA to add reassuring statements and delete cautionary ones."'. . The realistic choice for

Whitman was either to accept the White House guidance and reassure the public or disregard the CEQ's views in communicating with the public. A choice of that sort implicates precisely the competing governmental considerations that *Lombardi* recognized would preclude a valid claim of denial of substantive due process in the absence of an allegation that the Government official acted with intent to harm. Moreover, although the reasons to encourage the return of workers to the site promptly were undoubtedly weightier than any concern to encourage the return of residents to homes and offices, Whitman was subject to an array of competing considerations of the sort identified in *Lombardi*. . . Whether or not Whitman's resolution of such competing considerations was wise, indeed, even if her agency's overall performance was as deficient as the Plaintiffs allege, she has not engaged in conduct that 'shocks the conscience' in the sense necessary to create constitutional liability for damages to thousands of people under the substantive component of the Due Process Clause.").

But see ***Hawkins v. Holloway,*** 316 F.3d 777, 787 (8th Cir. 2003) ("The Supreme Court recognized in *Collins v. City of Harker Heights* that substantive due process does not protect municipal employees from the unreasonable risk of harm in the workplace. . . But the sheriff's alleged conduct cannot be characterized as an unreasonable risk incident to one's service as an employee in a sheriff's department. Instead, the facts demonstrate that the sheriff deliberately abused his power by threatening deadly force as a means of oppressing those employed in his department, thus elevating his conduct to the arbitrary and conscience shocking behavior prohibited by substantive due process."); ***Sherwood v. Oklahoma County,*** No. 01-6194, 2002 WL 1472197, at *6 (10th Cir. July 10, 2002) (not published) ("Concern about Plaintiff's and the inmates' welfare was not only possible, but one would think obligatory, given Defendants' position of authority over Plaintiff and the undisputed information given to Defendants about the serious safety and health hazards posed by the planned painting. Hence, the facts and circumstances presented to the Court evidence the possibility that a reasonable jury could find Defendants' behavior was egregious, outrageous and recklessly indifferent to the serious consequences imposed on Plaintiff. . . . With time to make an unhurried judgment and with accurate information outlining the applicable regulations and attendant risks and dangers involved with the proposed painting operation, Defendants placed their desire to paint old vehicles . . . over the health, safety, and welfare of Plaintiff. Such arbitrary action pursued without any reasonable justification makes the Defendants' deliberate indifference to the rights, health and welfare of the Plaintiff actionable."); ***Eddy v. Virgin Islands Water and Power Authority,*** 256 F.3d 204, 212, 213 (3rd Cir. 2001)

("Unlike the defendants, we do not read this passage or anything else in *Collins* to mean that the plaintiff in that case would not have stated a substantive due process claim if she had alleged conduct on the part of the city that satisfied the demanding shocks the conscience test. Rather, we understand *Collins* to mean that the allegations in that case did not rise to the conscience-shocking level and that the Due Process Clause does not reach a public employer's ordinary breach of its duty of care relative to its employees."); ***Jensen v. City of Oxnard***, 145 F.3d 1078, 1083-84 (9th Cir. 1998) ("Employing *Collins*, Oxnard argues that Officer Jensen could not have had any of his rights violated because he was injured while performing his duties as a police officer. We reject this argument and Oxnard's attempt to turn this into a safe workplace case. Although this case is similar to the safe workplace cases in that they both concern individuals who 'voluntarily accepted ... an offer of employment,'... this case is different in one significant way--the nature of the injury alleged.... While the safe workplace cases concern the failure of the state adequately to train, prepare, or protect government employees from non-state actors, this case involves the allegedly intentional or reckless acts of a government employee directed against another government employee."); ***Carty v. Texas Dep't of Public Safety***, No. 2-06-CV-138 (TJW), 2006 WL 3332589, at *2, *3 (E.D. Tex. Oct. 6, 2006) ("The allegations in the case at bar differ from those in *Harker Heights*. The plaintiffs are not making general allegations that DPS failed to provide a safe workplace, but that DPS adopted and implemented policies, practices and procedures that violated Jimmy Carty's substantive due process rights to bodily integrity and life. Specifically, the complaint alleges that this policy of conducting the counter measure drill was perpetuated by DPS and its employees after they knew of the high risks involved with conducting the drill. . . Further, the drill was a condition of continued employment. . . Also, the Supreme Court found there was nothing 'conscience shocking' about the training procedures implemented by the city in *Harker Heights*. This cannot necessarily be said for the present case. When the actions that caused the injury fall within a middle range between negligence and intentional conduct, the point of conscience shocking will depend on the circumstances of the case and whether the defendant had the opportunity to deliberate before engaging in the challenged conduct. . . In this case, there are allegations in the complaint that Defendants were very aware of the dangers involved with the counter measures drill as evidenced by the 121 traumatic brain injuries suffered by DPS recruits since 1971 as a result of the drill. . . In addition, the plaintiffs allege that no other law enforcement agency in the country uses this particular drill as part of their training. . . The allegations, taken as true at this early motion to dismiss stage, are sufficient to allege conduct which shocks the conscience."); ***Briscoe v. Potter,*** 355 F.Supp.2d 30, 44-47 (D.D.C. 2004) ("[T]aking

the allegations in Plaintiffs' complaint as true, Defendants did not simply 'stand by and do nothing' once it became known that the Brentwood facility was contaminated with anthrax. Defendants are alleged to have engaged in a series of actions which intentionally misled Plaintiffs into believing the facility was safe and prevented them from acting to preserve their own safety. Giving Plaintiffs the benefit of crediting the complaint allegations and all reasonable inferences therefrom, they have sufficiently alleged that Defendants took the requisite affirmative actions to trigger liability under the State Endangerment Theory to withstand dismissal on the pleadings . . .If the facts are as alleged, the conduct of USPS managers would appear commendable for their dedication to getting the mail out but deplorable for not recognizing the potential human risk involved. Just as in *Butera* and *Phillips,* these alleged actions demonstrated a gross disregard for a dangerous situation in which 'actual deliberation [was] practical.' . . It is alleged that Defendants 'had been put on notice of the serious consequences that could result' from Plaintiffs' exposure to anthrax yet, despite such knowledge, Defendants engaged in a campaign of misinformation designed to keep the employees at work. . . . The Court therefore finds that Plaintiffs have sufficiently alleged that Defendants' conduct amounted to deliberate indifference, which violated their substantive due-process rights under the State Endangerment theory. . . . Defendants' reliance on cases such as *Collins* and *Washington* to support their proposition that 'the "state endangerment" theory of *Butera* cannot be applied to the plaintiffs' allegations concerning a federal workplace,' . . . is misguided. . . . Unlike the plaintiffs in *Washington,*. . .Plaintiffs here are not seeking constitutional redress based on Defendants' failure to protect them from a hazard that was 'inherent' in their occupation. While it is true that Defendants did not force Plaintiffs to become postal workers, potential exposure to anthrax is not a danger that one would reasonably anticipate when accepting employment at a post office. . . Although the *Washington* court severely limited the extent to which government employers can be held constitutionally liable for injuries sustained by their employees, the Supreme Court's subsequent decision in *Collins* flatly rejected the notion that a government employee can never assert a substantive due-process claim against the government. . . Thus, the Court finds that the relevant case law does not preclude Plaintiffs' substantive due-process claims under the State-Endangerment theory.").

In ***Uhlrig v. Harder***, 64 F.3d 567 (10th Cir.1995), a therapist at a state mental hospital was killed by a criminally insane patient who, because of budgetary constraints, was housed with the general population. The court held that to state a claim for damages based on a state-created danger in the workplace:

> Plaintiff must demonstrate that (1) Uhlrig was a member of a limited and specifically definable group; (2) Defendants' conduct put Uhlrig and the other members of that group at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking.

64 F.3d at 574. *See also* ***Martinez v. Uphoff,*** 265 F.3d 1130 (10th Cir. 2001) (rejecting state-created danger theory in case where prison guard was killed by escaping inmates); ***Poe v. Wyandotte County,*** No. 99-2273-JWL, 2002 WL 57257, at *8 (D.Kan. Jan. 9, 2002) (not reported) (Reviewing Tenth Circuit cases involving employees in prison context and concluding "*Liebson, Maine* and *Martinez* illustrate that generalized claims pertaining to unsatisfactory work conditions will not suffice for a danger creation theory claim because they do not meet the shock the conscience standard.")

See also ***L.W. v. Grubbs*** **(L.W. II)**, 92 F.3d 894, 900 (9th Cir. 1996):

> We conclude that in order to establish Section 1983 liability in an action against a state official for an injury to a prison employee caused by an inmate, the plaintiff must show that the state official participated in creating a dangerous condition, and acted with deliberate indifference to the known or obvious danger in subjecting the plaintiff to it. Only if the state official was deliberately indifferent does the analysis then proceed further to decide whether the conduct amounts to a constitutional violation. We have not added a requirement that the conscience of the federal judiciary be shocked by deliberate indifference, because the use of such subjective epithets as "gross" "reckless" and "shocking" sheds more heat than light on the thought processes courts must undertake in cases of this kind. Deliberate indifference to a known, or so obvious as to imply knowledge of, danger, by a supervisor who participated in creating the danger, is enough. Less is not enough.

c. state-created-danger cases

In ***Archie v. City of Racine***, 847 F.2d 1211 (7th Cir. 1988) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989), a pre-***DeShaney*** decision, the Seventh Circuit

concluded that there is no constitutional duty under the due process clause to provide effective rescue services. 847 F.2d at 1220. The court expressly rejected the concept of a constitutional duty flowing from some sort of "special relationship" outside of the custodial context, and carefully set out the contexts in which the state might be found to have a duty to protect under the Due Process Clause.

"When the state puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk. When the state cuts off sources of private aid, it must provide replacement protection." *Id*. at 1223, distinguishing ***White v. Rochford***, 592 F.2d 381, 382-84 (7th Cir. 1979) (police had affirmative duty to protect children left abandoned in car on busy freeway after police arrested children's uncle).

See ***Bowers v. DeVito***, 686 F.2d 616, 618 (7th Cir. 1982) ("If the state puts a man in a position of danger from private persons and then fails to protect him... it is as much an active tortfeasor as if it had thrown him into a snake pit.").

The state-created-danger basis for finding a duty to protect on the part of the state appears to remain intact after ***Deshaney***. *See, e.g.,* ***King ex rel. King v. East St. Louis School Dist. 189***, 496 F.3d 812, 817, 818 (7th Cir. 2007) ("A fair reading of the decisions of this circuit and those of our sister circuits governing the state-created danger doctrine reveal the following three principles that must govern our analysis. . . First, in order for the Due Process Clause to impose upon a state the duty to protect its citizens, the state, by its affirmative acts, must create or increase a danger faced by an individual. . . . Second, the failure on the part of the state to protect an individual from such a danger must be the proximate cause of the injury to the individual. . . Third, because the right to protection against state-created dangers is derived from the substantive component of the Due Process Clause, the state's failure to protect the individual must shock the conscience."); ***Kennedy v. City of Ridgefield,*** 439 F.3d 1055, 1065 (9th Cir. 2006) ("Viewing the facts in the light most favorable to Kennedy, we find that, if accepted as true, they are sufficient to establish that Shields acted deliberately and indifferently to the danger he was creating. Kennedy warned Shields repeatedly about Burns and requested that Shields notify her first so she could protect her family. With knowledge of Burns's propensity for violence and of Kennedy's fear, and despite his promise to Kennedy to the contrary, Shields nevertheless notified Burns first. . . . Then, after notifying Burns, Shields allegedly reassured the visibly frightened Kennedy of increased security which was either never provided or plainly ineffective. Given the danger created by

Shields that the Kennedys faced, we find such alleged, capricious behavior sufficient evidence of deliberate indifference."), *reh'g en banc denied,* 440 F.3d 1091 (9th Cir. 2006); ***Pena v. DePrisco***, 432 F.3d 98, 108-12 (2d Cir. 2005) ("We have been joined by a majority of our sister circuits in recognizing that a state created danger can be the basis of a substantive due process violation, . . . but in various courts the term 'state created danger' can refer to a wide range of disparate fact patterns. For example, courts have used the 'state created danger' label to describe the state's duty to protect a person from private violence when the state itself has placed that person at risk. . . . This sort of state-created-danger case seems to rely on the existence of a special relationship between the state and the victim. Some courts have, indeed, incorporated the 'special relationship' criterion as a prerequisite to liability. . . We, by contrast, treat special relationships and state created dangers as separate and distinct theories of liability. . . . Our distinction between these categories of cases suggests that 'special relationship' liability arises from the relationship between the state and a particular victim, whereas 'state created danger' liability arises from the relationship between the state and the private assailant. To paraphrase *Bowers*, . . . the police officers in *Dwares* did not bring the victim to the snakes; they let loose the snakes upon the victim. In applying our 'state created danger' principle, we have sought to tread a fine line between conduct that is 'passive' as in *DeShaney* and that which is 'affirmative' as in *Dwares*. . . . It is clear from the cases, we think, that to the extent that the plaintiffs allege merely that the individual defendants failed to intercede on the day of the accident, their complaints do not involve sufficient affirmative acts to violate substantive due process rights. Similarly, to the extent that the plaintiffs allege that Grey's supervisors 'stood by and did nothing' to punish Grey's previous misconduct, we think those allegations are also inadequate to state a substantive due process claim. . . A failure to interfere when misconduct takes place, and no more, is not sufficient to amount to a state created danger. . . . As the plaintiffs' counsel recognized at oral argument before us, the key question is whether the individual defendants told, or otherwise communicated to, Officer Grey that he could drink excessively and drive while intoxicated without fear of punishment. The plaintiffs argue that a reasonable factfinder could infer that the defendants' behavior constituted an implicit prior assurance to Grey that he could drink and drive with impunity. We agree that to the extent that fellow police officers and some supervisors participated in or condoned Grey's behavior, and even--in Healy's case--invited Grey to drive after drinking heavily, it could be inferred by a reasonable juror that those defendants, by their actions, implicitly but affirmatively condoned Grey's behavior and indicated to Grey that he would not be disciplined for his conduct. . . . We conclude that when, as the plaintiffs allege, state officials communicate to a private

person that he or she will not be arrested, punished, or otherwise interfered with while engaging in misconduct that is likely to endanger the life, liberty or property of others, those officials can be held liable under section 1983 for injury caused by the misconduct under *Dwares*. This is so even though none of the defendants are alleged to have communicated the approval explicitly. . . We emphasize that the type of claim we understand the plaintiffs to assert is based on more than a failure to prevent misbehavior and to reprimand or punish the miscreants. The plaintiffs assert that prior assurances of impunity were actually, albeit implicitly, communicated."); ***Caldwell v. City of Louisville,*** No. 03-5342, 2004 WL 2829026, at *8, *9 (6th Cir. Dec. 9, 2004) (not published) ("Under the circumstances which have been placed upon the record, it is our judgment that Christy Caldwell can succeed in establishing that Lett was deliberately indifferent to the risks and dangers that her daughter faced during the mid-months of 2002. The record establishes that the County Attorney called Lett immediately after the State court reissued a warrant for Mills' arrest on September 13th. Her refusal to act upon the warrant and the City's existing internal law enforcement practices and policies resulted in a six day delay in its execution. In refusing to act upon the arrest warrant, Lett demonstrated neither mere negligence nor an actual intent to bring about a specific harm upon Rebecca. Thus, her culpability would appear to fall within the 'middle range,' and require this Court to determine if she was deliberately indifferent under the circumstances. Clearly, Lett had several days in which to fully consider and reflect upon her decision not to serve the warrant on Mills. The evidence also indicates that she was aware of facts from which a reasonable inference could be drawn that Rebecca faced a substantial risk of serious harm. The evidence also suggests that Lett's failure or refusal to process the warrant in a timely manner stemmed from an animus toward Rebecca who had (1) refused to provide the LPD authorities with any semblance of cooperation in dealing with a potentially dangerous situation, and (2) filed allegations of police misconduct against her. In the face of a real danger about which Lett knew or should have known, her adamant refusal to serve the warrant or have it served upon Mills by another law enforcement official clearly equates to the kind of deliberate indifference which is forbidden by the Constitution. Having found the existence of a 'State-created danger' and of deliberate indifference by a State actor, we conclude that Christy Caldwell has asserted a viable claim for a violation of her daughter's constitutional right to substantive due process."); ***Kneipp v. Tedder***, 95 F.3d 1199, 1208 (3d Cir. 1996) ("In the 1995 case of *Mark v. Borough of Hatboro*, . . .we suggested a test for applying the state-created danger theory. We found that cases predicating constitutional liability on a state-created danger theory have four common elements: 1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor

acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur. 51 F.3d at 1152."); ***Bank of Illinois v. Over***, 65 F.3d 76, 78 (7th Cir. 1995) ("If the defendants' employees knowingly placed Heather in a position of danger, they would not be shielded from liability by the decision in *DeShaney*. All that *DeShaney* and the cases following it . . . hold is that the Constitution does not impose a legally enforceable duty on state officers to protect people from private violence. If the officers are complicit in the violence, they are liable."); ***Losinski v. County of Trempealeau***, 946 F.2d 544 (7th Cir. 1991) ("The essence of the Court's exception in *DeShaney* is state creation of dangers faced or involuntary subjection to known risks."); ***Ayala v. Mohave County, Ariz.***, No. CV-07-8105-PHX-NVW, 2008 WL 4849963, at *4, *5, *7 (D. Ariz. Nov. 7, 2008) ("To conclude that Shamblin's danger was of his own making would require one to ignore several of the most salient facts in this case. Shamblin did not choose to walk along the highway in complete darkness; he repeatedly pleaded with the Officers for a ride. Nor was his walking on the pavement a volitional act; it was dark, he was heavily drunk, and it was a long way to town. A reasonable inference is that conditions in the dirt on the side of the road were so unfavorable or difficult to discern in the dark that he was naturally impelled to the surer footing of the roadway. Construing the facts and drawing all reasonable inferences in favor of Ayala, a reasonable juror could conclude that the Officers' actions, not Shamblin's independent choices, exposed him to a danger that he otherwise would not have faced. . . . The evidence can support a jury verdict that the Officers were deliberately indifferent to the known or obvious consequences of their actions--a collision that killed Shamblin. . . . No reasonable officer would believe that the law permits the abandonment of a person known to have been drinking along the shoulder of an extremely dark highway, miles from the next safe haven. The Officers are not immune from this suit."); ***Was v. Young***, 796 F. Supp. 1041, 1048 (E.D. Mich. 1992) ("Although *DeShaney* made clear that there is no general special relationship doctrine, . . . some lower federal courts have held the state accountable for a victim's injuries even though the victim was not in state custody, where the state has created a danger to the victim."); ***Matican v. City of New York***, 424 F.Supp.2d 497, 505, 506 (E.D.N.Y. 2006) ("In *Pena*, the Second Circuit noted in *dicta* that '[o]ur distinction between [the two exceptions to *DeShaney*] suggests that "special relationship" liability arises from the relationship between the state and a particular victim, whereas "state created danger" liability arises from the relationship between the state and the private assailant,' 432 F.3d at 109; here, there is no evidence of a relationship between the officers and Delvalle. The Court,

however, takes this aspect of *Pena* simply as a passing recognition that many of the circuit's prior state-created danger cases involved a connection between the governmental actor and the private assailant. The Court does not read *Pena* as establishing such a relationship as a *sine qua non* of state-created danger liability; governmental actors may put an individual in harm's way even in the absence of a connection to a private assailant, and the present case is an example. . . Thus, that there is no evidence of a relationship between the defendants and Delvalle is of no consequence. Another aspect of *Pena* provides more significant guidance. *Pena* reiterates that the state-created danger exception applies only when the governmental actor's conduct can be fairly characterized as 'affirmative,' as opposed to 'passive. . . . If Matican claimed only that the officers had failed to follow up on, and apprise him of, Delvalle's violent nature and release from jail, his claim would fall squarely on the 'passive' side of the line. . . Matican's claims are not so limited, however; he also claims that the officers executed the sting operation in such a way that Delvalle learned that Matican had set him up. Such conduct falls on the 'affirmative' side of the line because, taking the facts in the light most favorable to Matican, it 'assisted in creating or increasing the danger to the victim.'. . . Although the officers' handling of the sting operation can be considered a state-created danger, it does not rise to the level of a substantive due-process violation because, even taking the facts in the light most favorable to Matican, their conduct does not 'shock the conscience.' There is no indication that the officers intentionally exposed Matican to Delvalle's assault. Moreover, although the officers had time to plan the operation, it cannot be concluded that they were deliberately indifferent to Matican's safety in making those plans.").

See also ***Soto v. Flores***, 103 F.3d 1056, 1064 (1st Cir. 1997) ("In a creation of risk situation, where the ultimate harm is caused by a third party, courts must be careful to distinguish between conventional torts and constitutional violations, as well as between state inaction and action. . . The scope of any permissible section 1983 action based on a state-created danger theory is a difficult question. . . Because we find that this claim may be resolved on immunity grounds, we choose not to reach this question."). The court noted, however, that "[s]ince *DeShaney*, seven circuit courts of appeals have recognized that state-created dangers may, in proper circumstances, give rise to constitutional claims under section 1983. *See Kneipp*, 95 F.3d at 1208 (citing cases and tracing history of state-created danger theory)." 103 F.3d at 1065.

See also ***Patrick v. Great Valley School Dist***., No. 06-4270, 2008 WL 4516690, at *2, *3 (3rd Cir. Oct. 9, 2008) ("Coach Brown's decision to match Rosenberg with a much heavier teammate for live wrestling did not occur in a time-constrained or 'hyperpressurized' environment, and thus culpability should be assessed under the deliberate indifference standard. According to wrestling expert Ken Chertow's testimony, the pairing of Rosenberg, a young and inexperienced wrestler, with a much heavier partner for live wrestling amounted to an unreasonably dangerous practice. Plaintiffs have also introduced evidence suggesting that, despite the risks, Coach Brown matched Rosenberg with his heavier teammate because he wanted to provide the heavier wrestler with a practice partner and there were no wrestlers of comparable weight present at the practice at issue. Finally, Plaintiffs presented evidence that Coach Brown engaged in similar conduct on more than one occasion, providing, at the very least, circumstantial evidence of deliberate indifference. . . .Without deciding the issue, we hold that a rational jury could find that Coach Brown's conduct exhibited a level of culpability that shocks the conscience. Because the District Court rested its holding solely on Plaintiffs' failure to satisfy the culpability element of their state-created danger claim, we need not reach the question of whether Plaintiffs have raised a genuine issue of material fact with respect to the remaining three elements."); ***Rivas v. City of Passaic,*** 365 F.3d 181, 202, 203 (3d Cir. 2004) (Ambro, J., concurring in part) ("Judge Garth has noted the most important of the recent modifications to the *Kneipp* test, which involved its second prong: in light of the Supreme Court's decision in *County of Sacramento v. Lewis* . . . a state actor will be liable only for conduct that 'shocks the conscience'; it is no longer enough that she or he has acted in 'willful disregard' of the plaintiff's safety. . . This modification, however, is not the only one. In *Morse v. Lower Merion School District,* 132 F.3d 902 (3d Cir.1997), we reconsidered the third prong of the *Kneipp* test and suggested that there may be a 'relationship' between the state and the plaintiff merely because the plaintiff was a foreseeable victim, either individually or as a member of a discrete class. . . Moreover, we have written 'third party' out of the fourth prong of the test. We recently noted, 'The fourth element's reference to a 'third party's crime' arises from the doctrine's origin as an exception to the general rule that the state does not have a general affirmative obligation to protect its citizens from the violent acts of private individuals. The courts, however, have not limited the doctrine to cases where third parties caused the harm....' *Estate of Smith v. Marasco,* 318 F.3d 497, 506 (3d Cir.2003) . . . . In light of these substantial modifications to the *Kneipp* test, *Kneipp* as shorthand is a misnomer. To be sure, Judge Garth has mentioned the relevant refinements and considered this case by reference to the adapted rubric. I nonetheless believe that continuing to cite the *Kneipp* test as 'good law,' as Judge

Garth does, minimizes the extent to which the law of state-created danger in our Circuit has changed. And while the changes to the third and fourth prongs have expanded the state-created danger doctrine, the substitution of 'shocks the conscience' for 'willful disregard' is a significant limitation. In this context, our continued adherence to *Kneipp,* if only in name, colors plaintiffs' perception of their burden and tempts them to allege constitutional violations where none exist."); ***L.W. v. Grubbs*** **(L.W. I)**, 974 F.2d 119, 120-21 (9th Cir. 1992) (plaintiff, a registered nurse, stated a constitutional claim against defendant correctional officers, where defendants knew inmate was violent sex offender, likely to assault plaintiff if alone with her, yet defendants intentionally assigned inmate to work alone with plaintiff in clinic), *cert. denied*, 113 S. Ct. 2442 (1993).

But see ***Sandage v. Board of Com'rs of Vanderburgh County***, 548 F.3d 595, 599, 600 (7th Cir. 2008) ("The first principle is thus the key one, and its requirement of 'affirmative acts' distinguishes our case from *Monfils*. We add only that 'create or increase' must not be interpreted so broadly as to erase the essential distinction between endangering and failing to protect. If all that were required was a causal relation between inaction and harm, the rule of *DeShaney* would be undone, . . . since, had it not been for the state's inaction in *DeShaney*, there would have been no injury. The three cases that the opinion in *King* cites for the proposition that the state must by its 'affirmative acts ... create or increase' the danger to the victim--*Windle v. City of Marion*, 321 F.3d 658 (7th Cir.2003); *Bright v. Westmoreland County*, 443 F.3d 276 (3d Cir.2006), and *Monfils*--are either cases, like this one, of inaction by law enforcement personnel (*Windle* and *Bright*), so that there was no liability, or a case (*Monfils*) in which law enforcement personnel were responsible for the danger. When courts speak of the state's 'increasing' the danger of private violence, they mean the state did something that turned a potential danger into an actual one, rather than that it just stood by and did nothing to prevent private violence. That was *Monfils*; it is not this case; and after *Castle Rock* a broken promise--the essential act of which both the plaintiff in that case and the present plaintiffs complain (though there was more in *Monfils*--the handing over of the tape to the murderer)--may very well not be enough."); ***Walter v. Pike County, Pa.***, 544 F.3d 182, 195, 196 (3d Cir. 2008) ("If a state-created danger claim cannot be predicated on a failure to arrest, neither can it be predicated on a failure to provide protection. . . . And if an assurance of well-being despite the presence of a threat is not a sufficiently affirmative act, neither is the mere failure to warn of a threat. . . . Here, the District Court held that a jury could reasonably find that the defendants affirmatively used their authority in 2001, by 'allowing Michael Walter to become involved in eliciting

a confession from Joseph Stacy,' . . . and could reasonably find that the defendants were deliberately indifferent in 2002 in their 'failure to warn the Walter family of Joseph Stacy's menacing behavior....'. . . But for the reasons we have articulated above, these findings would not amount to a constitutional violation-they would not establish that the defendants committed a *culpable* act, only that they acted in 2001 and then, months later, shocked the conscience through inaction."); ***Barber v. Overton***, 496 F.3d 449, 456, 457 (6th Cir. 2007) ("We belabor the discussion of *Kallstrom* to emphasize what it did *not* do: It did not create a broad right protecting plaintiffs' personal information. Rather, *Kallstrom* created a narrowly tailored right, limited to circumstances where the information disclosed was particularly sensitive and the persons to whom it was disclosed were particularly dangerous *vis-a-vis the plaintiffs.* We cannot conclude that social security numbers and birth dates are tantamount to the sensitive information disclosed in *Kallstrom.* The court's careful footnote in that case, instructing the district court on remand, should put that to rest. If mere disclosure of social security numbers were sufficient then there was no need for the remand. In addition, *Kallstrom* did not restrict any private information from disclosure to anyone in any circumstances, but rather only *certain* restricted information when the plaintiffs had a reason to fear retaliation from persons to whom it was disclosed.In light of our narrow reading of the substantive due process right to non-disclosure privacy, we conclude that the release of the social security numbers was not sensitive enough nor the threat of retaliation apparent enough to warrant constitutional protection here. . . First, scary though it may be, the diligent miscreant who wishes to exact vengeance can locate a person with limited information. Plaintiffs' names, general whereabouts (near the IMAX facility), and approximate ages were already known to these prisoners. While the social security numbers and birth dates might have pinpointed the residence of a particular plaintiff, there are other methods of learning where persons reside; several hours in a car or several telephone calls might well provide the very same information. Voter registration records, county property records, and a plethora of other publically available sources exist through which persons can discover the residency of an individual and prisoners' accomplices have as ready access to them as any other citizen. The plaintiffs do not allege that this information allowed the prisoners to discover information that they would have been unable to otherwise. Therefore, this information does not rise to the level of sensitivity we found constitutionally significant in *Kallstrom*."); ***Draw v. City of Lincoln Park***, 491 F.3d 550, 554, 556 (6th Cir. 2007) ("As an initial matter, we first consider whether the instant case is distinguishable from our decision in *Jones* because the Plaintiffs-Appellants' claim here is predicated on a different theory of liability. As noted above, the Plaintiffs-

Appellants say that the district court erred in failing to evaluate their § 1983 claim under a 'direct injury' theory of liability rather than according to the 'state created danger' doctrine. . . . Here, the defendant officers' conduct was irresponsible. However, no evidence in the record indicates the officers intended to cause any harm through their actions or otherwise acted in a manner sufficient to transform wrongful behavior into unconstitutional conduct. . . . Here, even if the Court construes the defendant officers' conduct as conspiratorial, there is no evidence that the goal of the purported conspiracy--the facilitation of an illegal drag race--was in and of itself unconstitutional. Although violative of Michigan law, drag racing does not implicate constitutional concerns. Second, the Plaintiffs-Appellants' direct-injury argument ignores the fact that otherwise impermissible police conduct must truly be extraordinary in nature to qualify as 'conscience shocking.' . . . Here, the defendant officers stupidly encouraged third parties to engage in tortious conduct. Without question, such conduct showed incredibly poor judgment. However, the conduct in question does not meet the high threshold set out in *Lewis*. Accordingly, we find that the Plaintiffs-Appellants' claims are unsupportable under a direct-injury theory of liability."); ***Ye v. United States***, 484 F.3d 634, 639-41 (3d Cir. 2007) ("The three necessary conditions to satisfy the fourth element of a state-created danger claim are that: (1) a state actor exercised his or her authority, (2) the state actor took an affirmative action, and (3) this act created a danger to the citizen or rendered the citizen more vulnerable to danger than if the state had not acted at all. . . . Dr. Kim argues that an assurance or misrepresentation, without more, cannot constitute an 'affirmative' act for purposes of the state-created danger inquiry. This Court has never expressly addressed this issue. We hold that a mere assurance cannot form the basis of a state-created danger claim. . . .Although the *DeShaney* Court did not hold that words alone could not rise to the level of affirmative act that works a deprivation of liberty, the Supreme Court did provide two examples, incarceration and institutionalization, to guide our analysis. Ye cannot prevail unless Dr. Kim's misrepresentation that Ye had 'nothing to worry about and that he [was] fine' falls into the third category of a 'restraint of personal liberty' that is 'similar' to incarceration or institutionalization. *DeShaney* did not conclusively answer this question, nor was the Court focused on state-created liability, giving much greater consideration to circumstances that would give rise to the special relationship exception. However, the Court made clear that a 'deprivation of liberty' is a bedrock requirement of state liability under the substantive due process clause. Ye's claim places before us the question of whether a mere assurance can constitute an affirmative act that invaded Ye's personal liberty. We implicitly rejected this argument in *Bright* and do so expressly now."); ***Koulta v. Merciez***, 477 F.3d 442,

446, 447 (6th Cir. 2007) ("The officers' failure to administer a breathalyzer test (or otherwise to determine the extent of Lucero's drinking) before ordering her to leave the property may well have been negligent, but it did not 'create' or 'increase' the danger--of Lucero drinking and driving--that pre-dated their arrival on the scene. . . . In the final analysis, Lucero's admitted proclivity to drink and drive that evening placed Koulta (and other people using the roadways) in as much danger before the officers arrived as afterwards. And much as the officers were in a position to head off the tragedy that materialized minutes later, a reality (and memory) that no court decision will eliminate, their conduct was no more an affirmative risk-creating act than the conduct of the officers in *DeShaney* (who returned an abused child to the custody of his abusive father) or *Bukowsk*i (who returned a mentally disabled girl to the stranger who had been sexually abusing her).[distinguishing *Pena v. DePrisco*, 432 F.3d 98 (2d Cir.2005) and *Reed v. Gardner*, 986 F.2d 1122 (7th Cir.1993)]"); ***Johnson v. City of Seattle***, 474 F.3d 634, 641 (9th Cir. 2007) ("In contrast to the plaintiffs in *Wood*, *Penilla*, *Munger*, *Grubbs* and *Kennedy*, the Pioneer Square Plaintiffs have failed to offer evidence that the Defendants engaged in affirmative conduct that enhanced the dangers the Pioneer Square Plaintiffs exposed themselves to by participating in the Mardi Gras celebration. The decision to switch from a more aggressive operation plan to a more passive one was not affirmative conduct that placed the Pioneer Square Plaintiffs in danger, because it did not place them in any worse position than they would have been in had the police not come up with any operational plan whatsoever. . . . [T]he fact that the police at one point had an operational plan that might have more effectively controlled the crowds at Pioneer Square does not mean that an alteration to this plan was affirmative conduct that placed the Pioneer Square Plaintiffs in danger. The police did not communicate anything about their plans to the Pioneer Square Plaintiffs prior to the incident. Even if proved not the most effective means to combat the violent conduct of private parties, the more passive operational plan that the police ultimately implemented did not violate substantive due process because it 'placed [the Pioneer Square Plaintiffs] in no worse position than that in which [they] would have been had [the Defendants] not acted at all.'"); ***Carver v. City of Cincinnati***, 474 F.3d 283, 286, 287 (6th Cir. 2007) ("Here, the officers removed everyone from the apartment and they controlled the keys to the apartment. It has not been suggested that anyone tried to enter the apartment to render aid to Carver. Nor has it been established that anyone, whether it be the officers or the people removed from the apartment, knew of Carver's need for assistance. Therefore, there is no 'evidence that any private rescue was available or attempted.'. . The officers' act of closing off the apartment to conduct an investigation into the death of Smith-Sandusky did nothing in and of itself to increase

the risk of harm to Carver. No allegation has been made that Carver died while the officers were inside the apartment with him. The fact that Carver died from an apparent self-induced drug overdose is tragic. This tragedy, however, does not allow us to usurp Supreme Court precedent that the officers were under no general duty to render aid to Carver. . . In the absence of any allegation that a private rescue was attempted, the officers did not commit a constitutional violation by securing the apartment and leaving Carver lying on the couch."); ***Tanner v. County of Lenawee***, 452 F.3d 472, 478, 479 (6th Cir. 2006) (state-created-danger exception has never been extended to cover situations where the police simply respond to the scene of a 911 call); ***Bright v. Westmoreland County,*** 443 F.3d 276, 283, 284 (3d Cir. 2006) ("We conclude that the state cannot 'create danger' giving rise to substantive due process liability by failing to more expeditiously seek someone's detention, by expressing an intention to seek such detention without doing so, or by taking note of a probation violation without taking steps to promptly secure the revocation of the probationer's probation."); ***Jones v. Reynolds,*** 438 F.3d 685, 688, 691, 694, 698, 699 (6th Cir. 2006) ("Because the officers did not have custody of Denise Jones at the time of the accident, because the officers' actions did not place Denise Jones in any more danger than she voluntarily undertook before they arrived and because the officers' participation in this tragedy did not specially place Denise Jones at any more risk than the 150-300 people attending the drag race, all relevant precedent requires us to uphold the judgment of the district court summarily rejecting this constitutional claim. . . . Nothing in the record indicates that the race would not have proceeded if the officers had never arrived at the scene. And nothing in the record indicates that the officers made Jones 'more vulnerable' to the risk that she had already undertaken by voluntarily choosing to watch the race. . . . Even if an officer bet on the drag race, as one spectator alleges, and even if the officers played rap music for 15 minutes rather than 2 minutes, as other spectators allege, that does not change matters. While such conduct certainly would not have discouraged the participants from proceeding with the race, it also cannot be said that it placed the drivers or spectators in greater danger than if the police had never arrived. As deeply regrettable and ultimately tragic as the officers' actions were, no evidence suggests that their conduct altered the risk of harm to Denise Jones. . . . Faced with these kinds of assertions, it is tempting to say that they satisfy the 'state created danger' doctrine. But, to do so, we would have to say that the doctrine covers conduct it does not--that it covers state action that does not create or increase the risk of danger to the victim and that it applies to state action that does not specifically increase the risk of danger to a discrete individual or group of individuals. And even were we to move the doctrine in these directions, that would not advance this claim because the very act of modifying these rules

would defeat plaintiff's obligation to show that the officers violated 'clearly established' law. While we decline to extend the doctrine in this case, nothing in our decision prevents future litigants from arguing what the plaintiff has not argued here--that the alleged actions of the officers converted the private misconduct of the drivers into public misconduct and in the process converted this claim into a direct-injury constitutional claim under the *Lewis,* as opposed to *DeShaney,* line of cases."); ***May v. Franklin County Commissioners***, 437 F.3d 579, 585, 586 (6th Cir. 2006) ("In both *Cartwright v. City of Marine City* and *Bukowski v. City of Akron*, we discussed the 'Catch-22' that these sorts of scenarios can create for police officers, where they face a danger of potential liability whether they take action to attempt a rescue or they fail to do so. . . Franklin County would undoubtedly face legal and moral objections, and rightly so, if its Comm Center personnel had failed to dispatch an officer to Kirk's apartment after her repeated calls to 911. May's proposition that appellees violated Kirk's constitutional rights by sending a police cruiser in response to her 911 calls for help is unsettling, and we decline to interpret the Due Process Clause in such a manner as to discourage law enforcement officers from responding to requests for assistance. May has not produced any evidence that Franklin County's dispatch of police to Kirk's apartment created or increased the risk that Moss would harm Kirk. We therefore affirm the district court's conclusion that the dispatch is not an affirmative act under *Kallstrom*. . . .The inability of the Franklin County authorities to prevent Kirk's murder despite her numerous 911 calls to their emergency call center is deeply troubling. May has produced persuasive evidence that appellees failed to follow their established procedure for domestic violence calls when fielding Kirk's first 911 call, and that appellees may also have underestimated the urgency of Kirk's situation during the second 911 call. Had appellees attempted to obtain more information from Kirk during her phone calls to 911, it is possible that their attempt to intervene would have been more aggressive, and the tragic events of that night might have unfolded differently. While appellees' actions in response to Kirk's calls for assistance may not be faultless, none of appellees' actions directly increased Kirk's vulnerability to danger or placed her in harm's way. . . May has been unable to show that any of appellees' actions constitute affirmative acts as *Kallstrom* requires to sustain her state-created-danger claim."); ***McQueen v. Beecher Community Schools***, 433 F.3d 460, 464-66 (6th Cir. 2006) ("Every regional court of appeals, including this one, has walked through the door left open by the Court and recognized the state-created-danger theory of constitutional liability under §1983. . . In *Kallstrom*, we recognized the state-created-danger theory of due process liability and laid out three important requirements: an affirmative act that creates or increases the risk, a special danger to the victim as distinguished from the public at large, and

the requisite degree of state culpability. . . Although we have sometimes assumed the affirmative-act-plus-risk-creation requirement to be satisfied, . . . *Kallstrom* remains the only time we have explicitly held it to be met. . . . We have not previously considered whether it constitutes an affirmative-act-plus-risk-creation under *Kallstrom* for a teacher to leave students--and more pertinently, the student who ultimately causes the injury--unsupervised. . . The decisions reviewed above, however, provide enough guidance to conclude that Judd's leaving Smith and several of his classmates unsupervised in the classroom was not an affirmative act that created or increased the risk for purposes of *Kallstrom*. The cases most applicable to the situation here are those in which the state officials performed some act, . . .but we held that there was no affirmative act that created or increased the risk because the victim would have been in about the same or even greater danger even if the state officials had done nothing. . . .[J]ust as the plaintiffs in *Cartwright* and *Bukowski* would have faced at least the same danger if the police had not acted, Doe would have faced the danger of Smith drawing his gun and firing at her even if Judd had not acted (i.e., if Judd had remained in the classroom at all relevant times); ***Jackson v. Schultz***, 429 F.3d 586, 591, 592 (6th Cir. 2005) ("Even liberally construing Jackson's allegations, she has also not pled sufficient facts to show a constitutional violation based on the 'stated-created danger' exception. . . . Jackson . . .does not state a constitutional claim that the EMTs hindered third party aid. . . . The EMTs did not discourage others from entering the ambulance. All evidence indicates decedent was free to leave (or be removed from) the ambulance. Furthermore, there is no evidence that any private rescue was available or attempted. No set of facts consistent with the allegations shows that the EMTs interfered with private aid. Thus, Jackson does not allege sufficient facts to support a claim for a constitutional violation based on cutting off private aid."); ***Cartwright v. City of Marine City***, 336 F.3d 487, 493 (6th Cir. 2003) ("The facts of this case indicate, at most, a failure to act; they do not rise to the level of affirmative acts which created or increased the risk that the plaintiff would be exposed to an act of violence by a third party. Defendant officers took plaintiff from a place of great danger: the shoulder of a dark, foggy, two-lane highway. They placed him in a place of lesser danger: the parking lot of an open convenience store, where telephones, restrooms, and food and drink were available to him. . . . The question is not whether the victim was safer *during* the state action, but whether he was safer *before* the state action than he was *after* it."); ***Bukowski v. City of Akron,*** 326 F.3d 702, 709 (6th Cir. 2003) ("It seems difficult to characterize the actions of the officials as affirmative acts within the meaning of *DeShaney.* The officials arguably did nothing to increase Bukowski's vulnerability to danger. They merely returned her at her request to Hall's residence, where they originally had found

her. The Bukowskis argue that the police did not merely refuse to act: instead of simply allowing her to leave the police station, they affirmatively acted by returning her to Hall's residence. Whether or not the defendants 'acted' may be a difficult question in the abstract, but *DeShaney* makes clear that the acts of the officials here clearly fall on the inaction side of the line. Although in *DeShaney* the state returned Joshua to the ultimate aggressor, the *DeShaney* Court explicitly rejected the idea that such acts met the state-action requirement. . . . Examining the quality of governmental involvement here, it is apparent that the government was no more involved in making Bukowski more vulnerable to private violence than it was in *DeShaney*--in both cases, the government was merely returning a person to a situation with a preexisting danger."); ***Hernandez v. City of Goshen,*** 324 F.3d 535, 539 (7th Cir. 2003) ("In this case, the pleadings allege that the Goshen police department learned from Nu-Wood plant manager Greg Oswald's phone call that employee Robert Wissman threatened to do bodily harm to Nu-Wood employees, and that Oswald knew Wissman had access to guns. No other evidence of the City's knowledge or involvement with the situation at Nu-Wood appears on the face of the complaint. This is even less information about the specific danger facing Hernandez and Garza than the police had in *Windle* or the social workers had in *DeShaney*, and we therefore do not find that the City, through its police department's decision not to investigate the phoned-in threat, created or increased the danger faced by the Plaintiffs and their fellow Nu-Wood employees that day."); ***Windle v. City of Marion,*** 321 F.3d 658, 662, 663 (7th Cir. 2003) ("In focusing exclusively on whether the police acted affirmatively, Appellant fails to grasp that she has to establish that the police failed to protect her from a danger they created or made worse. She confuses the inert failure to protect with the proactive creation or exacerbation of danger. In this case the police did nothing to create a danger, nor did they do anything to make worse any danger Chaunce already faced. . . . If the police had never overheard the conversation, and had never been involved at all, the danger faced by Chaunce would likely have been the same or perhaps worse. The police did not place Chaunce in the custody of Rigsbee, and they did nothing to assist Rigsbee. They just failed to intervene until Raymer thought that matters had reached a crisis. This case is indistinguishable from *DeShaney* where the Supreme Court concluded that no constitutional violation had occurred when state actors who may have been aware that a child was being abused by his father did nothing to protect the child. . . . Appellant has not included in this suit a claim against Rigsbee, who as a teacher could also be considered a state actor. Rigsbee's status as a potential state actor does however raise one important question regarding the duties of the Marion Police. In certain cases liability under §1983 may exist when one state actor fails to intervene

to prevent another state actor from causing direct harm to a victim. *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir.1994). Just such a case can exist when one law enforcement officer has reason to know 'that any constitutional violation has been committed by [another] law enforcement official; and the officer had a realistic opportunity to intervene to prevent the harm from occurring.' *Id*. Liability under this theory is certainly not limited to the context of a police officer's relationship with other officers in her department; but on the other hand the rule is not so broad as to place a responsibility on every government employee to intervene in the acts of all other government employees. In the instant case there appears no particular governmental connection between Rigsbee and the Marion Police. Appellant has not alleged that the Marion Police have any authority over teachers that they do not have over any other citizen of Marion or that they share any joint responsibility with school officials. To be sure, we are not today deciding a case where an employee of one government entity failed to intervene to prevent harm by an employee of another entity where the two entities shared, in practice, some relationship. Against the background of this case, *Yang* does not apply."); ***Brown v. Commonwealth of Pennsylvania Dept. of Health Emergency Medical Services Training Institute***, 318 F.3d 473, 478 (3d Cir. 2003) ("We have not decided whether the Due Process Clause requires states to provide adequate or competent rescue services when they have chosen to undertake these services. Other appellate courts addressing this question have held that states have no constitutional obligation to provide competent rescue services. [citing cases] We agree with the reasoning of these decisions and join these Circuits in holding that there is no federal constitutional right to rescue services, competent or otherwise. Moreover, because the Due Process Clause does not require the State to provide rescue services, it follows that we cannot interpret that clause so as to place an affirmative obligation on the State to provide competent rescue services if it chooses to provide them."); ***Ruiz v. McDonnell,*** 299 F.3d 1173, 1183 (10th Cir. 2002) ("Here, the crux of Ms. Ruiz's claim is that J.R. suffered injuries of constitutional proportions because the State Defendants improperly licensed Tender Heart after failing to conduct an investigation into the facility. However, we do not view the mere licensure of Tender Heart as constituting the requisite affirmative conduct necessary to state a viable § 1983 claim. Specifically, the improper licensure did not impose an immediate threat of harm. Rather, it presented a threat of an indefinite range and duration. Moreover, the licensure affected the public at large; it was not aimed at J.R. or Ms. Ruiz directly. Unlike the direct placement of a child into an abusive home, the mere licensure of Tender Heart was not an act directed at J.R. which, in and of itself, placed J.R. in danger. For those reasons, we conclude that Ms. Ruiz has failed to allege any affirmative conduct on the part of the State

Defendants that created or increased the danger to J.R."); ***White v. Lemacks***, 183 F.3d 1253, 1259 (11th Cir. 1999) ("[T]he 'special relationship' and 'special danger' doctrines applied in our decision in *Cornelius* [*v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989)] are no longer good law, having been superseded by the standard employed by the Supreme Court in *Collins*. Under *Collins*, state and local government officials violate the substantive due process rights of individuals not in custody only when those officials cause harm by engaging in conduct that is 'arbitrary, or conscience shocking, in a constitutional sense,' and that standard is to be narrowly interpreted and applied. While deliberate indifference to the safety of government employees in the workplace may constitute a tort under state law, it does not rise to the level of a substantive due process violation under the federal Constitution. . . . In the seven years since *Collins*, we have questioned at least five times whether *Cornelius* retains any viability after *Collins*. . . . In the face of the obvious, it seems we have never quite been able to say goodbye to *Cornelius*, always avoiding the question of whether it has actually left the realm of living precedent in the wake of *Collins*. . . . Enough is enough. Like a favorite uncle who has passed away in the parlor, *Cornelius* needs to be interred. We do so now. Recognizing that it was dealt a fatal blow by *Collins*, we pronounce *Cornelius* dead and buried."); ***Davis v. Fulton County***, 90 F.3d 1346, 1352 (8th Cir. 1996) (evidence was insufficient to establish special duty owed to woman raped by inmate; failure to adequately supervise prisoner amounted to negligence which could not be the basis of constitutional tort claim); ***Liebson v. New Mexico Corrections Dep't***, 73 F.3d 275, 277 (10th Cir. 1996) (where prison librarian was kidnapped and raped by inmate, court concluded that, "[a]lthough plaintiffs have alleged that defendants' removal of the security officer was done with 'deliberate indifference and in complete disregard' of Ms. Liebson's rights, they have not alleged any specific facts, as did the plaintiff in *Grubbs*, to indicate that defendants' actions were egregious, outrageous, or fraught with unreasonable risk.").

See also ***Lawrence v. United States,*** 340 F.3d 952, 957 (9th Cir. 2003) ("[I]n each of the cases in which we have applied the danger-creation exception, ultimate injury to the plaintiff was foreseeable. In the present case, to allege liability based on the danger-creation exception, the Plaintiff must show that Officer Messuri and Inspector Hanrahan acted affirmatively, and with deliberate indifference, in creating a foreseeable injury to Plaintiff. . . . Here, Bello's criminal history consisted of a drug trafficking conviction, but no crimes of violence or sexual abuse. Although it might have been foreseeable that Bello would distribute illegal drugs to the children at CGH, it was not foreseeable that he would sexually abuse them. We

affirm the district court's findings that the harm to Jessica Lawrence was not foreseeable and that Plaintiff has failed to show the Defendants' conduct was the proximate cause of her injuries."); ***Jones v. Union County, Tennesse,*** 296 F.3d 417, 430, 431 (6th Cir. 2002) ("In this case, Plaintiff offers no factual support for her claim that Union County created or enhanced the danger to her by failing to serve the *ex parte* order of protection in a timely manner. While the Sheriff's Department was well aware of the seriousness of the domestic problems involving Plaintiff and her ex-husband, its failure to serve the *ex parte* order of protection did not create or increase the danger posed to Plaintiff by her ex-husband, or place her specifically at risk."); ***Beck v. Haik***, 234 F.3d 1267, 2000 WL 1597942, at *4 (6th Cir. Oct. 17, 2000) (Table) ("The Seventh Circuit would not quarrel, we assume, with the proposition that public safety officials should have broad authority to decide when civilian participation in rescue efforts is unwarranted. If police officials are not satisfied that would-be rescuers are equipped to make a viable rescue attempt, for instance, it would certainly be permissible to forbid such an attempt. It would not be irrational, similarly, to prohibit private rescue efforts when a meaningful state-sponsored alternative is available. But *Ross* holds that official action preventing rescue attempts by a volunteer civilian diver can be arbitrary in a constitutional sense if a state-sponsored alternative is not available when it counts--and we are constrained to agree."); ***Munger v. City of Glasgow Police Dep't***, 227 F.3d 1082, 1086 (9th Cir. 2000) ("In examining whether an officer affirmatively places an individual in danger, . . . we examine whether the officers left the person in a situation that was more dangerous than the one in which they found him."); ***Sutton v. Utah State School for the Deaf and Blind***, 173 F.3d 1226, 1238, 1239 (10th Cir. 1999) ("[T]to hold Moore liable for the injuries suffered by James at the hands of a private individual, plaintiff-appellant must demonstrate intentional or reckless, affirmative conduct on the part of Mr. Moore which created the danger, coupled with 'a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.' . . . Because Moore, as the charged defendant, did not affirmatively act so as to create or enhance the danger to James, plaintiff-appellant's claim on this theory fails as a matter of law."); ***Huffman v. County of Los Angeles***, 147 F.3d 1054, 1061 (9th Cir. 1998) ("[T]he danger-creation plaintiff must demonstrate, at the very least, that the state acted affirmatively . . . and with deliberate indifference . . . in creating a foreseeable danger to the plaintiff, . . . leading to the deprivation of the plaintiff's constitutional rights . . . . Whether or not the County's failure specifically to prohibit deputies from carrying guns while drinking was bad policy, it did not violate John Huffman's rights under the Fourteenth Amendment, because the County could not have foreseen Kirsch's

actions."); ***Hutchinson v. Spink***, 126 F.3d 895, 900 (7th Cir. 1997) ("Even if the State thought that the Spink household posed fewer dangers to Andrew than his home, Hutchinson has also alleged that the State knowingly passed up the chance to place Andrew in a household with risks far lower than those posed by the Spinks . . . . It was the State's affirmative act that placed Andrew with the Spinks instead of the Halversons, not any omission that would lie beyond the reach of § 1983 under *DeShaney*."); ***Reed v. Gardner***, 986 F.2d 1122, 1126-27 (7th Cir. 1993) ("[P]laintiffs . . . may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been . . . By removing a safe driver from the road and not taking steps to prevent a dangerous driver from taking the wheel, the defendants arguably changed a safe situation into a dangerous one."); ***Dwares v. City of New York***, 985 F.2d 94, 99 (2d Cir. 1993) (***DeShaney*** not controlling where plaintiff alleged that "officers conspired with the 'skinheads' to permit the latter to beat up flag burners with relative impunity, assuring the 'skinheads' that unless they got totally out of control they would not be impeded or arrested. . . . Thus, . . . the complaint asserted that the defendant officers indeed had made the demonstrators more vulnerable to assaults."); ***Freeman v. Ferguson***, 911 F.2d 52, 55 (8th Cir. 1990) ("[***DeShaney***] analysis establishes the possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual's danger of or vulnerability to, such violence beyond the level it would have been at absent state action."); ***Gibson v. City of Chicago***, 910 F.2d 1510, 1521 n.19 (7th Cir. 1990) (***DeShaney*** not controlling when City alleged to have played a part in both creating danger and rendering public more vulnerable to danger); ***Ross v. United States***, 910 F.2d 1422, 1431 (7th Cir. 1990) (plaintiff stated a cognizable claim under § 1983 where plaintiff alleged that her son was deprived of life due to County's policy of cutting off private aid to drowning victims without effective replacement protection), *distinguished* in ***Andrews v. Wilkins***, 934 F.2d 1267 (D.C. Cir. 1991) (whereas Deputy in ***Ross*** used his authority as state actor to intrude into purely private rescue effort, police in ***Andrews*** enlisted private assistance as part of ongoing police rescue effort); ***Weeks v. Portage County Executive Offices***, 235 F.3d 275, 278, 279 (6th Cir. 2000) ("We have found a deprivation under the due process clause in situations when the victim was in police custody and the police failed to act or when the police affirmatively acted to put the victim in a more vulnerable position that he would have been in otherwise. . . . [citing cases] In the case before us here, however, Weeks was not and had not been in police custody; it was not Longbottom's actions that caused Weeks' harm; and Longbottom's order to Weeks to move along

did not put Weeks in a more vulnerable position than he was in before he encountered Longbottom."); ***Benzman v. Whitman***, No. 04 Civ. 1888(DAB), 2006 WL 250527, at *19, *20 (S.D.N.Y. Feb. 2, 2006) ("[B]y the time the A1 Qaeda terrorists had committed their horrific acts, and the World Trade Center towers had collapsed, Whitman knew that the consequences of the terrorists' actions, namely causing the collapse of the World Trade Center, included the emission of tons of hazardous materials into the air. It is at this point, when the harmful emissions created a danger to the public that Whitman, knowing the likely harm to those exposed to the hazardous materials, encouraged residents, workers and students to return to the area. By these actions, she increased, and may have in fact created, the danger to Plaintiffs, namely harm to their persons through exposure to the hazardous substances in the air after the WTC collapse. Without doubt, if Plaintiffs had not been told by the head of a federal agency entrusted with monitoring the environment that it was safe, plaintiffs would not have so readily returned to the area so soon after the attacks. Defendant Whitman, like the defendant officers in *Dwares*, affirmatively took actions that increased or created the danger to Plaintiffs. If officials who conspire with others who harm others can be held liable under the state-created danger doctrine, it is even more clear that officials who themselves directly lead victims to a likely and/or known harm can be held liable under this doctrine."); ***Sloane v. Kanawha County Sheriff Dep't***, 343 F.Supp.2d 545, 552, 553 (S.D.W.Va. 2004) ("Assuming the truth of the Sloanes' allegations, Crosier and Moore knew that David's emotional difficulties were such that their conduct would increase the risk that he would harm himself. By questioning David in an abusive manner outside his grandparents' presence, they created an environment in which he was far more likely to cause emotional injury to David. Unlike the defendants in *Pinder*, *Shoenfield*, and other cases in which liability under § 1983 has been barred, Crosier and Moore engaged in affirmative conduct that significantly increased the risk that David would be seriously injured or killed. When a state actor takes actions (actions that, as discussed below, may themselves be unconstitutional) against an emotionally disturbed minor that the state actor knows will create or substantially enhance the risk that the minor will harm himself, and then fails to take any steps to mitigate that risk, he is subject to liability under 42 U.S.C. S 1983 pursuant to a theory of causation and duty premised on the state-created danger doctrine. As such, Plaintiffs' allegations are clearly sufficient to withstand a motion to dismiss."); ***Kennerly v. Montgomery County Bd. of Commissioners,*** 257 F. Supp.2d 1037, 1043-45 (S.D. Ohio 2003) ("*DeShaney* and *Kallstrom* make it clear that the government has neither a special relationship with the public nor a general duty to warn the public of potential threats of criminal danger, as a matter of constitutional law, and no such special relationship

or duty arises merely on account of the local government having placed a known dangerous individual on house arrest and outfitted him with a monitoring device at a prior point in time. Furthermore, a plaintiff cannot plead around *DeShaney*, and come within the ambit of the result reached in *Kallstrom*, merely by naming a more particular sub-class of the public as the group to which the government owed a duty, such as one's 'neighbors.' Neighbors are still the public. *Kallstrom* is not ambiguous: the government must be aware that its actions will increase the vulnerability of a specific individual to criminal danger. . . . Thus, even assuming the truth of the factual pleadings, which means assuming that the County was in fact aware that Peter Atakpu had removed the monitoring device, and in fact was aware that he posed a grave threat to the public, including his neighbors, and in fact had an official policy which allowed it to disregard the existence of such public threats, or, in the alternative, had an official policy to respond to such public threats to prevent any potential harm flowing therefrom but nevertheless intentionally disregarded it, the Plaintiff is not entitled to relief under § 1983. Absent the County taking an action that increased Byron Kennerly's vulnerability to danger at the hands of Peter Atakpu in a manner specific to him, in such a way that set him apart from the general public and from all of Peter Atakpu's other neighbors, the County cannot be held liable for the violence that Peter Atakpu committed upon him. . . . Liability under a state-created-danger theory must be predicated upon affirmative acts. There is not a single affirmative act complained of in the First Amended Complaint. The action of which the Plaintiff complains is inaction: the failure of the County to act. That is not enough."); ***Kallstrom v. City of Columbus,*** 165 F. Supp.2d 686, 700-03 (S.D. Ohio 2001) (on remand) (Based on revised findings of fact, court concludes "plaintiffs did not have a constitutional privacy interest in the information disclosed by the City[,]" that "City's release of redacted personnel files pursuant to a valid public records request does not 'shock the conscience' or amount to deliberate indifference on the part of defendant[,]" and "[f]or these reasons, the state-created-danger theory does not apply."); ***Wright v. Village of Phoenix***, No. 97 C 8796, 2000 WL 246266, at *6 (N.D. Ill. Feb. 25, 2000) (not reported) ("Here, as in *Sadrud-Din*, Wright is claiming that Berry abused Jackson-Berry while wearing the mantle of a police officer, that her murder was traceable to his status as a state actor, and that other police officers knew of the threat to Jackson-Berry's life and affirmatively furthered that threat by failing to properly respond to the complaints of domestic violence against Jackson-Berry due to Berry's status in the police department. Accordingly, Counts 2 and 6 state a claim under the Due Process Clause."); ***Wyatt v. Krzysiak***, 82 F. Supp.2d 250, 258, 259 (D.Del. 1999) ("Even if the first three prongs [of *Kneipp*] are met, the Court holds that Krzysiak's acts and/or omissions did not increase the risk of injury to Wyatt

because she would have been driving under the influence of alcohol had Krzysiak not intervened. The case law from this and other circuits holds that, under the state created danger doctrine, an officer is not liable unless he increases the risk of harm to the victim. . . . At worse, Krzysiak left Wyatt in the same position as she would have been in had he not intervened at all. It follows that Krzysiak did not increase the risk of harm to Wyatt, even if he told her to drive while under the influence of alcohol."); ***Norris v. City of Montgomery***, 29 F. Supp.2d 1292, 1297 (M.D. Ala. 1998) ("In order for the plaintiffs to hold the State liable under the special-danger analysis, they must show that the defendants affirmatively placed them in a position of danger that was distinguishable from that of the general public. . . . Accepting the plaintiffs' allegations as true and construing them in the light most favorable to the plaintiffs, the court still finds that they have failed to present facts sufficient to give rise to liability under the special-danger theory. The plaintiffs claim that Officer Perkins affirmatively endangered the plaintiffs by 'giving' Michael Perkins's car back to him. Regardless of whether one construes Officer Perkins's behavior as an affirmative act or an omission, however, the defendants' actions do not satisfy the special-danger standard, because their actions did not increase the danger posed by Michael Perkins to the plaintiffs. Had the defendants given Michael Perkins the alcoholic beverages that caused his intoxication, the defendants arguably would have increased the danger Michael Perkins posed to the plaintiffs. However, Officer Perkins merely failed to impound Michael Perkins's car. By so doing, Officer Perkins did not alter the danger posed by Michael Perkins to other drivers on the roads. The danger posed by Michael Perkins remained the same as if Officer Perkins had never stopped him. And, as mentioned earlier, the defendants were under no constitutional duty to stop Michael Perkins, or any other intoxicated driver, at all."), *aff'd*, 194 F.3d 1323 (11th Cir. 1999); ***Tazioly v. City of Philadelphia***, No. CIV.A. 97-CV-1219, 1998 WL 633747, at *11, *12 (E.D. Pa. Sept. 10, 1998) (not reported) ("The Third Circuit has not addressed the question specifically presented by the facts of this case--whether, under the state-created danger theory, an allegation that a government worker acted with willful disregard for the safety of a child by terminating satisfactory foster care and entrusting the child to the custody of a drug-addicted, unfit, and dangerous biological parent, thereby increasing the foreseeable risk of harm to the child, states a viable § 1983 cause of action for a violation of the child's rights under the Fourteenth Amendment. . . . [T]he evidence, viewed in a light most favorable to the Plaintiffs, indicates that the decision to return Michael to his biological mother was made with actual knowledge that she was unfit and dangerous. . . . Under the four-part test articulated in *Kneipp v. Tedder* and *Mark v. Borough of Hatboro*, the record of this case, when viewed in a light most favorable

to Plaintiffs, contains sufficient evidence from which a jury could find that Michael's injuries were caused by a state-created danger."); ***Sadrud-Din v. City of Chicago***, 883 F. Supp. 270, 276 (N.D. Ill. 1995) ("By allowing Edward Johnson to continue to carry his police-issued weapon knowing the information provided by Selena Johnson, the City affirmatively contributed to the circumstances which resulted in Edward Johnson murdering Selena Johnson with that weapon."); ***Boyle v. City of Liberty***, 833 F. Supp. 1436, 1448 (W.D. Mo. 1993) (Based on plaintiffs' allegations that the defendants "intentionally placed [plaintiffs] in a position where personal injury was not merely possible but inevitable[,]" the court concluded that plaintiffs had adequately pled both a duty to protect and a breach of that duty. The scope of the duty and the reasonableness of the conduct would remain to be resolved by summary judgment or trial.); ***Muhammad v. City of Chicago***, 1991 WL 5803 (N.D. Ill. Jan. 16, 1991) (not reported) ("A special relationship arises in two situations: when the state places a person in a position of danger or when it deprives her of the means by which to secure help from private sources."); ***Swader v. Commonwealth of Virginia***, 743 F. Supp. 434, 444 (E.D. Va. 1990) (where defendants required prison employees and their families to live on prison property on which inmates were allowed to work, special relationship could be shown).

Compare ***Hart v. City of Little Rock***, 432 F.3d 801, 804-09 (8th Cir. 2005) ("Hart and Dyer allege substantive due process violations, arguing Little Rock's release of their personnel files greatly increased the risk of harm by private individuals who might retaliate against them as police officers. . . . Hart and Dyer rely on the 'state-created danger' theory. We assume without deciding that Little Rock's release of Hart's and Dyer's personnel files created sufficient danger to implicate constitutionally protected privacy interests. Additionally, we conclude element two is satisfied because there is no dispute the alleged constitutional violation was precipitated by state action. Accordingly, our analysis will focus on the third element of their § 1983 claim--whether the evidence proved Little Rock acted with the requisite degree of culpability. . . . In this case, Little Rock acted under circumstances in which actual deliberation was practical. Therefore, its conduct shocks the conscience only if it acted with 'deliberate indifference.'. . . In *Lewis,* the Court equated deliberate indifference for substantive due process with Eighth Amendment deliberate indifference. . . Thus, to sustain the district court's denial of JAML, we must conclude there was sufficient evidence to find Little Rock acted intentionally or wrongfully in disregarding a known danger. . . Conversely, if we conclude Little Rock's conduct was merely negligent or even grossly negligent, the denial of JAML must be reversed. . . . We conclude the evidence was insufficient to

support a finding Witherell ever considered, *at the time she processed the request,* whether the information would be disseminated to a criminal defendant who might use it to harm Hart and Dyer. . . . The mere fact Little Rock made it a practice to release such information does not prove it ever considered the specific risks articulated by Hart and Dyer. Assuming, as argued by Hart and Dyer, the City 'knew or should have known' its actions exposed them to a significant and increased risk of harm, the evidence only proves the City acted negligently--not with deliberate indifference. . . .We are troubled by Little Rock's practice of releasing its employees' personnel files--especially those of police officers--without notice or any attempt to redact sensitive personal information. Nevertheless, we conclude the evidence shows Little Rock's actions constitute at most negligence or gross negligence and do not rise to the level of subjective deliberate indifference necessary to sustain a substantive due process claim. . . . The *Kallstrom* court based its holding on a finding '[t]he City either knew or clearly should have known' releasing the officers' personal information substantially increased their 'vulnerability to private acts of vengeance.'. . In so holding, the *Kallstrom* court erroneously applied a negligence standard instead of the subjective deliberate indifference standard adopted in *Farmer*. . . The district court's reliance on *Kallstrom* indicates it too improperly adopted a negligence standard, making the denial of Little Rock's motion for JAML erroneous.") *with* ***Kallstrom v. City of Columbus***, 136 F.3d 1055, 1066-67 (6th Cir. 1998) ("[W]hile the state generally does not shoulder an affirmative duty to protect its citizens from private acts of violence, it may not cause or greatly increase the risk of harm to its citizens without due process of law through its own affirmative acts. Although our circuit has never held the state or a state actor liable under the Fourteenth Amendment for private acts of violence, we nevertheless have recognized the possibility of doing so under the state-created-danger theory. *See Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 912-13 (6th Cir.1995); *Jones v. City of Carlisle*, 3 F.3d 945, 949-50 (6th Cir.1993). Liability under the state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence. . . . However, because many state activities have the potential to increase an individual's risk of harm, we require plaintiffs alleging a constitutional tort under § 1983 to show 'special danger' in the absence of a special relationship between the state and either the victim or the private tortfeasor. The victim faces 'special danger' where the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large. . . . The state must have known or clearly should have known that its actions specifically endangered an individual. . . . Applying the state-created-danger theory to the facts of this case, we hold that the City's actions placed the officers and their

family members in 'special danger' by substantially increasing the likelihood that a private actor would deprive them of their liberty interest in personal security. Anonymity is essential to the safety of undercover officers investigating a gang-related drug conspiracy, especially where the gang has demonstrated a propensity for violence. In affirmatively releasing private information from the officers' personnel files to defense counsel in the *Russell* case, the City's actions placed the personal safety of the officers and their family members, as distinguished from the public at large, in serious jeopardy. The City either knew or clearly should have known that releasing the officers' addresses, phone numbers, and driver's licenses and the officers' families' names, addresses, and phone numbers to defense counsel in the *Russell* case substantially increased the officers' and their families' vulnerability to private acts of vengeance. We therefore hold that the City's policy of freely releasing this information from the undercover officers' personnel files under these circumstances creates a constitutionally cognizable 'special danger,' giving rise to liability under § 1983.").

In ***Wood v. Ostrander***, 879 F.2d 583 (9th Cir. 1989) (opinion after rehearing), *cert. denied*, 498 U.S. 938 (1990), the court held an affirmative duty to protect was owed plaintiff by a police officer who arrested the driver of the car in which plaintiff was a passenger, impounded the vehicle and left plaintiff stranded in a high-crime area at 2:30 a.m. Plaintiff was raped by a man who offered her a ride home. *Id*. at 590.

The court reasoned that the officer's actions of arresting the driver, impounding the car and stranding plaintiff in that area at 2:30 a.m. "distinguishe[d] [plaintiff] from the general public and trigger[ed] a duty of the police to afford her some measure of peace and safety." *Id*.

The dissent in ***Wood*** characterized the majority's conclusion as a "special relationship contention... totally inconsistent with the legal principles enunciated so clearly in ***DeShaney***." 879 F.2d at 600 (Carroll, J., dissenting). *Accord* ***Reeves v. Besonen***, 754 F. Supp. 1135, 1140 n.1 (E.D. Mich. 1991).

In ***D.R. v. Middle Bucks Area Vocational Technical School***, 972 F.2d 1364, 1375 (3d Cir. 1992) (*en banc*), *cert. denied*, 113 S. Ct. 1045 (1993), the court rejected the "state created danger" theory in a case involving sexual assaults upon students by other students. The court noted that "[l]iability under the state-created danger theory is predicated upon the states' affirmative acts which work to plaintiffs' detriments in

terms of exposure to danger . . . . Plaintiffs' harm came about solely through the acts of private persons without the level of intermingling of state conduct with private violence that supported liability in *Wood*, *Swader*, and *Cornelius*."

See also ***Doe v. Town of Bourne,*** No. Civ.A.02-11363-DPW, 2004 WL 1212075, at *7, *8 (D. Mass. May 28, 2004) ("Neither the custodial relationship exception nor the state-created danger exception applies in this case. As to the former, the Does have not alleged any specialized facts that give rise to a custodial relationship between themselves and defendants, and while the First Circuit has not addressed the issue, other courts have resoundingly concluded that, as a general matter, students do not stand in a custodial relationship with public schools or their officials for purposes of applying *DeShaney*. . . . The allegations in the Complaint are similarly insufficient to support a state-created danger theory of liability. The only conduct of Grondin and Demitri at issue is their nonaction, including their failure to report the rape to Nicole's parents or the police and their failure to investigate, or more generally to prevent, the rape and harassment. Absent any affirmative action by school officials, the state-created danger theory does not open the door for due process violations for situations in which students are harmed by other students, even where the school deliberately ignores either a threat or actual prior instances of violence."); ***Carroll K. v. Fayette County Board of Education***, 19 F. Supp.2d 618, 624 (S.D.W.Va. 1998) ("Here, Plaintiffs allege Principal David Perry told Carroll K. that, as a female, she had no right to defend herself against attacks by male students and that she would be punished if she attempted to. Furthermore, they allege there was a longstanding hostile environment toward females so pervasive it had the force and effect of a custom within the school. Assuming these allegations to be true, which the Court must do, the Court cannot conclude there is no set of facts Plaintiffs could prove that would state a claim and entitle them to relief. Thus, Plaintiffs' claim survives the motion to dismiss insofar as it alleges Defendants created a dangerous situation.").

Compare ***Kneipp v. Tedder***, 95 F.3d 1199, 1201, 1209 n.22 (3d Cir. 1996) (In case involving severely inebriated woman who was stopped by police and then allowed to proceed home alone, court "adopt[ed] the "state-created danger" theory as a viable mechanism for establishing a constitutional violation under 42 U.S.C. § 1983. . . .[noting that] the relationship requirement under the state-created danger theory contemplates some contact such that the plaintiff was a foreseeable victim of a defendant's acts in a tort sense.") *and* ***Bogle v. City of Warner Robins***, 953 F. Supp. 1563, 1570 (M.D. Ga. 1997) (holding that "Plaintiff was not deprived of her

constitutional rights under the Fourteenth Amendment when police officers released her from custody in an impaired state," and Plaintiff was subsequently raped by a third party).

See also ***Sciotto v. Marple Newton School District,*** 81 F. Supp.2d 559, 567 & n.11 (E.D. Pa. 1999) ("A reasonable jury could conclude that Smith and Nathans, by maintaining a tradition of inviting older, heavier, more experienced alumni to participate in wrestling practices, "used their authority to create an opportunity" for Fendler to injury Louis Sciotto that would not have otherwise existed. But for the tradition and Nathans' invitation to Fendler pursuant to that tradition, Fendler would not have been present at practice, and would not have live wrestled Louis Sciotto on January 10, 1997. On the basis of this evidence, I conclude that a genuine issue of material fact exists as to whether the school defendants used their authority to create an opportunity for the events to occur which caused the injury suffered by Louis Sciotto. . . . Defendants contend that the free and voluntary nature of Louis Sciotto's participation in the wrestling program and his choice to wrestle Greg Fendler exonerates them from liability under the 'state-created danger' theory. While freedom and voluntary participation may be persuasive under a 'special relationship' theory, I find no cases holding that voluntary actions by the plaintiff nullify a 'state-created danger' claim. If voluntary actions by the plaintiff contributing to his or her own danger were dispositive, the Court of Appeals for the Third Circuit would have concluded that the plaintiff's voluntarily decision in *Kneipp* to become severely inebriated, and attempt to walk home, which undoubtedly contributed to her eventual fall and consequent injuries, prevented her from asserting a valid 'state-created danger' claim. The Court of Appeals for the Third Circuit did not do so there, and I decline to do so today."); ***Maxwell v. School District of City of Philadelphia***, 53 F. Supp.2d 787, 792, 793 (E.D.Pa. 1999) (applying *Kneipp* and finding allegations sufficient to state claim under state created danger theory where rape of a mentally impaired student by other students in a locked classroom with teacher present was "foreseeable and a fairly direct result of the state's actions."); ***Apffel v. Huddleston***, 50 F. Supp.2d 1129, 1138 (D. Utah 1999) ("It is persuasive to the court that the cliffs at issue are a natural condition on public land to which Jason Apffel had access at any time. Defendants did not create the cliffs nor the danger posed by climbing them. Furthermore, the court cannot find that the act of a planning a party on state lands near the sandstone cliffs enhanced the danger to decedent. The cases cited by defendants and referenced by the court in this decision compel a conclusion that neither the law as it existed at the time of the accident nor the facts plead in plaintiffs' complaint support finding that the state created the danger to decedent or enhanced

the risks that were already in existence."); ***Mason v. Barker***, 977 F. Supp. 941, 945, 947 (E.D. Ark. 1997) ("In the instant case, Plaintiffs contend that Defendants ordered Plaintiffs into Ms. Mason's car and directed them to leave McCrory. The Court believes that such an allegation distinguishes the relatively hands-offs, activity in *Foy* from the affirmative, authoritative conduct at issue here. If police officers compel an individual whom they know to be a danger to herself and others to drive a car out of town, those officers have infringed a constitutionally protected interest under the Due Process Clause. Indeed, such action by police officers presents a perverse scenario in which police officers, clothed with the authority of the State, force a citizen to break the law. . . . Although it is clear that states have no duty to protect citizens from drunk drivers, . . . police officers may not, consistent with the demands of the Constitution, compel individuals whom they know to be heavily medicated to expose themselves and others to danger by ordering them to drive."); ***Estate of Rosenbaum v. City of New York***, 975 F. Supp. 206, 217-18 (E.D.N.Y. 1997) ("If plaintiffs contended simply that the City had failed to respond to requests from the Hasidic community for additional police protection during the Crown Heights disturbances, such a claim would arguably be barred by *DeShaney*, decided two years before the disturbances took place. However, the thrust of plaintiffs' argument is quite different: plaintiffs allege that defendants, by the inappropriate implementation of a policy of restraint, actually exacerbated the danger to the Hasidic community and rendered the community more vulnerable to violence by private actors. . . . The Court concludes, therefore, that plaintiffs have properly set forth a substantive due process basis for relief under § 1983. The jury will determine at trial whether Dinkins or Brown, or any other state actor, had assisted in creating or increasing danger to the plaintiffs and, if so, whether such actions were the proximate cause of any injuries which plaintiffs sustained.").

In ***Johnson v. Dallas Independent School District***, 38 F.3d 198 (5th Cir. 1994), the court concluded that "[e]ven if the state-created danger theory is constitutionally sound, the pleadings in this case fall short of the demanding standard for constitutional liability." The court explained:

> The key to the state-created danger cases, and the essence of their distinction from *Middle Bucks*, lies in the state actors' culpable knowledge and conduct in 'affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid.' [cites omitted] Thus the environment created by the state actors must be

> dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. Put otherwise, the defendants must have been at least deliberately indifferent to the plight of the plaintiff.

Id. at 201. *See also* ***Morin v. Moore,*** F.3d 309 F.3d 316, 323 (5th Cir. 2002) ("Even if we were to consider all of the Morins' allegations, they fail to satisfy the 'state-created-danger' theory because the Morins have failed to demonstrate that the officers acted with deliberate indifference."); ***McClendon v. City of Columbia (McClendon II),*** 305 F.3d 314, 337, 338 (5th Cir. 2002) (en banc) (Robert M. Parker, J., joined by Judges Wiener and Harold R. DeMoss, Jr., dissenting) ("[T]he state-created danger theory is overwhelmingly accepted in today's federal jurisprudence. In the face of such overwhelming authority, the majority cowers. It does not have the courage to be the only federal circuit court of appeals in the nation to explicitly reject the state-created danger theory even though that is clearly what it wants to do. Although the majority refuses to take the road less traveled in a principled albeit unpopular way, it is perfectly willing to accomplish its objectives through subterfuge. The majority knows only too well how to play the game. If the Circuit never rules on whether this is a viable theory, the Circuit makes it exceedingly difficult for the district courts to rule that the Circuit law in state-created danger cases is 'clearly established' for purposes of a qualified immunity analysis. Thus, state actors who engage in behavior that falls within the confines of the 'state-created danger' theory will always escape liability under the majority's view no matter how egregious their behavior. That is an insidious approach to the law and I reject it outright. The Circuit should quit hiding the ball from the public and make a decision one way or the other. It has refused. [footnote omitted] However, I favor adopting, as has the rest of the country, the state-created danger theory as a viable mechanism for obtaining Section 1983 relief in this Circuit."); ***Martin v. Shawano-Gresham School District,*** 295 F.3d 701, 712 (7th Cir. 2002) ("Because the defendants did not create or increase a risk that Timijane would commit suicide by suspending her and then allowing her to return home at the end of the school day, the Martins' substantive due process claim must fail."); ***Piotrowski v. City of Houston (Piotrowski II)***, 237 F.3d 567, 584, 585 (5th Cir. 2001) ("Although this court has discussed the contours of the 'state-created danger' theory on several occasions, we have never adopted that theory. . . . We need not do so here, since, even if we were to adopt it, Piotrowski could not recover. . . . The initial problem is that no matter what official protection Bell received, the City actors did not create the danger she

faced. . . . Unlike other cases in which government officials placed persons in danger, the City at most left her in an already dangerous position. Depending on the facts, some cases interpret the state-created danger theory to result in § 1983 liability if government actors increase the danger of harm to a private citizen by third parties. Measured by this standard, the assistance provided to Bell consisted of furnishing Piotrowski's mug shot and failing to warn her of Waring's tip. Neither of these circumstances, however, actually increased the danger to her. . . . Moreover, the City did not act with deliberate indifference. . . . [T]here is no evidence that City actors knew of or participated in the murder contract, and they did nothing to prevent her from protecting herself."); ***Saenz v. Heldenfels Brothers, Inc.,*** 183 F.3d 389, 391, 392 (5th Cir. 1999) ("[N]either the text nor the history of the Due Process Clause supports holding that an officer who orders another officer to refrain from arresting a suspected drunk driver has committed a constitutional tort. The Due Process Clause is intended to curb governmental abuse of power over the people it governs, not to require state officers to protect the people from each other. . . . Unlike the deputy in *Ross*, Gonzalez was neither aware of an immediate danger facing a known victim, nor did he use his authority to prevent the appellants from receiving aid. This 'state-created danger' theory is inapposite without a known victim. . . . [W]e decline to issue the novel ruling that when one officer exercises his discretion by ordering another officer not to apprehend a drunk driver, a third party unknown to the officer at the time of the order who is later injured by the drunk driver has a constitutional claim against the ordering officer.").

See also ***Perry v. Wildes***, No. 97-3372, 1998 WL 199795, *3 (6th Cir. Apr. 15, 1998) (unpublished) ("[W]e are unwilling to say that police response to a citizen's call for assistance subjects the officers to potential liability for creating a 'special danger' premised upon a heightened sense of security. It does not follow from police presence and opinions about the potential for danger that a constitutional violation has occurred absent some action on the part of the responding officers that forcibly prevents the citizen who requested help from acting on his or her own behalf, or creates a special danger by enabling a private actor to do something that puts another specifically at risk."); ***Morse v. Lower Merion School Dist.***, 132 F.3d 902, 913-15 (3d Cir. 1997) ("[I]t would not appear that the state created danger theory of liability under § 1983 always requires knowledge that a specific individual has been placed in harm's way. Although it is appropriate to draw lines here, there would appear to be no principled distinction between a discrete plaintiff and a discrete class of plaintiffs. The ultimate test is one of foreseeability. . . . Whether an affirmative act rather than an act of omission is required under the state-created danger theory

appears to have been answered by *Mark*. As the *Mark* court noted, one of the common factors in cases addressing the state created danger is that the state actors 'used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.' *Mark*, 51 F.3d at 1152. Thus, the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or an omission."); ***Randolph v. Cervantes***, 130 F.3d 727, 731 (5th Cir. 1997) ("Viewing the evidence in the light most favorable to Randolph's mother, the defendants allowed and encouraged Randolph to voluntarily reside at Pine Hill Apartments as a tenant having the right to come and go from the premises at any time and having the right to cancel her lease. This will not trigger a duty under the state-created danger theory, even if we were to adopt such a theory."); ***Doe v. Hillsboro Independent School District***, 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc) ("Viewed in the light most favorable to the plaintiffs, the school district placed the student in the same area as a school custodian who had no known criminal record, sexual or otherwise, with school teachers in the same building but not in the immediate area. This will not trigger a duty under a state-created-danger theory, even if we were to adopt such a theory. Such post hoc attribution of known danger would turn inside out this limited exception to the principle of no duty."); ***Estate of Stevens v. City of Green Bay***, 105 F.3d 1169, 1177 (7th Cir. 1997) ("To recover under this [state-created danger] theory, the estate must demonstrate that the state greatly increased the danger to Stevens while constricting access to self-help; it must cut off all avenues of aid without providing a reasonable alternative. Only then may a constitutional injury have occurred."); ***Seamons v. Snow***, 84 F.3d 1226, 1236 (10th Cir. 1996) ("In addition to the 'special relationship' doctrine, we have held that state officials can be liable for the acts of third parties where those officials 'created the danger' that caused the harm. *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir.1995), *cert. denied*, --- U.S. ----, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996). However, we stated that a claim brought under the 'danger creation' theory must be predicated on 'reckless or intentional injury-causing state action which "shocks the conscience."' *Id.*"); ***Pinder v. Johnson***, 54 F.3d 1169, 1177 (4th Cir. 1995) (*en banc*) ("When the state itself creates the dangerous situation that resulted in a victim's injury, the absence of a custodial relationship may not be dispositive. In such instances, the state is not merely accused of a failure to act; it becomes much more akin to an actor itself directly causing harm to the injured party. [citing cases] At most, these cases stand for the proposition that state actors may not disclaim liability when they themselves throw others to the lions. [cite omitted] They do not, by contrast, entitle persons who rely on promises of aid to some greater

degree of protection from lions at large."); ***Piotrowski v. City of Houston (Piotrowski I)***, 51 F.3d 512, 515 (5th Cir. 1995) ("Piotrowski contends that her allegations qualify by satisfying the 'state-created danger' theory of § 1983 liability. [footnote omitted] While this Court has not affirmatively held that this theory is a valid exception to the *DeShaney* rule, . . . it has addressed what a plaintiff would have to demonstrate to qualify for relief under this theory. First, a plaintiff must show that the state actors increased the danger to her. Second, a plaintiff must show that the state actors acted with deliberate indifference."); ***Leffall v. Dallas Independent School Dist.***, 28 F.3d 521, 532 (5th Cir. 1994) ("[E]ven assuming that substantive due process imposed some duty on the state to protect [student] from dangers arising out of sponsorship of the dance at Lincoln High School, [plaintiff] failed to allege a violation of [student's] due process rights in her complaint because she did not allege facts that demonstrated deliberate indifference to those dangers on the part of the state actors."); ***Salas v. Carpenter***, 980 F.2d 299, 309, 310 (5th Cir. 1992) ("The Fourteenth Amendment does not require [Sheriff] to train and equip members of the sheriff's department for special SWAT or hostage negotiation duties. . . . It does not mandate that law enforcement agencies maintain equipment useful in all foreseeable situations. With no constitutional duty to provide SWAT or hostage negotiation equipment, [Sheriff's] failure to do so does not deny due process."); ***Gregory v. City of Rogers***, 974 F.2d 1006, 1012 (8th Cir. 1992) (*en banc*) (officers who arrested designated driver owed no constitutional duty of protection to intoxicated passengers whom driver left in car, with keys and unattended, outside police station; "it was [the driver's] abdication that placed [plaintiffs] in danger, not [the officer's] performance of his official duty."), *cert. denied*, 113 S. Ct. 1265 (1993); ***Hilliard v. City and County of Denver***, 930 F.2d 1516, 1520 (10th Cir. 1991) (in a case factually similar to ***Wood***, the court indicated reluctance to find a constitutional right to personal security where there is no element of state-imposed confinement or custody), *cert. denied*, 112 S. Ct. 656 (1991); ***Leidy v. Borough of Glenolden,*** No. CIV.A. 01-4361, 277 F. Supp.2d 547, 561 (E.D. Pa. 2003) ("Illich and Cooke may have taken Bennett into custody. But when they released him he posed no more of a danger than he did before he came into the station. . . . Other cases reinforce our analysis. In some cases where law enforcement officers were held responsible for a state-created danger, the officers acted to instigate private violence. [footnote collecting cases] In others, the officers acted to place people in harm's way who would otherwise not have been at risk. [footnote collecting cases] In others, the conduct of officers investigating crimes set off other hazards. [footnote collecting cases] In a final set of cases, the officers intervened in such a way as to cut people off from their private sources of protection. [footnote collecting cases] In contrast, where police officers

took insufficient measures to avert or control private violence, courts have not deemed the loss of life or liberty to be the result of state action. [footnote collecting cases] By foiling Bennett's surrender, the defendants gave inadequate protective service to the community. But inadequate protective services, like the failure to provide protective services at all, constitute only a failure to protect, and without more we must (reluctantly) deny plaintiffs' claim."); ***Pullium v. Ceresini,*** 221 F. Supp.2d 600, 604, 605 (D. Md. 2002) ("[T]he instant case involves affirmative conduct on the part Officer Ceresini (or another officer under his direction). The officer injected Mr. Pulliam into Plaintiff's home, thus creating a danger where previously none existed. According to the allegations in the Complaint, Mr. Pulliam would not have been in a position to assault Plaintiff if he had not been driven to her home by the officer and if the officer had not ordered Plaintiff to admit him, over her repeated and impassioned protestations. While the Fourth Circuit may be reluctant to impose liability on police officers whose omissions create increased dangers from third parties, there is no indication that the court would have the same reluctance where it is an officer's affirmative conduct that creates the danger."); ***Stevens v. Trumbull County Sheriffs' Dep't.***, 63 F. Supp.2d 851, 855 (N.D. Ohio 1999) ("Defendants' response to Plaintiff's 911 call did not create or enhance the danger to her. Defendants did nothing to give Plaintiff a heightened sense of security that subjects them to liability for violating her substantive due process rights. Furthermore, Defendants did not place any restraint on Plaintiff such that she was unable to act to protect herself. Plaintiff did not report a threat of imminent harm to her until it was too late for Defendants to respond. As such, Plaintiff has not established that Defendants' conduct violated her substantive due process rights."); ***Henderson v. City of Philadelphia***, No. CIV. A. 98-3861, 1999 WL 482305, at *11, *12 (E.D. Pa. July 12, 1999) (unpublished) ("The cases in which courts have allowed plaintiffs to proceed on their state-created danger claims all discuss actions taken by the defendants which increase the plaintiffs' risk of harm or subject the plaintiffs to harm that did not exist before they acted. . . . In this case, unlike *Kneipp*, the officers did not intervene to remove Henderson's private source of aid, his mother, and did not restrain her ability to assist her son. . . . The officers cannot be liable for the fact that their presence increased Henderson's agitation and his desire to escape. In the absence of an act by the officers that changed the volatile circumstances which already surrounded Henderson, they cannot be liable."); ***Pearson v. Miller***, 988 F. Supp. 848, 857 (E.D. Pa. 1997) (rejecting liability under state-created danger theory where "[p]laintiff's allegations [were] not sufficient to support an inference that Luzerne County C & Y workers knew that Miller posed a 'credible danger' to others and could and should have foreseen that he would assault

the plaintiff or someone in a discrete class to which she belongs."); ***Johnson v. City of Oakland***, No. C-97-283 JSB, 1997 WL 776368, *5, *6 (N.D. Cal. Dec. 3, 1997) (not published) ("One condition of a valid state-created danger claim is that the danger would not have existed without the state action. . . . Decisions in at least five other circuits condition relief for state-created danger upon a proven claim that the danger would not otherwise have existed. [citing cases] . . . . Neither the officers' failure to rescue Johnson before the fatal collision nor to call off their pursuit created a danger that would not otherwise have existed. Had the officers not pursued the van with Johnson clinging to its roof, Johnson would have been abandoned to the van's occupants who had shown no concern for Johnson's safety."); ***Semple v. City of Moundsville***, 963 F. Supp. 1416, 1428 (N.D.W.Va. 1997) ("[A]bsent a custodial situation, *Pinder II* and *DeShaney* preclude plaintiffs' claims that a 'special relationship' existed that obligated the police department to protect [decedents] from Michael's violence. Further, plaintiffs have not established that the Moundsville Police Department took any affirmative action to create or enhance the danger that existed from Michael's behavior. This Court finds that this case is a quintessential 'failure to act' case."), *aff'd,* 195 F.3d 708 (4th Cir. 1999); ***Park v. City of Atlanta***, 938 F. Supp. 836, 843 (N.D. Ga. 1996) ("Defendants in the instant case were not responsible for creating the mob's violence in the wake of the Rodney King verdict or directing it toward Plaintiffs or their businesses. The city did give assurances and Plaintiffs acted on these assurances, but the city did not limit the Plaintiffs' freedom of action, and that is what prevents this from arising to a constitutional violation."), *rev'd and remanded on other grounds*, 120 F.3d 1157 (11th Cir. 1997); ***Rutherford v. City of Newport News***, 919 F. Supp. 885, 895 (E.D. Va. 1996) ("In sum, the case law makes clear that the affirmative duty to protect under the Due Process Clause arises primarily in the custodial context. The 'danger creation' exception, to the extent it is recognized, still requires some element of custody or control--although in these cases the person in state custody or control is not the victim ..., but the perpetrator who harmed the victim."); ***Plumeau v. Yamhill County School District***, 907 F. Supp. 1423, 1443-44 (D. Ore. 1995) ("In this case, there is no evidence that the District was aware of a specific risk of harm to Memorial School students, much less to a particular child such as Amanda. Nor is there any evidence that the District took any affirmative action that created the danger which caused the specific harm suffered by Amanda. The District did hire and retain Moore. However, the mere fact that the District employed Moore to perform normal and customary janitorial duties which incidentally gave him access to the entire school building is insufficient to show that the District took affirmative action creating a specific danger to a specific individual. Absent some notice to the District of Moore's propensity to sexually

abuse children, Amanda may not rely on this theory."), *aff'd by Plumeau v. School Dist. No. 40,* 130 F.3d 432 (9th Cir. 1997); ***Young v. Austin Independent School District***, 885 F. Supp. 972, 979 (W.D. Tex. 1995) (allowing students who had a history of disciplinary problems back in school "does not constitute the type of culpable behavior envisioned in the state-created danger theory."); ***Baby Doe v. Methacton School District***, 880 F. Supp. 380, 386 (E.D. Pa. 1995) ("Cases interpreting the state-created danger exception have repeatedly held that a state is not liable for a state-created danger if the victim is not known and identified, but simply a member of the greater public. [citing cases] . . . . We find that there are no allegations in the Amended Complaint to indicate that the Methacton Defendants were aware that they had created a danger specifically to Baby Doe. . . Plaintiffs, therefore, cannot make out a state-created danger claim."); ***Thacker v. City of Miamisburg***, No. C-3-92-188, 1994 WL 1631036, at *5 (S.D. Ohio July 14, 1994) ("Even assuming that those officers removed Nick Foote from the home and promised Janice Foote that he would not return, still it does not appear that a relationship 'special' enough was created such that Janice's reliance on their promise could ultimately lay at the feet of the City the responsibility for her death. There is no evidence that the City prevented her from leaving her home that night before her husband returned to murder her. There is no evidence that the City provided Nick Foote with 'the necessary means and the specific opportunity' to kill Janice. . . Short of such evidence, summary judgment is appropriate."); ***Franklin v. City of Boise***, 806 F. Supp. 879, 887 (D. Idaho 1992) (where plaintiff's son exposed himself to danger by resisting arrest and fleeing, no duty to protect arose under *DeShaney*); ***Robbins v. Maine School Administrative District No. 56***, 807 F. Supp. 11, 13 (D. Me. 1992) ("The relationship between a state and its students does not constitute the special custodial relationship referred to in *DeShaney*. The absence of an affirmative constitutional duty to protect its students does not, however, mean that a state may create a dangerous situation and place students in harm's way without acquiring a corresponding duty to protect those students from resulting violations of their constitutional rights. A state may be held liable if it can fairly be said to have affirmatively acted to create or exacerbate a danger to the victims."); ***Was v. Young***, 796 F. Supp. 1041, 1050 (E.D. Mich. 1992) ("Absent some kind of custodial relationship between the state and either Plaintiffs or their attackers, no constitutional duty can be imposed on Defendants.").

See also ***Breen v. Texas A & M University***, 485 F.3d 325, 333-37 (5th Cir. 2007) ("A number of courts, including the majority of the federal circuits, have adopted the state-created danger theory of section 1983 liability in one form or

another. . . Prior to the *Scanlan* decision in the present group of cases, this court had often expressed reluctance to embrace the state-created danger theory, while noting its adoption by other courts.. . . Although the *Scanlan* opinion did not expressly announce that it was adopting the state-created danger theory, it explicitly recited the previously recognized essential elements of a state-created danger claim, applied them to the pleadings, and decided that the plaintiffs had stated a claim upon which relief could be granted under the theory. . . Thus, the *Scanlan* panel, unlike earlier panels of this court, was squarely faced with complaints that sufficiently alleged the elements of a state-created danger claim, and, therefore, stated claims under that theory. Consequently, the *Scanlan* court, by holding that the district court erred in dismissing plaintiffs' section 1983 claims, necessarily recognized that the state-created danger theory is a valid legal theory.. . . . The *Scanlan* panel's clearly implied recognition of state-created danger as a valid legal theory applicable to the case is the law of the case with respect to these further appeals in these same cases now before this panel. . . . Because the necessary implication of the *Scanlan* court's decision is that the state-created danger theory is, indeed, a valid basis for a claim on the set of facts alleged in the complaints in these cases, that clear implied holding is the law of the case in the present group of appeals."), *amended on reh'g in part by* ***Breen v. Texas A & M University***, 494 F.3d 516, 518 (5th Cir. 2007) (withdrawing that part of prior opinion that recognized state-created-danger theory of liability); ***Rios v. City of Del Rio, Texas***, 444 F.3d 417, 422, 423 (5th Cir. 2006) ("Rios contends. . . that *Scanlan v. Texas A & M Univ*., 343 F.3d 533 (5th Cir.2003), adopted the state-created danger theory. It is certainly not clear that *Scanlan* purports to do so. There the panel primarily addressed the district court's error in considering matters outside the complaint in granting a Rule 12(b)(6) dismissal. The *Scanlan* panel did cite the *Johnson* and *Piotrowsk*i opinions respecting what would be required to make out a state-created danger claim, and stated that the plaintiffs had adequately pled the there referenced required elements thereof; however, this discussion was introduced by the statement that 'this Court has never explicitly adopted the state-created danger theory,' . . . and *nowhere* in the opinion does the court expressly purport to adopt or approve that theory. At least two subsequent panels have construed *Scanlan* as not adopting the state-created danger theory. . . We need not, however, ultimately resolve the meaning of *Scanlan* because, as explained below, prior decisions of this court more specifically on point here than *Scanlan* (and not cited in *Scanlan*) are controlling in the present setting."[footnotes omitted]); ***Beltran v. City of El Paso,*** 367 F.3d 299, 307 (5th Cir. 2004) ("Beltran alternatively contends that Amador, by providing Sonye with inaccurate information about the status of the patrol units and recommending that she stay in the bathroom, created a

dangerous situation for which the state was or should be responsible. This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability even where the question of the theory's viability has been squarely presented. *See, e.g., McClendon,* 305 F.3d at 327-333; *Scanlan v. Texas A & M Univ.,* 343 F.3d 533, 537 (5th Cir.2003) (same). It is unnecessary to do so in this case."); ***Rivera v. Houston Independent School District,*** 349 F.3d 244, 249 & n.5 (5th Cir. 2003) ("We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause. . . .In *Scanlan v. Texas A & M University,* 343 F.3d 533 (5th Cir.2003), we found that 'this Court has never explicitly adopted the state-created danger theory.' *Id.* at 537. Despite remanding that case to the district court for further proceedings, we did not recognize the state created danger theory. . . . We again decline to do. Even if we were to review this case under the state created danger theory, it would fail. . . . Rather than pointing to an annunciated Board policy that was the 'moving force' behind the alleged due process violation, the Parents argue the Board established a custom of tolerating gang activity such that it constituted official Board policy, and this custom increased the danger to their son. . . .However, even if such a custom existed, there is no evidence showing the Board had actual or constructive knowledge of its existence. . . . Furthermore, even if the Parents could show that the Board was not assiduous at fighting gang activity, this does not demonstrate that it was 'deliberately indifferent' to the danger that gang activity might have posed to Avila. Nor does it show that the Board affirmatively placed Avila in a position of danger, namely in the situation where Balderas was a greater threat to him than he would have been otherwise."); ***Scanlan v. Texas A & M University,*** 343 F.3d 533, 537, 538 (5th Cir. 2003) ("Although this Court has never explicitly adopted the state-created danger theory, the Court set out the elements of a state-created danger cause of action in *Johnson v. Dallas Independent School District,* 38 F.3d 198 (5th Cir.1994). In *Johnson,* the Court explained that a plaintiff must show the defendants used their authority to create a dangerous environment for the plaintiff and that the defendants acted with deliberate indifference to the plight of the plaintiff. . . Later, the Court explained what is required to establish deliberate indifference. In *Piotrowski v. City of Houston,* the Court explained that to establish deliberate indifference, the plaintiff must show the 'environment created by the state actors must be dangerous; they must know it is dangerous; and ... they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur.' . . Even a cursory review of the complaints shows the plaintiffs pleaded facts to establish deliberate indifference. . . . If these allegations were construed in the light most favorable to the plaintiff, the district court should have determined the plaintiffs had

pleaded sufficient factual allegations to show the bonfire construction environment was dangerous, the University Officials knew it was dangerous, and the University Officials used their authority to create an opportunity for the resulting harm to occur. As a result, the district court should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory."); ***Doe v. Town of Bourne,*** No. Civ.A.02-11363-DPW, 2004 WL 1212075, at *7, *8 (D. Mass. May 28, 2004) ("Neither the custodial relationship exception nor the state-created danger exception applies in this case. As to the former, the Does have not alleged any specialized facts that give rise to a custodial relationship between themselves and defendants, and while the First Circuit has not addressed the issue, other courts have resoundingly concluded that, as a general matter, students do not stand in a custodial relationship with public schools or their officials for purposes of applying *DeShaney*. . . . The allegations in the Complaint are similarly insufficient to support a state-created danger theory of liability. The only conduct of Grondin and Demitri at issue is their nonaction, including their failure to report the rape to Nicole's parents or the police and their failure to investigate, or more generally to prevent, the rape and harassment. Absent any affirmative action by school officials, the state-created danger theory does not open the door for due process violations for situations in which students are harmed by other students, even where the school deliberately ignores either a threat or actual prior instances of violence.").

See also ***Monfils v. Taylor***, 165 F.3d 511, 517 (7th Cir. 1998) ("[W]e note that by having the requirement regarding avenues of self-help included in the instructions, the City received a benefit it was not strictly entitled to. In a claim such as this one based on a state-created danger, there is no absolute requirement that all avenues of self-help be restricted. *Wallace*, the case on which the City relies, involved, as we have said, a prison guard. He was attempting to establish liability by claiming both that he had a 'special relationship' with the state because of his position as a guard and that prison officials placed him in a position of danger he would not otherwise have faced. The requirement that self-help be restricted went only to his claim of a special relationship. The basis of a special relationship is that the state has some sort of control or custody over the individual, as in the case of prisoners, involuntarily committed mentally ill persons, or foster children. The state's duty to protect those persons or to provide services for them arises from that custody or control. For a person not in custody to claim a special relationship, he must at least claim that the state had sufficient control to cut off other avenues of aid. Recently, in a case which seems to merge the two theories, we have required a finding that alternative avenues of aid have been cut off. *Estate of Stevens v. City of Green Bay*,

105 F.3d 1169 (7th Cir.1997). *Wallace*, however, states no such requirement. We think *Wallace* correctly states the law of this circuit: a state can be held to have violated due process by placing a person in a position of heightened danger without cutting off other avenues of aid. As we said in *Wallace*, the elements of the claim are: 'what actions did the prison officials affirmatively take, and what dangers would Wallace otherwise have faced?'").

In ***G-69 v. Degnan***, 745 F. Supp. 254 (D.N.J. 1990), the court found a "special relationship" between an informant and the state, where "both parties anticipate[d] that the informant's activities . . . could result in a threat to [his] life . . . ." *Id*. at 265. Where the state had made guarantees of personal safety to the informant and where the informant's life and liberty are at risk, "the state may not, consistent with the Constitution, walk away from the bargain." *Id*. *See also* ***Butera v. District of Columbia,*** 235 F.3d 637, 649, 650 (D.C. Cir. 2001) ("The circuit courts have adopted the State endangerment concept in a range of fact patterns concerning alleged misconduct by State officials. Regardless of the conduct at issue, however, the circuits have held that a key requirement for constitutional liability is affirmative conduct by the State to increase or create the danger that results in harm to the individual. . . . We join the other circuits in holding that, under the State endangerment concept, an individual can assert a substantive due process right to protection by the District of Columbia from third-party violence when District of Columbia officials affirmatively act to increase or create the danger that ultimately results in the individual's harm."); ***Wang v. Reno***, 81 F.3d 808, 818 (9th Cir. 1996) ("[T]he government argues that Wang's due process rights were not violated because the government 'has no constitutional duty to protect a witness from harm stemming from his or her testimony that may occur after the witness is released from the government's custody.' The government's argument fails to take into account the government's constitutional duty to protect a person when it creates a special relationship with that person, or when it affirmatively places that person in danger. . . . Having placed Wang in custody, the government had an obligation to protect him from liberty deprivations he faced by virtue of his testimony in court.").

But see ***Matican v. City of New York***, 524 F.3d 151, 156-59 (2nd Cir. 2008) ("We therefore join several of our sister circuits in holding that a noncustodial relationship between a confidential informant and police, absent more, is not a special relationship. *Accord Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 80 (1st Cir.2005); *Dykema v. Skoumal*, 261 F.3d 701, 706 (7th Cir.2001); *Butera v.. District of Columbia*, 235 F.3d 637, 648 (D.C.Cir.2001); *Summar v. Bennett*, 157 F.3d 1054,

1059 (6th Cir.1998). . . . In applying the state-created danger principle, "we have sought to tread a fine line between conduct that is 'passive' " (and therefore outside the exception) "and that which is 'affirmative' " (and therefore covered by the exception). . . . As the district court recognized, Matican's allegation that the officers failed to learn about, or inform him of, Delvalle's violent criminal history or his release on bail fall on the passive side of the line. . . . By contrast, Matican's allegation that the officers planned the sting in a manner that would lead Delvalle to learn about Matican's involvement is sufficiently affirmative to qualify as a state-created danger. . . . Here, . . . the officers had ample opportunity to plan the sting in advance. Matican argues that the district court erred in holding that the officers did not act with deliberate indifference. He proposes a balancing test to help factfinders determine when the conscience is shocked by reckless or deliberately indifferent state action that creates or increases a danger. We need not consider Matican's proposed test, because this court's decision last year in *Lombardi* provides sufficient guidance to resolve this issue. In that case, we considered the claims of rescue and cleanup workers at the World Trade Center site following the 9/11 attacks. The workers in that case alleged that the defendants, federal environmental and workplace-safety officials, issued intentionally false press releases stating that the air in Lower Manhattan was safe to breathe, and that in reliance on those statements, the workers did not use protective gear. . . We held that, regardless of whether the situation was a time-sensitive emergency, plaintiffs' allegations of deliberate indifference did not shock the conscience. . . . The same considerations lead us to conclude that Matican's allegations of affirmative conduct by the officers, even if true, do not shock the contemporary conscience. In designing the sting, the officers here had two serious competing obligations: Matican's safety and their own. They could reasonably have concluded that the arrest of a potentially violent drug dealer demanded the use of overwhelming force, even if that show of force might jeopardize the informant's identity in the future. We are loath to dictate to the police how best to protect themselves and the public, especially when our ruling could be taken to require officers to use riskier methods than their professional judgment demands. As we explained in *Lombardi*, the defendants in our prior state-created danger cases were not subject to 'the pull of competing obligations.'. . .Because the officers were obliged to protect their own safety as well as Matican's, their design of the sting in this case does not shock the conscience."); ***Velez-Diaz v. Vega-Irizarry***, 421 F.3d 71, 81(1st Cir. 2005) ("We hold that plaintiffs have not alleged facts to support a claim based on the state created danger theory. Plaintiffs' theory may be that the government owes a duty to all cooperating witnesses to protect them from harm. There are risks inherent in being a cooperating witness, but the state does not

create those dangers, others do, and the witness voluntarily assumes those risks. . . We leave open the question whether, nonetheless, the state may violate substantive due process as to cooperating witnesses if it takes certain actions, such as sending a cooperating witness to what the state knows would be his certain death. Such action may shock the conscience by demonstrating 'deliberate indifference.' . . This case does not come close. There is no allegation the government knew Velez would be murdered. At most, the allegation is that Velez said that he was tired, not that he said he was under imminent risk. The attempt to show a substantive due process violation based on a claim that some yet unknown regulation required the state to promptly remove 'tired' cooperating witnesses fails. Plaintiffs have therefore failed to carry their burden under the threshold inquiry for qualified immunity. Absent a showing that the agents' conduct violated a constitutional right, qualified immunity applies."); ***Gatlin v. Green,*** 362 F.3d 1089, 1093, 1094 (8th Cir. 2004) ("Gatlin made a courageous decision to leave the MC gang, to cooperate with police, and to start a new life. By cooperating with police in exchange for a reduced sentence and a chance to relocate, Gatlin knowingly assumed a considerable risk that MC gang members would eventually discover his cooperation and seek to avenge him. Gatlin was a twenty-five year MC gang veteran. He could evaluate better than anyone the deadly risk inherent in cooperating with police. The actions of Sergeant Green, fellow police officers, Prosecutor McGlennen, the victim/witness personnel, and the state judiciary were undertaken with a solitary purpose-to minimize the risk of a retaliatory gang 'hit' against Gatlin by providing him with the legal and financial means necessary to flee his would-be avengers. Mrs. Gatlin's contention that more protective measures could have been taken is unavailing based on the record. That Gatlin would ultimately remain in or return to Minneapolis without informing authorities was unknown to Sergeant Green. Gatlin miscalculated the grave risk of harm he assumed. Tragically, his miscalculation cost him his life."); ***Dykema v. Skoumal,*** 261 F.3d 701, 706 (7th Cir. 2001) (rejecting application of state-created danger or custody theory with respect to informant shot by another drug dealer, where informant was experienced drug dealer, voluntarily cooperating with police for "cash, beer, and to get his driver's license back."); ***Summar v. Bennett***, 157 F.3d 1054, 1058, 1059 (6th Cir. 1998) ("Plaintiff has cited several foreign cases, each of which has purportedly concluded that government officials have a duty to protect certain private citizens from a third party's deprivation of their due process rights when a special relationship exists between the victims and the government officials. [citing cases] It is critical to note that in each of these cited cases, the official defendants created the risk of harm to the plaintiff without the consent of the victim. . . . Accordingly, the present controversy can be distinguished from the others because Summar

voluntarily elected to serve as a confidential informant, despite being advised that he would have to testify and reveal his status as an agent of the police. . . . [T]his forum does not adopt the proposition of law articulated by the New Jersey district court in *G-69*, and notes that *DeShaney* neither compels nor foreshadows the conclusion pronounced in that renegade decision."); ***McIntyre v. United States***, 336 F.Supp.2d 87, 113 (D. Mass. 2004) ("[T]he plaintiffs argue that, because McIntyre was a government informant, he was 'owed a constitutionally protected duty of care arising out of a recognized "special relationship."' . . . The plaintiffs' argument fails because, unlike an inmate or involuntarily institutionalized patient, the informant/government relationship is voluntary and does not involve physical restraint by government agents. . . .Whatever metaphorical shackles may be inherent in becoming an informant, or to whatever degree being an informant 'significantly compromises one's ability to protect oneself,' is simply insufficient to cloth the informant with substantive due process rights to protection from the harm he might suffer as a consequence of being an informant. Like the patient in *Monahan*, who voluntarily committed himself to a mental institution, McIntyre chose to be an informant. His freedom to choose whether to cooperate with the government bears no resemblance to the situation of one who, by action of the government, is forced behind locked hospital or prison doors."); ***Williamson v. City of Virginia Beach***, 786 F. Supp. 1238, 1250-55 (E.D. Va. 1992) (situation of seventeen-year-old informant who volunteered his services to police and subsequently committed suicide, not sufficiently analogous to incarceration or institutionalization to create affirmative duty to protect; State did not so restrain his liberty or exercise control so as to render individual incapable of caring for himself). *See also* ***Butera v. District of Columbia,*** 235 F.3d 637, 651 n.16 (D.C. Cir. 2001) ("Because we hold that the right arising from State endangerment was not clearly established in this circuit at the time of Eric Butera's death, we do not address whether the possibly voluntary nature of his conduct would relieve or mitigate the District of Columbia of constitutional liability.").

Compare ***Vasquez v. Attorney General of the United States***, No. 05-3510, 2006 WL 3724398, at *4 (3d Cir. Dec. 19, 2006) ("Vasquez argues the U.S. government has an affirmative duty to protect him because the risk of his being tortured arises from the assistance he provided to federal agents. Generally, the state has no obligation to protect individuals from harm inflicted by third parties. [citing *DeShaney*] However, as this Court explained in *Kamara v. Attorney General*, 'we have recognized a "state-created danger exception," such that the government has a constitutional duty to protect a person against injuries inflicted by a third-party when

it affirmatively places the person in a position of danger the person would not otherwise have faced.' 420 F.3d 202, 216 (3d Cir.2005). Despite Vasquez's contentions, *Kamara* explicitly declined to recognize the state-created danger exception in the immigration context. This Court determined that extending the exception in this way, 'would impermissibly tread upon the Congress' virtually exclusive domain over immigration, and would unduly expand the contours of our immigration statutes and regulations, including the regulations implementing the [Convention Against Torture].'. . Based on this precedent, we reject Vasquez's claim for relief under the state-created danger exception.") *and* ***Guerra v. Gonzales***, No. 04-60650, 2005 WL 1651660, at *2 (5th Cir. July 14, 2005) (not published) ("We have no reason to believe that the Supreme Court would, under any circumstances, apply the state created danger theory in an immigration case unless the petitioner established that the state actors created or increased the danger to the plaintiff. That is the underlying premise upon which the doctrine is based. . . In this case, the IJ [Immigration Judge] found that Guerra failed to establish that his life will be in danger if he is deported to Colombia. The only definitive evidence of danger that was presented to the IJ was evidence of a single phone threat to his wife and a threat in open court by a defendant against whom Guerra was testifying. Both of these threats apparently occurred around the time Guerra was incarcerated in 1999 or 2000. Guerra produced no additional evidence of any continuing threats or other manifestations of danger that may await him if he returns to Colombia. For the above reasons, we conclude that even if the state created danger theory is a viable one in the immigration context, based on the record evidence in this case, it has no application here. We therefore reject Guerra's substantive due process claim.") *with* ***Enwonwu v. Chertoff***, 376 F.Supp.2d 42, 72-74 (D. Mass. 2005) ("In this Court's assessment, Enwonwu has successfully carried his burden of establishing that the executive, in inducing his cooperation as an informant, created a danger of violent retribution at the hands of the individuals he betrayed. Furthermore, the executive's affirmative act of removing him to Nigeria where those individuals can easily access him is sufficient to trigger a constitutional duty to protect him. . . . This case. . .is distinguishable from *Rivera*. In *Rivera*, the court concluded that the state-created danger claim failed because the actions of the defendants were 'not the kind of affirmative acts by the state that would give rise to the constitutional duty to protect.' . . In other words, merely rendering an individual 'more vulnerable' to harm is not enough to trigger a constitutional duty to protect. . . Thus, if, as in *Rivera*, the executive, after promising to protect Enwonwu from being killed by those it induced him into betraying, simply failed to do so, Enwonwu would have no claim because such unkept promises merely rendered him more vulnerable to harm and would not

'cause' the deprivation. . . Enwonwu's claim is distinguished, however, by the added fact that the executive now seeks affirmatively to place him in an environment where he will be readily accessible to those wishing to harm him. . . . Such affirmative acts go beyond the realm of simply rendering him more vulnerable and can be fairly said to have causal effect. . . .Although Enwonwu has established that removal will cause a deprivation of his protected rights by affirmatively subjecting him (without protection) to a state-created danger, to prevail on his substantive due process claim, such conduct must 'shock the conscience of the court.'. . Here, the executive's deliberate indifference to the risk of death and torture its actions have caused meets this 'onerous requirement'. . . For the executive to subject Enwonwu to the risk of deadly retribution by inducing his cooperation though promises of protection and then force him to face that retribution is utterly egregious and intolerable. The Constitution simply cannot permit the executive to endanger the life of an alien, promise to protect him, and then cast him aside like refuse when he is no longer useful. . . The executive's suggestion that Enwonwu alone bears responsibility for his fate because of his decision to smuggle heroin into the United States demonstrates a frightening callousness. . . While the seriousness of Enwonwu's crime is not to be overlooked, that crime does not license the executive to disregard his constitutional rights much less his human dignity. Furthermore, that Enwonwu's crime rendered him removable makes removal on these facts no less unconstitutional. This is a man's life.").

For cases involving claims of failure to protect witnesses, *see, e.g.,* ***Rivera v. Rhode Island***, 402 F.3d 27, 35-38 (1st Cir. 2005) ("This court has, to date, discussed the state created danger theory, but never found it actionable on the facts alleged. [citing cases] Even if there exists a special relationship between the state and the individual or the state plays a role in the creation or enhancement of the danger, under a supposed state created danger theory, there is a further and onerous requirement that the plaintiff must meet in order to prove a constitutional violation: the state actions must shock the conscience of the court. . . In determining whether the state has violated an individual's substantive due process rights, a federal court may elect first to address whether the governmental action at issue is sufficiently conscience shocking. . . . Of course, whether behavior is conscience shocking varies with regard to the circumstances of the case. . . In situations where actors have an opportunity to reflect and make reasoned and rational decisions, deliberately indifferent behavior may suffice to 'shock the conscience.'. . Keeping all of this in mind, we echo the caution articulated in *Soto*: in a state creation of risk situation, where the ultimate harm is caused by a third party, 'courts must be careful to

distinguish between conventional torts and constitutional violations, as well as between state inaction and action.' . . .Rivera argues the state's two actions in identifying Jennifer as a witness and taking her witness statement in the course of investigating a murder compelled Jennifer to testify and thus enhanced the danger to Jennifer. Both are necessary law enforcement tools, and cannot be the basis to impose constitutional liability on the state. Rivera also argues issuance of a subpoena enhanced the risk to Jennifer. Issuing a subpoena is also a vital prosecutorial tool. While requiring Jennifer's testimony may in fact have increased her risk, issuance of a subpoena did not do so in the sense of the state created danger doctrine. Every witness involved in a criminal investigation and issued a subpoena to testify in a criminal proceeding faces some risk, and the issuance of a subpoena cannot become the vehicle for a constitutional claim against a state. The only remaining 'affirmative acts' alleged in the complaint are the defendants' assurances of protection. . . There is no doubt that, if accepted as true, the complaint shows that Jennifer may have been subjected to an increased risk, if she was promised protection, not given it, and relied on the promise. The state, in making these promises, may have induced Jennifer into a false sense of security, into thinking she had some degree of protection from the risk, when she had none from the state. While the unkept promises may have rendered her more vulnerable to the danger posed by Charles Pona and his associates, merely rendering a person more vulnerable to risk does not create a constitutional duty to protect. . . In part this is because an increased risk is not itself a deprivation of life, liberty, or property; it must still cause such a deprivation. Ultimately, the claims alleged in the complaint are indistinguishable from those in *DeShaney*.. . . The state's promises, whether false or merely unkept, did not deprive Jennifer of the liberty to act on her own behalf nor did the state force Jennifer, against her will, to become dependent on it.. . Moreover, the state did not take away Jennifer's power to decide whether or not to continue to agree to testify. Merely alleging state actions which render the individual more vulnerable to harm, under a theory of state created danger, cannot be used as an end run around *DeShaney*'s core holding. . . We add a few words about the separate shock the conscience test which plaintiff would also have to meet if she established a duty. In part, the test is meant to give incentives to prevent such gross government abuses of power as are truly outrageous. The facts here do not match the need for such incentives. Intimidation and even murder of witnesses is a growing national problem in major urban areas, plaguing witnesses, law enforcement officers, and the communities. It is in the interests of the police to protect witnesses, in order to secure convictions. There can be any number of common reasons why police protection of witnesses is ineffectual, none of which involve acts by the police intended to cause the murder of a needed witness. . . Of

course, there may be an extreme set of facts involving such deliberate and malevolent actions by police against witnesses as to shock the conscience and implicate a constitutional violation. Those await another day."); ***W.D.G. ex rel Burrell v. City of Oakland***, No. C 03-04283 WHA, C 02-05642 WHA, 2004 WL 1774226, at *9 (N.D.Cal. Aug. 6, 2004) ("[T]his Court held that a jury could reasonably conclude that Cruz had significantly and affirmatively understated the risk to Grundy, a positive act that may have lulled Grundy into a reduced level of caution, and that Cruz had led Grundy to believe that Cruz would warn Grundy of any specific threat learned from Scott's monitored telephone calls. A reasonable jury could also find that Cruz knew of a concrete and specific threat against Grundy's life and failed to communicate that threat. The facts as to Gilbert, however, are different. As mentioned, there was only one meeting with Gilbert. There were no follow-up meetings as in Grundy. At the meeting with Gilbert, Cruz told him of the risk he assumed in incriminating Scott as Abraham's murderer and told him to stay out of Oakland. Gilbert agreed that he was at risk and he gave neither Cruz nor Rullamas reason to think that he would expose himself to harm. Indeed, unlike Chance Grundy, who purportedly dismissed many of the warnings given by Cruz, Gilbert said he was moving to Sacramento and 'was adamant that he wasn't coming back' . . . Furthermore, Cruz did not assure Gilbert that he was going to monitor Scott's telephone calls and then, when Cruz learned of a specific threat, withhold such information from Gilbert. On this record, this order holds that a reasonable jury could not conclude that Cruz or Rullamas affirmatively created the danger that led to Gilbert's death. Hence, plaintiffs cannot succeed."); ***Clarke v. Sweeney,*** 312 F.Supp.2d 277, 290, 294 (D. Conn. 2004) ("The Second Circuit has not specifically considered whether the 'state created danger exception' to *DeShaney* applies to fact witnesses for whom visible police protection was provided and then withdrawn. . . . [I]t seems clear that this exception requires that the state actors do more than simply temporarily assign marked police cars for the protection of witnesses to crimes. This exception requires that the government defendant either be a substantial cause of the danger the witness faces or at least enhance it in a material way. Certainly, the BPD could have provided better protection for B.J. Brown and Karen Clarke. However, that does not mean that a violation of the U.S. Constitution occurred. . . Here, the danger posed by the Peelers was not the creation of the state. Nor did the actions of the police provide the Peelers with an opportunity to harm Karen or B.J. Thus, the Court finds that the state created danger exception to *DeShaney* is inapplicable based on the undisputed facts of this case as well as the disputed facts considered in a light most favorable to the plaintiff.").

d. entitlement cases

The Court in ***DeShaney*** did not address petitioners' argument that state law created an "entitlement" to protective services, any deprivation of which would be subject to Fourteenth Amendment due process constraints. 109 S. Ct. at 1003 n.2.

In ***Meador v. Cabinet for Human Resources***, 902 F.2d 474 (6th Cir. 1990), the court determined that Kentucky state law provided children placed in state-regulated foster homes with a "framework of entitlements," including "an entitlement to protective services of which they may not be deprived without due process of law." *Id*. at 476-77. *See also* ***Sealed v. Sealed,*** 332 F.3d 51, 55 (2d Cir. 2003) ("In this case, plaintiffs do not contend that the state of Connecticut has a constitutional obligation to protect them from child abuse . . . instead they argue that Connecticut's comprehensive child welfare scheme . . . creates an entitlement to protective services subject to Fourteenth Amendment scrutiny."); ***Hilliard v. Walker's Party Store, Inc.***, 903 F. Supp. 1162, 1174 (E.D. Mich. 1995) ("[T]hat plaintiff . . . was ordered to vacate the premises does not constitute a custodial situation giving rise to a special relationship and a duty on the part of the police officers to prevent injury to plaintiff . . . either from himself or third persons . . . Nevertheless, if the Michigan incapacitated persons statute . . . applies, such statute may have given rise to a special relationship through which defendant officers possessed a duty to protect plaintiff['s] well-being. If the statute applies . . . then the question arises whether defendant officers acted with deliberate indifference to plaintiff['s] special needs due to his asserted intoxication.").

In ***Doe by Nelson v. Milwaukee County***, 712 F. Supp. 1370 (E.D. Wis. 1989), *aff'd*, 903 F.2d 499 (7th Cir. 1990), plaintiffs claimed that Wisconsin law created a right to an investigation where there was a report of suspected child abuse and that they had been deprived of this entitlement without due process of law. An examination of state law led the court to conclude there was no entitlement to a mandatory investigation unless the report came from a law enforcement agency or person *required* to report under the statutory scheme. Thus, with no property interest in the investigation of their report, no due process rights were involved.712 F.Supp. at 1377-78.

The Court of Appeals for the Seventh Circuit affirmed, ***Doe by Nelson v. Milwaukee County***, 903 F.2d 499 (7th Cir. 1990), but went on to hold that even if the Does were required to report and the state investigation procedures were properly

triggered under state law, "the procedures themselves are not 'benefits' within the meaning of Fourteenth Amendment jurisprudence." *Id*. at 503. The court noted "the confusion that would result from elevating a state-mandated procedure to the status of a constitutionally protected property interest." *Id*.

Accord ***Blouin v. Spitzer,*** 356 F.3d 348, 363 (2d Cir. 2004) ("State procedures designed to protect substantive liberty interests entitled to protection under the federal constitution do not themselves give rise to additional substantive liberty interests."); ***Holcomb v. Lykens,*** 337 F.3d 217, 224, 225 (2d Cir. 2003) ("Although state laws may in certain circumstances create a constitutionally protected entitlement to substantive liberty interests, . . . state statutes do not create federally protected due process entitlements to specific state-mandated procedures. . . . Even were we to assume that Vermont law creates a federally protected entitlement to extended furlough, it did not create a similarly protected entitlement to the specific procedures outlined in Vermont Department of Corrections Directive 372.03. Rather, any entitlement to extended furlough would be federally protected by the processes created by the Fourteenth Amendment and outlined in *Morrisey*. These procedures were followed by the defendants when they revoked Holcomb's extended furlough. The defendants may have breached Vermont law or their own procedures, and their conduct may have been deplorable for that reason, but it did not violate the Fourteenth Amendment."); ***Doe by Fein v. District of Columbia***, 93 F.3d 861, 868 (D.C. Cir. 1996) ("In an effort to avoid *DeShaney*, Doe disclaims reliance on 'substantive due process' as such. Rather, she contends that her claim is based on a statutory entitlement to protective services and is thus not governed by *DeShaney* . . . . As noted, however, process alone does not give rise to a protected substantive interest: by codifying procedures for investigating child abuse and neglect reports, D.C. has not assumed a constitutional obligation to protect children from such abuse and neglect. The fact that Doe can point to a D.C. statute mandating investigation does not, therefore, convert a meritless substantive due process claim into a fruitful procedural one."); ***"Tony" L. by and through Simpson v. Childers***, 71 F.3d 1182, 1187 (6th Cir. 1995) (Upon examination of Kentucky's Unified Juvenile Code, the court concluded that "neither the words of the relevant statutes nor the policy goals expressed therein limit the discretion of Defendants enough to create a liberty interest protected by the Due Process Clause of the United States Constitution."); ***Morgan v. Weizbrod***, 17 F.3d 1437, 1994 WL 55607, *2 (10th Cir. Feb. 23, 1994) (Table) (rejecting plaintiff's argument that the Oklahoma child protection statute created a duty to investigate reports of child abuse, which duty was tantamount to an entitlement protected by the Fourteenth Amendment); ***Pusey v. City of Youngstown***,

11 F.3d 652, 656 (6th Cir. 1993) ("The Ohio victim impact law does not create a liberty interest here because it only provides that the victim has the right to be notified. The statute does not specify how the victim's statement must affect the hearing nor does it require a particular outcome based on what the victim has said."); ***Villanova v. Abrams***, 972 F.2d 792, 798 (7th Cir. 1992) (noting "persistent fallacy that procedural requirements create substantive entitlements"); ***Kellas v. Lane***, 923 F.2d 492, 494 (7th Cir. 1990) ("[A] state creates a protected liberty interest only when it establishes 'specific substantive predicates' that limit the discretion of official decisionmakers and mandates a particular outcome to be reached if the relevant criteria have been met."); ***A.S., by and through Blalock v. Tellus***, 22 F. Supp.2d 1217, 1223 (D. Kan. 1998) (concluding no liberty or property interest in enforcement of Kansas Code for the Care of Children); ***Semple v. City of Moundsville***, 963 F. Supp. 1416, 1431 (N.D.W.Va. 1997) ("[A]lthough a statute may prescribe and codify certain procedures for dealing with domestic violence and/or child abuse, the statute does not automatically create an entitlement that can be enforced by individuals. Rather, before the statute can give rise to a constitutionally protected entitlement it must be based on an independent, substantive constitutional right."), *aff'd,* 195 F.3d 708 (4th Cir. 1999).

See also ***Forrester v. Bass***, 397 F.3d 1047, 1057 (8th Cir. 2005) ("Thus, based on the plain statutory language and court precedent, we hold sections 210.109 and 210.145 of the Missouri Revised Statutes, which were in effect in August 1999, did not create specific, constitutionally protected property or liberty interests in state-created investigative, preventive, and protective social services. Finding no protected interests, we need not decide what, if any, procedural process was due."); ***Bagley v. Rogerson***, 5 F.3d 325, 328 (8th Cir. 1993) ("If a state law gives me the right to a certain outcome in the event of the occurrence of certain facts, I have a right, by virtue of the Fourteenth Amendment, to whatever process is due in connection with the determination of whether those facts exist. This is not at all the same thing as saying that the federal Constitution guarantees me all rights created or conferred upon me by state law."); ***Posr v. City of New York***, 835 F. Supp. 120, 125 (S.D.N.Y. 1993) (Plaintiff's expectation that officers would be disciplined following a finding of excessive force, "did not rise to the level of a constitutionally protected interest. Accordingly, a City decision not to discipline the officers did not violate any of plaintiff's constitutional rights."), *aff'd*, 22 F.3d 1091 (2d Cir. 1994); ***Coker v. Henry***, 813 F. Supp. 567, 570 (W.D. Mich. 1993) ("The Michigan Child Protection Law does not prescribe and mandate compliance with specific procedures substantively limiting the discretion of state officers. It is not sufficiently explicit

and mandatory and does not create a legitimate claim of entitlement of the nature here claimed."), *aff'd*, 25 F.3d 1047 (6th Cir. 1994); ***Boston v. Lafayette County, Mississippi***, 743 F. Supp. 462, 472 (N.D. Miss. 1990) (a state statute creating a duty on the part of the sheriff to safely keep prisoners entrusted to his care, could not serve as the source of procedural due process claim).

But see ***Powell v. Dep't of Human Resources***, 918 F. Supp. 1575, 1581 (S.D. Ga. 1996) ("Given the comprehensive intent of Georgia lawmakers and the mandatory nature of the [Richmond County Child Abuse] Protocol as it applies to all named agencies, the Protocol vests abused children with an entitlement to the procedures and protection mandated therein. Thus, an abused child may not be deprived of these procedures and protection without procedural due process."), *aff'd on other grounds*, 114 F.3d 1074, 1082 n.10 (11th Cir. 1997) ("Because we ultimately conclude that the appellees are entitled to qualified immunity in any event, we can assume arguendo, without deciding, that Powell's son had such a liberty interest.").

In ***Dawson v. Milwaukee Housing Authority***, 930 F.2d 1283 (7th Cir. 1991), plaintiff argued that Wisconsin state law created an entitlement to safe public housing "that the state could not take away without notice and an opportunity for a hearing." Judge Easterbrook rejected the argument, stating that "the Housing Authority's decision to set a particular target level of safety is not person-specific. It is a legislative rather than adjudicative decision, and the due process clause does not require individual hearings before a governmental body takes decisions that affect the interests of persons in the aggregate." *Id*. at 1286.

The entitlement theory has arisen in domestic violence cases, as well as child abuse cases. The Supreme Court has recently spoken to this issue. *See* ***Town of Castle Rock v. Gonzales***, 125 S. Ct. 2796, 2810 (2005) ("We conclude. . .that respondent did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband. . . . In light of today's decision and that in *DeShaney,* the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations. This result reflects our continuing reluctance to treat the Fourteenth Amendment as '"a font of tort law,"' . . .but it does not mean States are powerless to provide victims with personally enforceable remedies. Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871 . . . did not create a system

by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law.").

See also ***Burella v. City of Philadelphia***, 501 F.3d 134, 145, 146 (3d Cir. 2007) ("Jill Burella argues that the Supreme Court's decision in *Castle Rock* does not prevent her from succeeding on her procedural due process claim because the Pennsylvania Protection from Abuse Act states that police 'shall arrest a defendant for violating an order.' . . . Therefore, she contends, under the Pennsylvania statute, police officers do not have discretion not to enforce a protection from abuse order. . . . Although the Supreme Court did not specify what language would suffice to strip the police of such discretion, it is clear after *Castle Rock* that the phrase 'shall arrest' is insufficient. . . . . Finally, we cannot ignore that despite framing the issue as one of procedural due process, what Jill Burella appears to seek is a substantive due process remedy: that is, the right to an arrest itself, and not the pre-deprivation notice and hearing that are the hallmarks of a procedural due process claim. In short, whether framed as a substantive due process right under *DeShaney*, or a procedural due process right under *Roth*, Jill Burella does not have a cognizable claim that the officers' failure to enforce the orders of protection violated her due process rights."); ***Burella v. City of Philadelphia***, 501 F.3d 134, 153 (3d Cir. 2007) (Ambro, J., concurring in part) ("Pennsylvania has enacted statutory provisions much stronger than those of Colorado to signal its intent to entitle Ms. Burella and other victims of abuse to redress the lack of enforcement of PFA orders. This laudable effort, which predates *Castle Rock*, does not meet that case's substantial roadblocks. Further revisions to the Protection Act are required, but in no event will they help Ms. Burella. Moreover, I reluctantly concede my colleagues are correct to suggest that a legislature would be hard-pressed to draft around *Castle Rock* in light of the 'well-established tradition of police discretion [that] has long coexisted with apparently mandatory arrest statutes.'. . . Although the Supreme Court has not held explicitly that a state legislature can never mandate arrest or that abuse-protection statutes can never create a constitutionally protected interest, the perception persists that few (if any) paths to those results are available. There is nothing left but to observe that [i]n light of [*Castle Rock*] and ... *DeShaney* ... the benefit that a third party may receive from having someone else arrested for a crime *generally* does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."); ***Hudson v. Hudson***, 475 F.3d 741, 746 (6th Cir. 2007)("We recently applied *Castle Rock* to the enforcement of a Kentucky statute, holding that its enforcement 'cannot be considered mandatory for purposes of

creating a protected property interest under the Due Process Clause.' *Howard v. Bayes*, 457 F .3d 568, 576 (6th Cir.2006). Unlike the statute at issue in *Howard* that granted officers 'purely discretionary authority to arrest,' *id.* at 574 n. 6, the Tennessee Supreme Court considers arrests under the statute at issue here 'operational' as opposed to 'discretionary.' . . As we noted, *supra*, this statute grants officers at least some discretion to determine 'reasonable cause.' Tenn.Code Ann. S 36-3-611(a). While *Matthews* may have defined the arrests as 'operational' to remove state immunity for a state-law negligence claim, it did not decide whether Tennessee law creates a property interest in the enforcement of protective orders. Even if Tennessee law might be read to create some type of property interest, that interest must still rise to the level of a constitutionally protected interest under the Due Process Clause of the Fourteenth Amendment. Braddock's interest in the enforcement of the protection order, specifically the arrest of Hudson, would arise incidentally 'out of a function that government actors have always performed--to wit, arresting people who they have probable cause to believe have committed a criminal offense.'. . We share the Supreme Court's skepticism in *Castle Rock* that this type of entitlement could ever 'constitute a "property" interest for purposes of the Due Process Clause.'. . Imbuing these restraining orders with constitutional property value, protected by the Due Process Clause, would needlessly interfere with Tennessee's choice of how to allocate the resources necessary to enforce its domestic violence laws. We thus hold that the enforcement of Tennessee protective orders does not create a property interest protected by the Due Process Clause of the Fourteenth Amendment."); ***Howard v. Bayes***, 457 F.3d 568, 575, 576 (6th Cir. 2006) (Kentucky statutes did not confer any constitutionally protected property interest upon victim as to arrest of perpetrator); ***Starr v. Price***, 385 F.Supp.2d 502, 509, 510 (M.D. Pa. 2005) ("Plaintiff relies on *Coffman v. Wilson Police Department*, 739 F.Supp. 257 (E.D.Pa.1990), where the court found that a Pennsylvania PFA created a legitimate claim of entitlement. . . . In light of the Supreme Court's recent decision in *Town of Castle Rock, Colorado v. Gonzales*,. . . we find that *Coffman* is not an accurate statement of the law. . . . Plaintiff attempts to distinguish *Castle Rock* by arguing that it holds that the statute did not create an entitlement, whereas her claim is based on the terms of the PFA itself. Plaintiff misconstrues *Castle Rock*, which held that mandatory terms in a restraining order are insufficient to create a property interest protected by the Due Process Clause.").

e. equal protection cases

Although no such argument was raised in ***DeShaney***, the Court noted that the Equal Protection Clause of the Fourteenth Amendment would be violated by any selective denial of protective services to "certain disfavored minorities." 109 S. Ct. at 1004 n.3. *See, e.g.,* ***Mody v. City of Hoboken***, 959 F.2d 461, 467 (3d Cir. 1992) (rejecting plaintiff's claim where "evidence necessary to show constitutionally discriminatory police action in failing to provide cognizable minorities with protection from crime [was] absent."); ***Baugh v. City of Milwaukee***, 823 F. Supp. 1452, 1460-67 (E.D. Wis. 1993) (rejecting plaintiffs' argument that city had policy of denying equal housing inspection and code enforcement services based on race), *aff'd*, 41 F.3d 1510 (7th Cir. 1994).

There is an emerging line of cases in which municipal liability is based on policies used in handling domestic abuse cases, where plaintiffs claim that such policies violate their rights under the equal protection clause of the Fourteenth Amendment. *See, e.g.*, ***Soto v. Carrasquillo***, 878 F. Supp. 324, 328 (D.P.R. 1995) (discussing and citing cases where "a growing number of plaintiffs have turned to section 1983 claims to allege an equal protection violation for a police department's failure to provide protection from domestic violence."), *aff'd sub nom* ***Soto v. Flores***, 103 F.3d 1056 (1st Cir. 1997) ; ***McDonald v. City of Chicago***, Nos. 94 C 3623, 94 C 3624, 1994 WL 732865, *4 (N.D. Ill. Dec. 23, 1994) (not reported) (alleged practice of treating "domestic violence abuse reports from women with less priority than other crimes" sufficient to state equal protection claim); ***Bartalone v. County of Berrien***, 643 F. Supp. 574, 577 (W.D. Mich. 1986); ***Thurman v. City of Torrington***, 595 F. Supp. 1521, 1527-29 (D. Conn. 1984). *See also* ***Hynson v. City of Chester***, 864 F.2d 1026, 1027 n.1 (3d Cir. 1988) (collecting cases).

In ***Balistreri v. Pacifica Police Dept.***, 901 F.2d 696 (9th Cir. 1990), plaintiff was repeatedly abused, harassed and threatened by her estranged husband. Although she obtained a restraining order, the police continued to ignore her requests for protection. *Id*. at 698. In its post-***DeShaney*** second amended opinion, the Court of Appeals affirmed the district court's dismissal of plaintiff's federal due process claim where "Balistreri alleged neither that the State had created or assumed a custodial relationship over her, nor that the state actors had somehow affirmatively placed her in danger." 901 F.2d at 700. *See also* ***Dudosh v. City of Allentown***, 722 F. Supp. 1233, 1235 (E.D. Pa. 1989) (on motion for reconsideration after ***DeShaney***, court

relied on ***DeShaney*** to reaffirm finding of no due process violation based on existence of "special relationship" between decedent and police).

Balistreri's complaint also set out an equal protection claim based on discrimination against the plaintiff due to her status as a female victim of domestic violence.

The court held that where the allegations in plaintiff's complaint suggested "an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women," the district court should not have dismissed the complaint with prejudice, but should have allowed plaintiff an opportunity to amend in order to properly plead the equal protection claim. 901 F.2d at 701-02.

In ***McKee v. City of Rockwall, Texas***, 877 F.2d 409 (5th Cir. 1989), the court reversed the denial of summary judgment on behalf of individual officers, holding that plaintiff failed to make a sufficient showing on an essential element of her case, in which she asserted that the officers "acted pursuant to a discriminatory policy against making arrests in domestic assault cases." *Id*. at 410.

Plaintiff had introduced a statement made by the Chief of Police, to the effect that his officers "did not like to make arrests" in domestic assault cases. The court refused to treat this statement as having any probative value, distinguishing a "dislike" from a "policy." The statistics introduced by the plaintiff were likewise disregarded, since, "even on their face, [they did not] permit one to infer a disinclination to make arrests in domestic violence cases, much less to infer a policy discouraging such arrests." *Id*. at 415.

Concluding that there was a complete failure of proof on the issue of differential treatment of victims of domestic abuse, the court left undecided the question of whether such differential treatment would constitute intentional gender-based discrimination. *Id*. at 416.

The Fifth Circuit has since adopted the approach taken by the Tenth Circuit in ***Watson, infra.*** *See* ***Shipp v. McMahon***, 234 F.3d 907, 914 (5th Cir. 2000) ("We agree with our sister circuits that the standard articulated in *Watson* represents a coherent approach for courts to review Equal Protection claims pertaining to law enforcement's practices, policies, and customs toward domestic assault cases.").

In ***Watson v. City of Kansas City, Kansas***, 857 F.2d 690 (10th Cir. 1988), the court reversed a grant of summary judgment for the City, holding that the plaintiff's evidence was sufficient to support a jury determination "that the City and Police Department followed a policy or custom of affording less protection to victims of domestic violence than to victims of nondomestic attacks [and] that the City and Police Department acted with a discriminatory motive in pursuing this policy." *Id*. at 696. While plaintiff's evidence was sufficient to make out an equal protection claim based on her status as a victim of domestic violence, the court affirmed the grant of summary judgment for the City to the extent that the plaintiff's claims asserted gender-based discrimination. *Id*. Where the plaintiff presented no evidence of the policy's adverse impact on women and no evidence of a purpose to discriminate against women as a class, she failed to make out a prima facie case of sex-based discrimination. *Id*. at 697.

In ***Hynson v. City of Chester***, 864 F.2d 1026 (3d Cir. 1988), defendant police officers appealed from a denial of summary judgment on the issue of qualified immunity in a case where plaintiffs alleged that their decedent's right to equal protection was violated by the officers' adherence to a policy of treating domestic abuse victims differently from other victims of violent crimes. *Id*. at 1027. Noting that such a policy was gender-neutral on its face, the Third Circuit established the standard to be followed by the district courts in § 1983 cases based on denials of equal protection in domestic violence situations.

Relying on the ***Watson***, the court determined that to survive a motion for summary judgment, "a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom." *Id*. at 1031.

The court remanded on the qualified immunity issue, concluding that, given the standard articulated, a police officer would lose his qualified immunity only if a reasonable officer would know that a policy of treating domestic violence cases differently from other cases of violence "has a discriminatory impact on women, that bias against women was a motivating factor behind the adoption of the policy, and, that there is no important public interest served by the adoption of the policy." *Id*. at 1032.

On remand, plaintiff offered an expert's analysis and statistics reflecting, over a defined period of time, a lower level of police response to female victims of domestic violence. The district court found the evidence sufficient to withstand the City's motion for summary judgment under the Third Circuit's ***Hynson*** standard. ***Hynson v. City of Chester***, 731 F. Supp. 1236, 1240-41 (E.D. Pa. 1990). Summary judgment was granted as to the individual officers on qualified immunity grounds, since the contours of the particular right involved did not become clearly established until the Third Circuit's decision in ***Hynson***.

See also ***Ricketts v. City of Columbia***, 36 F.3d 775, 780-81 (8th Cir. 1994) ("We agree [with *Hynson* and *Watson*] that if discrimination against women were the purpose behind a municipal custom of providing less protection for victims of domestic abuse, then an equal protection claim would arise. In this case, the plaintiffs demonstrated a pattern of fewer arrests in cases of domestic violence, but the plaintiffs failed to produce evidence from which a reasonable jury could determine that this pattern proved a policy which was motivated by an intent to discriminate against women."), *aff'd*, 36 F.3d 775 (8th Cir. 1994).

See also ***Soto v. Flores***, 103 F.3d 1056, 1066 (1st Cir. 1997) ("In a matter of first impression for this court, we adopt the *Watson* standard for section 1983 equal protection claims brought by domestic violence victims. . . Under the standard we adopt today, Soto must show that there is a policy or custom of providing less protection to victims of domestic violence than to victims of other crimes, that gender discrimination is a motivating factor, and that Soto was injured by the practice."); ***Eagleston v. Guido***, 41 F.3d 865, 878 (2d Cir. 1994) ("A directed verdict is appropriate in a domestic violence equal protection claim unless the plaintiff adduces evidence sufficient to sustain the inference that there is a policy or a practice of affording less protection to victims of domestic violence than to other victims of violence in comparable circumstances, that discrimination against one sex was a motivating factor, and that the policy or practice was the proximate cause of plaintiff's injury.").

See also ***Jones v. Union County, Tennesse,*** 296 F.3d 417, 427 (6th Cir. 2002) ("In this case, Union County notes that Plaintiff does not indicate whether her equal protection claim is based upon her status as a victim of domestic violence generally or her status as a woman subject to domestic violence. Whatever her status, Plaintiff has failed to identify any policy of Union County that purposefully and intentionally discriminates against victims of domestic violence specifically or

women generally."); ***Navarro v. Block (*Navarro I),** 72 F.3d 712, 717 (9th Cir. 1996) ("In the present case . . . aside from the conclusory allegation that the County's custom of not classifying domestic violence calls as an emergency discriminates against abused women, the Navarros have failed to offer any evidence of such invidious intent or motive. [citing *Hynson* and *Watson*] Nevertheless, even absent evidence of gender discrimination, the Navarros' equal protection claim still survives because they could prove that the domestic violence/non-domestic violence classification fails even the rationality test."); ***Cellini v. City of Sterling Heights***, 856 F. Supp. 1215, 1222 (E.D. Mich. 1994) ("While it is beyond question that police need not treat different cases as the same, there still must be a rational relationship between the specific policy adopted and a legitimate governmental interest. Here, the alleged specific policy is one of never arresting in a domestic assault case for misdemeanor assault unless a police officer witnessed the assault. Defendants have not offered any explanation of what governmental interest is served by requiring an officer to have witnessed a domestic misdemeanor assault before making an arrest. The most obvious explanation for such a policy is that Sterling Heights considers a misdemeanor assault less serious when the victim is the assaulter's spouse. Absent an explanation of the governmental interest served by Sterling Heights's policy, defendants fail to satisfy even the relatively permissive rational relationship requirement of the equal protection clause. Such an unexplained discrepancy in the treatment of victims of domestic assault could legitimately give rise to an inference that the police department acted with discriminatory motive in employing its domestic assault policy."); ***Thacker v. City of Miamisburg***, No. C-3-92-188, 1994 WL 1631036, at *3 (S.D. Ohio July 14, 1994) (In its memorandum in support of the motion for summary judgment, the City cites *Siddle v. City of Cambridge*, 761 F.Supp. 503 (S.D.Ohio 1991), in which the policy of another Ohio city concerning the differential treatment of victims of domestic violence was upheld as rationally related to a legitimate state interest. Aside from the fact that *Siddle* is factually distinguishable from this case (e.g., no one was murdered in *Siddle*), it is still incumbent on the City to produce its own evidence as to why its own policy is justifiable. The City of Miamisburg cannot rely upon a judicial ruling concerning the City of Cambridge in another action to explain the reasonableness of a policy of the City of Miamisburg. . . . Meaning no disrespect to Chief Schenck or to the City, the Court would observe that disjointed generalizations are not the stuff of rationally based policies, especially where the policies are alleged to have resulted in the deprivation of life. It is incumbent upon the City to identify the legitimate state interest that is sought to be advanced, to set forth the policy at issue, and to explain how the policy is rationally related to the legitimate state interest.").

See also ***Fajardo v. County of Los Angeles (*****Navarro II*****)***, 179 F.3d 698, 699, 700 (9th Cir. 1999) ("On remand, the district court determined that it did not need to decide whether a custom or policy existed because it had 'previously found that such a [policy] meets the rational basis test.' Accordingly, the district court granted Defendants' Rule 12(c) motion for judgment on the pleadings. We again reverse and remand. . . .[T]he district court erred by equating domestic violence calls with not-in-progress calls and equating non-domestic violence calls with in-progress calls, and by assuming that domestic-violence crimes are less injurious than non-domestic-violence crimes. Because these assumptions formed the basis of the district court's conclusion, the district court also erred when it concluded, as a matter of law, that Defendants' domestic-violence/non-domestic-violence classification was rational and reasonable under equal-protection analysis.").