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MUNICIPAL LIABILITY UNDER SECTION 1983 INDEPENDENT OF EMPLOYEE LIABILITY

*Karen M. Blum*¹

I will focus on the question of whether there can be municipal liability under 42 U.S.C. § 1983,² absent a finding of a constitutional violation on the part of an individual, non-policymaking, employee. Although I have addressed this question in depth elsewhere,³ the issue remains a source of confusion for courts and litigants, and the case law continues to reflect that confusion. An essential starting point is the Supreme Court's decision in *City of Los Angeles v. Heller*.⁴ Heller brought suit against the City of Los Angeles, as well as individual police officers, alleging that the officers violated his constitutional rights by arresting him without probable cause and by using excessive

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² 42 U.S.C. § 1983 (1994 & Supp. 2001). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

³ Karen M. Blum, *Municipal Liability: Derivative or Direct? Distinguishing the Canton Case from the Collins Case*, 48 DEPAUL L. REV 687 (1999).

⁴ 475 U.S. 796, cert. denied, 476 U.S. 1154 (1986).

force in the course of the arrest.⁵ During the arrest, one of the officers employed a chokehold to restrain Heller, and in the resulting struggle, Heller fell through a plate glass window.⁶ Heller claimed that the officer's use of excessive force was in accordance with the City's alleged custom of condoning the use of excessive force.⁷

The District Court judge bifurcated the trial, with the first phase proceeding only against Officer Bushey on the excessive force claim.⁸ The jury, which did not receive instruction on any affirmative defense of qualified immunity⁹ or good faith, rendered a general verdict in favor of the officer.¹⁰ The District Court then dismissed the remaining claims against the City, reasoning that without an underlying constitutional violation by the individual officer, there could be no municipal liability.¹¹

The Court of Appeals for the Ninth Circuit reversed on the ground that the jury might have concluded that the officer acted in good faith and simply followed departmental policy.¹² Such a determination would not be inconsistent with a finding of

⁵ *Id.* at 797.

⁶ *Id.*

⁷ *Id.* at 801 (Stevens, J. and Marshall, J., dissenting). Apparently, the Los Angeles Police Department had an "escalating force" policy, which included the use of chokeholds. At trial, the testimony of both officers who used the chokehold, and a Los Angeles Police Sergeant, showed that the officer's actions complied with established Department policy.

⁸ *Id.* at 797.

⁹ A public official performing a discretionary function enjoys qualified immunity in a civil action for damages, provided his or her conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). At the time *Heller* was decided, it was common practice in the Ninth Circuit to instruct the jury on the affirmative defense of qualified immunity. Since then, the Supreme Court has admonished that "immunity ordinarily should be decided by the court long before trial." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam).

¹⁰ *Heller*, 475 U.S. at 798.

¹¹ *Id.*

¹² *Id.*

constitutional injury.¹³ Consequently, the Ninth Circuit held that Heller could proceed with his claim against the City.¹⁴

The United States Supreme Court reversed, holding that without instructions to the jury on any affirmative defenses, there could not be a presumption that the jury found for the officer based on a good faith defense.¹⁵ Since the officer did not inflict a constitutional injury upon Heller, the Supreme Court reasoned that there was no basis for holding the City liable, even if the City's policy authorized the use of unconstitutional force.¹⁶ The per curiam opinion concluded that "[i]f a person does not suffer a constitutional injury at the hands of the individual police officer, the mere fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point."¹⁷

Based on *Heller*, a number of courts have taken the position that they will bifurcate the trial when the plaintiff sues both the individual officers and the city.¹⁸ The theory is that when a plaintiff sues an officer and loses because there is no constitutional violation, the case is over. If the plaintiff prevails against the officer, generally nothing further is to be gained by proceeding against the city. In effect, the case still ends.¹⁹ This

¹³ *Id.*

¹⁴ *Heller*, 759 F.2d at 1376.

¹⁵ *Heller*, 475 U.S. at 799.

¹⁶ *Id.* at 799. *But see Id.* at 803 (Stevens, J., dissenting)(opining that the jury did not decide the constitutionality of the City's escalating force policy; thus, there would be no inconsistency between a verdict in favor of the officer and imposing liability on city).

¹⁷ *Id.* at 799 (emphasis in original).

¹⁸ See, e.g., *Treece v. Hochstetler*, 213 F.3d 360, 365 (7th Cir. 2000) (upholding the trial judge's discretion to bifurcate, especially in light of the fact that the City agreed to the entry of judgment against itself should the jury find the individual officer liable); *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996), *cert. denied*, 519 U.S. 1122 (1997). See generally Douglas Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499 (1993).

¹⁹ *But see Amato v. City of Saratoga Springs*, 170 F.3d 311, 318-21 (2d Cir. 1999) (upholding bifurcation and the plaintiff's right to proceed against the municipality for nominal damages, noting "a finding against officers in their individual capacities does not serve all the purposes of, and is not the

approach often causes prejudice to plaintiffs. One reason for this prejudice is that when an individual officer is sued, the rules of evidence will preclude the introduction of certain evidence. For example, prior bad acts or activities of other officers may be admissible in an action against a municipality to prove a case of inadequate training or failure to discipline an officer on the part of a municipality.²⁰ However, this same evidence is inadmissible where the action is against an individual officer. Evidence going to proof of actual or constructive knowledge on the part of a policy maker of a pattern or custom of constitutional violations would likewise be inadmissible in a case against an officer.

The majority of circuits have construed *Heller* to demand a dismissal of the *Monell* claim where there has been a finding of no constitutional violation on the part of the individual officer.²¹

equivalent of, a judgment against the municipality"); *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991) (plaintiffs in a bifurcated trial were "made whole" by compensatory damages against line officers, but were still entitled to proceed against Police Chief for punitive damages); *Medina v. City of Chicago*, 100 F. Supp. 2d 893, 896-98 (N.D. Ill. 2000) (noting the advantages of bifurcation and the fact that "from an economic standpoint, a prevailing plaintiff in a § 1983 excessive force case against police officers in Illinois gets nothing more from suing the municipality under *Monell* than he would get from suing just the officers," but also noting that bifurcation will not avoid a second trial where the individual officer prevails on qualified immunity; refusing to bifurcate, while issues of qualified immunity and City's willingness to have judgment entered against it if the officer was found liable were still on the table, but deferring discovery on *Monell* claim).

²⁰ FED. R. EVID. 404(b).

²¹ See, e.g., *Trigalet v. City of Tulsa*, 239 F.3d 1150, 1156 (10th Cir. 2001), cert. denied, 122 S. Ct. 40 (2001) ("[W]e 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"); *Treece*, 213 F.3d at 364 ("[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*

However, a line of cases in the Third Circuit has held, and other circuits have suggested, that there may be municipal liability based on a substantive due process claim, despite exoneration of the officer employee.²² The Supreme Court adopted different approaches in *City of Canton v. Harris*,²³ and *Board of Commissioners of Bryan County v. Brown*,²⁴ in contrast to the decisions in *Collins v. City of Harker Heights*,²⁵ and *County of Sacramento v. Lewis*.²⁶ The Court's reasoning with regard to the question of municipal liability independent of employee liability varied in these cases.

In *City of Canton*, the Court addressed the question of whether a municipality could ever be liable under § 1983 for constitutional violations resulting from a failure to train municipal employees.²⁷ The plaintiff in *City of Canton* had been arrested and brought to the police station in a patrol wagon. Upon arrival at the station, she repeatedly collapsed and was left on the floor and given no medical assistance. After being released to her

v. Grayson, 134 F.3d 449, 455 (1st Cir. 1998) *cert. denied*, 524 U.S. 953 (1998) ("Normally. . . a municipality cannot be held liable unless its agent actually violated the victim's constitutional rights").

²² See, e.g., *Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996) ("The precedent in our circuit requires the District Court to review the plaintiff's municipal liability claims independently of the § 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"); *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3d Cir. 1994) (*Fagan I*) ("A finding of municipal liability does not depend automatically or necessarily on the liability of a police officer"); *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1058-65 (3d Cir. 1991), *cert. denied*, 503 U.S. 985 (1992) (There was no inconsistency in the jury's determination that the police officer's actions did not amount to a constitutional violation, while the City was found liable under § 1983 on the theory of policy of deliberate indifference to serious medical needs of intoxicated and potentially suicidal detainees and the failure to train officers to detect and meet such needs).

²³ 489 U.S. 378 (1989).

²⁴ 520 U.S. 397 (1997).

²⁵ 503 U.S. 115 (1992).

²⁶ 523 U.S. 833 (1998).

²⁷ *City of Canton*, 489 U.S. at 380.

family, she was transported to a hospital where she was diagnosed with a number of emotional ailments.²⁸

Mrs. Harris brought suit under § 1983, claiming she was deprived of her substantive due process right to be free from deliberate indifference to her serious medical needs while in police custody.²⁹ She asserted a claim of municipal liability for this deprivation based on a theory of “grossly inadequate training.”³⁰ The plaintiff presented evidence of a municipal regulation, that established a policy that gave police shift commanders complete discretion to make decisions as to whether prisoners were in need of medical care.³¹ The evidence also demonstrated that such commanders received no training or guidelines to assist them in making such judgments.³² The United States Court of Appeals for the Sixth Circuit upheld the adequacy of the District Court’s jury instructions on the issue of municipal liability for inadequate training.³³ The court stated that the plaintiff could succeed on her claim of municipal liability for failure to train its police force, “[where] the plaintiff . . . prove[s] that the municipality acted recklessly, intentionally, or with gross negligence.”³⁴

The Supreme Court unanimously rejected the City’s argument that municipal liability can be imposed only where the challenged policy is 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.”³⁵ 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

²⁸ *Id.* at 381.

²⁹ *Id.*

³⁰ *Id.* at 383.

³¹ *Id.* at 382.

³² *Id.* at 381-82.

³³ *City of Canton*, 489 U.S. at 388.

³⁴ *Id.* at 388.

³⁵ *Id.* at 387.

police come into contact.”³⁶ The Court was careful to note that the “deliberate indifference” standard it was imposing as a matter of statutory construction under § 1983 had nothing to do with the level of culpability that may be required to make out the underlying constitutional wrong.³⁷ Rather, it relates to what is required to establish the municipal policy as the “moving force” behind the constitutional violation.³⁸ Given the state of the record before the Supreme Court, it was assumed that the plaintiff’s substantive due process right had been violated.³⁹ The issue was whether the given violation could be attributed to the City for liability purposes under § 1983.

In *Bryan County v. Brown*, the Supreme Court revisited the issue of municipal liability under § 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.⁴⁰ The 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.⁴¹ Burns removed Mrs. Brown from the vehicle with such force that he caused severe injury to her knees.⁴² The plaintiff sued both Reserve Deputy Burns and the County under § 1983.⁴³ A panel of the Fifth Circuit affirmed the District Court’s entry of judgment on the jury’s verdict against Reserve Deputy Burns for excessive force, false arrest, and false imprisonment.⁴⁴ The

³⁶ *Id.* at 388.

³⁷ *Id.* at 389.

³⁸ *Id.* at 388 n.8. Note that while the court has held that § 1983 contains no state-of-mind requirement, City of Canton does establish a deliberate indifference state-of-mind requirement as an essential element of failure-to-train claims, mandated not by the underlying constitutional violation, but by the “causation” language of § 1983. *Parratt v. Taylor*, 451 U.S. 527, 534 (1981).

³⁹ *City of Canton*, 489 U.S. at 388 n.8.

⁴⁰ *Bryan County*, 520 U.S. at 388.

⁴¹ *Id.* at 400.

⁴² *Id.* at 401.

⁴³ *Id.*

⁴⁴ *Bryan County*, 67 F.3d at 1181.

majority of the panel also affirmed the judgment against the County based on the sole decision of Sheriff Moore to hire Burns without adequately investigating his background.⁴⁵ The Fifth Circuit concluded that Moore's inadequate screening and hiring of Burns demonstrated "deliberate indifference to the public's welfare."⁴⁶

The Supreme Court, in a five to four decision written by Justice O'Connor, reversed the Court of Appeals.⁴⁷ The Court distinguished Brown's case, which involved a claim that a single lawful hiring decision ultimately resulted in a constitutional violation, from a case where a plaintiff claimed that "a particular municipal action itself violates federal law, or directs an employee to do so."⁴⁸ 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.⁴⁹ In this "single bad hire" situation, 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."⁵⁰ In the view of the

⁴⁵ *Id.* at 1184.

⁴⁶ *Id.* at 1185. 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.

⁴⁷ *Bryan County*, 520 U.S. at 397.

⁴⁸ *Id.* at 404.

⁴⁹ *See, e.g.,* *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (county prosecutor gave an order that resulted in a constitutional violation); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (decision of city council to cancel a license permitting a concert directly violated constitutional rights); *Owen v. City of Independence*, 445 U.S. 622 (1980) (city council discharged employee without due process). In such cases, there are no real problems with respect to the issues of fault or causation. *See also* *Bennett v. Pippin*, 74 F.3d 578, 586 & n.5 (5th Cir. 1996), *cert. denied*, 519 U.S. 817 (1996) (County held liable for Sheriff's rape of murder suspect, where Sheriff was a final policymaker in matters of law enforcement).

⁵⁰ *Id.* at 412.

majority, scrutiny of Burns' record produced insufficient evidence that a jury could have found that Sheriff Moore's hiring decision reflected deliberate indifference to an obvious risk that Burns would use excessive force.⁵¹

In *Bryan County*, as in *City of Canton*, there was no question that the non-policymaking employee had committed an underlying constitutional violation. In both cases, the Court was engaged in defining the level of culpability that plaintiffs would have to prove to demonstrate municipal liability under § 1983 for having "caused" the violation. In both *Bryan County* and *City of Canton*, the Court discussed deliberate indifference as the standard.⁵² However, this type of deliberate indifference is distinguishable from the deliberate indifference the Court established as the constitutional standard in *Farmer v. Brennan*.⁵³ For a person in custody to make a Fourteenth Amendment or Eighth Amendment constitutional deliberate indifference claim, where medical needs or issues of safety or protection are involved, the plaintiff must show subjective deliberate indifference.⁵⁴ Such a showing requires proof of actual knowledge of the serious medical need or the serious threat to the person's safety or health.⁵⁵ Further, the plaintiff must prove that the defendant actually failed to take reasonable steps to abate that risk or meet the serious medical need.⁵⁶ What is required is actual subjective knowledge in order to prove the constitutional violation.⁵⁷ However, to establish liability under § 1983, under *City of Canton* deliberate indifference, objective deliberate indifference suffices.⁵⁸ It is a "knew or should have known" standard. Therefore, if the plaintiff can demonstrate that the defendant knew or should have known that its policy (or the

⁵¹ *Id.* at 415.

⁵² *City of Canton*, 489 U.S. at 388-90; *Bryan County*, 520 U.S. at 405-13.

⁵³ 511 U.S. 825, 832-37 (1994).

⁵⁴ *Id.* at 838-40.

⁵⁵ *Id.* at 847.

⁵⁶ *Id.*

⁵⁷ *Id.* at 826-32.

⁵⁸ *City of Canton*, 489 U.S. at 380-87.

failure to have a policy) would result in some lower level official violating constitutional rights, the defendant would be held liable.

The issue before the Court in *Collins v. City of Harker Heights*,⁵⁹ was not municipal responsibility for an officer's unconstitutional conduct. Rather, the issue was whether a constitutional violation occurred at all.⁶⁰ In *Collins*, the wife of a sanitation department worker brought suit against the City of Harker Heights after her husband was asphyxiated while working on a sewer line.⁶¹ Mrs. Collins' claim against the City alleged the City violated her husband's substantive due process rights by failing to provide adequate training to its employees regarding the risks of working in sewer lines as well as failing to provide safety equipment, or safety warnings.⁶²

A unanimous Supreme Court held that the plaintiff needed to show that her harm was caused by a constitutional violation and that the City was responsible for that violation.⁶³ The Court noted that *City of Canton* answered only the question of whether the assumed underlying constitutional violation could be attributed to the municipality.⁶⁴ In *Collins*, the Court assumed, for purposes of this decision, that the plaintiff sufficiently alleged that the City was responsible for the harm to Collins based on a theory other than respondeat superior liability.⁶⁵

Turning to the issue of whether unconstitutional conduct occurred, the Supreme Court held that the City's failure to train or warn its employees about known risks of harm did not rise to

⁵⁹ 503 U.S. 115.

⁶⁰ *Id.* at 122-23.

⁶¹ *Id.* at 117.

⁶² *Id.*

⁶³ *Id.* at 120.

⁶⁴ *Id.* at 122-23. As the Court explained:

Although the term 'deliberate indifference' has been used in other contexts to define the threshold for finding a violation of the Eighth Amendment . . . as we have explained, that term was used in the *Canton* case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents.

⁶⁵ *Collins*, 503 U.S. at 124.

the level of arbitrary or conscious-shocking behavior.⁶⁶ Although the Court assumed that the City had a duty under Texas State law to warn employees of dangers as well as to provide education and training, the Court held that the City's failure to do so was not arbitrary in a constitutional sense.⁶⁷ Without conscious-shocking behavior, there was no underlying constitutional violation.

In *County of Sacramento*, 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."⁶⁸ The decedent in *County of Sacramento* was a sixteen-year-old passenger on a motorcycle driven by a friend.⁶⁹ A pursuit took place when the driver of the motorcycle ignored an officer's attempt to stop him for speeding.⁷⁰ The chase reached speeds of one hundred miles per hour and ended when the motorcycle failed to maneuver a turn, resulting in both the driver and passenger falling off the cycle.⁷¹ The police officer in pursuit skidded into Lewis, propelling him seventy feet down the road. Lewis died as a result of his injuries.⁷²

In addressing the question of what standard of culpability a plaintiff must demonstrate to maintain a substantive due process claim in the "pursuit" context, the Court first observed that "the core of the concept" of due process has always been the notion of "protection against arbitrary action."⁷³ 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."⁷⁴ To establish an executive abuse of power that is

⁶⁶ *Id.* at 128. The Court noted that the plaintiff had not alleged willfulness or deliberate harm or that the supervisor knew or should have known of the significant risk.

⁶⁷ *Id.* at 129.

⁶⁸ *County of Sacramento*, 523 U.S. at 839.

⁶⁹ *Id.* at 836.

⁷⁰ *Id.* at 837.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 845.

⁷⁴ *County of Sacramento*, 523 U.S. at 845.

“fatally arbitrary,” the plaintiff will have to demonstrate conduct that “shocks the conscience.”⁷⁵ The Court acknowledged that “the measure of what is conscience-shocking is no calibrated yard stick,”⁷⁶ and that “the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault.”⁷⁷ Most likely to rise to the conscience-shocking level would be “conduct intended to injure in some way unjustifiable by any government interest.”⁷⁸

Approving the subjective 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.”⁷⁹ 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 § 1983.⁸⁰

Without suggesting improper or malicious motive on the part of the officer in *County of Sacramento*, the alleged conduct

⁷⁵ *Id.* at 854.

⁷⁶ *Id.* at 847.

⁷⁷ *Id.* at 848.

⁷⁸ *Id.* at 849.

⁷⁹ *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).

⁸⁰ *County of Sacramento*, 523 U.S. at 854.

could not be found “conscience-shocking.” Thus, as in *Collins*, there was no underlying constitutional violation. *County of Sacramento*, as *Collins*, is a case considering the requirements for making a substantive due process claim under the Constitution. It is not a case about municipal responsibility under § 1983.

In *Simmons v. City of Philadelphia*,⁸¹ a decision rendered prior to the Supreme Court’s decisions in *Collins* and *County of Sacramento*, suit was brought under § 1983 against the City and the individual officer who was the “turnkey” on duty when the plaintiff’s son hanged himself after being taken into custody for public intoxication.⁸² Municipal liability was asserted on the basis of a policy or custom of inattention, amounting to deliberate indifference to the serious medical needs of intoxicated and potentially suicidal detainees, as well as deliberate indifference in failing to train officers to detect and to meet those serious needs.⁸³

The jury in *Simmons* found that the “turnkey” officer, although negligent, did not violate Simmons’ constitutional rights, but held the City was liable under § 1983.⁸⁴ One question on appeal was whether, in light of *Heller*, the City could be held liable under § 1983 where the individual, low-level official, was found not to have violated the decedent’s constitutional rights.⁸⁵ In affirming the verdict against the City, Judge (now Chief Judge) Becker concluded that to establish municipal liability, the plaintiff must both identify a particular official with policymaking authority in the area and demonstrate “scienter-like” evidence with respect to that policymaker.⁸⁶ Judge Becker noted that the plaintiff need not name the specific policymaker as a defendant, nor obtain a verdict against him to prevail against the municipality.⁸⁷ The plaintiff must only present evidence of the

⁸¹ 947 F.2d 1042.

⁸² *Id.* at 1050.

⁸³ *Id.*

⁸⁴ *Id.* at 1094-95.

⁸⁵ *Id.* at 1059.

⁸⁶ *Id.* at 1062-63.

⁸⁷ *Simmons*, 947 F.2d at 1065 n.21.

policymaker's "knowledge and his decisionmaking or acquiescence."⁸⁸

In a concurring opinion, then Chief Judge Sloviter, objected to the "scienter-like" requirement imposed by Judge Becker.⁸⁹ Judge Sloviter's concern was that insisting upon a showing of "scienter" would limit § 1983 cases "to those where plaintiffs can show defendants knew of the constitutional deprivation and exclud[e] those cases where plaintiffs argue that defendants should have known of it."⁹⁰ Interpreting "scienter" to require actual knowledge and intentional conduct, Judge Sloviter concluded the requirement was inconsistent with the Supreme Court's decision in *City of Canton*.⁹¹

Examining *Simmons* through the lens of subsequent Supreme Court decisions, it appears Judge Becker's "scienter-like" requirement was inconsistent with the objective deliberate indifference standard of *City of Canton*. The *Canton* Court would hold a municipality liable for constitutional violations committed by non-policymaking employees, provided that policymakers knew, *or should have known*, that their acts or omissions would cause such constitutional injuries to be inflicted upon citizens with whom their employees came into contact.⁹² Deliberate indifference under *City of Canton* does not require actual knowledge or intentional conduct.⁹³ On the other hand, it was proper for Judge Becker to insist upon a higher level of culpability, a "scienter-like" requirement on the part of identified policymakers, as *Simmons* was not about a *City of Canton*-type derivative statutory liability, but rather, was about the underlying constitutional violation committed by the City.

In *Fagan v. City of Vineland*,⁹⁴ a post-*Collins* but pre-*County of Sacramento* decision, the Third Circuit again held that a city could be found independently liable for the violation of

⁸⁸ *Id.*

⁸⁹ *Id.* at 1089 (Sloviter, C.J., concurring in the judgment).

⁹⁰ *Id.*

⁹¹ *Id.* at 1091.

⁹² *City of Canton*, 489 U.S. at 397.

⁹³ *Id.* at 398.

⁹⁴ 22 F.3d 1283.

plaintiffs' constitutional rights.⁹⁵ This was true even if the individual officers were not found liable because they lacked the requisite mental state to be constitutionally accountable.⁹⁶ This case involved a high-speed pursuit that resulted in the deaths of innocent persons killed by a collision with the pursued vehicle.⁹⁷ The officers were found not to have acted in a manner that would satisfy the Supreme Court's *Collins*-shocks-the-conscience standard, but the plaintiffs' injuries were linked to *City of Canton*-type deliberate indifference on the part of the City.⁹⁸

Fagan may not be problematic if the Supreme Court ultimately decides that when talking about municipal liability, one cannot argue in terms of subjective deliberate indifference because the defendant is an "entity." The Court could adopt the view that if the plaintiffs can demonstrate that policymakers knew or should have known that a particular policy was going to result in injury to persons having contact with municipal employees, that would be sufficient to hold the municipality liable for a constitutional wrong. To date, the Supreme Court has not yet done that. In *City of Canton*, the Court emphasized that there is a difference between the underlying constitutional wrong and the notion of the City's liability under § 1983.⁹⁹ Absent a constitutional violation committed by the non-policymaking employee(s), and with a showing of only *City of Canton*-type deliberate indifference, there is simply no constitutional violation, and therefore, no basis for § 1983 liability on anyone's part. The Third Circuit's error in *Fagan* was treating proof of statutory responsibility under *Canton*'s deliberate indifference theory as proof of constitutional liability under *Collins*.¹⁰⁰

⁹⁵ *Id.* at 1292.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1287.

⁹⁸ *Id.*

⁹⁹ *City of Canton*, 489 U.S. at 389.

¹⁰⁰ *See, e.g., Contreras v. City of Chicago*, 119 F.3d 1286, 1294 (7th Cir. 1997):

We would first note that much of the plaintiffs' argument reflects confusion between what constitutes a constitutional violation and what makes a municipality liable for

The court in *Arnold v. County of Nassau*,¹⁰¹ a case involving a sex offender detainee who was held with detainees that had mental problems, took a similar approach recently. The detainees conducted a mock trial of the sex offender detainee, decided he was guilty, and severely and brutally beat him.¹⁰² The question in *Arnold* was whether the county could be held liable if the individual officers on duty were found not to have been subjectively deliberately indifferent.¹⁰³ The court concluded:

[T]he County could logically be found liable under § 1983 in the absence of individual liability. . . . [I]n a lack of prison supervision case against a municipality, a jury can assess whether the municipality's policymakers responsible for attending to prisoner safety knew or should have known that sex offense prisoners or detainees faced a substantial risk of serious harm, even where individual liability is not implicated, and whether the supervisory policies and practices adopted by these policymakers were deliberately indifferent to the safety of these vulnerable inmates.¹⁰⁴

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.

¹⁰¹ 89 F. Supp. 2d 285 (E.D.N.Y. 2000), *judgment vacated on other grounds*, 252 F.3d 599 (2d Cir. 2001).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 304-05.

The court in *Arnold*, as the Third Circuit in *Fagan*, determined that a showing of objective deliberate indifference was enough to make out a constitutional violation when shown at the policy making level.¹⁰⁵ In reaching its conclusion on municipal liability independent of an underlying constitutional violation by the non-policymaking employee, the *Arnold* court relied on the Second Circuit opinion in *Barrett v. Orange County Human Rights Commission*.¹⁰⁶ *Barrett*, however, was not a *City of Canton* type case. *Barrett* was a case brought by a civil rights commissioner, alleging his dismissal was an impermissible retaliation for comments he made on matters of public concern.¹⁰⁷ The jury in *Barrett* found that the two individual commissioners were not liable because they did not have the requisite "impermissible motive."¹⁰⁸ They found no liability on behalf of the two individual commissioners sued.¹⁰⁹ The Second Circuit reasoned that the finding of no liability on the part of the individual commissioners did not preclude the plaintiff from holding the commission itself liable.¹¹⁰ The commission is a multi-member entity and the plaintiff could establish liability of the entity by demonstrating the majority of those who voted had impermissible motive, even if the two named individual commissioners were found to have not acted improperly. The *Arnold* court's reliance on the language in *Barrett* is confusing and misleading. The question of entity liability in *Barrett* is raised in a completely different context from that in *Arnold*. *Barrett* in no way authorizes a finding of municipal liability based on a showing of objective deliberate indifference on the part of policymakers in the absence of any underlying constitutional violation.

The Court of Appeals for the Tenth Circuit has struggled with this issue at length and has reached conflicting results in the course of the litigation of two different high-speed pursuit cases.

¹⁰⁵ *Id.* at 304.

¹⁰⁶ 194 F.3d 341 (2d Cir. 1999).

¹⁰⁷ *Id.* at 345-46.

¹⁰⁸ *Id.* at 343-44.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 349-50.

In *Williams v. City and County of Denver*,¹¹¹ the plaintiff's son was killed when a police vehicle ran a red light and struck the decedent's vehicle.¹¹² At the time of the collision, the officer operating the police vehicle was responding to a non-emergency request for assistance by another officer.¹¹³ The plaintiff sued both Officer Farr and the City.¹¹⁴ The District Court determined that the officer's conduct did not amount to a constitutional violation and granted summary judgment for the City on the *City of Canton* claims. The District Court also rejected the notion that the City could be held liable under § 1983, independent of the officer's liability. In reversing the District Court's holding on the existence of the underlying constitutional violation, the Court of Appeals concluded that the officer's conduct could be viewed as "reckless and conscience-shocking[.]" and therefore, egregious enough to constitute an underlying substantive due process violation.¹¹⁵ However, because the law was not clearly established at the time of the incident, the court affirmed summary judgment for the officer based on qualified immunity.¹¹⁶ Because there was sufficient evidence to make out an underlying constitutional violation by Officer Farr, the Court of Appeals also reversed the summary judgment for the City and remanded for further proceedings. The Court of Appeals subsequently granted a rehearing en banc, but, given the Supreme Court's intervening decisions in *Bryan County* and *County of Sacramento*, vacated its panel opinion and remanded to the District Court for reconsideration in light of these two Supreme Court opinions.¹¹⁷

¹¹¹ 99 F.3d 1009 (10th Cir. 1996) *vacated* (in light of *County of Sacramento*) by *Williams v. City and County of Denver*, 140 F.3d 855 (10th Cir. 1997), *remanded* by *Williams v. City and County of Denver*, 153 F.3d 730 (10th Cir. 1998) (per curiam) (en banc).

¹¹² *Id.* at 1012.

¹¹³ *Id.*

¹¹⁴ *Williams*, 99 F.3d at 1012.

¹¹⁵ *Id.* at 1017.

¹¹⁶ *Id.* at 1021.

¹¹⁷ *Williams*, 153 F.3d at 737 (per curiam) (en banc) On remand, the District Court concluded that because the officer's conduct occurred in a non-emergency situation, the plaintiff did not have to satisfy County of Sacramento's "intent to harm" level of culpability in order to establish

The now vacated panel opinion of the Court of Appeals also acknowledged that a claim could be asserted directly against the City on a *Collins* theory, but affirmed summary judgment for the City because there was insufficient evidence from which a jury could find that the City's conduct was "so egregious, outrageous and fraught with unreasonable risk as to shock the conscience."¹¹⁸ Thus, the Tenth Circuit's panel opinion in *Williams*, recognized that in cases where the plaintiff's underlying constitutional claim depended upon establishing a particular state of mind on the part of the non-policymaking employee, there may be situations in which an officer inflicts the injury, but lacks the requisite state of mind. In these cases, the plaintiff should be able to proceed directly against the government entity on a *Collins* theory, if the plaintiff demonstrates: (1) that the policymaker(s) possessed the requisite state of mind required to make out a constitutional violation and (2) that the policymaker's acts or omissions were the "moving force" behind the plaintiff's injury.

In a recent decision, however, a different panel of the Tenth Circuit rejected the position espoused by the court in *Williams*. In *Trigalet v. City of Tulsa*,¹¹⁹ the court entertained an appeal under 28 U.S.C. § 1292(b).¹²⁰ The specific question certified to the court was:

conscious-shocking behavior that would violate substantive due process. *Williams v. City and County of Denver*, No. 90 N 1176, slip op. at *17 (D. Colo. Sept. 27, 1999) (on remand). In a tactical decision arrived at to keep certain evidence regarding Officer Farr's past driving record and other incidents from the jury, the City stipulated to liability based on a jury determination of Farr's having violated plaintiff's substantive due process rights in the incident in question. The jury returned a \$2.25 million verdict for the plaintiff. Post-verdict motions are being entertained at the time of this writing. The City will no doubt appeal if not successful in its post-trial motions. (Conversations with Steven Black, one of the attorneys representing the plaintiff in *Williams*).

¹¹⁸ *Williams*, 99 F.3d at 1020.

¹¹⁹ 239 F.3d 1150 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 40 (2001).

¹²⁰ 28 U.S.C. § 1292 (b) (1994 & Supp. 2001) allows a District Court judge to certify an order for interlocutory appeal when "such order involves a controlling question of law as to which there is substantial ground for

Whether, under the rationale of *Williams v. City and County of Denver* . . . a municipality can be held liable if the City's actions can be characterized as arbitrary, or conscience-shocking, in a constitutional sense, even if there are no unconstitutional acts by an individual officer.¹²¹

The court answered the question "in the negative."¹²² For purposes of the appeal, which was decided on the briefs without oral argument, the facts were taken as undisputed. The plaintiffs in *Trigalet* were three individuals killed when their station wagon was hit by a minivan being pursued by officers of the Tulsa Police Department.¹²³ The van was pursued for a stolen vehicle offense.¹²⁴ During the course of the pursuit the van failed to stop for at least eight stop signs in residential areas, by a park, a high school, and within blocks of the University of Tulsa.¹²⁵ Although policy mandated all pursuits be supervised, there was no supervision of this pursuit.¹²⁶ The testimony of the manager of safety and equipment for the Tulsa Police Department reflected that it was permissible and appropriate to pursue any traffic offender regardless of the offense.¹²⁷

In the course of the lengthy legal battle, the officers prevailed on qualified immunity grounds.¹²⁸ It was not clearly established at the time of the incident that the officers could be

difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation"

¹²¹ *Trigalet*, 239 F.3d at 1150-51.

¹²² *Id.* at 1151.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* (The Court of Appeals referenced the content of the unreported District Court order of August, 1998). The plaintiffs alleged that five elements of the policies and practices of the Tulsa Police Department with respect to pursuits made those policies and practices conscience shocking and arbitrary in a constitutional sense.

¹²⁶ *Id.* at 1151.

¹²⁷ *Trigalet*, 239 F.3d. at 1151.

¹²⁸ *Id.*

liable under § 1983 for injuries caused by third parties.¹²⁹ Following the Supreme Court's decision in *County of Sacramento*, the District Court granted summary judgment to the City on plaintiffs' *City of Canton*, derivative liability claim.¹³⁰ However, the court denied summary judgment on the direct liability claim; the claim that the City of Tulsa could be found to have directly violated plaintiffs' constitutional rights through policies and practices characterized as arbitrary or conscience shocking.¹³¹ The District Court relied on the distinction drawn by the panel in the vacated *Williams* opinion, noting that while the opinion had been vacated, "its distinction between direct and indirect municipal liability is still valid and persuasive."¹³²

The Court of Appeals in *Trigalet* concluded that without a "predicate constitutional violation" by an employee, the municipality cannot be found liable.¹³³ The panel relied on the Supreme Court's decisions in *Heller*, *County of Sacramento*, and *Bryan County*, as well as a number of its own decisions and other circuits rejecting municipal liability absent a finding of a constitutional violation by an employee.¹³⁴ Because there was no evidence of the requisite purpose to harm on the part of the officers participating in the pursuit in *Trigalet*, there was no constitutional injury inflicted by them, and thus, no basis for a finding of municipal liability. As the court stated:

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

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 1152.

¹³² *Id.* (Court of Appeals quoting from unreported district court Order of August, 1998).

¹³³ *Trigalet*, 239 F.3d at 1154.

¹³⁴ *Id.* at 1154-55.

supervision with regard to the individual defendants.¹³⁵

This author would suggest that if the panel in *Trigalet* was right, it is indeed time, as Justice Breyer suggested in *Bryan County*, to revisit *Monell*.¹³⁶ Assume Tulsa's policy-makers had adopted a pursuit policy that not only allowed pursuits for any traffic offense, but also authorized the use of any means necessary to bring the offender under control and into custody. Additionally, assume that pursuant to this policy, Officers Rip and Roar pursue a traffic offender and engage in a high-speed pursuit. Assume that Officer Rip, consistent with the City's policy and his training, fires a few rounds at the tires of the fleeing vehicle, and while unsuccessful in bringing the vehicle to a stop, does manage to hit an innocent bystander with a stray bullet. If the driver of the vehicle had been seized,¹³⁷ she no doubt would have had a good claim for use of unreasonable force under the Fourth Amendment. The bystander, however, has not been seized within the meaning of the Fourth Amendment,¹³⁸ and would have only a substantive due process claim under *County of Sacramento*. Should a failure to make out the requisite "purpose to harm" on the part of the acting officers preclude the bystander from asserting a claim against the City based on the subjective deliberate indifference of its policymakers in adopting a policy they knew was likely to result in serious injuries to citizens who were subjected to or in the vicinity of police pursuits?

¹³⁵ *Id.* at 1155.

¹³⁶ *Bryan County*, 520 U.S. at 430 (Breyer, J., joined by Ginsburg, J., and Stevens, J., dissenting). In *Bryan County*, Justice Breyer, joined by Justices Ginsburg and Stevens, authored a dissent that criticized 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 called for a reexamination of "the legal soundness of that basic distinction itself."

¹³⁷ In *California v. Hodari D.*, 499 U.S. 621 (1991), the Court held that a police pursuit does not amount to a "seizure" within the meaning of the Fourth Amendment.

¹³⁸ See *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (Fourth Amendment seizure occurs only when there is a government termination of freedom of movement through means intentionally applied).

While there is some justification for setting a high threshold of culpability for plaintiffs to meet before recovery is allowed against individual officers engaged in rapidly-developing, emergency-type situations, there is no legitimate reason to apply the same level of culpability to the conduct of policymakers who intentionally and knowingly adopt a course of action that is deliberately indifferent to citizens' health, safety and welfare. If a jury should determine that the criticized elements of the City's pursuit policy did indeed make the policy arbitrary and conscience-shocking, and were deliberately and knowingly adopted or ratified by the City's policymakers, the City should be held directly liable for having violated the substantive due process rights of plaintiffs. Although the officers inflicted the physical injury, the policymakers committed the constitutional violation. The courts in *Simmons* and *Williams* had the right theory. *County of Sacramento* clarifies that, in a context where there is time and opportunity to deliberate, subjective deliberate indifference will suffice to establish a substantive due process violation. A finding of direct municipal liability based on the subjective deliberate indifference of policymakers to the safety of citizens is consistent with *Monell*, *City of Canton* and *County of Sacramento*.

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