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The Theory of Municipal Custom and Practice

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THE THEORY OF MUNICIPAL CUSTOM AND PRACTICE

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JUDGE PRATT:

Thank you. Moving ahead, professor Karen Blum will discuss Section 1983 on municipal custom and practice. She has been here many times before and we welcome her back.

We will lead off with Professor Blum who will lay out the ground work. Then, we will get into some of the details.

PROFESSOR BLUM:

Good afternoon. It is a pleasure to be back. I am going to talk a little about the theory of municipal custom and practice cases. For those of you who are not well-versed in the area of Section 1983 litigation, a plaintiff attempting to prove municipal or local government liability under Section 1983 will generally rely on one of four recognized methods for establishing such liability.

The first method is exemplified by *Monell v. Dep't of Social Services of the City of New York*,[1] where the plaintiffs pointed to an officially adopted, written regulation of the City of New York that required pregnant employees to stop working at a given point in time, even if not medically necessary.[2] Where, as in *Monell*, a formal and officially adopted policy is found to be unconstitutional, a single application of that policy will result in government liability.[3] Official policy cases usually are not too

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[1] Monell v. Dep't of Social Services of the City of New York, 436 U.S. 658 (1978).

[2] *Id.* at 661.

[3] *Id* at 700; *see also* City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (challenging the vote of the city council to cancel license for rock concert); Owen v. City of Independence, 445 U.S. 622 (1980) (finding that personnel decision made by city council constitutes official city policy); O'Brien v. City of Grand Rapids, 23 F.3d 990, 1004 (6th Cir. 1994) (noting that "[t]he official policy proved at trial was the decision to follow the teachings of [a national authority] and to adopt his philosophy in developing a response plan for critical incident management. . . . In accordance with his teachings, Grand Rapids followed the routine practice of not securing warrants during the

troublesome, unless they present a controversy about whose policy it is that has caused the constitutional injury.

It is important that the challenged policy statement, ordinance, regulation, or decision actually is 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.[4] Local government entities may take the position

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management of critical incidents. The trouble is that this policy was illegal"); Grow v. City of Milwaukee, 84 F. Supp. 2d 990 (E.D. Wis. 2000) In *Grow* the court found as follows:

> In the present case the city of Milwaukee has an express policy requiring police officers, whether on or off duty, to submit to alcohol tests whenever two supervisors observing the officer have a reasonable suspicion to believe that the member is intoxicated. The policy necessarily requires that suspected officers be taken to police stations where the tests are administered, because it is understood by police officers that is where the tests take place. The policy makes no exception for officers suspected of being intoxicated in their homes. The seizures of Lindsey and Grow were conducted pursuant to this express policy. If the seizures are ultimately determined to have been unreasonable, the City may properly be held liable for the deprivations of constitutional rights.

Id. at 1007.

[4] *See, e.g.,* Bethesda Lutheran Homes and Services, Inc. v. Leean, 154 F.3d 716, 718 (7th Cir. 1998) (holding that "[w]hen 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"); West v. Congemi, 28 F. Supp.2d 385, 394 (E.D. La. 1998) (noting that "[t]he Fifth Circuit has long recognized that simply following the mandatory dictates of state law cannot form a predicate for *Monell* liability"); *but see* Smith v. City of Dayton, 68 F. Supp.2d 911 (S.D. Ohio 1999) In *Smith* the court found that:

> 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.

Id. at 917-18.

that they are merely enforcing state or federal policy rather than a policy of the local entity.[5]

For example, in *Tennessee v. Garner*,[6] the state of Tennessee had a statute that allowed the shooting of all fleeing felons.[7] This statute was challenged in the Supreme Court and was struck down as applied to the shooting of a non-dangerous, unarmed, fleeing burglar.[8] The Court in *Garner* established guidelines for determining when the use of deadly force would be constitutionally justified.[9]

When the case was remanded to the Sixth Circuit, the only defendants remaining in the suit were the City of Memphis and the police department. The individual officer had qualified immunity[10] and the state could not be sued under Section 1983 because it enjoyed immunity under the Eleventh Amendment.[11] The Sixth Circuit rejected defendants' argument that they had no choice but to follow the state fleeing felon policy holding that "[d]efendants' decision to authorize use of deadly force to apprehend

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[5] *See, e.g.*, Garner v. Memphis Police Dep't, 8 F.3d 358 (6th Cir. 1993).

[6] 471 U.S. 1 (1985).

[7] *Id.* at 4-5. A Tennessee statute provided that "[If], after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all the necessary means to effect the arrest." *Id.* citing TENN. CODE ANN, § 40-7-108 (1982).

[8] *Id.* at 11.

[9] *Id.*

[10] *Id.* The officer enjoyed qualified immunity because he acted in good faith reliance on the Tennessee Statute, and the law was not clearly established that the officer's conduct violated the Fourth Amendment.

[11] *See* U.S. CONST. Amend. XI. The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Id. See also Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989). In *Will*, 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. *Id.* at 71.

nondangerous fleeing burglary suspects was, . . . a deliberate choice from among various alternatives...."[12]

A second method of establishing local government liability is through the attribution of certain decisions or conduct by final policymakers of the entity. In its *Pembaur/Praprotnik/Jett* line of cases,[13] the Supreme Court held that a single decision or act by a final policymaker in that area could be attributed to the local government entity for purposes of liability under Section 1983.[14] In *Pembaur*, for example, the County was held responsible for the single, ad hoc decision of the County prosecutor, who was determined to be the final policymaker on matters of law enforcement in the County and who ordered police officers to "go in and get" witnesses in a situation that involved entering the premises of a third party without a warrant for such entry.[15] The question of who is a final policymaker is a question of state law.[16]

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[12] Garner v. Memphis Police Dep't, 8 F.3d 358, 364 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1219 (1994). For other examples of cases where the courts have rejected attempts to shift liability to the state or at least away from the local government unit, on the theory that the local government was merely enforcing a state authorized policy, *see, e.g.,* DePiero v. City of Macedonia, 180 F.3d 770 (6th Cir. 1999); Brotherton v. Cleveland, 173 F.3d 552 (6th Cir. 1999); McKusick v. City of Melbourne, 96 F.3d 478(11th Cir. 1996); Community Health Care Association of New York v. DeParle, 69 F. Supp. 2d 463 (S.D.N.Y. 1999); *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]").

[13] Jett v. Dallas Independent School District, 491 U.S. 701 (1989); City of St. Louis v. Praprotnik, 485 U.S. 112 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

[14] *See e.g.*, Pembaur v. City of Cincinati, 475 U.S. 469, (1986); Jett v. Dallas Independent School District, 491 U.S. 701 (1989); Louis v. Praprotnik, 485 U.S. 112 (1988).

[15] *Pembaur*, 475 U.S. at 485.

[16] *Id.* at 483.

A third method of establishing local government liability is by demonstrating the requisite deliberate indifference on the part of the municipality to recurring constitutional violations committed by non-policymaking employees[17] or deliberate indifference to a very strong likelihood that constitutional rights will be violated as a result of failing to train, supervise or discipline in certain areas where the need for such training is obvious.[18] Liability in such cases is based on the Supreme Court's decisions in *City of Canton v Harris,*[19] and *Board of County Commissioners of Bryan County v. Brown.*[20] In *City of Canton* cases, liability of the municipality will be derivative. That is, if there is no underlying constitutional violation committed by the non-policymaking employee, there will

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[17] *See, e.g.,* Pena v. Leombruni, 200 F.3d 1031, 1033, 1034 (7th Cir. 1999) (finding that "[I]f 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) (noting that "[w]here 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").

[18] Allen v. Muskogee, 119 F.3d 837, 843, 844 (10th Cir. 1997) (finding that "[w]hen 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"); Weaver v. Tipton County, 41 F. Supp.2d 779, 792 (W.D. Tenn. 1999). In *Weaver*, "[b]ased 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").

[19] City of Canton v. Harris, 489 U.S. 378 (1989).

[20] Board of County Commissioners of Bryan County v. Brown, 117 S. Ct. 1382 (1997).

be no municipal liability based on a policy of deliberate indifference to such violations.[21]

The focus of this presentation is the fourth method of making out a case against the municipality under Section 1983, the so-called "custom or practice" theory of liability. We are talking about a practice, custom or usage that is so widespread and so persistent that it has the force of law. A good description of the difference between a formal policy and a custom is contained in *Britton v. Maloney*.[22] Unlike a policy, which is established by the top-down affirmative decision of a policymaker, a custom develops from the bottom up.[23] It is the subordinate, lower level, non-policymaking employees that engage in a certain practice or custom which becomes "the way things are done."[24] The following cases provide some examples of "custom or practice" liability under Section 1983:

Sharp v. City of Houston[25] was a code of silence case out of the Fifth Circuit. The plaintiff introduced evidence of retaliation for having violated the code of silence, which had the effect of proving the code's existence.[26] The Fifth Circuit stated that "[t]he jury could have surmised that co-workers and supervisors enforced this [Houston Police Department] wide 'code of silence' by retaliatory

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[21] *See* City of Los Angeles v. Heller, 475 U.S. 796 (1986). In Heller 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. *Id.* "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). *But see* Kneipp v. Tedder, 95 F.3d 1199, 1213 (3d Cir. 1996) (noting that "[t]he 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").

[22] 901 F. Supp. 444 (D. Mass. 1995).

[23] *Id.* at 450.

[24] *Id.*

[25] 164 F.3d 923 (5th Cir. 1999).

[26] *Id.* at 935.

acts.[27] If the jury finds a code of silence is enforced as a matter of custom, usage, or policy, then the city can be held liable.[28]

The court, in *Bordanaro v. McLeod*,[29] found that the city of Everett, Massachusetts had a custom of allowing police officers to knock down doors whenever they were in pursuit of a fleeing felon.[30] This was held to be unconstitutional.[31]

In *Dykema v. Skoumal*,[32] the plaintiff was unable to point to specific written guidelines directing police officers not to protect confidential informants or not to train police officers working with confidential informants.[33] The court found that the plaintiff had sufficiently alleged that the municipality and county should be held liable based on the custom or practice prong of *Monell*, based on "an unwritten custom and practice of not providing training and protection for individuals who were used as informants in police undercover activities and not providing training to police officers who worked with confidential informants."[34]

In *Lauro v. City of New York*,[35] the court found that "perp walks" done for the purpose of allowing the press to get a photo opportunity for particularly newsworthy suspects, constituted an unconstitutional custom or practice that was condoned by the city of New York.[36]

Gary v. Sheehan[37] and *Thomas v. District of Columbia*[38] both point out that a municipality may be liable based on custom or practice, even where the custom or practice is actually contrary to

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[27] *Id.*

[28] *Id.*

[29] 871 F.2d 1151 (1st Cir. 1989), *cert. denied*, 493 U.S. 820 (1989).

[30] *Id.* at 1159.

[31] *Id.*

[32] No. 98 C 5309, 1999 WL 417360 (N.D. Ill. 1999).

[33] *Id.* at *6-7.

[34] *Id.*

[35] 39 F. Supp. 2d 351, 364-65 (S.D.N.Y. 1999).

[36] *Id.* at 365. The *Lauro* court held that the perp walk lacked any legitimate law enforcement objective, and failed the basic test of constitutionality as laid out in *Turner v. Safley*, 482 US 78, 90 (1987). *Id.*

[37] No. 96 C 7294, 1998 WL 6547116 (N.D. Ill. 1998).

[38] 887 F. Supp. 1 (D.D.C. 1995).

written policy.[39] If it turns out that the municipality had either actual or constructive knowledge of the practice, the municipality will still be "on the hook" under Section 1983.

Some of the cases discuss how many incidents must be shown before a custom can be said to exist. If a person is in Washington, D.C., six incidents of alleged excessive use of force might not be statistically sufficient over a given period of time.[40] However, six incidents of excessive use of force within the same period of time in a small town with five or six police officers may be a lot.[41] Attention must be paid to the facts of the particular case, because this theory of municipal liability is based on policymakers' actual or constructive knowledge of the practice and acquiescence in it.[42]

There are a number of cases where the plaintiffs failed to make out their case, because they never presented any evidence that policymakers were aware of this pattern or custom. In *Floyd v. Waiters*,[43] the plaintiff contended that there was a long standing and widespread custom, where male security guards would transport female students to certain places to engage in illicit sex.[44]

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[39] *Id.* at 5.

[40] *See generally*, Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986).

[41] *See e.g., Brown v. City of Margate,* 842 F. Supp. 515, 518 (S.D. Fla. 1993) (finding "[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 mater 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").

[42] *See, e.g., McNabola v. Chicago Transit Authority*, 10 F.3d 501, 511 (7th Cir. 1993) (noting that "[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) (determining that "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) (finding that "a longstanding and widespread practice is deemed authorized by the policymaking officials because they must have known about it but failed to stop it").

[43] 133 F.3d 786 (11th Cir. 1998).

[44] *Id.* at 788.

The court concluded that this did not constitute a school district custom that could support Section 1983 liability.[45] The court reasoned that the policymaking officials did not know what the male security guards were doing and, as a result, there would be no liability, because a custom required that policymaking officials know about the widespread practice and fail to do anything about it.[46]

Sometimes having no policy can be an unconstitutional policy or custom. Presently, a class action lawsuit is being litigated in Boston,[47] because there is no place to hold female detainees.[48] As a result, they are taken over to the Suffolk County Jail where they are put in with the general population, and automatically strip-searched.[49] Neither the county nor the City of Boston had an official policy requiring individualized suspicion, and a blanket strip-search practice had existed for years.

A lot of these cases fall under the *City of Canton* category.[50] In the *City of Canton* cases, the plaintiff is required to show that the city's policy was deliberately indifferent to the likelihood that underlying constitutional violations will occur.[51] In *City of Canton*, the Court set out two ways that plaintiffs could demonstrate deliberate indifference.[52] 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.[53] Second, plaintiff may

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[45] *Id.* at 795.

[46] *Id.* at 795 (citing Brown v. City of Fort Lauderdale, 923 F.2d 1474 (11th Cir. 1991); *see also* Jane Doe A. v. Special School District, 901 F.2d 642 (8th Cir. 1990); Samarco v. Neumann, 44 F. Supp. 2d 1276 (S.D. Fla. 1999).

[47] Mack v. Suffolk County, 191 F.R.D. 16 (D. Mass. 2000) (opinion certifying class). *See also, Lawyers Asks to Expand Lawsuit over Strip-Searches.* THE BOSTON GLOBE. October 29, 1999 at B3.

[48] *Id.*

[49] *Id.*

[50] 489 U.S. 378 (1989).

[51] *Id.*

[52] *Id.* at 396-97.

[53] 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

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.[54] There is general agreement

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indifference" to constitutional rights required for the imposition of municipal liability. 489 U.S. at 390 n.10. *But see* Pena v. Leombruni, 200 F.3d 1031 (7th Cir. 1999). The court found that:

> failing 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.

Id. at 1033.

[54] *See, e.g.*, 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."). *See also* Cornfield v. Consolidated High School District No. 230, 991 F.2d 1316, 1327 (7th Cir. 1993); Thelma D. v. Board of Education of the City of St. Louis, 934 F.2d 929, 934-45 (8th Cir.1991). *Compare* 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.") *with* Johnson v. City of Cincinnati, 39 F. Supp.2d 1013, 1019, 1020 (S.D. Ohio 1999) ("Plaintiff provides evidence

among the Circuits that post-event evidence may be relevant and admissible to prove the existence of a practice or custom.[55]

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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.").

[55] *See, e.g.*, 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* 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), where the court made the following observations:

> Here, factual issues were presented that the county acted in accordance with an established policy of 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

It is worth noting that plaintiffs can sometimes build a case against a municipality based on a pattern or custom with respect to a single officer. In *Vann v. City of New York*[56] and *Beck v. City of Pittsburgh*,[57] the Courts of Appeals found that evidence of repeated complaints of excessive force against an individual officer, along with other indicators of a pattern of violent behavior, was sufficient to create an issue of municipal liability based on the policymakers' deliberate indifference to an obvious need for more or better discipline and supervision. The court in *Vann* concluded as follows:

> 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.[58]

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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.

[56] 72 F.3d 1040 (2d Cir. 1995). Vann was a bus driver who got into an accident with an off-duty police officer. The officer called Vann a "nigger," drew his gun and threatened to shoot him. The officer proceeded to hit Vann in the head and throw him against the bus causing several injuries. The officer arrested Vann but the precinct commander voided the arrest. *Id.*

[57] 89 F.3d 966 (3d Cir. 1996). Beck had skidded in a circle in a wet parking lot after a party and was blocked from leaving by a police cruiser. The police officer ordered Beck out of the car, shoved his gun in Beck's face, cursed and used obscene language, struck him in the face six to eight times with the end of the gun and kicked him in the ribs. The officer subsequently arrested Beck and charged him for driving under the influence of alcohol and reckless driving. *Id.*

[58] *Vann*, 72 F.3d at 1049, 1051.

There are two cases I just wanted to mention that are not in the program materials, but that present interesting situations. If you represent school boards, especially if you are in Pennsylvania, you will want to pay attention. *Kurilla v. Callahan*,[59] was a case involving a teacher who had a physical altercation with a student.[60] The teacher evidently forcefully grabbed this student; his fist hit the student's chest in such a way as to bruise it, but no medical care was needed.[61] While this particular assault was preceded by only one incident, it happens that there were three incidents within less than one year involving this teacher. The failure to take any disciplinary action against the teacher following the three incidents in a span of less than one year was found by the court to be "probative of the question as to whether the School District had a policy or custom to tolerate or be deliberately indifferent to the excessive use of force by teachers."[62] An interesting aspect to this case is that this was a substantive due process claim raised by the student against the teacher; it was not a seizure; it was not a Fourth Amendment claim; and it was not an Eighth Amendment claim.[63] The court applied the "shocks the conscience/purpose to harm" standard of *County of Sacramento v. Lewis*[64] as the level of culpability that would be required to establish a substantive due process violation as to this momentary use of force by the school teacher.[65] The court found the standard was not satisfied, so the teacher did not commit a substantive due process violation, but the School District could still be held liable.[66] The court relied on a Third Circuit line of cases that permits a finding of municipal

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[59] 68 F. Supp. 2d 556 (M.D. Pa. 1999).

[60] *Kurilla*, 68 F. Supp. 2d at *557.*

[61] *Id.*

[62] *Id.* at 568-69.

[63] *Id.*

[64] 523 U.S. 833 (1998).

[65] *Kurilla*, 68 F. Supp. 2d at 564. "The pertinent inquiry is 'whether the force applied caused injuries so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'" *Id.*

[66] *Id.* at 565.

liability for a substantive due process violation independent of the liability of any individual official.[67]

Thus, the court in *Kurilla* concluded that the School District could still 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."[68]

A final case I thought worth calling to your attention involves another example of school district liability in Pennsylvania. In *Sciotto v. Marple Newtown High School*,[69] the court concluded that plaintiffs had introduced sufficient evidence from which a reasonable jury could find that the school district policymakers were aware of and had ratified a longstanding tradition and custom of inviting "older, heavier, more experienced wrestlers to practice with the Marple Newtown High School's wrestling team . . . ."[70] The consequences of the tradition were tragic in this case, where a sixteen-year-old, 110 pound, high school student was injured in a

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[67] *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 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"); Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3d Cir. 1994) (Fagan I) (holding that in the 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"); 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). For criticism that this author has directed at the legal reasoning used in this line of cases, *see* Karen M. Blum, *Municipal Liability: Derivative or Direct? Distinguishing the* Canton *Case from the* Collins *Case*, 48 DePaul L. Rev. 687 (1999).

[68] *Kurilla*, 68 F. Supp.2d at 565.

[69] Sciotto v. Marple Newtown School District, 81 F. Supp.2d 559 (E.D. Pa. 1999).

[70] *Id.* at 576.

match against a heavier, more experienced alumnus.[71] The student was rendered a quadriplegic as a result of his injuries.[72] The court found an underlying substantive due process violation based on the state-created danger theory,[73] and enough evidence to put to the jury on the question as to whether the school district could be held liable based on the knowledge, acquiescence and ratification of this custom and tradition.[74] If you are practicing in Pennsylvania, or anywhere in the Third Circuit, I would take a look at both *Kurilla* and *Sciotto*, especially if you are representing school districts.

I see my time is up. Thank you and good luck with your cases!

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[71] *Id.* at 562.

[72] *Id.*

[73] *Id.* at 567. The Third Circuit has recognized a state-created danger theory of liability under the Substantive Due Process Clause. *See, e.g.*, 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.").

[74] *Sciotto*, 81 F. Supp.2d at 575-76.