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MAKING OUT THE *MONELL* CLAIM UNDER SECTION 1983

*Karen M. Blum**

INTRODUCTION

In most Section 1983 lawsuits, the individual actors who committed the alleged constitutional violations are the named defendants, but in many suits, the municipal entity is brought in as well.¹ Local government entities, as long as they are not the state or an arm of the state, can be sued under Section 1983 for damages and injunctive relief.²

Plaintiffs generally use one of four methods to establish municipal liability. First, plaintiffs may point to an officially adopted or promulgated policy.³ Second, they may point to a custom or practice that is not written or formally adopted, but that is a pervasive, long-standing practice that has the force of law.⁴ The final two methods

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¹ See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 701 (1978) (holding that municipal corporations may be named in a Section 1983 lawsuit).

² Political subdivisions of the state have no Eleventh Amendment protection from suit in federal court. *Moor v. County of Alameda*, 411 U.S. 693, 717-25 (1973). See also *Northern Ins. Co. of New York v. Chatham County, Ga.*, 126 S. Ct. 1689, 1690 (2006).

³ David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 *FORDHAM L. REV.* 2183, 2188 (2005) (citing *Monell*, 436 U.S. at 690).

⁴ See, e.g., *Gregory v. City of Louisville*, 444 F.3d 725, 754 (6th Cir. 2006) (alleged custom of using overly suggestive show-ups); *Sharp v. City of Houston*, 164 F.3d 923, 936 (5th Cir. 1999) (finding a custom existed for transfers and demotion when officers reported misconduct); *Watson v. City of Kansas City*, 857 F.2d 690, 696 (10th Cir. 1988) (finding a sufficient showing of the police department's custom for treating domestic violence cases

present the most difficult problems.

The third method can be referred as the *City of Canton* method of demonstrating liability. This occurs when plaintiffs point to a failure to “blank”: a failure to train, a failure to supervise, a failure to discipline, a failure to adequately screen, etc.⁵ Finally, plaintiffs may point to a particular decision or act made by someone who is asserted to be a final policymaker for the entity.⁶ The Supreme Court has held that in certain situations, the decisions or the acts of a final policymaker, even if only on a single occasion, may be attributed to the entity for liability purposes under Section 1983.⁷

I. OFFICIALLY PROMULGATED POLICY

There are not many newly written policies that are unconstitutional on their face, but there may be some policies that are unconstitutional as applied. The *Lanier v. City of Woodburn*⁸ case from the Ninth Circuit is an example. The city had a drug testing policy for new employees.⁹ The court held that it was unconstitutional as applied to a teenage girl who was applying to be a page at the public library.¹⁰

In *Maddux v. Officer One*,¹¹ the city had a written policy au-

lightly).

⁵ See *City of Canton v. Harris*, 489 U.S. 378 (1989).

⁶ *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1989)).

⁷ *Pembaur*, 475 U.S. at 484-85 (holding a county prosecutor’s decision to send the deputy sheriffs into a premises to get a witness constituted a county policy even though it occurred only once).

⁸ 518 F.3d 1147 (9th Cir. 2008).

⁹ *Id.* at 1148.

¹⁰ *Id.*

¹¹ 90 F. App’x 754 (5th Cir. 2004).

thorizing police officers to forcibly enter a third-party's premises without a warrant¹²—clearly unconstitutional. The city asserted that the policy on the books was an old policy, and that the department trains its officers not to enter private property without a warrant.¹³ However, in the *Maddux* case, the police officers went in without a warrant, and the policy was the source of that action.¹⁴ As such, the Fifth Circuit held that the municipality could be held liable, and remanded the matter to the district court for a jury trial.¹⁵

In *Rauen v. City of Miami*,¹⁶ the plaintiffs alleged that there was a formal plan adopted to stifle protest in violation of the First Amendment at the Free Trade Area of the Americas gathering in Miami.¹⁷ The *Tardiff v. Knox County*¹⁸ case concerned an actual written policy authorizing the strip search of felony arrestees who were arrested for non-violent, non-weapon, non-drug related charges, and that policy was held unconstitutional.¹⁹

A. Entity Liability for Facially Neutral Policy Adopted With Impermissible Motive

In some “officially adopted policy” cases, the plaintiff may claim that an officially adopted policy, adopted by a local legislative board or council, while neutral on its face, was adopted with a constitutionally impermissible purpose.

¹² *Id.* at 757.

¹³ *Id.*

¹⁴ *Id.* at 770.

¹⁵ *Id.* at 776.

¹⁶ No. 06-21182, 2007 WL 686609, at *1 (S.D. Fla. Mar. 2, 2007).

¹⁷ *Id.* at *1.

¹⁸ 425 F. Supp. 2d 159 (D. Me. 2006).

¹⁹ *Id.* at 163.

*Bogan v. Scott-Harris*²⁰ went to the Supreme Court on the issue of a local legislator's immunity from suit when sued in her individual capacity.²¹ The Supreme Court held that a local legislator has absolute immunity when making a legislative decision or performing a legislative function.²² Just as a national legislator, regional legislator, or state legislator would have absolute immunity, so too do local legislators. The Supreme Court did not address the question of the entity's liability for a decision adopted with an impermissible or unconstitutional motive—race, sex, or impermissible First Amendment retaliation—or how the plaintiff can demonstrate the impermissible motive to make out the claim against the entity itself.²³ Decisions from the Courts of Appeal reflect somewhat different approaches to the problem. In *Scott-Harris v. City of Fall River*,²⁴ the First Circuit held that if a plaintiff puts forth evidence that a significant bloc of the legislators had an impermissible purpose, and can point to the probable complicity of others, that is enough to survive a summary judgment motion.²⁵ In *Cine SK8, Inc. v. Town of Henrietta*,²⁶ the Second Circuit said that if the plaintiff can show that the impermissible motive was a significant reason for the decision, the burden is on the defendant to come back and prove, or at least put in evidence, that the majority of those who voted did not, in fact, have the impermissible

²⁰ 523 U.S. 44 (1998).

²¹ *Id.* at 46.

²² *Id.* at 49.

²³ *Id.* at 54. Municipalities are not protected from suit through the absolute immunity of the individual. *Morris v. Lindau*, 196 F.3d 102, 111 (2d Cir. 1999).

²⁴ 134 F.3d 427 (1st Cir. 1997), *rev'd on other grounds sub nom Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

²⁵ *City of Fall River*, 134 F.3d at 438.

²⁶ 507 F.3d 778 (2d Cir. 2007).

purpose.²⁷ Some circuits have adopted the “but for” approach that puts the initial burden on the plaintiff to show that the majority of those who voted on the decision had the impermissible purpose so that, “but for” their votes, the decision would not have been made.²⁸ In application, the approach adopted by the First and Second Circuits seems to favor the plaintiff.

Some circuits also adopt a position that individual legislators who have absolute immunity from suit also have some kind of a testimonial immunity.²⁹ As such, the plaintiff cannot take a legislator’s deposition, even when the city or town is the named defendant rather than the legislator. In these circuits, it is obviously very difficult for plaintiffs to make out the requisite showing on motive.

B. Whose Policy Is It? Local Officials Enforcing State Law

Another interesting question regarding the first method of demonstrating municipal liability arises when there is an official policy, but there are questions about whose policy it is. In *Cooper v. Dillon*,³⁰ the sheriff of Key West arrested the editor of a free newspaper for violating a state statute making it a crime to disclose non-

²⁷ *Cine SK8, Inc.*, 507 F.3d at 786.

²⁸ *See, e.g.*, *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261-63 (6th Cir. 2006); *Laverdure v. County of Montgomery*, 324 F.3d 123, 126 (3d Cir. 2003); *Dixon v. Burke County, Georgia*, 303 F.3d 1271, 1275-76 (11th Cir. 2002).

²⁹ *See, e.g.*, *Knights of Columbus v. Town of Lexington*, 138 F. Supp. 2d 136, 139, 140 (D. Mass. 2001); *Miles-UN-Ltd., Inc. v. Town of New Shoreham*, 917 F. Supp. 91, 98-99 (D.N.H. 1996). “As specifically noted by a variety of jurisdictions, ‘legislative immunity not only protects state [and local] legislators from civil liability, it also functions as an evidentiary and testimonial privilege.’” *Id.* at 98 (citing *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 297 (D. Md. 1992)).

³⁰ 403 F.3d 1208 (11th Cir. 2005).

public information obtained as a participant in an internal investigation of law enforcement.³¹ The held the statute to be unconstitutional, but determined that the sheriff had qualified immunity.³² The question became whether the enforcement of the statute could be attributed to the city's policy, because the sheriff was a final policymaker for law enforcement purposes.³³ The city claimed it was not its policy—it was a state statute that was being enforced.³⁴ The court disagreed, and held the statute was not mandatory and required conscious enforcement, and the city chose to enforce it.³⁵ Thus, if you adopt it and make it your own, it becomes your policy.

There are many cases out of the Sixth Circuit involving this issue. In *DePiero v. City of Macedonia*,³⁶ an Ohio law authorized mayor's courts; if a person was stopped for speeding or for some other transgression, that person was hauled before a mayor's court and given a ticket or fine.³⁷ The Ohio statute authorized this practice but did not make it mandatory or say how to set it up—whether the mayor himself had to be the officiator or some other official in the town.³⁸ In *Brotherton v. Cleveland*,³⁹ an Ohio statute authorized the harvesting of dead human corneas, but did not mandate it.⁴⁰ Cleveland adopted the policy and had its coroners institute this practice. In

³¹ *Id.* at 1212-13.

³² *Id.* at 1223.

³³ *Id.* at 1221.

³⁴ *Id.* at 1222.

³⁵ *Cooper*, 403 F.3d at 1222-23.

³⁶ 180 F.3d 770 (6th Cir. 1999).

³⁷ *Id.* at 775.

³⁸ *Id.* at 786-87.

³⁹ 173 F.3d 552 (6th Cir. 1999).

⁴⁰ *Id.* at 555.

both cases, policies authorized—but not mandated—by state law were consciously implemented by cities and, in each case, the policy was attributed to the City for purposes of liability under Section 1983.

A more notable example is *Garner v. Memphis Police Dep't*,⁴¹ which eventually went to the United States Supreme Court as *Tennessee v. Garner*.⁴² In what is known as the “deadly force” case, there was a state statute in Tennessee that authorized the shooting of all fleeing felons.⁴³ However, the state has immunity under the Eleventh Amendment and is not considered a person under Section 1983.⁴⁴ As such, the state could not be sued under Section 1983. In addition, the individual officers who shot an unarmed, non-threatening minor as he was running away from the house he had just burglarized, received qualified immunity because, at the time, it was not clearly established that shooting a fleeing felon who was not presenting a threat was a constitutional violation.⁴⁵ The only defendant left in the case was the City of Memphis; it claimed this was not the city’s policy—it was a state statute that allowed the shooting of all fleeing felons.⁴⁶ On remand, the Sixth Circuit held the state statute authorized the action, but it did not mandate it.⁴⁷ In addition, the court found the city modified the policy and did not allow for the

⁴¹ 710 F.2d 240 (6th Cir. 1983).

⁴² 471 U.S. 1 (1985).

⁴³ *Id.* at 4.

⁴⁴ *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989).

⁴⁵ *Garner*, 471 U.S. at 5, 22.

⁴⁶ *Id.* at 13.

⁴⁷ *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (1993).

shooting of all fleeing felons.⁴⁸ The city's policy was better than that of the state; however, it still allowed for the shooting of fleeing burglars who were unarmed—which is what happened in that case.

*Vives v. City of New York*⁴⁹ involved a state statute authorizing arrests for what is called aggravated harassment.⁵⁰ In *Vives*, an individual sent letters to public officials informing them of conspiracies of organizations involving Jews.⁵¹ A public official who received one such letter was quite upset about it.⁵² The statute authorized the arrest for aggravated harassment when such communications were sent by mail in a manner likely to cause annoyance or harm and done with the intent to harass, annoy, or threaten or alarm. Pursuant to the statute, *Vives* was arrested.⁵³ The district court ruled the statute was “unconstitutionally overbroad on its face.”⁵⁴ The city asserted the statute was not a city ordinance; it was a penal code provision of the State of New York.⁵⁵ Thus, the city claimed it should not be liable for the enforcement of this statute.⁵⁶ The Court of Appeals went into a lengthy discussion and said this was an issue of first im-

⁴⁸ *Id.*

⁴⁹ 524 F.3d 346 (2d Cir. 2008).

⁵⁰ *Id.* at 348-49. See N.Y. PENAL LAW § 240.30 (McKinney 2008), which provides, in pertinent part:

[a] person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she . . . (1) communicates with a person, anonymously or otherwise, by . . . mail . . . , in a manner likely to cause annoyance or alarm.

Id.

⁵¹ *Vives*, 524 F.3d at 348.

⁵² *Id.*

⁵³ *Id.* at 348-49.

⁵⁴ *Id.* at 348.

⁵⁵ *Id.* at 350.

⁵⁶ *Vives*, 524 F.3d at 351.

pression as to whether a city can be held liable for the enforcement of a state statute.⁵⁷

The Second Circuit sent this back to the lower court in order to determine whether New York had any discretion at all to enforce the statute, and whether New York made a conscious decision to enforce this particular statute.⁵⁸ In other words, the court implied that a municipality could not be held liable simply for a policy of choosing to enforce the entire state penal law.

In sum, if the city's position is to enforce all state laws, that may not be enough to establish municipal liability for the enforcement of a particular law. Ultimately, cases involving municipal enforcement of state law are going to turn on the degree of the city's discretion. The question is whether the municipality did enough to affirmatively make this state policy the municipal policy.

C. Whose Policy Is It? Inter-governmental or Inter-Agency Agreements

Another issue, which came up in *Young v. City of Little Rock*,⁵⁹ and *Ford v. City of Boston*,⁶⁰ arises where you have inter-governmental or inter-agency agreements. These are cases where cities used county jails to house some of their detainees for a certain length of time. In both cases, the county jails had unconstitutional strip search policies.⁶¹ Both cities tried to argue it was not their pol-

⁵⁷ *Id.*

⁵⁸ *Id.* at 358. (One of the participants at this PLI program indicated that the case has settled, so the issue was never resolved by the court).

⁵⁹ 249 F.3d 730 (8th Cir. 2001).

⁶⁰ 154 F. Supp. 2d 131 (D. Mass. 2001).

⁶¹ *Young*, 249 F.3d at 736; *Ford*, 154 F. Supp. 2d at 133.

icy, but the county's.⁶² Both courts held that the city knew what was going on and chose to put their detainees there.⁶³ In essence, this was the city's policy too; thus, it is on the hook with the county. Conversely, in *Deaton v. Montgomery County*,⁶⁴ the Sixth Circuit held just the opposite. Here, the county was using the city's jail. However, the court held that the county was not liable because the county sheriff, the final policymaker, had no knowledge—actual or constructive—of an unconstitutional strip search policy taking place at the city jail.⁶⁵

*Warren v. District of Columbia*⁶⁶ and *Herrera v. County of Santa Fe*⁶⁷ are cases concerning counties that delegated their prison responsibilities to private prison corporations. The courts stated that whatever policies the private prison management corporations adopt, are going to be considered the counties' policies for which they will be liable.⁶⁸ Counties cannot delegate away their constitutional obligation to care for prisoners.⁶⁹

II. CUSTOMS AND PRACTICES

There are times when there is not an officially adopted policy, written rule, or regulation, but there is a practice or custom the plaintiff claims has the force of law, and for which the entity should be

⁶² *Young*, 249 F.3d at 736; *Ford*, 154 F. Supp. 2d at 138.

⁶³ *Young*, 249 F.3d at 736; *Ford*, 154 F. Supp. 2d at 148-49.

⁶⁴ 989 F.2d 885 (6th Cir. 1993).

⁶⁵ *Id.* at 889-90.

⁶⁶ 353 F.3d 36 (D.C. Cir. 2004).

⁶⁷ 213 F. Supp. 2d 1288 (D.N.M. 2002).

⁶⁸ *Warren*, 353 F.3d at 38; *Herrera*, 213 F. Supp. 2d at 1292.

⁶⁹ *Herrera*, 213 F. Supp. 2d at 1291 (citing *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 705, 706, nn. 8, 9 & 11 (11th Cir. 1985)).

held responsible under Section 1983. In *Gregory v City of Louisville*,⁷⁰ for example, the plaintiff alleged a custom of overly suggestive line-ups and show-ups.⁷¹ Likewise, in *Cash v. Hamilton County Department of Adult Probation*,⁷² the plaintiffs alleged the county had a policy of cleaning up the property of homeless people—collecting it and destroying it.⁷³ The Sixth Circuit reversed and remanded the case in order to determine the scope of the city's practice and its appropriateness.⁷⁴

In *Lopez v. City of Houston*,⁷⁵ the plaintiffs alleged a practice of mass detentions.⁷⁶ The city put a policy in place—it was not in writing—to attempt to clean up street racing in the City of Houston.⁷⁷ In enforcing the policy, the city engaged in separate, mass arrests spanning from thirty-seven people to 285.⁷⁸ Despite the city's arguments, the court determined the plaintiffs had produced sufficient evidence to withstand summary judgment and remanded the case for trial.⁷⁹

It is important to note that having a good paper policy does not necessarily save an entity from liability. In *Price v. Sery*,⁸⁰ even though the deadly force policy was, on its face, perfectly constitu-

⁷⁰ 444 F.3d 725 (6th Cir. 2006).

⁷¹ *Id.* at 753.

⁷² 388 F.3d 539 (6th Cir. 2004).

⁷³ *Id.* at 543.

⁷⁴ *Id.* at 543, 544, 545.

⁷⁵ *Lopez v. City of Houston*, Nos. H-03-2297 et al., 2008 WL 437056, at *1 (S.D. Tex. Feb. 14, 2008).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at *2.

⁷⁹ *Id.* at *11.

⁸⁰ 513 F.3d 962 (9th Cir. 2008).

tional, the Ninth Circuit held that the plaintiff had introduced sufficient evidence from which a jury could find that the actual practice or custom regarding the use of deadly force was to shoot first and ask questions later.⁸¹ Likewise, in *Daskalea v District of Columbia*,⁸² the city had a perfectly good paper policy that prohibited guards from having sex with the prison inmates; in practice, however, what was going on in the prison was quite different.⁸³

In *Marriott v. County of Montgomery*,⁸⁴ there was a paper policy that was perfectly constitutional regarding strip searches of inmates to the institution.⁸⁵ However, in reality, the court found a practice of unconstitutional strip searches.⁸⁶ As the court put it, “[c]onstitutional words cannot erase unconstitutional conduct.”⁸⁷

If you are bringing one of these “custom, usage, or practice” kinds of cases, it is not enough just to show the practice or the custom. The plaintiff must link the custom to somebody at the policy-making level.⁸⁸ The courts have come down on this fairly consistently. To establish this link, constructive knowledge is enough in most circuits—you do not have to show actual knowledge.⁸⁹

⁸¹ *Id.* at 973-74.

⁸² 227 F.3d 433 (D.C. Cir. 2000).

⁸³ *See id.* at 450.

⁸⁴ 426 F. Supp. 2d 1 (N.D.N.Y. 2006).

⁸⁵ *Id.* at 4.

⁸⁶ *Id.* at 7.

⁸⁷ *Id.* at 9.

⁸⁸ A municipality is liable when the constitutional injury to the plaintiff resulted from the implementation or “execution of a government’s policy or custom, whether made by its lawmakers or by those . . . said to represent official policy.” *Monell*, 436 U.S. at 694.

⁸⁹ *Cox v. City of Dallas*, 430 F.3d 734, 748-49 (5th Cir. 2005) (stating that “[t]he policymaker must have either actual or constructive knowledge of the alleged [unconstitutional] policy”); *Baron v. Suffolk County Sheriff’s Dep’t*, 402 F.3d 225, 243(1st Cir. 2005) (stating that municipal liability can be based on a policymaker’s constructive knowledge).

In most circuits an entity is liable if a policymaker had constructive knowledge of the wrongdoing and failed to do anything about it.⁹⁰ One incident is generally not enough to give notice.⁹¹ Even a pattern is generally not enough, unless you show a policymaker had actual or constructive knowledge of the pattern.⁹² For example, in *Pineda v. City of Houston*,⁹³ the plaintiff showed there was a pattern of unconstitutional searches, but did not show that anybody at the policymaking level had knowledge of the pattern.⁹⁴ Similarly, in *Latuszkin v City of Chicago*,⁹⁵ the plaintiff alleged there was a practice of police officers holding parties on Friday afternoons in the yard next to a particular police precinct in Chicago.⁹⁶ The officers would drink and then go home. One afternoon, a police officer who had consumed alcohol, drove away and killed somebody on his way home.⁹⁷ The plaintiff was able to show that there was this practice of partying and drinking, but did not establish constructive or actual

⁹⁰ See, e.g., *Wright v. Town of Glenarden*, 89 F.3d 831, at *3 (4th Cir. 1996) (stating that “[t]he plaintiff must show that responsible policymakers of the municipality had actual or constructive knowledge of the misconduct, but failed, as a matter of specific intent or deliberate indifference, to stop or correct the practices”).

⁹¹ *Meck v. Ctr. for Health Care Servs.*, No. SA-05-CA-838-PM, 2006 WL 2128906, at *8 (W.D. Tex. July 27, 2006) (“Plaintiffs cite evidence of one incident involving the deputies which is not sufficient to establish a custom or practice or Bexar County’s deliberate indifference to constitutional rights”).

⁹² “A pattern may exist without actual or constructive knowledge because the facts of the events are concealed from policymakers.” *Pineda v. City of Houston*, 291 F.3d 325, 330 n.13 (5th Cir. 2002). Therefore, “actual or constructive knowledge of [a] custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policy-making authority.” *Id.* (citing *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984)).

⁹³ 533 F.3d 50 (1st Cir. 2008).

⁹⁴ *Id.* at 54.

⁹⁵ 250 F.3d 502 (7th Cir. 2001).

⁹⁶ *Id.* at 503.

⁹⁷ *Id.*

knowledge of the practice on the part of any city policymaker.⁹⁸

III. *CITY OF CANTON* FAILURE TO TRAIN, SUPERVISE, OR DISCIPLINE CASES

A. **Municipal Liability Based on Failure to Train, Supervise, or Discipline**

The third method of establishing local government liability under section 1983 involves demonstrating a failure on the part of the city that causes an underlying constitutional violation to occur. *City of Canton v. Harris* concerned a woman who was arrested and brought into the police station.⁹⁹ She kept falling down in the booking area and the officers kept propping her up.¹⁰⁰ Finally, the officers called her family.¹⁰¹ After the woman's family came to take her, she was hospitalized for medical care.¹⁰² By the time the case was heard by the Supreme Court, it was assumed that there was an underlying constitutional violation. The woman was a pretrial detainee and there was subjective deliberate indifference to her serious medical needs, which is a Fourteenth Amendment substantive due process violation.¹⁰³

The question before the Supreme Court was whether the city could be held liable under Section 1983 for this constitutional viola-

⁹⁸ *Id.* at 505.

⁹⁹ *City of Canton*, 489 U.S. at 381.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 381-82.

tion?¹⁰⁴ The city argued that it could not be liable unless the policy itself was unconstitutional.¹⁰⁵ The Court disagreed and found the city could be held liable under Section 1983 even though the policy itself was not unconstitutional.¹⁰⁶ Therefore, a city may be liable for the underlying constitutional violation committed by a non-policymaking employee if the city's policy is objectively deliberately indifferent to the likelihood a particular constitutional violation would occur.¹⁰⁷

The Court indicated two ways the plaintiff may show the requisite objective deliberate indifference. First, the plaintiff may argue that there was an obvious need to train.¹⁰⁸ For example, if there is an armed police force with the power to arrest felons, the city better train them on the constitutional limits of the use of deadly force. If not, the first time there is an incident that is unconstitutional, the city will be liable because there was such an obvious need to train, and therefore it was deliberately indifferent not to do so.

Second, there are other cases where the need to train, supervise, or discipline is not so obvious. However, if a certain number of events or a pattern of constitutional violations become apparent, the court will hold the city on constructive notice; and if no training, supervision, or discipline is put in place, the city is going to be held liable.¹⁰⁹ Both of these methods, the obviousness method and the constructive notice method, are discussed in *Sornberger v. City of*

¹⁰⁴ See *City of Canton*, 489 U.S. at 383.

¹⁰⁵ *Id.* at 386.

¹⁰⁶ *Id.* at 387.

¹⁰⁷ *Id.* at 388.

¹⁰⁸ *Id.* at 390.

¹⁰⁹ *City of Canton*, 489 U.S. at 397 (O'Connor, J., dissenting).

Knoxville.¹¹⁰

With respect to the obviousness cases, there is a catch: it cannot be too obvious. If a violation was too obvious, it was not a lack of training that caused the problem. For example, in *Walker v. City of New York*,¹¹¹ an individual who spent nineteen years in jail for a crime he did not commit sued the District Attorney and the District Attorney's Office for failing to train police officers not to lie on the stand.¹¹² The Second Circuit rejected this argument stating that most people, never mind police officers, understand that you do not commit perjury, and therefore, it was not the lack of training that led to the constitutional violation or the wrongful conviction.¹¹³ However, the court did say that if there had been a pattern of police officers testifying falsely, then the plaintiff could have made an argument based on constructive notice of an unconstitutional pattern and a failure to do any training or supervising to rectify the problem.¹¹⁴

Similarly, in *Hernandez v. Borough of Palisades Park Police Department*,¹¹⁵ the Third Circuit held that there was no obvious need to train police officers not to rob the houses they were supposed to be

¹¹⁰ 434 F.3d 1006 (7th Cir. 2006).

¹¹¹ 974 F.2d 293 (2d Cir. 1992).

¹¹² *Id.* at 298. 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.* While prosecutors generally do not have absolute immunity for tasks performed in their administrative capacities, in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), the Court unanimously held that a district attorney and chief deputy district attorney had absolute immunity as to claims "that the prosecution failed to disclose impeachment material . . . due to: (1) a failure properly to train prosecutors, (2) a failure properly to supervise prosecutors, or (3) a failure to establish an information system containing potential impeachment material about informants." *Id.* at 858, 859.

¹¹³ *Walker*, 974 F.2d at 295.

¹¹⁴ *Id.* at 300.

¹¹⁵ 58 F. App'x 909 (3d Cir. 2003).

watching when patrolling in a particular neighborhood.¹¹⁶ In cases involving sexual assaults on inmates, prisoners, or suspects in police custody, courts have held that it is not a lack of training that led to the underlying constitutional violation.¹¹⁷ Therefore, you have to be careful about these cases—cases of obviousness.

Let me give you some examples of cases where courts have found deliberate indifference in failing to train based on the obviousness of the need for training. In *Gregory v. City of Louisville*,¹¹⁸ the Sixth Circuit held that there was an obvious need to train officers with respect to the handling of exculpatory materials.¹¹⁹ Likewise, in *Young v. City of Providence*,¹²⁰ the First Circuit held that a jury might find an obvious need to train police officers with respect to problems of misidentification of other officers, especially minority officers, when they are off duty and the department has an “always armed/always on duty” policy.¹²¹ This case involved a minority officer who responded to an incident when he was off duty and out of

¹¹⁶ *Id.* at 915.

¹¹⁷ *See, e.g.,* *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.

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.”).

¹¹⁸ 444 F.3d 725 (6th Cir. 2006).

¹¹⁹ *Id.* at 754.

¹²⁰ 404 F.3d 4 (1st Cir. 2005).

¹²¹ *Id.* at 28.

uniform.¹²² The officers who were in uniform mistook him for the perpetrator and shot him.¹²³ The court stated that it was possible to have an obvious need to train if there is a policy of having officers always armed, and always on duty.¹²⁴ A city should give officers some training with respect to issues of misidentification. In *Allen v. Muskogee*,¹²⁵ the Tenth Circuit held that there was an obvious need to train with respect to taking emotionally disturbed persons into custody.¹²⁶

A case where the court found no obvious need to train is *Beard v. Whitmore Lake School District*.¹²⁷ The Sixth Circuit held that there might be obvious need to implement a policy on conducting searches in schools with respect to school children, but there was not such an obvious need to train teachers as to what the policy is.¹²⁸ In *St. John v. Hickey*,¹²⁹ the Sixth Circuit held that there was no obvious need to train with respect to taking wheelchair-bound persons into custody and transporting them.¹³⁰ If you have a number of incidents where people are injured, the entity is most likely on notice, but the court stated that there was no obvious need for such training. In

¹²² *Id.* at 9.

¹²³ *Id.*

¹²⁴ *Id.* at 28-29.

¹²⁵ 119 F.3d 837 (10th Cir. 1997).

¹²⁶ *Id.* at 845.

¹²⁷ 244 F. App'x 607 (6th Cir. 2007).

¹²⁸ *Id.* at 612 ("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.").

¹²⁹ 411 F.3d 762 (6th Cir. 2005).

¹³⁰ *Id.* at 776.

Lewis v. City of West Palm Beach,¹³¹ the court stated that there was no obvious need to train officers with respect to using hobble restraints and the use of their knees when confronting mentally ill individuals.¹³² In *Lewis*, there was nothing to put the city on notice that there was a problem until the incident occurred.

In some circuits—the Eleventh and Fifth Circuits, for example—a pattern must be shown before the city will be put on notice that it needs to do something.¹³³ On the other hand, in *Olsen v. Layton Hills Mall*,¹³⁴ the Tenth Circuit held that the county had constructive notice that it needed to train the admitting jail officials about the problems of Obsessive Compulsive Disorder (“OCD”).¹³⁵ The court reasoned that prison officials knew what was going on with respect to OCD prisoners, and there was a lot of information on OCD and people with OCD.¹³⁶ The dissent said there was a lot of information on OCD, but it is all on doctors’ desks, not on prison officials’ desks.¹³⁷ Also, OCD is not like other things about which law enforcement agencies are being bombarded with information.¹³⁸ As such, it was not something one would expect to know about and have

¹³¹ No. 06-81139-CIV, 2008 WL 763250, at *1 (S.D. Fla. Mar. 19, 2008).

¹³² *Id.* at *9.

¹³³ See, e.g., *Lewis v. Pugh*, 289 F. App’x 767, 775 (5th Cir. 2008) (stating that plaintiff failed to establish a pattern of bad acts similar to what had transpired); *McDowell v. Brown*, 392 F.3d 1283, 1302 (11th Cir. 2004) (stating that plaintiff failed to establish a pattern of injuries attributable to the county’s budgeting practices); *Thomas v. Roberts*, 261 F.3d 1160, 1174 (11th Cir. 2001) (agreeing with the district court that plaintiffs failed to demonstrate a pattern of unconstitutional searches by school officials); *Thompson v. Upshur County*, 245 F.3d 447, 459 (5th Cir. 2001) (stating that “[t]he plaintiff must generally demonstrate at least a pattern of similar violations”).

¹³⁴ 312 F.3d 1304 (10th Cir. 2002).

¹³⁵ *Id.* at 1320.

¹³⁶ *Id.*

¹³⁷ *Id.* at 1328 (Hartz, J., dissenting).

¹³⁸ *Id.*

prison officials trained on.

B. *Board of County Commissioners of Bryan County v. Brown: Failure to Screen Cases*

*Bryan County v. Brown*¹³⁹ is an important case. *Bryan County* brings together the final policymaker issue, which I will discuss shortly, and the *City of Canton* issue. In this case, a final policymaker, the county sheriff, hired his nephew's son to be a reserve deputy sheriff, and gave him no training.¹⁴⁰ The part of the case that went up to the Supreme Court was the issue of failing to adequately screen when hiring.¹⁴¹ The county sheriff knew his nephew's son had a criminal record, but the offenses were all misdemeanors (DUI, assault, and battery).¹⁴² During his second week on the job, the nephew's son yanked some woman out of a truck with such force that he broke both her kneecaps.¹⁴³

As in *City of Canton*, there was no question that there was an underlying constitutional violation committed by a non-policymaking employee, here a Fourth Amendment excessive force violation. The question presented was whether the county could be held liable for the underlying constitutional violation based on this county sheriff's single bad hiring decision?¹⁴⁴ This presents a tougher causation issue than the *City of Canton* failure to train or failure to supervise claim. The Court held that the failure to adequately screen requires the

¹³⁹ 520 U.S. 397 (1997).

¹⁴⁰ *Id.* at 401.

¹⁴¹ *Id.* at 402.

¹⁴² *Id.* at 401.

¹⁴³ *Id.*

¹⁴⁴ *Bryan County*, 520 U.S. at 402.

plaintiff to demonstrate the requisite deliberate indifference on the part of the final policymaker, which is a tough burden.¹⁴⁵ The plaintiff had to show that if the county sheriff had read the deputy's file from cover to cover, he would have understood that the "plainly obvious consequence"¹⁴⁶ of hiring this individual would be the particular constitutional violation that resulted. *Bryan County* has been extended, not only to bad screening and bad hiring cases, but to failure to train, failure to supervise, and failure to discipline cases.¹⁴⁷

The standard from *Bryan County* is a tough one for plaintiffs to satisfy. For example, in *Hardeman v. Kerr County*,¹⁴⁸ a man who was hired by a school district and worked in a school made improper sexual advances to many of the female students.¹⁴⁹ After he was fired from that job, he was hired as a guard in a women's prison where he raped one of the inmates.¹⁵⁰ The Fifth Circuit said it was not plainly obvious that his history with the school district would result in this kind of constitutional violation.¹⁵¹

*Crete v. City of Lowell*¹⁵² concerned the hiring of a police officer who had a criminal history that included an assault and battery charge.¹⁵³ The First Circuit found that it was not plainly obvious that he, the police officer, was going to engage in excessive force in this

¹⁴⁵ *Id.* at 405.

¹⁴⁶ *Id.* at 411.

¹⁴⁷ See *supra* text accompanying note 133.

¹⁴⁸ 244 F. App'x 593 (5th Cir. 2007).

¹⁴⁹ *Id.* at 596.

¹⁵⁰ *Id.* at 594.

¹⁵¹ *Id.* at 596.

¹⁵² 418 F.3d 54 (1st Cir. 2005).

¹⁵³ *Id.* at 56-57.

case.¹⁵⁴ Why not? One reason the court stated was because the police officer's probation officer said that, despite his record of assault and batteries, he would "make an excellent police officer."¹⁵⁵

*Estate of Davis v. City of North Richland Hills*¹⁵⁶ involved an officer who committed every possible infraction throughout his training, such as shooting when he was not supposed to shoot.¹⁵⁷ The Fifth Circuit held that incidents that occurred during training are not constitutional violations.¹⁵⁸ Because plaintiff could not point to prior constitutional violations, there was nothing that happened during training that would make it plainly obvious that this officer was going to engage in the use of excessive force with a deadly weapon, the particular constitutional violation asserted in the case.¹⁵⁹

C. **Derivative Nature of Liability Under *City of Canton* and *Bryan County***

It is important to keep in mind that the nature of municipal liability under both *City of Canton* and *Bryan County* is derivative, in the sense that if there is no underlying constitutional violation committed by an individual, there will be no municipal liability for failing to train, supervise, discipline or screen. This is the principle announced by the Court in *City of Los Angeles v. Heller*.¹⁶⁰ If any particular official or individual did not commit a constitutional violation,

¹⁵⁴ *Id.* at 66.

¹⁵⁵ *Id.*

¹⁵⁶ 406 F.3d 375 (5th Cir. 2005).

¹⁵⁷ *Id.* at 378.

¹⁵⁸ *Id.* at 384.

¹⁵⁹ *Id.* at 385.

¹⁶⁰ 475 U.S. 796 (1986).

then there should not be any entity liability.¹⁶¹ For example, *Best v. Cobb County*¹⁶² and *Trigalet v. City of Tulsa*¹⁶³ are two cases that best exemplify this rule. Both cases involved high-speed pursuit cases where the plaintiffs could not win against the individual officers involved because of the tough standard of culpability governing substantive due process claims announced by the Court in *County of Sacramento v. Lewis*.¹⁶⁴ In these cases, innocent people were killed during the course of a pursuit when they were hit by the pursued suspect's car.¹⁶⁵ However, the officers clearly did not have the purpose or intent to harm needed to make out a substantive due process claim under *County of Sacramento*.¹⁶⁶ In both cases, the plaintiffs tried to demonstrate that a policy, on the part of the city or county, was so bad that it was deliberately indifferent to the likelihood that this type of tragedy was going to happen.¹⁶⁷ Imagine walking into court and demonstrating the worst possible pursuit policy. Assume the policies stated that officers could pursue under any conditions. The officers are never called off the pursuit—regardless of the surrounding circumstances—until the assailant is apprehended. Even if that is the policy, without an underlying substantive due process violation by the officers involved, there would be no municipal liability. The Third and Second Circuits have a couple of cases discussing munici-

¹⁶¹ *Id.* at 799.

¹⁶² 239 F. App'x 501 (11th Cir. 2007).

¹⁶³ 239 F.3d 1150 (10th Cir. 2001).

¹⁶⁴ 523 U.S. 833 (1998).

¹⁶⁵ *Cobb County*, 239 F. App'x at 502; *Trigalet*, 239 F.3d at 1151.

¹⁶⁶ 523 U.S. at 854.

¹⁶⁷ *Cobb County*, 239 F. App'x at 502; *Trigalet*, 239 F.3d at 1155 -56.

pal liability without individual liability.¹⁶⁸ However, the courts never discussed municipal liability without a constitutional violation. When defending this type of case, it is imperative to make sure there is a constitutional violation. Otherwise, no one should be in court.

D. Bifurcation

Heller prompts many defendants to move for bifurcation when plaintiff sues both the individual officers and the city.¹⁶⁹ Bifurcating the case and forcing plaintiff to establish the underlying constitutional violation by the individual officer before allowing plaintiff to pursue the *Monell* claim is a strategy that protects defendants from burdensome discovery requests until a violation is shown. It is also a strategy that may eliminate the need to proceed against the municipality, either because plaintiff fails to establish a constitutional wrong or because the city agrees initially to indemnify and pay any judgment should the plaintiff prevail against the individual officer.¹⁷⁰

A plaintiff might attempt to avoid bifurcation by not naming

¹⁶⁸ 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.”). See also *Barrett v. Orange County Human Rights Commission*, 194 F.3d 341, 349, 350 (2d Cir. 1999) (noting that a municipality can still be found liable even though there is no liability on a named defendant); *Sforza v. City of New York*, No. 07 Civ. 6122(DLC), 2009 WL 857496, at *10 (S.D.N.Y. Mar. 31, 2009) (“[W]here claims against the individual officers have been dismissed without reaching their merits, it is still possible for a jury to find a constitutional violation for which a municipality may, though its policies, practices, or customs, be liable.”).

¹⁶⁹ See generally Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499 (1993).

¹⁷⁰ See, e.g., *Wilson v. Morgan*, 477 F.3d 326, 339-40 (6th Cir. 2007); *Wilson v. Town of Mendon*, 294 F.3d 1, 7 (1st Cir. 2002). But see *Amato v. City of Saratoga Springs*, 170 F.3d 311, 318 (2d Cir. 1999) (“[A] finding against officers in their individual capacities does not serve all the purposes of, and is not the equivalent of, a judgment against the municipality.”).

the individual officers as defendants, bringing only the *Monell* claim against the city. This strategy did not work for the plaintiff in *Young* who tried to avoid bifurcation by dropping the individual shooting officers from the claim.¹⁷¹ The district court held that it was going to bifurcate anyway, and the plaintiff would be required to make out an underlying constitutional violation by an individual officer before plaintiff could proceed against the city.¹⁷² Ultimately, this strategy created problems when plaintiff was left with a finding of liability against one of the officers (who was not a named defendant) and summary judgment in favor of the city on the *Monell* claim.

In *McCoy v. City of New York*,¹⁷³ the court denied bifurcation and stated that the defendants' arguments in favor of bifurcation overlooked the possibility of municipal liability without individual liability.¹⁷⁴ This may occur if the officer is not liable because of qualified immunity. For example, if during phase one of bifurcation the court concludes there is a constitutional violation, but the officer gets qualified immunity on the ground that the law was not clearly established, you still have the underlying constitutional violation, and the case may proceed on the *Monell* claim. The *McCoy* Court also stated that bifurcation might not be so efficient.¹⁷⁵

¹⁷¹ See *Young*, 404 F.3d at 9.

¹⁷² See *id.*

¹⁷³ No. CV 07-4143 (RJD)(JO), 2008 WL 3884388 (E.D.N.Y. Aug. 13, 2008).

¹⁷⁴ *Id.* at *2.

¹⁷⁵ *Id.* at *2-3. See also *Jeanty v. County of Orange*, 379 F. Supp. 2d 533, 550 (S.D.N.Y. 2005) ("[S]everance of the claims or separate trials would not further convenience or be conducive to 'expedition and economy;' rather, it would require the Court to try two cases that are essentially the same except for additional evidence which might be presented in support of plaintiff's *Monell* claim. Such a result, would clearly not further Rule 42(b)'s goals of efficiency and convenience.").

IV. FINAL POLICYMAKERS

In *Pembaur v. City of Cincinnati*, 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.¹⁷⁶ 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.¹⁷⁷ With respect to municipal liability based on acts or decisions of final policymakers, the Court has made clear that who constitutes a final policymaker is a question of state law.¹⁷⁸ A final policymaker will generally be someone whose decisions are not subject to review by another official or governmental body.¹⁷⁹ Therefore, if there is any kind of review of an individual's decision, that individual is not the final policymaker.¹⁸⁰ Furthermore, one might be a final policymaker in one context and not in another. For example, in *Ar-*

¹⁷⁶ 475 U.S. 469, 470 (1986).

¹⁷⁷ *Id.* at 485. See also *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.").

¹⁷⁸ *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988).

¹⁷⁹ See generally *McMillian v. Monroe County*, 520 U.S. 781, 785-86 (1997). See also *Hill v. Borough of Kutztown*, 455 F.3d 225, 246 (3d Cir. 2006) (arguing the mayor's constructive discharge of plaintiff was final in the sense that it was not reviewable by any other person or any other body or agency in the Borough).

¹⁸⁰ See, e.g., *Quinn v. Monroe County*, 330 F.3d 1320-26 (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."); *Tharling v. City of Port Lavaca*, 329 F.3d 422, 427 (5th Cir. 2003) (finding that a local law requiring approval of City Council for employment decisions made by City Manager rendered City Council the final policymaker); *Gernetzke v. Kenosha Unified School District No. 1*, 274 F.3d 464, 468 (7th Cir. 2001) ("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.").

endale v. City of Memphis,¹⁸¹ the chief of police is the final policymaker with respect to suspensions that are ten days or less because there is no subsequent review.¹⁸² On the other hand, the chief of police is not a final policymaker if the suspension is more than ten days because the Civil Service Commission reviews that decision.¹⁸³ Both plaintiffs and defendants should be very careful about attention to state law and local ordinances in final policymaker cases.

Is every act or decision by someone who is a final policymaker considered “policy?” No. There are some cases where the individual who normally would be the final policymaker has done something or made a decision contrary to what is “official” final policy. For example, if a mayor sexually assaults young women in his office, that conduct will most likely not be considered official “policy” attributable to the city.¹⁸⁴ Likewise, in *Auriemma v. City of Chicago*,¹⁸⁵ the superintendent of police hired, fired, promoted, and demoted based on race, which was contrary to the written policy of the city.¹⁸⁶ In *Thomas v. Roberts*,¹⁸⁷ the school assistant principal’s decision to strip search school children without individualized reasonable suspicion, a decision not subject to review, did not represent official “policy” of the school district where it was the District’s explicit pol-

¹⁸¹ 519 F.3d 587 (6th Cir. 2008).

¹⁸² *Id.* at 602.

¹⁸³ *Id.*

¹⁸⁴ See *Roe v. City of Waterbury*, 542 F.3d 31 (2d Cir. 2008).

¹⁸⁵ 957 F.2d 397 (7th Cir. 1992).

¹⁸⁶ *Id.* at 400.

¹⁸⁷ 261 F.3d 1160 (11th Cir. 2001), *opinion reinstated and supplemented by* *Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003).

icy that searches not be conducted absent reasonable suspicion.¹⁸⁸

However, it is important to note *Simmons v. Uintah Health Care Special Service District*.¹⁸⁹ In this case, the Tenth Circuit recently held that “[a]ctions taken by a municipality’s final policymakers, even in contravention of their own written policies, are fairly attributable to the municipality.”¹⁹⁰ *Simmons* can be distinguished from *Roe*, *Auriemma*, and *Thomas*. Those three cases all involved an individual final policymaker—mayor, chief of police, and assistant principal of schools—who performed an act or made a decision contrary to a written policy.¹⁹¹ In the *Simmons* case, it was the local legislative body that made the decision to fire someone without due process, which was contrary to the written policy of the entity itself.¹⁹² As such, the Tenth Circuit did not allow the legislative body to make a decision contrary to its own written policy, and then say that there was no entity liability.¹⁹³

¹⁸⁸ 261 F.3d at 1172-73.

¹⁸⁹ 506 F.3d 1281 (10th Cir. 2007).

¹⁹⁰ *Id.* at 1287.

¹⁹¹ *Roe*, 542 F.3d at 33; *Auriemma*, 957 F.2d at 400; *Thomas*, 261 F.3d at 1172-73.

¹⁹² *Simmons*, 506 F.3d at 1283.

¹⁹³ *Id.* at 1285.