

BASIC PRINCIPLES OF SECTION 1983 LITIGATION

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Basic Principles of Section 1983 Litigation

I. Direct v. Vicarious Liability

Title 42 U.S.C. § 1983 provides in relevant part:

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

Note that a plaintiff must assert the violation or deprivation of a right secured by federal law. *See, e.g., Bradley v. City of Ferndale*, 148 Fed.Appx. 499, 2005 WL 2173780, at *6 (6th Cir. Sept. 8, 2005) (“[T]he violation of city policy is not in and of itself a constitutional violation under 42 U.S.C. § 1983.”); *Waubanascum v. Shawano*, 416 F.3d 658, 667 (7th Cir. 2005) (“Waubanascum suggests that Shawano County showed deliberate indifference by its ‘long-standing custom of granting courtesy licenses without conducting investigations of the applicants.’ Thus, he argues, ‘Shawano County’s policy was deliberately indifferent to a known risk to foster children.’ Waubanascum seems to propose that state laws and regulations assume that failure to perform background checks necessarily will expose foster children to risk, thus constituting deliberate indifference. This argument misstates the legal standard, because it sidesteps the requirement that there be knowledge or suspicion of actual risk and substitutes the possibility of risk arising from the county’s custom. Undoubtedly, foster children would be exposed to a heightened degree of risk if foster license applicants were subjected to no background checks at all. We may assume that it is this very concern that underlies Wisconsin’s laws and regulations requiring such background checks before a foster license may be granted. But a failure to abide by a general statutory requirement for background checks cannot substitute for the requirement of actual knowledge or suspicion in the foster home context. . . . As noted, it is unclear that Shawano County actually did violate

Wisconsin law in effect at the time that the county granted Fry the courtesy foster license. But in any event, state law does not create a duty under the federal constitution, so even if Shawano County failed to abide by Wisconsin law, this would not by itself amount to a violation of Waubesa's due process rights.”); *Tanberg v. Sholtis*, 401 F.3d 1151, 1164, 1165 (10th Cir. 2005) (“Although plaintiffs frequently wish to use administrative standards, like the Albuquerque SOPs, to support constitutional damages claims, this could disserve the objective of protecting civil liberties. Modern police departments are able--and often willing--to use administrative measures such as reprimands, salary adjustments, and promotions to encourage a high standard of public service, in excess of the federal constitutional minima. If courts treated these administrative standards as evidence of constitutional violations in damages actions under § 1983, this would create a disincentive to adopt progressive standards. Thus, we decline Plaintiffs' invitation here to use the Albuquerque Police Department's operating procedures as evidence of the constitutional standard. The trial court's exclusion of the SOPs was particularly appropriate because Plaintiffs wished to admit not only evidence of the SOPs themselves, but also evidence demonstrating that the APD found that Officer Sholtis violated the SOPs and attempted to discipline him for it. Explaining the import of these convoluted proceedings to the jury would have been a confusing, and ultimately needless, task. The Albuquerque Chief of Police followed the recommendation of an internal affairs investigator to discipline Officer Sholtis both for making an impermissible off-duty arrest and for use of excessive force. An ad hoc committee subsequently reversed this decision. Additional testimony would have been necessary to help the jury understand the significance of these determinations and the procedures used to arrive at these contradictory results. This additional testimony explaining the procedures used at each step in the APD's investigation and decision-making would have led the jury ever further from the questions they were required to answer, and embroiled them in the dispute over whether Officer Sholtis's actions did or did not violate the SOPs. At the end of this time-consuming detour through a tangential and tendentious issue, the jury would have arrived at the conclusion that the APD itself seems to have been unable to resolve satisfactorily the question whether Plaintiffs' arrest violated the APD SOPs. . . . The similarity of the SOP addressing excessive force to the objective standard employed by state and federal law would render jury confusion even more likely, tempting the jury to conclude that if experienced police officers interpreted Officer Sholtis's actions as a violation of SOPs employing the same standards as the law, then Officer Sholtis must also have violated legal requirements. When, as here, the proffered evidence adds nothing but the substantial likelihood of jury confusion, the trial judge's exclusion of

it cannot be an abuse of discretion.”); *Chamberlin v. City of Albuquerque*, No. CIV 02-0603 JB/ACT, 2005 WL 2313527, at *4 (D.N.M. July 31, 2005)(Plaintiff barred from introducing as evidence “the Albuquerque Police Department's SOP's to support its allegation that [officer] acted unreasonably in directing his police service dog to attack the [plaintiff] in violation of his Fourth Amendment rights.”); *Wilhelm v. Knox County, Ohio*, No. 2:03-CV-786, 2005 WL 1126817, at *14 (S.D. Ohio May 12, 2005) (not reported) (“[T]he Court recognizes that the Sixth Circuit has held that (1) a defendant cannot be liable under §1983 unless he or she violated one of a plaintiff's federal constitutional rights, and (2) a state right ‘as an alleged misdemeanor to be arrested only when the misdemeanor is committed in the presence of the arresting officer [is] not grounded in the federal constitution and will not support a § 1983 claim.’ . . . The issue is whether probable cause to arrest existed, not whether the arrest violated state law. Accordingly, because probable cause to believe that a crime had occurred existed, Bradley's §1983 false arrest claim under the Fourth Amendment must fail.”).

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

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

the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision

officially adopted and promulgated by that body's officers. Moreover, . . . local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's decisionmaking channels.

Monell rejects government liability based on the doctrine of *respondeat superior*. Thus, a government body cannot be held liable under § 1983 merely because it employs a tortfeasor. 436 U.S. at 691-92. *See also Smedley v. Corrections Corporation of America*, No. 04-5113, 2005 WL 3475806, at * (10th Cir. Dec. 20, 2005) (“While it is quite clear that *Monell* itself applied to municipal governments and not private entities acting under color of state law, it is now well settled that *Monell* also extends to private defendants sued under § 1983. *See e.g., Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1216 (10th Cir.2003) (collecting circuit court cases). As such, a private actor such as CCA ‘cannot be held liable solely because it employs a tortfeasor--or, in other words ... cannot be held liable under §1983 on a respondeat superior theory.’ . . . As we understand it, Ms. Smedley appears to argue that because corporations could be held liable under 42 U.S.C. § 1983 both before and after *Monell*, it ‘simply defies logic to state that the traditional liability that existed for corporations prior to’ *Monell* ‘should somehow be abrogated as a result of the Supreme Court extending liability under § 1983 to municipalities where no such liability existed before.’ . . . We disagree. The Tenth Circuit, along with many of our sister circuits, has rejected vicarious liability in a § 1983 case for private actors based upon *Monell*. . . As Ms. Smedley has failed to provide any evidence that CCA had an official policy that was the ‘direct cause’ of her alleged injuries, summary judgment for CCA was appropriate.”); *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 728 (4th Cir. 1999) (“We have recognized, as has the Second Circuit, that the principles of § 1983 municipal liability articulated in *Monell* and its progeny apply equally to a private corporation that employs special police officers. Specifically, a private corporation is not liable under § 1983 for torts committed by special police officers when such liability is predicated solely upon a theory of respondeat superior.”); *Buckner v. Toro*, 116 F.3d 450, 452 (11th Cir. 1997) (“We conclude that the Supreme Court’s decision in *Wyatt* has not affected our decision in *Howell v. Evans*. The policy or custom requirement is not a type of immunity from liability but is instead an element of a § 1983 claim. Accordingly, we affirm the district court’s finding that the *Monell* policy or custom requirement applies in suits against private entities performing functions traditionally within the exclusive prerogative of the state, such as the provision of medical care to inmates.”); *Wall v. Dion*, 257

F. Supp.2d 316, 319 (D. Me. 2003) (“Though, it does not appear to me that the First Circuit has addressed this question head on, Courts of Appeal in other circuits have expressly concluded that when a private entity contracts with a county to provide jail inmates with medical services that entity is performing a function that is traditionally reserved to the state; because they provide services that are municipal in nature the entity is functionally equivalent to a municipality for purposes of 42 U.S.C. § 1983 suits. . . . Following the majority view that equates private contractors with municipalities when providing services traditionally charged to the state, Wall’s claims against these movants will only be successful if they were responsible for an unconstitutional municipal custom or policy.”); *Mejia v. City of New York*, 119 F. Supp.2d 232, 276 (E.D.N.Y. 2000) (noting that Second Circuit and other circuits have held “that a private corporation cannot be held liable in the absence of the showing of an official policy, practice, usage, or custom.”).

But see Hutchison v. Brookshire Brothers, Ltd., 284 F.Supp.2d 459,472, 473 (E.D.Tex. 2003) (“The court now turns to the question of Brookshire Brothers’ liability. Defendants’ argue that, even if Plaintiff succeeds in proving concert of action between McCown and Shelton, Plaintiff’s Fourth Amendment claim against Brookshire Brothers ought to be dismissed because ‘[o]bviously there is no respondeat superior for §1983 purposes.’. . . Where Defendants brush aside Plaintiff’s claim in a single sentence, the court finds a more complicated issue. What is clear is that Defendants have cited the wrong precedent to support their statement of law. *Collins v. City of Harker Heights* stands for the proposition that a municipality (and not a private employer) generally ‘is not vicariously liable under §1983 for the constitutional torts of its agents.’. . . It is not so clear, however, that a private employer cannot be held vicariously liable under §1983 when its employees act under color of law to deprive customers of constitutional rights. The court can find no case that supports this proposition, and the language of §1983 does not lend itself to Defendants’ reading. . . . Though the Supreme Court has stated that §1983 ‘cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor,’. . . the Court has made no similar statement regarding private employers. Indeed, there would be no textual basis for such a statement. Additionally, the court finds no persuasive policy justification for shielding private employers from vicarious liability. While the Supreme Court has found that Congress did not want to create a ‘federal law of respondeat superior ‘ imposing liability in municipalities in the § 1983 context because of ‘all the constitutional problems associated with the obligation to keep the peace,’. . . this court cannot find any similar concerns

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

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

Note on Statute of Limitations:

Joseph v. Lopez, No. Civ.A. 05-1640(DRD), 2005 WL 2000153, at *2 (D.N.J. Aug. 17, 2005) (“Civil rights claims are best characterized as personal injury actions and they are governed by the applicable state’s statute of limitations for personal injury actions. *See Wilson v. Garcia*, 471 U.S. 261, 280 (1985). Accordingly, New Jersey’s two-year limitations period on personal injury actions, N.J. Stat. Ann. S 2A:14-2, governs Plaintiff’s claims. *See Montgomery v. DeSimone*, 159 F.3d 120, 126 & n. 4 (3d Cir.1998).).

II. Under Color of Law

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

In *Monroe v. Pape*, 365 U.S. 167, 180 (1961), the Court held that acts performed by a police officer in his capacity as a police officer, even if illegal or not authorized by state law, are acts taken “under color of” law. As the Supreme Court

stated in *United States v. Classic*, 313 U.S. 299, 326 (1941), "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

An off-duty officer who purports to exercise authority possessed by virtue of his official position will generally be held to have acted under color of law. In *Barna v. City of Perth Amboy*, 42 F.3d 809 (3d Cir. 1994), the court observed that "[m]anifestations of such pretended authority may include flashing a badge, identifying oneself as a police officer, placing an individual under arrest, or intervening in a dispute involving others pursuant to a duty imposed by police department regulations." *Id.* at 818. On the other hand, if the underlying nature of an officer's conduct, whether on or off duty, is personal and not purported to be in the exercise of any state authority, the conduct will not be viewed as an act under color of state law. In *Barna*, for example, the court concluded that off-duty officers involved in an altercation in which there was an unauthorized use of a police-issue nightstick, did not act under color of state law where the dispute arose out of one officer's personal and family concerns and where no attempt was made to invoke police authority or make an arrest.

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

Compare Johnson v. LaRabida Children's Hospital, 372 F.3d 894, 897 (7th Cir. 2004) (privately employed special police officer not entrusted with full powers possessed by the police does not act under color of state law) *with Henderson v. Fisher*, 631 F.2d 1115, 1118 (3d Cir. 1980) (Where campus police at the University of Pittsburgh exercised, by statute, the same functions as municipal police officers, they were held to be acting under color of law).

III. Individual Capacity v. Official Capacity Suits

When a plaintiff names an official in his individual capacity, the plaintiff is seeking "to impose personal liability upon a government official for actions he takes under color of state law." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Failure to expressly state that the official is being sued in his individual capacity may be construed as an intent to sue the defendant only in his official capacity. *See, e.g.,*

Murphy v. Arkansas, 127 F.3d 750, 755 (8th Cir. 1997) (“[W]e do not require that personal capacity claims be clearly-pleaded simply to ensure adequate notice to defendants. We also strictly enforce this pleading requirement because ‘[t]he Eleventh Amendment presents a jurisdictional limit on federal courts in civil rights cases against states and their employees.’ *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir.1989); *see Wells v. Brown*, 891 F.2d 591, 593 (6th Cir.1989). Although other circuits have adopted a more lenient pleading rule, *see Biggs v. Meadows*, 66 F.3d 56, 59-60 (4th Cir.1995), we believe that our rule is more consistent with the Supreme Court’s Eleventh Amendment jurisprudence.”); *Ware v. Moe*, No. Civ.03-2504 ADM/JSM, 2004 WL 848204, at *5 (D. Minn. Apr. 19, 2004) (“The Second Amended Complaint does not explain whether Defendants are being sued as individuals or officials. The caption merely lists Defendants’ names. Further, the Complaint itself states that certain Defendants ‘acted as peace officers employed by the City of Appleton,’ and others ‘acted as social workers employed by ... Swift County,’ suggesting that Defendants are being sued in their official capacities. . . Plaintiffs’ assertion that its prayer for relief meets the requirement this Court discussed in *Lopez-Buric v. Notch*, 168 F.Supp.2d 1046 (D.Minn.2001), misconstrues that case’s holding and Eighth Circuit precedent. In *Lopez-Buric*, we explained that a § 1983 plaintiff can easily meet the Eighth Circuit’s pleading requirement by indicating that she ‘sues each and all defendants in both their individual and official capacities.’ . . Simply adding ‘jointly and severally’ to a damages request does not provide sufficient clarity to meet the pleading standard. . . Therefore, because Plaintiffs allege official capacity claims only against Defendants in count one, and have stipulated that count one does not state a *Monell* claim, Defendants’ Motions for Summary Judgment are granted.”); *Landsdown v. Chadwick*, 152 F. Supp.2d 1128, 1138 (W.D. Ark. 2000) (“The Eighth Circuit has consistently advised plaintiffs to specifically plead whether government agents are being sued in their official or individual capacities to ensure prompt notice of potential personal liability. . . When the plaintiff fails to state whether he is suing an official in his individual capacity, the Eighth Circuit has construed the claim as against the official in his official capacity only.”).

But see Powell v. Alexander, 391 F.3d 1, 22 (1st Cir. 2004) (“We now join the multitude of circuits employing the ‘course of proceedings’ test, which appropriately balances a defendant’s need for fair notice of potential personal liability against a plaintiff’s need for the flexibility to develop his or her case as the unfolding events of litigation warrant. In doing so, we decline to adopt a formalistic ‘bright-line’ test requiring a plaintiff to use specific words in his or her complaint in order

to pursue a particular defendant in a particular capacity. However, we do not encourage the filing of complaints which do not clearly specify that a defendant is sued in an individual capacity. To the contrary, it is a far better practice for the allegations in the complaint to be specific. A plaintiff who leaves the issue murky in the complaint runs considerable risks under the doctrine we adopt today. Under the ‘course of proceedings’ test, courts are not limited by the presence or absence of language identifying capacity to suit on the face of the complaint alone. Rather, courts may examine ‘the substance of the pleadings and the course of proceedings in order to determine whether the suit is for individual or official liability.’”); **Moore v. City of Harriman**, 272 F.3d 769, 773, 775 (6th Cir. 2001) (en banc) (“The officers in this case urge us to read *Wells* as adopting the Eighth Circuit's rule presuming an official capacity suit absent an express statement to the contrary. They argue that to withstand a motion to dismiss, *Wells* requires complaints seeking damages for alleged violations of §1983 to contain the words ‘individual capacity,’ regardless of whether the defendants actually receive notice that they are being sued individually. Although we acknowledge that *Wells* contains language supporting this reading, we find the more reasonable interpretation to be that §1983 plaintiffs must clearly notify defendants of the potential for individual liability and must clearly notify the court of its basis for jurisdiction. When a §1983 plaintiff fails to affirmatively plead capacity in the complaint, we then look to the course of proceedings to determine whether *Wells*'s first concern about notice has been satisfied. . . . In conclusion, we reaffirm *Wells*'s requirement that §1983 plaintiffs must clearly notify any defendants of their intent to seek individual liability, and we clarify that reviewing the course of proceedings is the most appropriate way to determine whether such notice has been given and received “); **Biggs v. Meadows**, 66 F.3d 56, 59-60 (4th Cir. 1995) (adopting the view of the majority of circuits, including the Second, Third, Fifth, Seventh, Ninth, Tenth and Eleventh, that looks to “the substance of the plaintiff's claim, the relief sought, and the course of proceedings to determine the nature of a § 1983 suit when a plaintiff fails to allege capacity. [citing cases] Because we find the majority view to be more persuasive, we hold today that a plaintiff need not plead expressly the capacity in which he is suing a defendant in order to state a cause of action under § 1983.”). *See also Daskalea v. District of Columbia*, 227 F.3d 443, 448 (D.C. Cir. 2000) (“Neither the complaint nor any other pleading filed by plaintiff indicates whether Moore was charged in her official or her individual capacity. In some circuits, that would be the end of the matter, as they require a plaintiff who seeks personal liability to plead specifically that the suit is brought against the defendant in her individual capacity. . . Although it has not definitively resolved the issue, . . . the Supreme Court has typically looked instead to the ‘course

of proceedings’ to determine the nature of an action. . . Following the Supreme Court’s lead, this circuit has joined those of its sisters that employ the ‘course of proceedings’ approach.”); **Rodriguez v. Phillips**, 66 F.3d 470, 482 (2d Cir. 1995) (“Where, as here, doubt may exist as to whether an official is sued personally, in his official capacity or in both capacities, the course of proceedings ordinarily resolves the nature of the liability sought to be imposed.”); **Hill v. Shelander**, 924 F.2d 1370, 1374 (7th Cir. 1991) (“[W]here the complaint alleges the tortious conduct of an individual acting under color of state law, an individual capacity suit plainly lies, even if the plaintiff failed to spell out the defendant’s capacity in the complaint.”). *Accord* **Miller v. Smith**, 220 F.3d 491, 494 (7th Cir. 2000); **Shabazz v. Coughlin**, 852 F.2d 697, 700 (2d Cir.1988) (“Notwithstanding the complaint’s ambiguous language, ... Shabazz’s request for punitive and compensatory damages, coupled with the defendants’ summary judgment motion on qualified immunity but not Eleventh Amendment grounds, suggests that the parties believed that this action is a personal capacity suit.”).

Naming a government official in his official capacity is the equivalent of naming the government entity itself as the defendant, and requires the plaintiff to make out *Monell*-type proof of an official policy or custom as the cause of the constitutional violation. While qualified immunity is available to an official sued in his personal capacity, there is no qualified immunity available in an official capacity suit.

See **Hafer v. Melo**, 112 S. Ct. 358, 361-62 (1991) (personal and official capacity suits distinguished). *See also* **Med Corp., Inc. v. City of Lima**, 296 F.3d 404, 417 (6th Cir. 2002) (“The district court reasoned that an individual capacity suit could not be maintained against the Mayor ‘because 1) the Mayor never acted in his individual capacity, and 2) the Fourteenth Amendment does not apply to individual actions’ because ‘[t]he Fourteenth Amendment protects property interest[s] only from a deprivation by state action.’ . . . [T]he fact that Mayor Berger acted in his official capacity as mayor does not immunize him from being sued as an individual under § 1983. The district court’s second reason for rejecting the individual capacity suit--that the Fourteenth Amendment protects only against actions of the state--also conflicts with *Hafer*. The state action requirement of the Fourteenth Amendment is satisfied by showing that a state official acted ‘under color of’ state law, as when the official exercises authority conferred by a state office. . . The state action requirement does not limit civil rights plaintiffs to suits against only government entities. The district court’s interpretation of ‘state action’ would eliminate all § 1983 suits against

individual state officers.”); *Ritchie v. Wickstrom*, 938 F.2d 689 (6th Cir. 1991) (clarifying confusion between official capacity and individual capacity). The official capacity suit is seeking to recover compensatory damages from the government body itself. See *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *Kentucky v. Graham*, 473 U.S. 159 (1985).

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

IV. Supervisory Liability v. Municipal Liability

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

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

policymaker that causes the violation of the Plaintiffs federally protected rights. . . . Typically, claims asserted against supervisory officials in both their individual and official capacities provide bases for imposing both supervisory liability (the individual claim) and municipality liability (the official capacity claim) if the supervisor constitutes a policymaker.”).

As with a local government defendant, a supervisor cannot be held liable under § 1983 on a *respondeat superior* basis, *Monell v. Dept. of Social Services*, 436 U.S. 658, 694 n.58 (1978), although a supervisory official may be liable even where not directly involved in the constitutional violation. The misconduct of the subordinate must be "affirmatively link[ed]" to the action or inaction of the supervisor. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976).

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

While § 1983 itself contains no independent state of mind requirement, *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986), lower federal courts consistently require plaintiffs to show something more than mere negligence yet less than actual intent in order to establish supervisory liability. *See e.g.*, *Baker v. Monroe Township*, 50 F.3d 1186, 1194 & n.5 (3d Cir. 1995) (applying Third Circuit standard which requires "actual knowledge and acquiescence" and noting that other circuits have broader standards for supervisory liability); *Salvador v. Brown*, No. Civ. 04-3908(JBS), 2005 WL 2086206, at *4 (D.N.J. Aug. 24, 2005) (“The Third Circuit Court of Appeals has articulated a standard for establishing supervisory liability which requires ‘actual knowledge and acquiescence.’ *Baker v. Monroe Township*, 50 F.3d 1186, 1194 & n. 5 (3d Cir.1995). . . . Plaintiff has not alleged that Defendants Brown or MacFarland had any direct participation in the alleged retaliation by corrections officers. It appears that Plaintiff bases Commissioner Brown and Administrator MacFarland's alleged liability solely on their respective job titles, rather than any specific action alleged to have been taken by them adverse to Plaintiff.”).

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

See also *Mercado v. City of Orlando*, 407 F.3d 1152, 1157, 1158 (11th Cir. 2005) ("All of the factors articulated in *Graham* weigh in favor of Mercado. Because he was not committing a crime, resisting arrest, or posing an immediate threat to the officers at the time he was shot in the head, if Padilla aimed for Mercado's head, he used excessive force when apprehending Mercado. At this point, we must assume that Padilla was aiming for Mercado's head based on the evidence that Padilla was trained to use the Sage Launcher, that the weapon accurately hit targets from distances up to five yards, and that Mercado suffered injuries to his head. Padilla was aware that the Sage Launcher was a lethal force if he shot at a subject from close range. The officers were also aware that alternative actions, such as utilizing a crisis negotiation team, were available means of resolving the situation. This is especially true in light of the fact that Mercado had not made any threatening moves toward himself or the officers. Thus, in the light most favorable to Mercado, Padilla violated his Fourth Amendment rights when he intentionally aimed at and shot Mercado in the head with the Sage Launcher. . . We further conclude, however, that Officer Rouse did not violate Mercado's Fourth Amendment rights. Although Officer Rouse did not fire the Sage Launcher, Mercado contends that she should be held responsible under a theory of supervisory liability. . . Officer Rouse was in another room during the incident, and did not see Padilla aim or fire the gun. She did not tell Padilla to fire the Sage Launcher at Mercado's head. Given that Padilla was trained in the proper use of the launcher, that the Department's guidelines prohibited firing the launcher at a suspect's head or neck except in deadly force situations, and that . . . there is no evidence that Padilla has used similarly excessive force in the past—all of which are undisputed facts in the record—Rouse could not reasonably have anticipated that Padilla was likely to shoot Mercado in the head either intentionally or unintentionally. Even under the 'failure to stop' standard for supervisory liability, Rouse cannot be held liable."); *Doe v. Taylor Independent School District*, 15 F.3d

443, 453 (5th Cir. 1994) (en banc) ("The most significant difference between *City of Canton* and this case is that the former dealt with a municipality's liability whereas the latter deals with an individual supervisor's liability. The legal elements of an individual's supervisory liability and a political subdivision's liability, however, are similar enough that the same standards of fault and causation should govern."), *cert. denied sub nom Lankford v. Doe*, 115 S. Ct. 70 (1994); *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994) ("We have set forth three elements necessary to establish supervisory liability under § 1983: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices,' and (3) that there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff." citing *Miltier v. Beorn*, 896 F.2d 848, 854 (4th Cir. 1990)), *cert. denied*, 115 S. Ct. 68 (1994); *Walker v. Norris*, 917 F.2d 1449, 1455-56 (1990) (applying *City of Canton* analysis to issue of supervisory liability); *Sample v. Diecks*, 885 F.2d 1099, 1116-1117 (3d Cir. 1989) (same).

Compare *Rosenberg v. Vangelo*, No. 02-2176, 2004 WL 491864, at *5 (3d Cir. Mar. 12, 2004) (unpublished) ("[W]e respectfully disagree with the *Ricker* Court's decision to cite and rely on the 'direct and active' language from *Grabowski*. We also conclude that the deliberate indifference standard had been clearly established prior to 1999 and no reasonable official could claim a higher showing would be required to establish supervisory liability.") with *Ricker v. Weston*, No. 00-4322, 2002 WL 99807, at *5, *6 (3d Cir. Jan. 14, 2002) (unpublished) ("A supervisor may be liable under 42 U.S.C. § 1983 for his or her subordinate's unlawful conduct if he or she directed, encouraged, tolerated, or acquiesced in that conduct. . . . For liability to attach, however, there must exist a causal link between the supervisor's action or inaction and the plaintiff's injury. . . .[E]ven assuming, arguendo, that the K-9 officers were not disciplined as a result of Zukasky's investigation, that investigation did not in any way cause Freeman's injuries. . . . We reach the same conclusion as to Palmer and Goldsmith. The undisputed facts indicate that they knew about Schlegel's prior misconduct but nonetheless promoted him to Captain of Field Services. They also knew of Remaley's violent episodes but permitted him to be a member of the K-9 Unit. These acts are, as a matter of law, insufficient to constitute the requisite direct involvement in appellees' injuries. . . . Importantly, neither Palmer nor Goldsmith were aware of the attacks in question until

after they occurred. At that time, they ordered an investigation but ultimately chose not to discipline the officers involved, even though it appears that Zukasky had recommended that at least certain of the officers be disciplined. This decision not to discipline the officers does not amount to active involvement in appellees' injuries given that all of the injuries occurred before the decision. There is simply no causal link between those injuries and what Palmer and Goldsmith did or did not do.”).

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

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

See International Action Center v. United States, 365 F.3d 20, 26-28 (D.C. Cir. 2004) (“The MPD supervisors do not seek a ruling on whether they enjoy qualified immunity from a supervisory inaction claim based on past transgressions under *Haynesworth*. . . . What was being appealed, counsel explained, was any effort to base liability on a duty to actively supervise and to train without regard to anything, any other aspect, or any prior history. That merely because these four individuals are supervisors, they had an obligation to anticipate that constitutional torts were highly likely and to take steps to prevent them regardless of any other facts in the case. . . . Plaintiffs do wish to pursue such a theory of liability. At oral argument, they argued that the duty to supervise arose generally from the potential for constitutional violations, even absent proof that the MPD supervisors had knowledge of a pre-existing pattern of violations by either Cumba or Worrell. Plaintiffs contend that the general duty to supervise ‘arises in the ordinary course of taking responsibility where the police intervene in the context of mass demonstration activity,’. . . because of the ‘substantial risk’ of constitutional violations. . . . Plaintiffs also contend that ‘[t]he duty to supervise does not require proof of a pre-existing pattern of violations.’. . . Such a theory represents a significant expansion of *Haynesworth* -- one we are unwilling to adopt. The broad wording of the district court opinion, and its failure to focus on what ‘circumstances’ gave rise to a duty on the part of the supervisors to act, pose the prospect that a claim of the sort described by plaintiffs' counsel could proceed. The district court, in denying qualified immunity on the inaction claim, simply noted that ‘it is undisputed that the MPD Supervisors were overseeing the activities of many uniformed and plain-clothes MPD officers present at the Navy Memorial for crowd control purposes during the Inaugural Parade and that those officers included ... Cumba and Worrell,’ and that plaintiffs ‘allege that in this context, there could be a substantial risk of violating protestors' free speech or Fourth Amendment rights.’. . . Without focusing on which allegations sufficed to give rise to a claim for supervisory inaction, the court concluded that immunity was not available because plaintiffs ‘have sufficiently alleged a set of circumstances at the Navy Memorial on January 20, 2001, which did indeed make it ‘highly likely’ that MPD officers would violate citizens' constitutional rights.’. . . The district court's analysis failed to link the likelihood of particular constitutional

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

Compare Braddy v. Florida Dep't of Labor and Employment Security, 133 F.3d 797, 802 (11th Cir. 1998) ("The standard by which a supervisor is held liable in her individual capacity for the actions of a subordinate is extremely rigorous. The causal connection between Lynch's offensive behavior and Davis's liability as his supervisor for such behavior can only be established if the harassment was sufficiently widespread so as to put Davis on notice of the need to act and she failed to do so. A few isolated instances of harassment will not suffice, the 'deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration."); *Howard v. Adikson*, 887 F.2d 134, 138 (8th Cir. 1989) ("A single incident, or a series of isolated incidents, usually provides an insufficient basis upon which to assign supervisory liability."); *Meriwether v. Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989) (impliedly accepting defendants' argument that more than one incident is needed to impose supervisory liability); *Garrett v. Unified Government of Athens-Clarke County*, 246 F. Supp.2d 1262, 1283 (M.D. Ga. 2003) (“[T]he standard for imposing supervisory liability differs slightly from the standard for municipal liability. Specifically, an

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

V. Local Government Entities Have No Qualified Immunity From Compensatory Damages But Absolute Immunity from Punitive Damages

Although certain individual officials may have a qualified immunity available to them in suits brought against them for damages, *see generally Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court has held that a government defendant has no qualified immunity from compensatory damages liability. *Owen v. City of Independence*, 445 U.S. 622 (1980). *See also Beedle v. Wilson*, 422 F.3d 1059, 1068 (10th Cir. 2005) (“The

Hospital nonetheless contends it is not liable because at the time it filed its state suit and opposed Mr. Beedle's various motions to dismiss, the Hospital had a good-faith basis for believing it was not a governmental entity for §1983 purposes and thus was not precluded from bringing a libel action. . . This contention approximates a qualified immunity defense in that the Hospital claims a reasonable official would not have known its actions violated a clearly established federal right. . . Such an argument is misplaced because a governmental entity may not assert qualified immunity from a suit for damages. . . A qualified immunity defense is only available to parties sued in their individual capacity.”); *Langford v. City of Atlantic City*, 235 F.3d 845, 850 (3d Cir. 2000) (“[W]e are satisfied and accordingly hold, as do *Monell* and *Carver*, that a municipality (in this case, Atlantic City) can be held liable for its unconstitutional acts in formulating and passing its annual budget.”); *Berkley v. Common Council of City of Charleston*, 63 F.3d 295, 302 (4th Cir. 1995) (en banc) (holding “that a municipality is not entitled to an absolute immunity for the actions of its legislature in suits brought under 42 U.S.C. § 1983.”). *Accord Carver v. Foerster*, 102 F.3d 96, 105 (3d Cir. 1996) (“We know of no circuit that currently accepts the doctrine of municipal legislative immunity under Section 1983.”); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 74 (2d Cir.1992); *Kessler v. City of Providence*, 167 F. Supp.2d 482, 490, 491 (D.R.I. 2001) (“In this case, Plaintiff is not seeking damages against Defendants Prignano and Partington; instead she seeks one day's wages from the Police Department that she lost from the suspension. Therefore, Defendants can not assert the doctrine of qualified immunity as an affirmative defense. For this reason, the individual Defendants' motion for summary judgment is denied; and therefore, the Defendant City of Providence's motion to dismiss, which is inexorably tied to Prignano and Parrington's motion for summary judgment, is also denied.”).

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

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

The Supreme Court had granted certiorari to address the following question: "Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, Section 6-5-410 (Ala. 1975), governs the recovery by the representative of the decedent's estate under 42 U.S.C. Section 1983?" In *City of Tarrant v. Jefferson*, 682 So.2d 29 (Ala. 1996), cert. dismissed, 118 S. Ct. 481 (1997), plaintiff sued individually and as a personal representative for the estate of his mother, alleging that Tarrant firefighters, based upon a policy of selectively denying fire protection to minorities, purposefully refused to attempt to rescue and revive his mother. On appeal from an interlocutory order in which the trial court held that the question of the survivability of Ms. Jefferson's cause of action for compensatory damages under section 1983 was governed by federal common law rather than by Alabama's Wrongful Death Act, the Supreme Court of Alabama reversed, holding that Alabama law governed plaintiff's claim. Under the Alabama wrongful death statute, compensatory damages are not available. The statute allows only punitive damages.

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

Courts sometimes confuse the consequences that flow from two very different determinations. If the court concludes that there is no underlying constitutional violation, then *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), would dictate no liability on the part of any defendant. (See discussion of “Derivative Nature of Liability,” *infra*) If, however, the determination is that there is no liability on the part of the individual official because of the applicability of qualified immunity, it does

not necessarily follow that there has been no constitutional violation and that the municipality cannot be liable.

See, e.g., Roberts v. City of Shreveport, 397 F.3d 287, 292 (5th Cir. 2005) (“Plaintiffs allege that Chief Prator failed to train Officer Rivet sufficiently. Chief Prator responds that this issue is foreclosed in his favor because the jury verdict in Officer Rivet’s trial found Rivet’s conduct objectively reasonable. Chief Prator is incorrect. The jury, after all, found that Officer Rivet violated Carter’s constitutional rights, even though it also accepted Officer Rivet’s defense that his conduct was objectively reasonable. Under such circumstances, Chief Prator remains vulnerable to a failure to train claim because the plaintiffs may be able to demonstrate that by his failure to train or supervise adequately, he both caused Carter’s injuries and acted deliberately indifferent to violations of Fourth Amendment rights by Shreveport police officers, including Officer Rivet. . . . Nevertheless, even assuming that lack of training ‘caused’ Carter’s injuries, the plaintiffs have not provided sufficient evidence of either Prator’s failure to train (the first requirement) or his deliberate indifference to Carter’s constitutional rights (the third requirement) to create a triable fact issue. . . . A plaintiff seeking recovery under a failure to train or supervise rationale must prove that the police chief failed to control an officer’s ‘known propensity for the improper use of force.’ . . . Moreover, to prove deliberate indifference, a plaintiff must demonstrate ‘at least a pattern of similar violations arising from training that is so clearly inadequate as to be obviously likely to result in a constitutional violation.’”); *Scott v. Clay County, Tenn.*, 205 F.3d 867, 879 (6th Cir.2000) (“[I]f the legal requirements of *municipal* or *county* civil rights liability are satisfied, qualified immunity will *not* automatically excuse a municipality or county from constitutional liability, even where the municipal or county actors were personally absolved by qualified immunity, *if* those agents *in fact* had invaded the plaintiff’s constitutional rights.”[emphasis in original, footnote omitted]); *Myers v. Oklahoma County Board of County Commissioners*, 151 F.3d 1313, 1317-18 (10th Cir. 1998) (“[I]f a jury returns a general verdict for an individual officer premised on qualified immunity, there is no inherent inconsistency in allowing suit against the municipality to proceed since the jury’s verdict has not answered the question whether the officer actually committed the alleged constitutional violation. . . . In this case, the defendants moved for summary judgment on the basis of qualified immunity, but the district court denied that motion. . . . The defendants may have attempted to raise the issue at trial as well. . . . On the record before us, we are unable to determine the grounds for the jury’s decision. The jury verdict form was a general one. The form instructed the jury only to declare the defendants ‘liable’ or ‘not liable’

on the use of excessive force claim. In addition, neither party placed a copy of the jury instruction in the record. Therefore, it is possible that the jury based its decision on qualified immunity. With that ambiguity lurking, the *Heller* rule does not foreclose the suit against the County."); *Doe v. Sullivan County, Tenn.*, 956 F.2d 545, 554 (6th Cir. 1992) ("To read *Heller* as implying that a municipality is immune from liability regardless of whether the plaintiff suffered a constitutional deprivation simply because an officer was entitled to qualified immunity would . . . represent a misconstruction of its holding and rationale."); *Sunn v. City & County of Honolulu*, 852 F. Supp. 903, 907 (D. Haw. 1994) ("[T]he circuits which have considered the issue have held that *Heller* is inapplicable to cases where police officers are exempt from suit on qualified immunity grounds." citing cases); *Munz v. Ryan*, 752 F. Supp. 1537, 1551 (D. Kan. 1990) (no inconsistency in granting official qualified immunity, while holding municipality liable for constitutional violations if caused by final policymaker).

But see Jiron v. City of Lakewood, 392 F.3d 410, 419 n.8 (10th Cir. 2004) ("Plaintiff argues that dismissal of the claims against the remaining defendants was improper because summary judgment was granted to Officer Halpin on the basis of qualified immunity. Plaintiff is correct that some dismissals against the officer on the basis of qualified immunity do not preclude a suit against the municipality. . . . However, when a finding of qualified immunity is based on a conclusion that the officer has committed no constitutional violation--i.e., the first step of the qualified immunity analysis--a finding of qualified immunity *does* preclude the imposition of municipal liability."); *Turpin v. County of Rock*, 262 F.3d 789, 794 (8th Cir. 2001) ("Having concluded that the district court properly granted Officer Svoboda and Deputy Anderson summary judgment on qualified-immunity grounds, we likewise conclude that the county was entitled to summary judgment. *See Abbott v. City of Crocker*, 30 F.3d 994, 998 (8th Cir.1994) (municipality cannot be liable unless officer is found liable on underlying substantive claim)."); *Mattox v. City of Forest Park*, 183 F.3d 515, 523 (6th Cir. 1999) (exercising pendent appellate jurisdiction over City's interlocutory appeal on grounds that "[i]f the plaintiffs have failed to state a claim for violation of a constitutional right at all, then the City of Forest Park cannot be held liable for violating that right any more than the individual defendants can."); *Martin v. City of Oceanside*, 205 F. Supp.2d 1142, 1154, 1155 (S.D.Cal. 2002) ("If a court finds the officers acted constitutionally, the city has no liability under §1983. Here, the Court has already concluded that the officers' conduct was not unconstitutional. It is true that the Court has answered the first *Saucier* question, whether plaintiff alleges facts that show a constitutional violation by the officers, in

the affirmative. However, it is equally clear from the Court's analysis above that in answering the second *Saucier* question, in the course of which the Court is permitted to review both parties' summary judgment papers, rather than just plaintiff's complaint, the Court has determined that the uncontradicted facts show the officers did not violate plaintiff's constitutional rights. First, the Court has determined that the officers' entry into plaintiff's home was justified by the 'emergency aid' exception to the Fourth Amendment's warrant requirement. Second, the Court has found that the officers' alleged failure to announce their presence and purpose, even if true, did not make their search of plaintiff's home unreasonable under the Fourth Amendment. Third, the Court has determined that the officers' pointing guns at plaintiff did not constitute excessive force under the circumstances. Therefore, because the officers' conduct did not violate plaintiff's constitutional rights, there is no unconstitutional action which can be charged against the City, and plaintiff's *Monell* claim against the City fails.”), *aff'd*, 360 F.3d 1078 (9th Cir. 2004); *VanVorous v. Burmeister*, No. 2:01-CV-02, 2001 WL 1699200, at *10 (W.D. Mich. Dec. 26, 2001) (not reported) (“The Court has determined that the Individual Defendants, including Burmeister, are entitled to qualified immunity. Unlike the court in *Doe v. Sullivan County*, however, this conclusion was not based solely on the reasonableness of the officers' belief that their conduct was lawful. Under *Saucier*, the Court was first required to determine whether VanVorous suffered a constitutional violation at all before asking whether that right was clearly established. The Court concluded that the Individual Defendants acted reasonably in using deadly force and did not violate VanVorous' Fourth Amendment rights. More recent Sixth Circuit opinions have made clear that a determination that the individual defendants committed no constitutional violation, whether by a court on summary judgment or by a jury, precludes municipal liability under §1983. [citing cases] When there is no underlying constitutional violation by individual officers, there can be no municipal liability either. Therefore, the Court will grant the City of Menominee's motion for summary judgment of Plaintiff's claims.”).

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

The determination that a subordinate law enforcement officer is entitled to qualified immunity from suit under section 1983 is not necessarily dispositive of the supervisor's immunity claim. Nevertheless, it does increase the weight of the burden plaintiff must bear in demonstrating not only a deficiency in supervision but also the

essential causal connection or "affirmative linkage" between any such deficiency in supervision and the alleged deprivation of rights.

VI. Local Governments Have No Eleventh Amendment Immunity/State Immunities Not Applicable

Although the Court has held that Section 1983 does not abrogate Eleventh Amendment immunity of state governments, *Quern v. Jordan*, 440 U.S. 332, 345 (1979), political subdivisions of the state have no Eleventh Amendment protection from suit in federal court. *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973). Furthermore, a state court may not refuse to entertain a § 1983 action against a school board on the ground that common law sovereign immunity barred the suit. *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430 (1990).

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

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

See also Cash v. Hamilton County Dept. of Adult Probation, 388 F.3d 539, 545 (6th Cir. 2004) ("The County argues that it is entitled to Eleventh Amendment immunity from suit because the Hamilton County Department of Adult Probation is an arm of the common pleas and municipal courts of the state of Ohio. To support this contention, the County cites a number of Ohio statutes. . . . The bald assertion that the Department is an arm of the common pleas and municipal courts is insufficient by itself to garner Eleventh Amendment immunity. . . . Rather, this argument is one of many factors that must be considered by the district court. We have recognized that the most important factor is 'will a State pay if the defendant loses?' . . . The County raised the issue of Eleventh Amendment immunity in its motion for summary judgment. Although the district court granted the County's motion, the order provides no findings or analysis pertaining to the Eleventh

Amendment. A final resolution of this issue will turn on factual findings regarding whether the Department of Adult Probation is part of the Ohio court system and whether the State or the County would pay damages for a constitutional violation perpetrated by the Department. We therefore remand this issue to the district court for further development.”); *Manders v. Lee*, 338 F.3d 1304, 1328 n.51 (11th Cir. 2003) (en banc) (“*Hess* says that the state treasury factor is a ‘core concern’ of Eleventh Amendment jurisprudence. . . . It is true that the presence of a state treasury drain alone may trigger Eleventh Amendment immunity and make consideration of the other factors unnecessary. Thus, this is why some decisions focus on the treasury factor. If the State footed the entire bill here, there would be no issue to decide. The Eleventh Amendment, however, does not turn a blind eye to the state's sovereignty simply because the state treasury is not directly affected. Moreover, the United States Supreme Court has never said that the absence of the treasury factor alone defeats immunity and precludes consideration of other factors, such as how state law defines the entity or what degree of control the State has over the entity. As mentioned earlier, although the state treasury was not affected, the *Hess* Court spent considerable time pointing out how that lawsuit in federal court did not affect the dignity of the two States because they had ceded a part of their sovereignty to the federal government as one of the creator-controllers of the Compact Clause entity in issue. If the state-treasury-drain element were always determinative in itself, this discussion, as well as the other control discussion, would have been unnecessary.”); *Endres v. Indiana State Police*, 334 F.3d 618, 627 (7th Cir. 2003) (“Sharing of authority among units of government complicates both practical administration and legal characterization. Even if as a matter of state law the counties act as agents of the state in raising and remitting revenues, it remains a matter of federal law whether this makes each county's department part of the state. . . The dispositive question is more ‘who pays?’ than ‘who raised the money?’ . . . The combination of *J.A.W.* and the 2000 legislation leads us to conclude that county offices of family and children in Indiana now must be classified as part of the state for purposes of the eleventh amendment. This does not require the overruling of *Baxter*, which dealt with superseded legislation. It is enough to say that the statutes now in force make county offices part of the state, as *J.A.W.* held and as the formal organization chart now shows them.”); *Alkire v. Irving*, 330 F.3d 802, 813 (6th Cir. 2003) (“Unfortunately, we find ourselves with virtually no evidence on the most important point--who is responsible for a monetary judgment against the Holmes County Court--as it was not briefed by the parties, who assumed *Mumford* [*v. Basinski*, 105 F.3d 264, 268 (6th Cir.), *cert. denied*, 522 U.S. 914 (1997)] was binding precedent. As we shall hold that a remand is in order in any event, we choose

to remand this issue to the district court. The district court can make the initial determination whether Ohio would be legally liable for a judgment against the Holmes County Court, as well as an evaluation of the other factors that may bear on whether the Holmes County Court should receive sovereign immunity.”); **Hudson v. City of New Orleans**, 174 F.3d 677, 683 (5th Cir. 1999) (“Ultimately we are most persuaded by the fact that the state treasury will in all likelihood be left untouched if damages were to be levied against the Orleans Parish District Attorney's office. It is well established that this . . . factor is crucial to our Eleventh Amendment arm of the state analysis. . . . In sum, we conclude that the Orleans Parish District Attorney's office is not protected from suit in federal court by the Eleventh Amendment.”); **Harter v. Vernon**, 101 F.3d 334, 340 (4th Cir. 1996) (“In sum, when determining if an officer or entity enjoys Eleventh Amendment immunity a court must first establish whether the state treasury will be affected by the law suit. If the answer is yes, the officer or entity is immune under the Eleventh Amendment.”). *But see Sales v. Grant*, 224 F.3d 293, 298 (4th Cir. 2000) (concluding that a promise of indemnification does not alter the non-immune status of state officers sued in their individual capacities).

See also Cash v. Granville County Bd. of Educ., 242 F.3d 219, 226, 227 (4th Cir. 2001) (“[W]e conclude that upon our consideration of each of the factors identified for determining whether a governmental entity is an arm of the State and therefore one of the United States within the meaning of the Eleventh Amendment, the Granville County Board of Education appears much more akin to a county in North Carolina than to an arm of the State. . . . In reaching our conclusion in this case, we continue to follow our jurisprudence, as stated in *Harter, Gray, Bockes*, and *Ram Ditta*, and in doing so, we believe that we are faithfully applying the relevant Eleventh Amendment jurisprudence announced by the Supreme Court in *Regents, Hess, Lake Country Estates*, and *Mt. Healthy*. We therefore reject the district court's view that the Supreme Court's recent decisions in *Regents* and *McMillian* overruled our decisions in *Harter, Gray, Bockes*, and *Ram Ditta*.”); **Belanger v. Madera Unified School District**, 963 F.2d 248, 251 (9th Cir. 1992) (holding school districts in California are state agencies for purposes of the Eleventh Amendment). *See generally Eason v. Clark County School Dist.*, 303 F.3d 1137, 1141 n.2, 1144 (9th Cir. 2002) (holding school district in Nevada is local or county agency, not state agency and collecting cases from circuits).

In ***Regents of the University of California v. Doe***, 117 S. Ct. 900, 905 (1997), the Court held that “[t]he Eleventh Amendment protects the State from the

risk of adverse judgments even though the State may be indemnified by a third party."

VII. Ethical Concerns for Government Attorneys

Note the ethical problems for government attorneys who might be required to defend both the government body and its employees. After *Monell*, there is an inherent conflict of interest between the local government body and its employee when both are named as defendants in a § 1983 suit. It is in the interest of the local government unit to establish that the employee was not acting pursuant to any official policy or custom. The employee, on the other hand, may avoid or substantially reduce personal liability by asserting that his conduct was pursuant to official policy. See *Dunton v. County of Suffolk*, 729 F.2d 903 (2d Cir. 1984). Compare *Moskowitz v. Coscette*, No. 02-7097, 2002 WL 31541004, at *2 (2d Cir. Nov.15, 2002) (unpublished) ("We have recognized that a potential conflict can arise between the interests of a municipal employee and the interests of the municipality when both are defendants in a lawsuit arising out of the municipal employee's alleged misconduct. See *Dunton v. Suffolk County*, 729 F.2d 903, 907 (2d Cir.1984). For the reasons that follow, however, we do not believe that any conflict of interest here warrants Rule 60(b)(6) relief. It is true that the fact that a police officer acts pursuant to orders can bolster a qualified immunity defense where the officer could reasonably have believed that he was not violating any rights. . . . It is also certainly possible that the jury would have viewed Coscette as less culpable had it perceived him merely to be following orders, and would not have awarded (or would have awarded lower) punitive damages. . . . Coscette's reliance on our decision in *Dunton v. Suffolk County*, 729 F.2d 903 (2d Cir.1984), is misplaced. In *Dunton*, the attorney representing the municipality and the officer sacrificed the officer's interests to those of the municipality by arguing that the officer acted not as a police officer but as an irate husband. *Id.* at 907-08. Here, in contrast, the defense attorney did not argue that Coscette's actions went beyond the scope of his employment, and the Town had in fact conceded that Coscette's actions were taken under the color of state law. There is simply no indication that at any time before, during, or after the trial the defense attorney took a position, advanced an argument, or adopted a strategy that benefitted the Town at Coscette's expense.").

In *Coleman v. Smith*, 814 F.2d 1142 (7th Cir. 1987), the Seventh Circuit noted that it was "troubled by the Second Circuit's broad holding that after *Monell* an automatic conflict results when a governmental entity and one of its employees

are sued jointly under section 1983." *Id.* at 1147-48. The court in *Coleman* found no conflict of interest warranting disqualification where the Village acknowledged that the individual defendants were acting in their official capacities and where the claim against the Village was of an "entirely different character" than the claim against the individual defendants. *Id.* at 1148.

In *Silva v. Witschen*, 19 F.3d 725 (1st Cir. 1994), the court upheld an award of attorney fees to the City of East Providence, Rhode Island, for fees by counsel appearing for five individual defendants, and by the City Solicitor appearing on behalf of the City and the same five individuals in their official capacities. The First Circuit agreed "that it was reasonable for the five defendants, in their individual capacities, to obtain representation by their own counsel while the merits of plaintiffs' claims remained in litigation, since counsel to the City represented the individual defendants in their official capacities only." *Id.* at 732. The court also affirmed the disallowance of fees for counsel for the individual defendants for services rendered "after the point in time when it became clear that no conflicts of interest precluded the individual defendants' joint representation by counsel to the City." *Id.*

In *Atchinson v. District of Columbia*, 73 F.3d 418 (D.C. Cir. 1996), the court of appeals affirmed the district court's denial of leave to amend the complaint on the eve of trial to name a police officer defendant in his individual, rather than official, capacity. The court noted that "the district court's concerns regarding Officer Collins's choice of counsel and litigation strategy seem well-founded." *Id.* at 427. The court further observed:

Municipal officials sued only in their official capacities may early on, as here, agree to be represented by the municipality's attorneys. Subsequently naming the officials in their individual capacities, however, may make continued joint representation problematic, if not impossible. A municipality and officials named individually may have mutually exclusive defenses. For example, officials sued individually may find it advantageous to agree with a plaintiff that training was inadequate, for a jury might conclude that officials without proper training should not be liable for any harm caused. Because of these potential conflicts, it is possible that had the officials known all along of the potential for personal liability, they would never have agreed to joint representation at the outset. [*Id.*]

In *Johnson v. Board of County Commissioners for the County of Fremont*, 85 F.3d 489, 493-94 (10th Cir. 1996), the court adopts the following position on the conflict issue:

While some courts have held separate representation is required in the face of the potential conflict, *see, e.g., Ricciuti v. New York City Transit Auth*, 796 F.Supp. 84, 88 (S.D.N.Y. 1992); *Shadid v. Jackson*, 521 F.Supp. 87, 90 (E.D.Tex. 1981), we decline to adopt a per se rule. We hold that when a potential conflict exists because of the different defenses available to a government official sued in his official and individual capacities, it is permissible, but not required, for the official to have separate counsel for his two capacities. *See Silva v. Witschen*, 19 F.3d 725, 732 (1st Cir. 1994); *Richmond Hilton Assocs. v. City of Richmond*, 690 F.2d 1086, 1089 (4th Cir. 1982); *Clay v. Doherty*, 608 F.Supp. 295, 303 (N.D.Ill. 1985). Obviously, if the potential conflict matures into an actual material conflict, separate representation would be required. [citing *Dunton* and *Clay*] Model Rules of Professional Conduct, Rule 1.7. Though separate representation is permissible, an attorney may not undertake only the official capacity representation at his or her sole convenience. Under Colorado Rules of Professional Conduct, Rule 1.2(c), a lawyer may limit the objectives of her representation only "if the client [consents] after consultation." In the case where an attorney has been hired to represent a government official in only his official capacity in a suit where the official is also exposed to liability in his individual capacity but has no representation in that capacity, this rule serves an important function. When adhered to properly, the rule ensures the defendant is adequately informed about the workings of 42 U.S.C. § 1983 and the potential conflict between the defenses he may have in his separate capacities. Above all else, the attorney and the district court should ensure the official is not under the impression that the official capacity representation will automatically protect his individual interests sufficiently. Courts have recognized a "need for sensitivity" to the potential for conflict in this area, and have advised that "[t]he bar should be aware of potential ethical violations and possible malpractice claims." *Gordon v. Norman*, 788 F.2d 1194, 1199 n. 5 (6th Cir. 1986) (quotation omitted). In the service of these interests, we embrace the Second Circuit's procedure whereby counsel

notifies the district court and the government defendant of the potential conflict, the district court determines whether the government defendant fully understands the potential conflict, and the government defendant is permitted to choose joint representation. *See Kounitz v. Slaatten*, 901 F.Supp. 650, 659 (S.D.N.Y. 1995). In addition, the defendant should be told it is advisable that he or she obtain independent counsel on the individual capacity claim. We reinforce that, as with many issues relating to the relationship between attorney and client, the crucial element is adequate communication.

See also DeGrassi v. City of Glendora, 207 F.3d 636 (9th Cir. 2000), where the court affirmed the district court's rejection of a former city council member's claim to indemnification from the city for attorney fees incurred in defending a slander action. The city had complied with its obligation to provide a defense when it offered defense of the slander action against the city council member subject to the condition that the city control the litigation and approve of any potential settlement. The city council member rejected the offer and retained her own counsel. In rejecting her request for indemnification, the court noted that "there is no authority entitling DeGrassi to retain independent counsel on the strength of her unilateral assertion of a conflict of interest involving the City. Section 995.2(a)(3) permits the public entity to refuse to provide a defense if it determines that the defense would create a conflict of interest between the entity and the employee. *See id.* That section does not entitle the employee to independent counsel simply because she asserts the existence of a conflict of interest." *Id.* at 643.

In *Maderosian v. Shamshak*, 170 F.R.D. 335 (D. Mass. 1997), the court held that a conflict of interest that arose from town counsel's joint representation of the town, the town's selectmen, and the police chief, warranted relief from the judgment with respect to plaintiff's due process claim against the police chief in his individual capacity. Plaintiff, a part-time police officer, had sued defendants for terminating him without due process. The police chief, in his motion to set aside the judgment, submitted an affidavit in which he stated that, with respect to the termination of the plaintiff, town counsel had advised the police chief that plaintiff was an "at will employee" who was not entitled to notice and a hearing prior to termination. *Id.* at 337. At the trial for the wrongful termination, town counsel did not elicit any testimony concerning his conversation with the police chief, the advice the chief had received or the fact that the chief had relied on counsel's advice. *Id.* at 341.

The court concluded:

There is no question that Town Counsel's dual representation of the Town, its Selectmen and Chief Shamshak presented a conflict of interest. Although in hindsight the potential conflict of interest should have been readily apparent, at the time of trial, I did not recognize this conflict and therefore, failed to inquire of the parties as to whether or not they were aware of the conflict, the potential prejudice which this conflict presented and whether they knowingly and voluntarily wished to proceed with Town Counsel as trial counsel in this matter. Chief Shamshak as a lay person cannot be expected to recognize the potential conflict and therefore, cannot be said to have waived his objection to multiple representation. . . . It is obvious that there was an actual conflict of interest between Chief Shamshak and Town Counsel, who was also acting as his trial counsel and that Town Counsel's failure to advise Chief Shamshak to testify as to his conversation with Town Counsel, a conversation during which Town Counsel may have given Chief Shamshak erroneous legal advice, resulted in prejudice which may well have affected the jury's verdict in this case. Additionally, I am convinced that Chief Shamshak's interests may have been prejudiced by the actual conflict of interests created by Town counsel's simultaneous representation of him and the Town.

Id. at 340-42.

In *Guillen v. City of Chicago*, 956 F. Supp. 1416 (N.D. Ill. 1997), plaintiff sued the City and several police officers for their role in the death of her husband. The court denied plaintiff's motion to disqualify the City's corporation counsel from representing the paramedic employees of the City who transported her husband to the hospital and who were to be witnesses, but not parties, in the legal proceedings. The court held that City counsel could continue to represent the paramedics at their depositions, "but with one caveat: City counsel must fully inform its clients of the pros and cons of joint representation. . . . For instance, what if the statements given to City Counsel by the paramedics do tend to establish liability of the City or the officers? What then? Under these circumstances, City counsel should candidly disclose the potential hazards of common representation to Marlow and O'Leary.

The paramedics will then be in a position to decide whether or not retaining City counsel is in their best interests.” *Id.* at 1426, 1427.

VIII. States Are Not "Persons" Under Section 1983

In the absence of consent to suit or waiver of immunity, a state is shielded from suit in federal court by virtue of the Eleventh Amendment. A damages action against a state official, in her official capacity, is tantamount to a suit against the state itself and, absent waiver or consent, would be barred by the Eleventh Amendment. Congress may expressly abrogate a state's Eleventh Amendment immunity pursuant to its enforcement power under the Fourteenth Amendment. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98-100 (1984).

See also Wisconsin Dep't of Corrections v. Schacht, 118 S. Ct. 2047, 2051-52 (1998) ("We now conclude, contrary to the Seventh Circuit, that the presence in an otherwise removable case of a claim that the Eleventh Amendment may bar does not destroy removal jurisdiction that would otherwise exist. . . . The Eleventh Amendment. . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. . . Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it."); *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 482 (4th Cir. 2005) (noting that Eleventh Amendment immunity is not strictly an issue of subject-matter jurisdiction but that court should address issue promptly once the State asserts its immunity); *Parella v. Retirement Board of the Rhode Island Employees' Retirement System*, 173 F.3d 46, 55 (1st Cir. 1999) ("[T]he Supreme Court has now clearly stated that courts are free to ignore possible Eleventh Amendment concerns if a defendant chooses not to press them."). *Compare David B. v. McDonald*, 156 F.3d 780, 783 (7th Cir. 1998) (With no reference to *Schacht*, holding "the eleventh amendment, extended in *Hans v. Louisiana* . . . to federal-question cases, deprives the court of jurisdiction.") with *Endres v. Indiana State Police*, 334 F.3d 618, 623 (7th Cir. 2003) ("Because the eleventh amendment does not curtail subject-matter jurisdiction (if it did, states could not consent to litigate in federal court, as *Lapides* holds that they may), a court is free to tackle the issues in this order, when it makes sense to do so, without violating the rule that jurisdictional issues must be resolved ahead of the merits."). *See also McConnell v. Fernandes*, No. Civ.A. 03-10829-RWZ, 2003 WL 23019183, at *1 (D. Mass. Dec. 29, 2003) ("In March 2003, plaintiff filed a four-count Complaint in Suffolk Superior

Court against defendants Fernandes and the Commonwealth of Massachusetts ("Commonwealth"). Counts One and Two allege false imprisonment and negligence against the Commonwealth under a theory of *respondeat superior*. Counts Three and Four allege violations of 42 U.S.C. § 1983 and the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, §§ 11H & 11I, against Fernandes. Defendant Fernandes timely removed to this Court without the Commonwealth's consent. . . . Both defendants have now filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The Commonwealth's motion, premised on its Eleventh Amendment immunity from suit, is conceded by all parties, although plaintiff suggests that this Court should remand the case to Suffolk Superior Court if it finds that the Commonwealth did not voluntarily waive immunity. The consent of all defendants is normally a prerequisite for removal jurisdiction. . . . A number of cases in this jurisdiction, however, have followed a 'refined' rule of unanimity that requires the consent only of those parties who would be independently entitled to remove. . . . Nevertheless, it makes little sense to divide this case between federal and state courts. The state law claims are closely related to the federal claim; to the extent that defendant Fernandes violated plaintiff's constitutional rights,[footnote omitted] the Commonwealth may well be liable for negligence. Requiring the case to be litigated twice virtually assures that legal costs will outweigh the relatively small damages involved. It would run contrary to the rational and economical administration of justice to retain jurisdiction over the federal claim while remanding the others. Therefore, in the absence of the Commonwealth's consent to remove the case, the entire action will be remanded to state court.”).

In *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), the Court held that neither a state nor a state official in his official capacity is a "person" for purposes of a section 1983 damages action. Thus, even if a state is found to have waived its Eleventh Amendment immunity in federal court, or even if a § 1983 action is brought in state court, where the Eleventh Amendment has no applicability, *Will* precludes a damages action against the state governmental entity. This holding does not apply when a state official is sued in his official capacity for injunctive relief. 491 U.S. at 71 n. 10. *See also Manders v. Lee*, 338 F.3d 1304, 1328 n.53 (11th Cir. 2003) (en banc) (“If sheriffs in their official capacity are arms of the state when exercising certain functions, then an issue arises whether Manders's § 1983 suit is subject to dismissal on the independent ground that they are not ‘persons’ for purposes of § 1983. [citing *Will*] This statutory issue, however, is not before us as it was neither briefed nor argued on appeal.”); *Gean v. Hattaway*, 330 F.3d 758, 766 (6th Cir. 2003) (“[T]he need for this court to undertake a broad sovereign immunity

analysis with respect to the § 1983 claims is obviated by the fact that the defendants in their official capacities are not recognized as ‘persons’ under § 1983. Even if Tennessee's sovereign immunity has been properly waived or abrogated for the purposes of the federal statute the defendants allegedly violated, a § 1983 claim against the defendants in their official capacities cannot proceed because, by definition, those officials are not persons under the terms of § 1983.”); ***Tower v. Leslie-Brown***, 167 F. Supp.2d 399, 403 (D. Me. 2001) (“Defendants Peary and Leslie-Brown therefore enjoy the same immunity from suit in their official capacities that their employing agencies do.”).

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

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

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

IX. State-of-Mind Requirement: Depends on the Right in Question

A plaintiff bringing an action under § 1983 is not required to show that the defendant acted with a "specific intent" to deprive him of a constitutional right. However, depending on the right allegedly violated, the plaintiff may have to prove that the defendant acted with a particular type of intent as part of the proof necessary

to show violation of a constitutional right. In *Daniels v. William*, 474 U.S. 327 (1986), and *Davidson v. Cannon*, 474 U.S. 344 (1986), the Supreme Court reiterated its conclusion in *Parratt v. Taylor*, 451 U.S. 527 (1981), that § 1983 contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right. Thus, to make out a claim under §1983, a plaintiff must consult Supreme Court decisions construing the particular right alleged to be violated and determine what state-of-mind requirement, if any, the Court has imposed on violations of that particular constitutional right. For example, the Court in *Daniels* and *Davidson* held that due process rights cannot be violated by conduct which is merely negligent. *Davidson v. Cannon*, 474 U.S. 344, 347 (1986); *Daniels v. Williams*, 474 U.S. 327, 333 (1986).

See also United States v. Gonzales, No. 04-20131, 2006 WL 118276, at *20 n.5 (5th Cir. Jan. 17, 2006) (“The defendant Reyna, as an initial matter, also argues that deliberate indifference is a civil standard from section 1983 cases, and that a criminal prosecution under § 242 should require nothing less than willfulness. This argument confuses two separate and independent culpability standards. The willfulness culpability standard that the prosecution must prove to support a § 242 conviction is independent of the ‘deliberate indifference’ standard that the Court requires for a violation of the due process right to medical care while in custody. For example, the Supreme Court has held that ‘section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.’ [citing *Daniels v. Williams*, 474 U.S. 327 (1986)]. For a § 1983 claim the plaintiff need prove deliberate indifference, because that much is required to prove a violation of the due process right. However, for a § 242 claim, the prosecution must also prove that the defendant acted willfully.”)

A. 4th, 8th, 14th Amendment Claims

In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court held that the use of excessive force during an arrest, investigatory stop, or other “seizure” of a free citizen is judged by the objective reasonableness standard of the Fourth Amendment. *See also Tennessee v. Garner*, 471 U.S. 1 (1985) (applying Fourth Amendment standard to use of deadly force to apprehend fleeing suspect). It may not always be clear when someone is “seized” for Fourth Amendment purposes.

See, e.g., Ciminillo v. Streicher, No. 04-4346, 2006 WL 89157, at *2, *3 (6th Cir. Jan. 17, 2006) (“Ciminillo argues that the district court erred in analyzing his excessive-force claim under the Fourteenth Amendment. Under the Fourth Amendment, Knight would be liable for his conduct if it were unreasonable. . . Under the Fourteenth Amendment, however, Ciminillo must establish that Knight's conduct ‘shocked the conscience.’ . . It is established law that if the incident out of which litigation arises is neither a search nor a seizure, an excessive-force claim will not be analyzed under the Fourth Amendment. In *Graham*, the Supreme Court held that all claims that police officers used excessive-force in the course of an arrest, investigatory stop, or other seizure should be analyzed under the rubric of the Fourth Amendment as opposed to the Fourteenth Amendment. . . . Thus, in determining whether to apply the Fourth or the Fourteenth Amendment to Ciminillo's excessive-force claim, the proper inquiry is whether Ciminillo was seized. . . . Unlike the plaintiffs in *Claybrook* and *Ewolski*, Ciminillo was not collaterally injured by an assertion of force against a third party; he was the direct target of police conduct. In holding that the Fourth Amendment does not apply here, the district court reasoned that Knight's use of force was not accompanied by an effort to restrain or apprehend Ciminillo, and thus did not constitute a seizure under the Fourth Amendment. Whether Knight shot Ciminillo in an effort to restrain his movement, however, is a disputed question of fact. Assuming those facts supported by the record that are most favorable to Ciminillo to be true, and drawing all inferences in his favor, there was in fact a seizure. Ciminillo alleges that he was shot after attempting to leave the scene of the riot. He alleges that he was shot as he approached Knight with his hands raised in the air. . . . That Ciminillo was not eventually placed in handcuffs or taken to the police station does not preclude a determination that he was seized.”).

The Eighth Amendment applies to convicted prisoners. In Eighth Amendment excessive force cases the Court has required plaintiffs to show that prison officials used force "maliciously and sadistically." *Hudson v. McMillian*, 503 U.S. 1 (1992); *Whitley v. Albers*, 475 U.S. 312 (1986).

In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court defined the Eighth Amendment standard of deliberate indifference applicable to medical treatment, prison conditions, and failure to protect cases. Adopting a subjective standard, the Court held that a prison official may be held liable for failing to protect a prisoner from assault by other prisoners only if the official actually knew of "a substantial risk of serious harm and disregard[ed] that risk by failing to take reasonable measures to abate it." *Id.* at 847.

See also *Boone v. Brown*, No. Civ. 05-750(AET), 2005 WL 2006997, at *7, *8 (D.N.J. Aug. 22, 2005) (“The Third Circuit has defined a serious medical need as: (1) ‘one that has been diagnosed by a physician as requiring treatment;’ (2) ‘one that is so obvious that a lay person would recognize the necessity for a doctor’s attention;’ or (3) one for which ‘the denial of treatment would result in the unnecessary and wanton infliction of pain’ or ‘a life-long handicap or permanent loss.’ *Atkinson v. Taylor*, 316 F.3d 257, 272-73 (3d Cir.2003) (internal quotations and citations omitted); see also *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir.1987), *cert. denied*, 486 U.S. 1006 (1988). . . . The Third Circuit has found deliberate indifference where a prison official: (1) knows of a prisoner’s need for medical treatment but intentionally refuses to provide it; (2) delays necessary medical treatment for non-medical reasons; or (3) prevents a prisoner from receiving needed or recommended treatment. See *Rouse[v. Plantier]*, 182 F.3d 192 (3d Cir.1999), 182 F.3d at 197. The court has also held that needless suffering resulting from the denial of simple medical care, which does not serve any penological purpose, violates the Eighth Amendment. *Atkinson*, 316 F.3d at 266.”).

There is some question as to what standard applies in Fourteenth Amendment contexts involving pretrial detainees. See, e.g., *Hubbard v. Taylor*, 399 F.3d 150, 166 (3d Cir. 2005) (“The district court then erred in concluding that ‘pretrial detainees are afforded essentially the same protection as convicted prisoners and that an Eighth Amendment analysis is appropriate for determining if the conditions of confinement rise to the level of a constitutional violation.’ . . . The district court’s error is understandable given our discussion in *Kost*. There, we were discussing medical and nonmedical conditions of confinement. Although we specifically stated that the Eighth Amendment provided a floor for our due process inquiry into the medical and nonmedical issues, much of our discussion focused on whether the plaintiffs had established the ‘deliberate indifference’ that is the hallmark of cruel and unusual punishment under the Eighth Amendment. . . . Moreover, we failed to cite *Bell v. Wolfish* which, as we have explained, distinguishes between pretrial detainees’ protection from ‘punishment’ under the Fourteenth Amendment, and convicted inmates’ protection from punishment that is ‘cruel and unusual’ under the Eighth Amendment. . . . Nevertheless, it is clear that plaintiffs here ‘are not within the ambit of the Eighth Amendment[’s],’ prohibition against cruel and unusual *punishment*. . . . They are not yet at a stage of the criminal process where they can be punished because they have not as yet been convicted of anything. As the Supreme Court explained in *Bell*, pre-trial detainees cannot be punished at all under the Due Process Clause.”); *Board v. Farnham*, 394 F.3d 469, 478 (7th Cir. 2005) (“[W]e have found

it convenient and entirely appropriate to apply the same standard to claims arising under the Fourteenth Amendment (detainees) and Eighth Amendment (convicted prisoners) ‘without differentiation.’”); *A.M. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 584 (3d Cir. 2004) (“Given his status as a detainee, A.M. maintains his claims must be assessed under the Fourteenth Amendment. We do not dispute that A.M.'s claims are appropriately analyzed under the Fourteenth Amendment since he was a detainee and not a convicted prisoner. However, the contours of a state's due process obligations to detainees with respect to medical care have not been defined by the Supreme Court. . . . Yet, it is clear that detainees are entitled to no less protection than a convicted prisoner is entitled to under the Eighth Amendment.); *Gibson v. County of Washoe*, 290 F.3d 1175, 1189 n.9 (9th Cir. 2002) (“It is quite possible, therefore, that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment.”); *Patten v. Nichols*, 274 F.3d 829, 834 (4th Cir. 2001) (“As to denial-of-medical-care claims asserted by pre-trial detainees, whose claims arise under the Fourteenth Amendment rather than the Eighth Amendment, the Supreme Court has yet to decide what standard should govern, thus far observing only that the Fourteenth Amendment rights of pre-trial detainees ‘are at least as great as the Eighth Amendment protections available to a convicted prisoner.’”); *Riggs v. Correctional Medical Services*, No. Civ.A.03-2246(JAG), 2005 WL 2009920, at *4, *5 (D.N.J. Aug. 19, 2005) (“Plaintiff is no longer incarcerated for having committed a criminal offense; rather, he is involuntarily committed, pursuant to the SVPA. In *Natale v. Camden County Correctional Facility*, 318 F.3d 575 (3d Cir.2003), the Third Circuit held that, when considering pre-detainees' claims, pursuant to Section 1983, for deliberate indifference application of the Fourteenth Amendment is clearly appropriate. The Court found that because the plaintiff was not committed as a prisoner, the Eighth Amendment did not directly apply. . . . However, the Court noted that, when evaluating deliberate indifference under the Fourteenth Amendment, the Third Circuit has found no reason to apply a different standard than that pertaining to deliberate indifference claims brought under the Eighth Amendment. *See also Woloszyn v. County of Lawrence, et al.*, 396 F.3d 314 (3d Cir.2005) (explaining that in the context of a pre-trial detainee's S 1983 claim, deliberate indifference under the Eighth Amendment does not directly control, but the Court may nevertheless look to Eighth Amendment, because the rights of pre-trial detainees are at least as great as those rights of the convicted); *Hubbard v. Stanley Taylor, et al.*, 399 F.3d 150 (3d Cir.2005) (evaluating a pre-trial detainee's Fourteenth Amendment inadequate medical care

claim under the standard used in similar claims brought under the Eighth Amendment).”).

See also *Wever v. Lincoln County, Nebraska*, 388 F.3d 601, 606 n.6 (8th Cir. 2004) (“While *Yellow Horse* involved an Eighth Amendment claim, it is well established that pretrial detainees such as Wever are ‘accorded the due process protections of the Fourteenth Amendment, protections “at least as great” as those the Eighth Amendment affords a convicted prisoner.’ *Boswell v. Sherburne County*, 849 F.2d 1117, 1121 (8th Cir.1988). We have previously suggested that the burden of showing a constitutional violation is lighter for a pretrial detainee under the Fourteenth Amendment than for a post-conviction prisoner under the Eighth Amendment. *Smith v. Copeland*, 87 F.3d 265, 268 n. 4 (8th Cir.1996).”); *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1121 (9th Cir.2003) (holding that “the substantive due process rights of incapacitated criminal defendants are not governed solely by the deliberate indifference standard”); *Patten v. Nichols*, 274 F.3d 829, 841, 842 (4th Cir. 2001) (“[E]ven though pre-trial detainees and involuntarily committed patients both look to the Fourteenth Amendment for protection and neither group may be punished (in the Eighth Amendment sense), it can hardly be said that the groups are similarly situated. The differences in the purposes for which the groups are confined and the nature of the confinement itself are more than enough to warrant treating their denial-of-medical-care claims under different standards We therefore conclude that denial-of-medical-care claims asserted by involuntarily committed psychiatric patients must be measured under *Youngberg*’s ‘professional judgment’ standard.”); *Davis v. Rennie*, 264 F.3d 86, 99, 100, 108 (1st Cir. 2001) (“[T]here is precedent for subjecting the conduct of a mental health worker to a more exacting standard than that of a prison guard controlling a riot or a police officer chasing a fleeing car. . . . Davis was in the state’s custody because of mental illness, not culpable conduct, and the trial court’s decision to reject the “shocks the conscience” standard is consistent with this distinction. [citing *Andrews v. Neer*] We agree . . . with the Eighth Circuit that the usual standard for an excessive force claim brought by an involuntarily committed mental patient is whether the force used was ‘objectively reasonable’ under all the circumstances.”); *Andrews v. Neer*, 253 F.3d 1052, 1060, 1061 (8th Cir. 2001) (“This Circuit has not addressed the constitutional standard applicable to § 1983 excessive-force claims in the context of involuntarily committed state hospital patients. In other situations in which excessive force is alleged by a person in custody, the constitutional standard applied may vary depending upon whether the victim is an arrestee, a pretrial detainee, or a convicted inmate of a penal institution. If the victim is an arrestee, the Fourth Amendment’s

'objective reasonableness' standard controls. . . The evaluation of excessive-force claims brought by pre-trial detainees, although grounded in the Fifth and Fourteenth Amendments rather than the Fourth Amendment, also relies on an objective reasonableness standard. . . Excessive-force claims brought by prisoners fall under the protections provided by the Eighth Amendment's prohibition of cruel and unusual punishment. . . . Andrews's excessive force claim does not fit neatly into an analysis based on status as an arrestee, a pre-trial detainee, or a prisoner. Bobby Andrews was held in Fulton after having been found not guilty of murder by reason of insanity, and thus he was not a 'prisoner' subject to punishment. . . The Eighth Amendment excessive-force standard provides too little protection to a person whom the state is not allowed to punish. On the other hand, the state of Missouri was entitled to hold Bobby Andrews in custody. His confinement in a state institution raised concerns similar to those raised by the housing of pretrial detainees, such as the legitimate institutional interest in the safety and security of guards and other individuals in the facility, order within the facility, and the efficiency of the facility's operations. . . Accordingly, we conclude that Andrews's excessive-force claim should be evaluated under the objective reasonableness standard usually applied to excessive-force claims brought by pretrial detainees. "); *Fuentes v. Wagner*, 206 F.3d 335, 347, 348 (3d Cir. 2000) ("[W]e hold that the Eighth Amendment cruel and unusual punishments standards found in *Whitley v. Albers* . . . and *Hudson v. McMillian* . . . apply to a pretrial detainee's excessive force claim arising in the context of a prison disturbance. We can draw no logical or practical distinction between a prison disturbance involving pretrial detainees, convicted but unsentenced inmates, or sentenced inmates. Nor can prison guards be expected to draw such precise distinctions between classes of inmates when those guards are trying to stop a prison disturbance."); *United States v. Walsh*, 194 F.3d 37, 48 (2d Cir. 1999) ("Because all excessive force claims in the prison context are qualified, . . . we conclude that the *Hudson* analysis is applicable to excessive force claims brought under the Fourteenth Amendment as well."); *Tesch v. County of Green Lake*, 157 F.3d 465, 474 (7th Cir. 1998) ("[T]he Supreme Court and this Court have applied the *Bell* test to analyze constitutional attacks on the general practices, rules, and restrictions of pretrial confinement. . . . However, a second line of cases exists which establishes a different state of mind standard from the *Bell* test when the State denies a pretrial detainee his basic human necessities. Since *Archie v. City of Racine*, 847 F.2d 1211, 1218-19 (7th Cir.1988) (en banc), we have required plaintiffs to establish that officials acted intentionally or in a criminally reckless manner in order to sustain a substantive due process claim for their specific acts or failures to act. Under the alternative description 'deliberate indifference,' we have required plaintiffs to establish that a jail

official acted with this level of intent in relation to a pretrial detainee's need for medical care, . . . risk of suicide, . . . risk of harm from other inmates, . . . and need for food and shelter."); **Scott v. Moore**, 114 F.3d 51, 53-55 (5th Cir. 1997) (en banc) ("In an 'episodic act or omission' case, an actor usually is interposed between the detainee and the municipality, such that the detainee complains first of a particular act of, or omission by, the actor and then points derivatively to a policy, custom, or rule (or lack thereof) of the municipality that permitted or caused the act or omission. Although, in her amended state petition, Scott complains generally of inadequate staffing, . . . the actual harm of which she complains is the sexual assaults committed by Moore during the one eight-hour shift--an episodic event perpetrated by an actor interposed between Scott and the city, but allegedly caused or permitted by the aforesaid general conditions. . . . [A]s to the discrete, episodic act, the detainee must establish only that the constitutional violation complained of was done with subjective deliberate indifference to that detainee's constitutional rights. . . . In the instant case, Scott has met that burden. Accordingly, we next must determine whether the city may be held accountable for that violation. Under *Hare*, as we have stated, this latter burden may be met by putting forth facts sufficient to demonstrate that the predicate episodic act or omission resulted from a municipal custom, rule, or policy adopted or maintained with objective deliberate indifference to the detainee's constitutional rights. . . . At best, the evidence proffered by Scott may be construed to suggest that the jail could have been managed better, or that the city lacked sufficient prescience to anticipate that a well-trained jailer would, without warning, assault a female detainee. In either event, they do not reflect objective deliberate indifference to Scott's constitutional rights."); **Guerts v. Piccinni**, No. C 00-3588 PJH (PR), 2002 WL 467709, at *4 (N.D.Cal. March 25, 2002) (not reported) ("Several circuits have held that the *Hudson* analysis also applies to excessive force claims brought by pretrial detainees under the Fourteenth Amendment. [citing cases] Although the Ninth Circuit has not addressed the issue, it has used the Eighth Amendment as a benchmark for evaluating claims brought by pretrial detainees. . . . The court need not resolve the question of whether the *Hudson* standard also applies when considering an excessive force due process claim brought by a pretrial detainee. The actions of defendants were reasonably related to the facility's interest in maintaining jail security, and given plaintiff's agitated condition and refusal to comply with orders to stand still, were not an excessive response. Defendants' actions hence did not constitute 'punishment' in the Fourteenth Amendment sense. They certainly did not rise to the level of malicious and sadistic actions taken for the purpose of causing harm, the *Hudson* standard."); **Thornhill v. Breazeale**, 88 F. Supp.2d 647, 651 (S.D. Miss. 2000) ("Through a long line of cases involving both

convicted prisoners and pretrial detainees, the Fifth Circuit has fashioned two different standards of care that the State owes to a pretrial detainee. A Section 1983 challenge of a jail official's episodic acts or omissions evokes the application of one standard while a challenge of the general conditions, practices, rules, or restrictions of pretrial confinement evokes another. . . . A jailer's constitutional liability to a pretrial detainee for episodic acts or omissions is measured by a standard of deliberate indifference. . . . Constitutional attacks on general conditions, practices, rules, or restrictions, otherwise known as jail condition cases, are subject to the *Bell* test which is premised on a reasonable relationship between the condition, practice, rule, or restriction and a legitimate governmental interest.”).

See also Jones v. Blanas, 393 F.3d 918, 931-34 (9th Cir. 2004) (“Jones claims that Blanas and the County violated his substantive due process rights by confining him for a year among the general criminal inmate population of the Sacramento County Jail and for another year in T-Sep, an administrative segregation unit where Jones experienced substantially more restrictive conditions than those prevailing in the Main Jail. While in T-Sep, Jones was afforded substantially less exercise time, phone and visiting privileges, and out-of-cell time than inmates in the general population. Jones was completely cut off from recreational activities, religious services, and physical access to the law library. Jones continued to be subjected to strip searches during this time. . . . Though it purported to analyze Jones's conditions of confinement claim under the Fourteenth Amendment, the district court actually applied the standards that govern a claim of cruel and unusual punishment under the Eighth Amendment. The court mistook the amendment that was to be applied. . . . The case of the individual confined awaiting civil commitment proceedings implicates the intersection between two distinct Fourteenth Amendment imperatives. First, ‘[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.’ *Youngberg*, 457 U.S. at 321-22. Second, when the state detains an individual on a criminal charge, that person, unlike a criminal convict, ‘may not be *punished* prior to an adjudication of guilt in accordance with due process of law.’ *Bell*, 441 U.S. at 535 (emphasis added). . . . As civil detainees retain greater liberty protections than individuals detained under criminal process, *see Youngberg*, 457 U.S. at 321-24, and pre-adjudication detainees retain greater liberty protections than convicted ones, *see Bell*, 441 U.S. at 535-36, it stands to reason that an individual detained awaiting civil commitment proceedings is entitled to protections at least as great as those afforded to a civilly committed individual and at least as great as those afforded to an

individual accused but not convicted of a crime. . . . In addition to comparing the conditions of confinement of pre-adjudication *civil* detainees to those of pre-trial *criminal* detainees, it is also relevant to compare confinement conditions of civil detainees *pre-adjudication* to conditions *post-commitment*. As the Eleventh Circuit has persuasively reasoned, ‘[i]f pretrial detainees cannot be punished because they have not yet been convicted, [citing *Bell*], then [civil] detainees cannot be subjected to conditions of confinement substantially worse than they would face upon commitment.’ *Lynch*, 744 F.2d at 1461. Or, to put it more colorfully, purgatory cannot be worse than hell. Therefore when an individual awaiting SVPA adjudication is detained under conditions more restrictive than those the individual would face following SVPA commitment, we presume the treatment is punitive. . . . In sum, a civil detainee awaiting adjudication is entitled to conditions of confinement that are not punitive. . . . With respect to an individual confined awaiting adjudication under civil process, a presumption of punitive conditions arises where the individual is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held, or where the individual is detained under conditions more restrictive than those he or she would face upon commitment. Finally, to prevail on a Fourteenth Amendment claim regarding conditions of confinement, the confined individual need not prove ‘deliberate indifference’ on the part of government officials.”).

There is also some disagreement among the Circuits as to when the Fourth Amendment or arrest context ends and the Fourteenth Amendment pre-trial detainee context begins. *See e.g., Hicks v. Moore*, 422 F.3d 1246, 1254 n.7 (11th Cir. 2005)(“‘Claims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment’s Due Process Clause,’ and require a showing of deliberate indifference to a substantial risk of serious harm. . . .Plaintiff asserts protection under the Fourth Amendment standard, which is commonly an easier standard for a plaintiff to meet. At the time of the fingerprinting, Plaintiff had already been arrested, delivered to the Jail, and had begun--but not completed--the booking process. The original arresting officer had turned Plaintiff over to jailers, and he was not present during and did not participate in the events underlying the complaint. The precise point at which a seizure ends (for purposes of Fourth Amendment coverage) and at which pretrial detention begins (governed until a conviction by the Fourteenth Amendment) is not settled in this Circuit. We underline that Defendants never argue that the strip search or fingerprinting was separate from Plaintiff’s seizure; so we--will assume (for this case) Plaintiff was still being seized and--analyze the claim under the Fourth Amendment.”); *Bryant v. City*

of New York, 404 F.3d 128, 136 (2d Cir. 2005) (“The Fourth Amendment, which applies to the states through the Fourteenth Amendment. . . prohibits ‘unreasonable . . . seizures,’ U.S. Const. amend IV. Indisputably, an arrest is a seizure. Further, although plaintiffs would have us rule that a ‘seizure’ within the meaning of the Fourth Amendment consists only of the initial act of physical restraint, and nothing thereafter . . . , it is well established that the Fourth Amendment governs the procedures applied during some period following an arrest. . . . Accordingly, given that plaintiffs complain that defendants’ failure to issue them desk appearance tickets unconstitutionally prolonged their respective periods of postarrest detention, we turn to Fourth Amendment principles.”); ***Boone v. Spurgess***, 385 F.3d 923, 933, 934 (6th Cir. 2004) (“An allegation by Boone that Moyer had used excessive force against him after his arrest would therefore be a Fourth Amendment question: was the continuing seizure of Boone reasonable? A seizure can be ‘unreasonable’ for any number of reasons, and the guarantee of reasonableness in the manner of a seizure does not seem to allow for a distinction between a claim that an officer used excessive force and a claim that the same officer denied medical care to a detainee. In *Graham* itself, the excessive force claim was partially based on the officers’ refusal to provide medical care to a handcuffed suspect suffering from a diabetic attack. . . At least one circuit has therefore applied the Fourth Amendment’s guarantee of ‘reasonable’ seizures to a claim that police failed to provide adequate medical care to a suspect in their custody. *See Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 595-96 (7th Cir.1997). *But see Barrie v. Grand County*, 119 F.3d 862, 865-69 (10th Cir.1997). None of our prior cases speak directly to this issue, although we have in the past used the Fourteenth Amendment even where the suspect was still technically “seized” under the continuing seizure doctrine, without noting the conflict. *See, e.g., Weaver*, 340 F.3d at 410; *Lily v. Watkins*, 273 F.3d 682, 685-86 (6th Cir.2001). District courts in the circuit have split on the issue. *Compare Estate of Owensby v. City of Cincinnati*, No. 1:01-CV-00769, 2004 U.S. Dist. LEXIS 9444, *42-*60 (S.D.Ohio May 19, 2004) (using substantive due process) *with Alexander v. Beale St. Blues Co.*, 108 F.Supp.2d 934, 940-41 (W.D.Tenn.1999) (using reasonableness standard and relying on *Estate of Phillips*, 123 F.3d at 595-96). Ultimately, there seems to be no logical distinction between excessive force claims and denial of medical care claims when determining the applicability of the Fourth Amendment. Because we conclude that under either standard, Boone has not made out a claim, we do not decide this issue, but instead reserve it for a more appropriate case.”); ***Garrett v. Athens-Clarke County***, 378 F.3d 1274, 1279 n.11 (11th Cir. 2004) (“Defendants argue we should analyze the excessive force claims under the rubric of the Fourteenth Amendment, not the Fourth Amendment. We disagree. The excessive force claims arise from

events happening in the course of the arrest. . . . Although the line is not always clear as to when an arrest ends and pretrial detention begins, the facts here fall on the arrest end. *See Gutierrez v. City of San Antonio*, 139 F.3d 441, 452 (5th Cir.1998) (stating Fourteenth Amendment analysis does not begin until "after the incidents of arrest are completed, after the plaintiff has been released from the arresting officer's custody, and after the plaintiff has been in detention awaiting trial for a significant period of time") (quotation and citation omitted.); *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002) ("Although the Supreme Court has not expressly decided whether the Fourth Amendment's prohibition on unreasonable searches and seizures continues to protect individuals during pretrial detention, . . . we have determined that the Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention. . . . *Graham* therefore explicates the standards applicable to a pretrial detention excessive force claim in this circuit."); *Phelps v. Coy*, 286 F.3d 295, 299, 300 (6th Cir. 2002) ("The question of which amendment supplies Phelps's rights is not merely academic, for the standards of liability vary significantly according to which amendment applies. . . . Which amendment applies depends on the status of the plaintiff at the time of the incident, whether free citizen, convicted prisoner, or something in between. . . . If the plaintiff was a free person at the time of the incident and the use of force occurred in the course of an arrest or other seizure of the plaintiff, the plaintiff's claim arises under the Fourth Amendment and its reasonableness standard For a plaintiff who was a convicted prisoner at the time of the incident, the Eighth Amendment sets the standard for an excessive force claim. . . . Finally, if a plaintiff is not in a situation where his rights are governed by the particular provisions of the Fourth or Eighth Amendments, the more generally applicable due process clause of the Fourteenth Amendment still provides the individual some protection against physical abuse by officials Coy contends that the Fourth Amendment does not apply to Phelps's case because Phelps had already been arrested when the incident took place. Our cases refute the idea that the protection of the Fourth Amendment disappears so suddenly. At the time of the incident, Phelps was still in the custody of Coy and Stutes, the arresting officers. Stutes was booking Phelps when he asked Phelps to raise his foot, and this was the gesture which Coy mistook for aggression. After the incident, Phelps was booked and released, rather than being incarcerated as a pretrial detainee. We have explicitly held that the Fourth Amendment reasonableness standard governs throughout the seizure of a person. . . . Whatever arguments can be made about pretrial detainees' rights are beside the point in this case, in which the plaintiff was still in the custody of the arresting officers and was never incarcerated. The 'murky area' does not begin until the protection of the Fourth Amendment ends,

and our precedent establishes that an arrestee in the custody of the arresting officers is still sheltered by the Fourth Amendment.”); *Fontana v. Haskin*, 262 F.3d 871, 878, 879 & n.5 (9th Cir. 2001) (“At the outset, we make two related points about the scope of the Fourth Amendment. (1) Fontana’s claim is a Fourth Amendment claim for unreasonable seizure and intrusion on one’s bodily integrity, and (2) the Fourth Amendment protects a criminal defendant after arrest on the trip to the police station. First, even though this case does not involve excessive force in the traditional sense, it still falls within the Fourth Amendment. The Fourth Amendment’s requirement that a seizure be reasonable prohibits more than the unnecessary strike of a nightstick, sting of a bullet, and thud of a boot. . . . Second, we have held that ‘once a seizure has occurred, it continues throughout the time the arrestee is in the custody of the arresting officers.... Therefore, excessive use of force by a law enforcement officer in the course of transporting an arrestee gives rise to a section 1983 claim based upon a violation of the Fourth Amendment.’ *Robins v. Harum*, 773 F.2d 1004, 1010 (9th Cir.1985). . . . We note that the circuits are split on this issue. *Compare Wilson v. Spain*, 209 F.3d 713, 715-16 (8th Cir.2000) (adopting continuing seizure approach); *United States v. Johnstone*, 107 F.3d 200, 206-07 (3d Cir.1997) (same), and *Frohman v. Wayne*, 958 F.2d 1024, 1026 (10th Cir.1992) (same), and *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir.1989) (same), and *McDowell v. Rogers*, 863 F.2d 1302, 1306 (6th Cir.1988), with *Riley v. Dorton*, 115 F.3d 1159, 1164 (4th Cir.1997) (declining to adopt a ‘continuing seizure’ conception of the Fourth Amendment, and listing cases from circuits rejecting and adopting the rule), and *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir.1996) (analyzing claims of pretrial detainees under Fourteenth Amendment’s due process clause), and *Brothers v. Klevenhagen*, 28 F.3d 452, 456 (5th Cir.1994) (same), and *Wilkins v. May*, 872 F.2d 190 (7th Cir.1989) (same).”); *Wilson v. Spain*, 209 F.3d 713, 715 & n.2 (8th Cir. 2000) (“Between arrest and sentencing lies something of a legal twilight zone. The Supreme Court has left open the question of how to analyze a claim concerning the use of excessive force by law enforcement ‘beyond the point at which arrest ends and pretrial detention begins,’ *Graham*, 490 U.S. at 395 n. 10, and the circuits are split. . . . Some circuits hold that after the act of arrest, substantive due process is the proper constitutional provision because the Fourth Amendment is no longer relevant. See *Riley v. Dorton*, 115 F.3d 1159, 1161-64 (4th Cir.) (en banc), cert. denied, 522 U.S. 1030 (1997); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir.1996); *Wilkins v. May*, 872 F.2d 190, 192-95 (7th Cir.), cert. denied, 493 U.S. 1026 (1989). Other circuits hold that the Fourth Amendment applies until an individual arrested without a warrant appears before a neutral magistrate for arraignment or for a probable cause hearing, or until the arrestee leaves the joint or sole custody of the arresting officer

or officers. See *Barrie v. Grand County*, 119 F.3d 862, 866 (10th Cir.1997); *Pierce v. Multnomah County*, 76 F.3d 1032, 1042-43 (9th Cir.), *cert. denied*, 519 U.S. 1006 (1996); *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir.1989); *McDowell v. Rogers*, 863 F.2d 1302, 1306-07 (6th Cir.1988). The Fifth Circuit, while generally taking the position that substantive due process applies after the act of arrest, see *Valencia v. Wiggins*, 981 F.2d 1440, 1443-45 (5th Cir.), *cert. denied*, 509 U.S. 905 (1993), has concluded that the relevant constitutional provisions overlap and blur in certain factual contexts. See *Petta v. Rivera*, 143 F.3d 895, 910-914 (5th Cir.1998) (noting that Fourth Amendment standards are sometimes used in analyzing claims technically governed by substantive due process). . . . This Court previously has applied the Fourth Amendment to situations very similar to this case. In *Moore v. Novak*, 146 F.3d 531 (8th Cir.1998), law enforcement officers at a jail used force against an arrestee who was being violent and disruptive during the booking process. See *id.* at 532-33. We held that the district court appropriately applied Fourth Amendment standards to Moore's excessive-force claims. See *id.* at 535. Similarly, in *Mayard v. Hopwood*, 105 F.3d 1226 (8th Cir.1997), we applied Fourth Amendment standards not only to the act of arrest, but also to use of force against an arrestee who was restrained in the back of a police car. See *id.* at 1228. We therefore shall use the Fourth Amendment to analyze Wilson's federal claims. In doing so, we observe that if Wilson cannot win his case under Fourth Amendment standards, it is a certainty he cannot win it under the seemingly more burdensome, and clearly no less burdensome, standards that must be met to establish a Fourteenth Amendment substantive due process claim.”); *Bornstad v. Honey Brook Township*, No. C.A.03-CV-3822, 2005 WL 2212359, at *19 n.47 (E.D. Pa. Sept. 9, 2005) (“Some courts have evaluated a claim for failure to render medical assistance during the course of an arrest using a Fourth Amendment excessive force analysis. *Price*, 990 F.Supp. at 1241 n. 22. Here, Plaintiff does not argue that the Defendants' failure to offer medical assistance constituted excessive force. Rather, he relies solely on the protections afforded by the Fourteenth Amendment.”); *Calhoun v. Thomas*, 360 F.Supp.2d 1264, 1271-74 (M.D. Ala. 2005) (“[W]hile it is clear that Calhoun had already been ‘seized’ and, for all intents and purposes, arrested at the time of the alleged abuses, it is equally plain that he had not yet acquired the status of a pretrial detainee. As a formal matter, Calhoun had not yet been officially arrested at the time the alleged abuses occurred. In addition, he was in the custody of the officers who eventually arrested him at all times during the interrogation process. He had not been booked into the Pike County Jail, and had not yet made an initial appearance before a judge. . . Furthermore, at that point in time, Calhoun had not been charged with any crime. Thus, the alleged application of excessive force in this case occurred while

Calhoun was in a 'legal twilight zone,' the legal implications of which were left unclear by *Graham*. . . Since *Graham* was decided, lower courts have grappled with the issue of which constitutional provision provides protection from excessive force during this period of detention following an arrest or seizure, but prior to a judicial determination of probable cause. . . While some federal appellate courts have continued to apply the Fourteenth Amendment Due Process Clause to excessive force claims occurring during this post-arrest, pre-custody time period, a number of appellate courts have applied the Fourth Amendment to incidents of excessive force occurring after the moment of arrest by adopting the 'continuing seizure' approach to defining when seizure ends and pretrial detention begins. Under this analysis, a Fourth Amendment seizure is treated as extending beyond the actual moment of arrest to the ensuing period of intermittent custody in the hands of the arresting officers. [citing cases] The Eleventh Circuit Court of Appeals has not explicitly adopted this 'continuing seizure' test. However, it has indirectly countenanced the application of the Fourth Amendment to post-arrest, pre-detention excessive-force claims in several cases. [discussing cases] . . . Most recently, the Eleventh Circuit touched upon the issue in *Garrett v. Athens-Clarke County*, 378 F.3d 1274 (11th Cir.2004), another § 983 excessive-force case alleging a Fourth Amendment violation of an arrestee's rights. As in *Cottrell*, the arrestee in *Garrett* died from positional asphyxia. In this case, arresting officers had pepper-sprayed him and bound his feet and ankles together during the course of arresting him. He died while lying in the road behind the squad car, moments after he had been physically subdued. In noting that Garrett's claim was properly analyzed under the rubric of the Fourth Amendment, the court stated in a footnote, 'Although the line is not always clear as to when an arrest ends and pretrial detention begins, the facts here fall on the arrest end. See *Gutierrez v. City of San Antonio*, 139 F.3d 441, 452 (5th Cir.1998) (stating Fourteenth Amendment analysis does not begin until 'after the incidents of arrest are completed, after the plaintiff has been released from the arresting officer's custody, and after the plaintiff has been in detention awaiting trial for a significant period of time') (quotation and citation omitted).' . . . By citing to a Fifth Circuit Court of Appeals case that emphasized the specific limits of the Fourteenth Amendment in excessive-force cases, the court again implied that the Fourth Amendment provides a more appropriate framework of analysis for post-arrest, pre-detention cases. . . . Thus, the Eleventh Circuit's own case law, in addition to the case law of a number of other circuits and the Supreme Court, suggests that an analysis under the Fourth Amendment is appropriate, if not required, in post-seizure, pre-detention allegations of excessive force such as Calhoun's. Accordingly, this court finds that the Fourth Amendment is the specific constitutional right allegedly infringed by the challenged

application of force in this case.”); *Whiting v. Tunica County*, 222 F. Supp.2d 809, 822, 823 (N.D. Miss. 2002) (“Some Circuits, for example, apply the Fourth Amendment reasonableness standard to excessive force claims arising post-arrest, setting arraignment as the line of demarcation between the Fourth and Fourteenth Amendments. In these circuits, the Fourth Amendment reasonableness standard applies until the arrestee appears before a neutral magistrate for arraignment or probable cause hearing, or until the individual leaves the joint custody of the arresting officers. [citing cases] Other Circuits focus on the Due Process Clause of the Fourteenth Amendment and apply a substantive due process standard at the moment the incidents of arrest are complete. [citing cases] On facts similar to the instant case, the Eighth Circuit has applied Fourth Amendment standards to a claim of excessive force allegedly suffered by an individual in being restrained in the back of a police car post-arrest. . . . The Fifth Circuit has taken a somewhat hybrid approach. As a general rule, substantive due process applies in the Fifth Circuit after the fact of arrest. [citing cases] On these facts, the Court concludes that the Fourth Amendment applies to Whiting's claim arising out of the post-arrest events in the police car. . . . The proximity to the arrest in this case, unlike in *Valencia*, transpired so closely to the actual arrest, that, under *Graham*, the most reasoned approach is to apply the Fourth Amendment. This is especially so since Whiting was still in the custody of the arresting officer, having never left that custody.”); *Carlson v. Mordt*, No. 00 C 50252, 2002 WL 1160115, at *4, *5 (N.D.Ill. May 29, 2002) (not reported) (“The Seventh Circuit has not made clear at precisely what point an arrest ends, and pretrial detention begins. *See, e.g., Proffitt v. Ridgway*, 279 F.3d 503, 506 (7th Cir.2002) (analyzing excessive force claim under due process standard where action occurred en route to jail following arrest); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 596 (7th Cir.1997) (acknowledging struggle with the issue, and analyzing excessive force claim under Fourth Amendment where conduct in question occurred shortly after arrestee was handcuffed) . . . The court concludes that in this case, when the police dog was dropped from the attic, Carlson's arrest was still ongoing. At that time, Carlson had not been removed from his house, where he had been apprehended. The attack occurred immediately after Carlson was handcuffed, while he was still on the floor. . . . [C]onsequently the court must analyze Carlson's excessive force claim as to that incident under the Fourth Amendment.”); *Bartram v. Wolfe*, 152 F. Supp.2d 898, 910 & n.8 (S.D.W.Va. 2001) (noting that the Fourth Circuit in *Riley v. Dorton*, 115 F.3d 1159, 1161 (4th Cir.1997), rejected concept of a ‘continuing seizure’ but provided no simple rule for determining when Fourth Amendment protection ends; suggesting “[a] simple rule would be that a person is an arrestee until the person has made an initial appearance before a judicial officer,

and then the person becomes a pretrial detainee. Such a rule would have the added benefit of discouraging the use of force and intimidation by police officers in the obtaining of a statement from an accused who has not appeared in court and has not obtained counsel.”); *Hill v. Algor*, 85 F. Supp.2d 391, 402, 403 (D.N.J. 2000) (“[T]he Supreme Court [in *Graham*] left unanswered (1) the particular moment in time at which arrest or seizure ends and pretrial detention begins; and (2) whether the Fourth Amendment applies beyond arrest into the period of pretrial detention. . . . [I]t is clear from *Bell* that one who remains in detention after formal charge and while awaiting trial is a pretrial detainee subject to Due Process protection. The question now plaguing the courts of appeals, however, concerns whether the starting point of pretrial detention, as determined by the termination of a Fourth Amendment ‘seizure’, precedes post-charge detention as acknowledged in *Bell*. . . . At least three circuits have declined to extend the Fourth Amendment beyond the initial arrest or seizure. [citing cases from Fourth, Fifth and Seventh Circuits] Disagreeing with these courts, the Ninth and Tenth Circuits have applied the Fourth Amendment to post-arrest, pre-arraignment custody obtained without a warrant. [citing cases] In line with the Ninth and Tenth Circuits, the Second Circuit has concluded, ‘the Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned, or formally charged, and remains in the custody ... of the arresting officer.’ *Powell v. Gardner*, 891 F.2d 1039, 1043 (2nd Cir.1989). . . . This Court agrees with the Ninth and Tenth Circuits that a person continues to be an arrestee subject to Fourth Amendment protection through the period of post-arrest but prearraignment detention. Stated differently, this Court declines to extend pretrial detention beyond the circumstances in *Bell*, concluding that such detention does not begin until an arrestee is at least formally charged and his release or continued detainment is determined.”).

B. Note on "Deliberate Indifference"

1. *City of Canton*

In *City of Canton v. Harris*, 489 U.S. 378 (1989), the plaintiff claimed a deprivation of her right to receive necessary medical care while in police custody. She asserted a claim of municipal liability for this deprivation based on a theory of "grossly inadequate training." The plaintiff presented evidence of a policy that gave police shift commanders complete discretion to make decisions as to whether prisoners were in need of medical care, accompanied by evidence that such

commanders received no training or guidelines to assist in making such judgments. *Id.* at 382.

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

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

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

The "deliberate indifference" standard has nothing to do with the level of culpability that may be required to make out the underlying constitutional wrong, but rather has to do with what is required to establish the municipal policy as the "moving force" behind the constitutional violation. *Id.* at 388 n.8.

The Court made it clear that on remand the plaintiff would have to identify a particular deficiency in the training program and prove that the identified deficiency was the actual cause of plaintiff's constitutional injury. It would not be enough to establish that the particular officer was inadequately trained, nor that there was

negligent administration of an otherwise adequate program, nor that the conduct resulting in the injury could have been avoided by more or better training. The federal courts are not to become involved "in an endless exercise of second-guessing municipal employee-training programs." *Id.* at 390-91.

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

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

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

Thus, *City of Canton* provides a plaintiff with two different approaches to a failure-to-train case. **First**, a plaintiff may establish deliberate indifference by demonstrating a failure to train officials in a specific area where there is an obvious need for training to avoid violations of citizens' constitutional rights. **Second**, plaintiff may rely on a pattern of unconstitutional conduct so pervasive as to imply actual or constructive knowledge on the part of policymakers, whose deliberate indifference, evidenced by a failure to correct once the need for training became obvious, would be attributable to the municipality.

See, e.g., A.M. v. Luzerne County Juvenile Detention Center, 372 F.3d 572, 583 (3d Cir. 2004) (“Although this issue presents a close question on whether the Center's failure to establish a written policy and procedure for reviewing and following up on incident reports amounts to deliberate indifference, we conclude that a reasonable jury could conclude from the evidence that by failing to establish such a policy the Center disregarded an obvious consequence of its action, namely, that residents of the Center could be at risk if information gleaned from the incident reports was not reviewed and acted upon.”); *Natale v. Camden County Correctional Facility*, 318 F.3d 575, 585 (3d Cir. 2003) (“A reasonable jury could conclude that the failure to establish a policy to address the immediate medication needs of inmates with serious medical conditions creates a risk that is sufficiently obvious as to constitute deliberate indifference to those inmates' medical needs. The failure to establish such a policy is a ‘particular[ly] glaring omission’ in a program of medical care . . . PHS [Prison Health Services] ‘disregarded a known or obvious’ consequence of its actions, i.e., the likelihood that the medical conditions of some inmates may require that medication be administered within the first 72 hours of their incarceration.”); *Andrews v. Camden County*, 95 F. Supp.2d 217, 229, 230 (D.N.J. 2000) (“It is well established that in § 1983 suits, a municipality may be held liable for not having in place a policy that is necessary to safeguard the rights of its citizens, or for failure to act where inaction amounts to deliberate indifference to the rights of persons affected. . . . [I]f defendants knowingly failed to enforce the requirements that a Medical Director be in place and that medical rounds be conducted daily to visit segregated prisoners, this is evidence of reckless disregard of a condition creating an unreasonable risk of violation of inmates' Eighth Amendment rights . . .”); *DiLoreto v. Borough of Oaklyn*, 744 F. Supp. 610, 623-24 (D.N.J. 1990) (“By not creating and implementing a policy and not training its employees regarding accompanying detainees to the bathroom, the Borough has expressed deliberate indifference to the fourth amendment rights of detainees....”).

Compare Carswell v. Borough of Homestead, 381 F.3d 235, 245 (3d Cir. 2004) (“[W]e have never recognized municipal liability for a constitutional violation because of failure to equip police officers with non-lethal weapons. We decline to do so on the record before us. . . . Mandating the type of equipment that police officers might find useful in the performance of their myriad duties in frequently unanticipated circumstances is a formidable task indeed. It is better assigned to municipalities than federal courts. We conclude that the judgment as a matter of law in favor of the Borough and Chief Zuger as well as that in favor of Snyder must be affirmed.”) *with Carswell v. Borough of Homestead*, 381 F.3d 235, 246-50 (3d Cir.

2004) (McKee, J., concurring in part and dissenting in part) (“As the majority ably discusses, the fact that a jury could conclude that Snyder used excessive force to subdue Carswell and thus violated Carswell's Fourth Amendment rights is not enough, standing alone, to deprive him of qualified immunity. It is, however, enough to support a finding that the use of excessive force resulted from the Borough's policy and custom of providing police officers only with guns, i.e. lethal weapons.[footnote omitted] The jury could conclude from Snyder's testimony that, at the very moment he fired the fatal shot, he believed that he was using excessive deadly force where non-lethal force would suffice. Indeed, if the jury accepted his testimony as true, it would have been hard to conclude anything else. The jury could therefore reason that the officer had to resort to excessive force solely because the Borough left him no alternative but to use his gun in a situation where non-lethal force could reasonably have been employed to subdue Carswell. . . . I believe that a jury could reasonably conclude that this record establishes such deliberate indifference because the Borough's training left Officer Snyder with no reasonable alternative to the use of deadly force. . . . Police Chief Zuger compiled the policy manual for the Borough's police department pursuant to his authority as police chief. . . The manual contains the Borough's official policy for the police department, and all police officers in the Borough were required to familiarize themselves with it and attest to having read it. It prescribes an official policy of ‘progressive force’ for the Borough's police, stating that ‘[t]he use of force will be progressive in nature, and may include verbal, physical force, the use of non-lethal weapons or any other means at the officer's disposal, provided they are reasonable under the circumstances.’ . . Chief Zuger testified further that ‘[t]he policy of the Homestead Police Department is to use only the amount of force which is necessary in making an arrest or subduing an attacker. In all cases, this will be the minimum amount of force that is necessary.’ . . . [footnote omitted] However, as the majority notes, the Borough provided only guns to its officers. It did not equip them with any non-lethal weapons. Rather, an officer had to request any non-lethal weapon he/she might wish to carry and the request had to be approved by Zuger. If the request was approved, the officer then had to undergo additional training with the new weapon and become certified to use it. . . Although Chief Zuger was not asked about training in lethal force, the fact that officers were equipped with a gun and had to be trained in any approved non-lethal weapon they may have carried certainly supports the inference that the Borough only trained officers in the use of lethal force unless the Borough approved an individual request for a non-lethal weapon. It is obviously foreseeable that an officer who is equipped only with a lethal weapon, and trained only in the use of lethal force, will sooner or later have to resort to lethal force in situations that officer believes could be safely

handled using only non-lethal force under the Borough's own 'progressive force' policy. This record therefore presents that 'narrow range of circumstances, [where] the violation of federal rights [is] a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.' . . . [D]efining our inquiry in terms of whether the Constitution creates an approved 'equipment list' for police is both misleading and counterproductive. That is simply not the issue, and that formulation of the issue obfuscates our inquiry rather than advancing it. Given the duties of a police officer, it was certainly foreseeable that the Borough's policy of equipping officers only with guns and training them only in the use of deadly force would sooner or later result in the use of unjustifiable deadly force. . . . The result is. . . not a mandated equipment list, but a mandated alternative to using deadly force in those situations where an officer does not believe it is necessary to use deadly force. . . . Moreover, interpreting the Fourth Amendment as requiring municipalities to provide reasonable alternatives to the use of deadly force imposes no undue burden. In fact, here, it would do nothing more than effectuate the Borough's own announced policy of 'progressive force.' My colleagues imply that the Borough can not be liable under a failure to train theory because its police officers were properly trained in the use of deadly force. . . . However, plaintiff never argued that liability should be imposed on the basis of a failure to train in the use of deadly force. Rather, plaintiff argues that the Borough should be liable because its policy of requiring training only in using deadly force and equipping officers only with a lethal weapon, caused Officer Snyder to use lethal force even though he did not think it reasonable or necessary to do so. Moreover, as I have already noted, given the duties of a police officer, it does not require a 'pattern of underlying constitutional violations' to alert the Borough to the fact that its policies would cause police to unnecessarily use deadly force. Rather, as I have argued above, this record satisfies the teachings of *Brown* because plaintiffs have established that 'narrow range of circumstances, [where] a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.' . . . Thus, even without a pattern of abuse, '[t]he likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision ... reflected "deliberate indifference" to the obvious consequence of the policymakers' choice.'").

In *Beck v. City of Pittsburgh*, 89 F.3d 966, 973-74 (3d Cir. 1996), "the plaintiff offered in evidence a series of actual written civilian complaints of similar nature, most of them before and some after [the incident in question], containing

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

La v. Hayduka, 269 F. Supp.2d 566, 586 (D.N.J. 2003) ("In contrast to the blatantly damaging evidence uncovered in *Russo*, plaintiffs rely solely on the fact that the SBPD [South Brunswick Police Department] did not have a written policy regarding use of force against EDPs. To implicate a municipality, a plaintiff must 'demonstrate that, through its deliberate conduct, the municipality was the moving force behind the injury alleged.' . . . Although the officers acknowledged that they did not receive specific EDP training, Hayduka testified that he had received training regarding the practice of contacting the UMDNJ and accompanying mental health evaluators to on-site screenings. . . . Furthermore, the officers each testified that they were trained in a variety of situations and in using several methods of dealing with people of varying psychological states. When asked if he received training regarding use of force against mentally disturbed individuals, Hayduka stated he received extensive on-the-job training, as well as training on handling people with Alzheimer's Disease. . . . Officer Schwarz stated that in continuum of force training, topics included discussions of rational as well as irrational persons. . . . Moreover, unlike in *Russo*, plaintiffs have not offered any internal documentation that would establish that the SBPD was aware of a lack of training in dealing with EDPs, or that there existed the potential for rampant injustice as a result of alleged lack of training."); ***Tofano v. Reidel***, 61 F. Supp.2d 289, 306 (D.N.J. 1999) ("Plaintiff has presented absolutely nothing which would establish that Ramsey was deliberately indifferent to the rights of its citizens by failing to properly train its officers to deal with mentally unstable individuals. The record is devoid of any evidence of interactions in the past between Ramsey police officers and mentally unstable individuals which would have placed

the municipality on notice that its training was inadequate. . . In addition, nothing in the record establishes that it would have been known or ‘obvious’ to a reasonable policymaker that the training provided to Ramsey police officers concerning interaction with mentally unstable individuals would likely result in the deprivation of constitutional rights.”)

2. Statutory vs. Constitutional Standard

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

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

Id. at 841. The Court held "that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* at 847. *See also Gonzales v. Martinez*, 403 F.3d 1179, 1187 (10th Cir. 2005) (“First, Sheriff Salazar explicitly stated his Jail Administrator did not want to investigate allegations of problems at the Jail. Second, the evidence indicates the sheriff’s consistent willingness to ignore inmate complaints by attributing them to attitudes of the complainants, characterizing them as ‘troublemakers’ or ‘conjuring up’ incidents to ‘discredit’ his deputies,’ allowed him to excuse his failure to pursue the issues any further. Finally, and most astonishing, when first advised two visibly ‘upset’ female inmates accused two of his jailers of sexually assaulting them, he not only left the prisoners unprotected in the jail, but also in the custody and control of the very men accused of the assaults. When the women were removed for their protection, the decision to do so was not made by Sheriff Salazar, but by the District Attorney. None of this evidence is controverted, and its significance was seemingly ignored by the district court. Finally, we are constrained to note the district court misread *Farmer*, believing it required Ms. Gonzales to show Sheriff Salazar specifically knew Major Bob posed a substantial

risk of harm to her. Rather, the *Farmer* Court noted a prison official could not escape liability by showing although ‘he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault. . . . The undisputed evidence of the physical assaults on inmates set against the facts of Sheriff Salazar’s knowledge of reported risks to inmate health or safety, including the documented lapse of security in the control room, complaints of sexual harassment and intimidation, Dominick’s demotion for, as Sergeant Zudar characterized it, ‘a combination of things,’ as well as the presence in the record of Ms. Tefteller’s letter, which she attested was handed to Major Bob, surely raise a reasonable inference that Sheriff Salazar knew of and disregarded an excessive risk to Ms. Gonzales.”); *Parrish ex rel Lee v. Cleveland*, 372 F.3d 294, 306, 307, 309 (4th Cir. 2004) (“In the absence of particularized evidence showing that the officers actually had training or experience with the TranZport Hood and therefore were familiar with the manner in which it fit and the uses for which it was designed, it is difficult to conclude that this particular risk was obvious to the officers. Finally, and most importantly, EMT Earl, a trained medical professional, observed the placement of Lee in the van with the spit mask over his head and expressed no concern While the EMT’s presence by no means immunizes the officers from liability, the fact that a trained medical technician did not recognize the risk associated with transporting a handcuffed inebriated person wearing a spit mask strongly suggests that the risk was something less than obvious. . . . [W]e have noted that an officer’s response to a perceived risk must be more than merely negligent or simply unreasonable. . . . If a negligent response were sufficient to show deliberate indifference, the Supreme Court’s explicit decision in *Farmer* to incorporate the subjective recklessness standard of culpability from the criminal law would be effectively negated. . . . Accordingly, where the evidence shows, at most, that an officer’s response to a perceived substantial risk was unreasonable under the circumstances, a claim of deliberate indifference cannot succeed. [citing cases in support and in opposition] In short, the evidence shows that the officers took precautions that they believed (albeit erroneously) were sufficient to prevent the harm that befell Lee. There simply is no evidence in the record, in the form of contemporaneous statements or otherwise, to justify an inference that the officers subjectively recognized that their precautions would prove to be inadequate.”); *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004) (“[W]here a specific individual poses a risk to a large class of inmates, that risk can also support a finding of liability even where the particular prisoner at risk is not known in advance. . . . Greene has raised an issue of fact as to Warden Brigano’s knowledge of a risk to her safety because of her status as a vulnerable inmate and because of

Frezzell's status as a predatory inmate.”); *Taylor v. Michigan Dep't of Corrections*, 69 F.3d 76, 81 (6th Cir. 1995) (“*Farmer* makes it clear that the correct inquiry is whether he had knowledge about the substantial risk of serious harm to a particular class of persons, not whether he knew who the particular victim turned out to be.”).

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

See also Baker v. District of Columbia, 326 F.3d 1302, 1305, 1306, 1308 (D.C. Cir. 2003) (“On appeal, Baker . . . contends that the district court incorrectly analyzed his claim against the District of Columbia under *Monell* Essentially, he contends that the district court erred by confusing the ‘deliberate indifference’ required to find an underlying Eighth Amendment violation by the Virginia defendants, which does require subjective knowledge, with the ‘deliberate indifference’ required to find that the District of Columbia ignored the unconstitutional conduct of the Virginia prison officials to whom it had entrusted its prisoners, which only requires objective knowledge. He contends that under *Monell* he may state a claim against the District of Columbia based on a policy or custom without any analysis of the subjective state of mind of District of Columbia officials. The distinction between the two ‘deliberate indifference’ standards was drawn by the Supreme Court in *Collins* Accordingly, in considering whether a plaintiff has stated a claim for municipal liability, the district court must conduct a two-step inquiry . . . First, the court must determine whether the complaint states a claim for a predicate constitutional violation. . . Second, if so, then the court must determine whether the complaint states a claim that a custom or policy of the

municipality caused the violation. . . [B]ecause the district court erred by applying a subjective standard to Baker's *Monell* claim and resolution of his claim against the District of Columbia may depend on additional pleadings and discovery in light of the records of the Virginia proceedings, we reverse and remand the case to the district court.”); ***Gibson v. County of Washoe***, 290 F.3d 1175, 1188 n.8 (9th Cir. 2002) (“Because the Eighth Amendment's deliberate indifference standard looks to the subjective mental state of the person charged with violating a detainee's right to medical treatment, it--somewhat confusingly--differs from the *Canton* deliberate indifference standard, which we also apply in this opinion. The *Canton* deliberate indifference standard does not ‘turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation;’ instead it is used to determine when a municipality's omissions expose it to liability for the federal torts committed by its employees. . . . As opposed to the *Farmer* standard, which does not impose liability unless a person has actual notice of conditions that pose a substantial risk of serious harm, the *Canton* standard assigns liability even when a municipality has constructive notice that it needs to remedy its omissions in order to avoid violations of constitutional rights.”); ***Marsh v. Butler County***, 268 F.3d 1014, 1028 (11th Cir. 2001) (en banc) (“We accept that conditions in a jail facility that allow prisoners ready access to weapons, fail to provide an ability to lock down inmates, and fail to allow for surveillance of inmates pose a substantial risk of serious harm to inmates. In addition, Plaintiffs' allegations that the County received many reports of the conditions but took no remedial measures is sufficient to allege deliberate indifference to the substantial risk of serious harm faced by inmates in the Jail.”); ***Marsh v. Butler County***, 268 F.3d 1014, 1036 n.17 (11th Cir. 2001) (en banc) (“In considering the Sheriff's potential personal liability as a policymaker, we have looked at decisions involving the liability of local governments as policymakers. The local government precedents are not directly on point. The reason is that the standard for imposing policymaker liability on a local government is more favorable to plaintiffs than is the standard for imposing policymaker liability on a Sheriff or other jail official in his personal capacity in a case like this one. [citing *Farmer*] Still, the local government cases can guide us by analogy; if a local government would not be liable as a policymaker *a fortiori* there is no personal liability.”); ***Doe v. Washington County***, 150 F.3d 920, 923 (8th Cir. 1998) (noting that “the Court has not directly addressed the question of how *Monell*'s standard for municipal liability meshes with *Farmer*'s requirement of subjective knowledge.”); ***Ginest v. Bd. of County Commissioners of Carbon County***, 333 F.Supp.2d 1190, 1204 (D. Wyo. 2004) A difference exists, however, regarding *burden of proof* in those Eighth Amendment cases where, as here, the plaintiffs claim that their rights were violated

due to a supervisor's failure to train subordinates. In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court held that the 'deliberate indifference' test to determine municipal liability differs from the one applicable in individual liability cases; in municipal liability cases, there is no subjective component, and the plaintiff need only show an objective risk of injury and a failure to train. . . . In short, to win their case against Sheriff Colson, the plaintiffs need to show both an objective risk of substantial harm and subjective intent--on a par with criminal recklessness--to cause injury. To win their claim against Carbon County, however, the plaintiffs need only to show an objective risk of substantial harm and the Sheriff's failure to train staff in how to reasonably address and abate that risk."); *Vinson v. Clarke County*, 10 F. Supp.2d 1282, 1300 (S.D. Ala. 1998) ("As a preliminary matter, it is important to note that the court's inquiry into defendant Clarke County's alleged deliberate indifference cannot take the form of the traditional, subjective analysis as established in the governing case law. . . . Proving such subjective awareness on the part of a governmental entity is not practical, and, therefore, it is necessary to apply a more awkward objective analysis to the deliberate indifference factor. . . . Under this objective approach to deliberate indifference, the court must consider whether the substantial risks associated with unreasonably unsafe conditions of confinement were 'so obvious' that the county's policymakers 'can reasonably be said to have been deliberately indifferent to the need.' [citing *Canton*]"); *Earrey v. Chickasaw County*, 965 F. Supp. 870, 877 (N.D. Miss. 1997) ("The actions of governmental officials, who are fully capable of subjective deliberate indifference, serve as the basis of governmental liability for Eighth Amendment violations. While the governmental entity may only need be shown to be objectively deliberately indifferent to the known or obvious consequences of a custom or policy which does not itself violate federal law, it cannot be held liable unless the plaintiff shows that a constitutional violation has in fact occurred. In the Eighth Amendment context, in order for a violation to occur, a prison official must know 'that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it.'"); *Lowrance v. Coughlin*, 862 F. Supp. 1090, 1115 (S.D.N.Y. 1994) ("Adopting a subjective standard, the Court in *Farmer* held that a prison official may be held liable under the Eighth Amendment for acting with deliberate indifference to prisoner health or safety only if the official has actual knowledge that the prisoner faced a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. . . . The *Farmer* Court was careful to explain that this result was not inconsistent with the objective standard applied in [*City of Canton*] Under the objective test, municipal liability attaches when policymakers have actual or constructive notice of the constitutional violation.").

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

3. Jail Suicide Cases

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

See e.g., *Wever v. Lincoln County, Nebraska*, 388 F.3d 601, 607 (8th Cir. 2004) (“Wever's complaint alleges that Carmen was aware of two prior suicides in the Lincoln County jail, one occurring in 1999 while he was sheriff, and one occurring in 1996, prior to his tenure. [footnote omitted] Carmen argues that as a matter of law, one or two suicides are insufficient to put a sheriff on notice that his training and supervision is constitutionally inadequate. Under his proposed rule, a sheriff may sit idly by until at least a third inmate known to be suicidal takes a blanket from an officer and hangs himself, only then ordering his officers not to place a suicidal person in an isolation cell and hand him a blanket. We decline to so hold. We have previously stated that, in most circumstances, a single incident does not provide a supervisor with notice of deficient training or supervision However, as indicated, this calculus is not rigid, and must change depending on the seriousness of the incident and its likelihood of discovery. In *Howard*, the alleged constitutional violation was caused by an unsanitary cell. *Id.* at 136. A supervisor is not expected to be put on notice of constitutionally deficient sanitation training by a single instance of a dirty cell. But we cannot equate death with dirty cells. Our case law reflects this flexible calculus. In *Andrews*, the plaintiff sued a police chief for failing to supervise an officer who ultimately raped two women. . . We held that the chief's knowledge

of two prior complaints against the officer for making inappropriate sexual advances to women during traffic stops was sufficient to create an issue of material fact as to notice, rendering summary judgment improper. . . In some circumstances, one or two suicides may be sufficient to put a sheriff on notice that his suicide prevention training needs revision. In the present case, Wever has alleged that Carmen was placed on notice by two previous suicides, and we cannot say this is insufficient as a matter of law.”); **Woodward v. Correctional Medical Services of Illinois, Inc.**, 368 F.3d 917, 927, 928 (7th Cir. 2004) (“[W]e find that there was enough evidence for the jury to conclude that CMS's actual practice (as opposed to its written policy) towards the treatment of its mentally ill inmates was so inadequate that CMS was on notice at the time Farver was incarcerated that there was a substantial risk that he would be deprived of necessary care in violation of his Eighth Amendment rights. . . . [A] reasonable jury could find that CMS's custom of repeatedly failing to follow proper procedures led to Farver's successful suicide attempt. . . . The reality is that CMS's actual policy and practice caused its employees to be deliberately indifferent to Farver's serious health needs. . . . Finally, we cannot leave unaddressed CMS's claim that ‘the plaintiff's failure to introduce evidence of any suicide at the Lake County jail besides Farver's dooms plaintiff's efforts to prove a custom or practice.’ CMS does not get a ‘one free suicide’ pass. The Supreme Court has expressly acknowledged that evidence of a single violation of federal rights can trigger municipal liability if the violation was a ‘highly predictable consequence’ of the municipality's failure to act. . . Here, there was a direct link between CMS's policies and Farver's suicide. That no one in the past committed suicide simply shows that CMS was fortunate, not that it wasn't deliberately indifferent. Moreover, we note that CMS's liability is based on much more than a single instance of flawed conduct, such as one poorly trained nurse. It was based on repeated failures to ensure Farver's safety--by Dean, by Mollner, and by Dr. Fernando--as well as a culture that permitted and condoned violations of policies that were designed to protect inmates like Farver.”); **Cabrales v. County of Los Angeles**, 864 F.2d 1454, 1461 (9th Cir. 1988) (in detainee suicide case, plaintiff prevailed against County on ground that County's policy of understaffing its jail with psychiatrists was itself an unconstitutional policy or custom of deliberate indifference to inmates' medical and psychological needs), *vacated*, 490 U.S. 1087 (1989) (remanded for consideration in light of **City of Canton v. Harris**, 109 S. Ct. 1197 (1989)), 886 F.2d 235 (9th Cir. 1989) (reinstating prior decision) (**City of Canton** does not alter previous opinion which was based on finding of unconstitutional policy), *cert. denied*, 494 U.S. 1091 (1990); **Wilson v. Genessee County**, No. 00-CV73637, 2002 WL 745975, at *11, *14 (E.D.Mich. March 26, 2002) (not reported) (“[A] reasonable juror could find that the City of

Flint's policy of verbally communicating an individual's suicide risk is inadequate and/or that the City of Flint does not adequately train its police officers regarding its policy, that this failure was the result of the City of Flint's deliberate indifference to Wilson's right to be reasonably protected against taking his own life, and that the inadequacies were closely related to Wilson's eventual suicide. . . . In essence, this case is about a failure to communicate and/or to have policies in place for adequately accessing and communicating an individual's suicide risk at all levels, and especially when transporting an individual from one facility to another. The evidence of record is sufficient to have this issue submitted to a jury to determine whether the individual defendant's actions, and the City of Flint and Genesee County's policies and training amounted to deliberate indifference to Wilson's serious medical need to be adequately screened for suicidal tendencies and to be protected against taking his own life.”).

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

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

See also *Evans v. City of Marlin*, 986 F.2d 104, 108 (5th Cir. 1993) (City's failure to train police personnel to detect potential suicidal impulses did not give rise to deprivation of constitutional rights of prisoner who committed suicide in city jail cell, absent any manifest signs that prisoner was danger to herself.); *Rhyne v. Henderson County*, 973 F.2d 386, 393 (5th Cir. 1992) (evidence was insufficient to support finding that county acted with deliberate indifference in adopting policies regarding care of pretrial detainees known to be suicidal); *Colburn v. Upper Darby Township*, 946 F.2d 1017, 1030 (3d Cir. 1991) (*Colburn II*) ("In a prison suicide case . . . plaintiff must (1) identify specific training not provided that could reasonably be expected to prevent the suicide that occurred, and (2) must demonstrate

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

A common problem for plaintiffs attempting to impose § 1983 liability on a government entity in jail suicide cases is making out the underlying constitutional deprivation that is necessary before a remedy will be available against any defendant under § 1983. *See, e.g., Gray v. City of Detroit*, 399 F.3d 612, 616 (6th Cir. 2005) ("Barber confirmed an earlier holding that there is no general constitutional right of detainees to receive suicide screenings or to be placed in suicide safe facilities, unless the detainee has somehow demonstrated a strong likelihood of committing suicide. . . . Here, plaintiff has presented no evidence to support his claim that Officer Gross actually knew that Gray was at risk of committing suicide. All of Gray's complaints had been of a physical nature, and none of his behavior had been self-injurious. He did not demonstrate a 'strong likelihood' of committing suicide. The only conceivable way that any individual officer could have possibly concluded that Gray was a suicide risk was to have obtained and appropriately pieced together the knowledge of every other officer involved in the case. And as the District Court said, '[t]he test for deliberate indifference is a subjective test ... not an objective test or collective knowledge.' Because Gray's conduct and statements did not give rise to a constitutional duty on the part of his jailors to screen or monitor him for suicide,

there is no evidence that Officer Gross violated Gray's constitutional rights in any way.”); *Crocker v. County of Macomb*, No. 03-2423, 2005 WL 19473, at *4, *5 (6th Cir. Jan. 4, 2005) (unpublished) (“Jail officials cannot be charged with knowledge of a particular detainee's high suicide risk based solely on the fact that the detainee fits a profile of individuals who purportedly are more likely to commit suicide than those who do not fit the profile in all respects. This is particularly true since if past suicide attempts are factored out, the profile described by plaintiff casts a very wide net, and there is no evidence that the majority of detainees who fit the profile in those respects that would be apparent to an observer are at risk for attempting suicide. Thus, absent evidence that any individual defendant knew Tarzwell had a serious medical need manifesting itself in suicidal tendencies or that such need was obvious, plaintiff cannot prevail on the Fourteenth Amendment claim against the individual defendants under the *Estelle* analysis. As in another jail suicide case decided by this court, because there is no evidence that the individual defendants knew Tarzwell was at risk of attempting suicide, ‘[t]he “right” that is truly at issue here is the right of a detainee to be screened correctly for suicidal tendencies and the right to have steps taken that would have prevented suicide.’ . . . Indeed, plaintiff identifies the right which forms the basis for the alleged constitutional violation in this manner by arguing that although Officer Murphy knew that Tarzwell met certain criteria for a suicide risk, Murphy failed to take steps to confirm the risk, such as checking law enforcement records or asking Tarzwell about his suicidal ideation, and did not conduct any screening of Tarzwell when he was delivered to the jail. We found in *Danese* that a right to be screened correctly for suicidal tendencies and to have steps taken to prevent suicide was not clearly established as of the date of that decision, noting that, ‘[i]t is one thing to ignore someone who has a serious injury and is asking for medical help; it is another to be required to screen prisoners correctly to find out if they need help.’ . . . Plaintiff has not cited any case decided by the United States Supreme Court or by this Circuit since *Danese* finding a constitutional right to be screened for suicidal tendencies on the part of either a pretrial detainee or a prisoner entitled to the protections of the Eighth Amendment. Consistent with our prior decisions addressing this issue, we hold that the individual defendants' failure to screen Tarzwell for suicidal tendencies or ideation and to take measures that would have prevented his suicide are not tantamount to punishment under the circumstances of this case and cannot serve as the basis for imposing liability on the individual defendants under § 1983. Accordingly, the district court did not err by granting summary judgment in favor of the individual defendants.”); *Matos ex rel Matos v. O'Sullivan*, 335 F.3d 553, 557 (7th Cir.2003) (defendant must have had actual knowledge of detainee's risk of suicide); *Cagle v. Sutherland*,

334 F.3d 980, 987(11th Cir. 2003) (per curiam) (“Cagle concedes, in her brief, that consent decrees can neither create nor expand constitutional rights. She says, however, that the consent decree can still be relevant to a section 1983 action. She claims that the *Praytor* order put Winston County on notice of the understaffing problem and, in this sense, that the violation of the order establishes deliberate indifference to the risk of jail suicide. We disagree. . . . The *Praytor* order derived from a jail-condition class action. Suicide was no factor in that litigation. The word ‘suicide’ appears nowhere in the *Praytor* complaint and nowhere in the *Praytor* order. Sheriff Sutherland's requests for an additional nighttime jailer were based on his concerns about escape. His requests make no mention of a risk of suicide. These facts fall short of establishing that the County was aware of a strong likelihood of suicide. In addition, no evidence shows that, before Butler, any prisoner had ever committed suicide in Winston County Jail. Nothing in the record required County officials to conclude that commonly prisoners in the Winston County Jail were substantially likely to attempt suicide.”); ***Boncher v. Brown County***, 272 F.3d 484, 488 (7th Cir. 2001) (“The plaintiff is left to argue that the defendants exhibited deliberate indifference to suicide risk by failing to train the intake officers or adopt a better intake questionnaire. It is not clear what good the better training would have done, at least in this case; the basic judgment the intake officers had to make was whether Boncher was joking, and that is not a judgment likely to be much assisted by special training. . . . The form is defective, but because of a rather subtle problem--the failure to specify probing follow-up questions for inmates who indicate mental or emotional problems. That is a serious deficiency and one that ought to be corrected, if only to shield the defendants from liability for commonlaw negligence in suits under state law. But like other courts to consider the issue, we don't see how such a slip, at worst careless, could be proof evidence of something much worse, a deliberate failure to deal with a known high risk of death.”); ***Payne v. Churchich***, 161 F.3d 1030, 1041, 1042 (7th Cir. 1998) (“When the § 1983 claim is based on a jail suicide, the degree of protection accorded a detainee is the same that an inmate receives when raising an inadequate medical attention claim under the Eighth Amendment-- deliberate indifference. . . . [O]ur cases dealing with § 1983 claims based on a pretrial detainee's suicide have held that a state actor like Deputy Papa can be held liable for a detainee's suicide only if the defendant was deliberately indifferent to a substantial suicide risk. . . . We have held that knowledge of a substantial risk of suicide can be inferred from the obviousness of the risk. . . . However, we do not believe that the allegations in the complaint about Mr. Hicks' conduct and tattoo message, without more, indicate an obvious, substantial risk of suicide. There is no allegation of Mr. Hicks' suicidal tendencies, no claim or

evidence of past suicide attempts or warnings from family members of a mental disturbance and suicidal condition. . .None of the facts alleged in this case--Mr. Hicks' intoxication, cursing and tattoo--raises an issue of whether Deputy Papa had knowledge of, or even particular reason to suspect, a substantial risk of suicide on Mr. Hicks' part."); *Liebe v. Norton*, 157 F.3d 574, 578 (8th Cir. 1998) ("The facts of this case are strikingly similar to those in *Rellergert*. In both cases, the prisons had policies in place for the protection of inmates classified as suicide risks. Tragically, in both cases, despite those preventive policies, inmates were successful in committing suicide. . . . While Norton may have been negligent in not checking on Liebe more often, or in failing to notice the exposed electrical conduit in the temporary holding cell, we cannot say as a matter of law that his actions were indifferent. To the contrary, Norton's actions constituted affirmative, deliberate steps to prevent Liebe's suicide. Despite Norton's ultimate failure to prevent that suicide, Norton did not act with deliberate indifference."); *Barrie v. Grand County*, 119 F.3d 862, 868, 869 (10th Cir. 1997) ("[W]e conclude that in this circuit a prisoner, whether he be an inmate in a penal institution after conviction or a pre-trial detainee in a county jail, does not have a claim against his custodian for failure to provide adequate medical attention unless the custodian knows of the risk involved, and is 'deliberately indifferent' thereto. Whether the detainee has been taken before a magistrate judge or other judicial officer to determine the legality of his arrest is not material, the custodian's duty is the same in either event. And the same standard applies to a claim based on jail suicide, i.e., the custodian must be 'deliberately indifferent' to a substantial risk of suicide."); *Estate of Hocker by Hocker v. Walsh*, 22 F.3d 995, 1000 (10th Cir. 1994) ("Here, no facts suggest that the Detention Center staff had knowledge of the specific risk that Ms. Hocker would commit suicide. Nor do the facts suggest that Ms. Hocker's risk of suicide was so substantial or pervasive that knowledge can be inferred. Though the staff obviously knew that Ms. Hocker was intoxicated or under the influence of drugs, intoxication with its accompanying incoherence does not, by itself, give the Detention Center staff knowledge that Ms. Hocker posed a specific risk of suicide." footnote omitted); *Bowen v. City of Manchester*, 966 F.2d 13, 18, 19 (1st Cir. 1992) ("In cases involving the psychological needs of a potentially suicidal detainee, courts have found officials to have acted with deliberate indifference only when the detainee shows clear signs of suicidal tendencies and the officials had actual knowledge, or were willfully blind, to the large risk that the detainee would take his life."); *Manarite v. City of Springfield*, 957 F.2d 953, 954 (1st Cir. 1992) ("where police departments have promulgated commonplace suicide-prevention policies, courts ordinarily have found supervisors not liable . . . even if officers did not always follow the department's

policy and even if other, better policies might have diminished suicide risks."), *cert. denied*, 113 S. Ct. 113 (1992); **Hall v. Ryan**, 957 F.2d 402, 405 (7th Cir. 1992) (prison officials not entitled to qualified immunity if they actually knew inmate was serious suicide risk, yet failed to take appropriate steps to protect inmate); **Schmelz v. Monroe County**, 954 F.2d 1540, 1545 (11th Cir. 1992) (no liability for suicide of prisoner who had never threatened or attempted suicide and who was never viewed as suicide risk); **Barber v. City of Salem**, 953 F.2d 232, 239-40 (6th Cir. 1992) ("[W]e adopt the Eleventh Circuit's holding in **Popham** that the proper inquiry concerning the liability of a City and its employees in both their official and individual capacities under section 1983 for a jail detainee's suicide is: whether the decedent showed a strong likelihood that he would attempt to take his own life in such a manner that failure to take adequate precautions amounted to deliberate indifference to the decedent's serious medical needs."); **Colburn**, *supra*, 946 F.2d at 1023, ("[P]laintiff in a prison suicide case has the burden of establishing three elements: (1) the detainee had a 'particular vulnerability to suicide,' (2) the custodial officer or officers knew or should have known of that vulnerability, and (3) those officers 'acted with reckless indifference' to the detainee's particular vulnerability."); **Elliott v. Cheshire County, N.H.**, 940 F.2d 7, 10-11 (1st Cir. 1991) ("The key to deliberate indifference in a prison suicide case is whether the defendants knew, or reasonably should have known, of the detainee's suicidal tendencies Moreover, the risk must be 'large,' . . . and 'strong,' . . . in order for constitutional (as opposed to tort) liability to attach." cites omitted); **Popham v. City of Talladega**, 908 F.2d 1561, 1564 (11th Cir. 1990) (absent knowledge of detainee's suicidal tendencies, cases have consistently held failure to prevent suicide does not constitute deliberate indifference); **Burns v. City of Galveston, Texas**, 905 F.2d 100, 104 (5th Cir. 1990) (constitutional right of detainees to adequate medical care does not include absolute right to psychological screening in order to detect suicidal tendencies); **Belcher v. Oliver**, 898 F.2d 32, 36 (4th Cir. 1990) (plaintiffs' attempt to turn case into one for inadequate training is unavailing where no underlying constitutional infraction); **Williams v. Borough of West Chester**, 891 F.2d 458, 464-467 (3d Cir. 1990) (not enough evidence to prove that officers knew of arrestee's suicidal tendencies).

See also Hare v. City of Corinth, 949 F. Supp. 456, 462-63 (N.D. Miss. 1996) (on remand) ("The subjective nature of the *Farmer* and *Hare IV* analyses are relevant when determining whether or not the officer had actual knowledge of the existence of the risk, but not at all dispositive of whether or not the risk itself was in fact a substantial one of serious harm. An officer cannot escape liability by being actually aware of an objectively substantial risk of serious harm which he

subjectively believes is not substantial. To do so would only protect detainees and inmates from risks of harm that prison officials deem substantial. This portion of the deliberate indifference inquiry focuses upon subjective knowledge, not subjective seriousness."), *rev'd on other grounds*, 135 F.3d 320 (5th Cir. 1998).

See also Cook v. Sheriff of Monroe County, 402 F.3d 1092, 1115-17 (11th Cir. 2005) (“[T]o succeed on her § 1983 claim, Cook must establish that the Sheriff himself, as representative of Monroe County, was deliberately indifferent to the possibility of Tessier's suicide, since neither *respondeat superior* nor vicarious liability exists under § 1983. . . . Accordingly, ‘our first inquiry ... is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.’ . . . After thorough review of the entire record in this case, we conclude that there is not. Cook in essence offers two municipal policies or customs that she believes establish such a link: first, the County's allegedly deficient procedures for processing and responding to inmate medical requests; and second, the County's failure to adequately train MCDC employees in suicide prevention. However, we need look no further than Cook's failure to establish that the County should have foreseen Tessier's suicide to conclude that any deficiencies that may exist in MCDC policies do not rise to the level of deliberate indifference. Foreseeability, for the purpose of establishing deliberate indifference, requires that the defendant have had ‘subjective knowledge of a risk of serious harm,’ meaning, in a prison suicide case, knowledge of ‘a strong likelihood rather than a mere possibility that the self-infliction of harm will occur.’ . . . Moreover, because *respondeat superior* liability does not attach under § 1983, the defendant himself--in this case, the Sheriff (as representative of the County)--must have had this knowledge. The record in this case is devoid of any evidence that the Sheriff had any such knowledge. As we have explained previously, ‘[n]o matter how defendants' actions might be viewed, the law of this circuit makes clear that they cannot be liable under § 1983 for the suicide of a prisoner who never had threatened or attempted suicide and who had never been considered a suicide risk.’ . . . Cook has presented no evidence that Tessier had previously attempted suicide or had ever been considered a suicide risk. . . . Cook argues that the MCDC's allegedly defective procedures amount to ‘deliberate indifference toward a class of suicidal detainees to which Tessier belongs, and that the deliberate indifference toward that class caused constitutional harm to Tessier individually.’ . . . However, as we have explained previously, under our precedent, the defendant must have had ‘notice of the suicidal tendency of the individual whose rights are at issue in order to be held liable for the suicide of that individual.’ . . . Deliberate indifference, in the jail suicide context, is not

a question of the defendant's indifference to suicidal inmates or suicide indicators generally, but rather it 'is a question of whether a defendant was deliberately indifferent to an individual's mental condition and the likely consequences of that condition.' . . . For this reason, '[a]bsent knowledge of a detainee's suicidal tendencies, [our] cases have consistently held that failure to prevent suicide has never been held to constitute deliberate indifference.' . . . Thus, even if Cook had established the Sheriff's deliberate indifference toward suicidal inmates in general--and, on this record, precious little evidence points to such a conclusion--this would not suffice to demonstrate the foreseeability of Tessier's suicide and to hold the Sheriff liable under § 1983. . . . Because Cook has failed to demonstrate that Tessier's suicide was foreseeable to the Sheriff, the sole defendant in this case, 'there is no legally sufficient evidentiary basis for a reasonable jury to find' deliberate indifference. . . . Accordingly, the district court properly entered judgment as a matter of law for the Sheriff on Cook's § 1983 claim."); ***Tittle v. Jefferson County Commission***, 10 F.3d 1535, 1539 (11th Cir. 1994) (*en banc*) ("[I]n this circuit a finding of deliberate indifference requires that officials have notice of the suicidal tendency of *the* individual whose rights are at issue in order to be held liable for the suicide of that individual.").

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

deliberately indifferent to an individual's mental condition and the likely consequences of that condition.' [cite omitted] Hence, deliberate indifference to a dangerous jail condition that invited and facilitated the decedent's suicide cannot itself form the basis of an Eighth Amendment claim. This holding absolves jail authorities of responsibility for features of their jails which they know contribute substantially to detainee suicides.").

See also Bowens v. City of Atmore, 171 F. Supp.2d 1244, 1253, 1254 (S.D. Ala. 2001) ("Because *Farmer* requires that the defendant's knowledge of the facts and appreciation of the resulting risk be actual, Eleventh Circuit cases suggesting that merely constructive knowledge is sufficient [footnote reference to *Popham v. City of Talladega*, 908 F.2d 1561, 1564 (11th Cir.1990)] are no longer good law. While the defendant's mere denial of subjective awareness is not dispositive, the plaintiff must provide sufficient circumstantial evidence, including the obviousness of the facts and of the resulting inference of risk, to support a finding of subjective awareness and appreciation. . . . The only circumstance recognized as providing a sufficiently strong likelihood of an imminent suicide attempt is a prior attempt or threat."), *aff'd*, 275 F.3d 57 (11th Cir. 2001); *Vinson v. Clarke County*, 10 F. Supp.2d 1282, 1301 (S.D. Ala. 1998) ("[T]he liability of an Alabama county in this context can only properly be based on an indifference to the obvious needs of detainees in general, or of certain defined classes of detainees. . . . Accordingly, the court finds that, in jail suicide cases involving conditions of confinement, the appropriate inquiry is whether jail conditions and past events made it so obvious that suicide would result from the county's failure to modify its jail facilities that the county could be seen as deliberately indifferent to the interests of all detainees and/or intoxicated detainees.").

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

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

In affirming the verdict against the City, Judge Becker engaged in a lengthy analysis of municipal liability based on a custom, policy, or failure to train, concluding that to establish municipal liability, principles set forth by the Supreme Court in its "*Pembaur* trio" must be satisfied. Plaintiff must both identify a particular official with policymaking authority in the area and adduce "scienter-like" evidence with respect to that policymaker.

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

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

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

In order to establish the City's liability under her theory that Simmons' rights were violated as a result of a municipal policy or custom of deliberate indifference to the serious medical needs of intoxicated and potentially suicidal detainees, plaintiff must have shown that the officials determined by the district court to be the responsible policymakers were aware of the number of suicides in City lockups and of the alternatives for preventing them, but either deliberately chose not to pursue these alternatives or acquiesced in a longstanding policy or custom of inaction in this regard. [footnote omitted] As a predicate to establishing her concomitant theory that the City violated Simmons' rights by means of a deliberately indifferent failure to train, plaintiff must similarly have shown that such policymakers, likewise knowing of the number of suicides in City lockups, either deliberately chose not to provide officers with training in suicide prevention or acquiesced in a longstanding practice or custom of providing no training in this area.

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

C. Note on "Shocks the Conscience"

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court granted certiorari "to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." *Id.* at 839. The decedent in *Lewis* was a sixteen-year-old passenger on a

motorcycle driven by a friend. A pursuit took place when the driver of the motorcycle ignored an officer's attempt to stop him for speeding. The chase reached speeds of up to 100 miles per hour and ended when the motorcycle failed to maneuver a turn, resulting in both the driver and passenger falling off the cycle. The police officer in pursuit skidded into Lewis, propelling him 70 feet down the road. Lewis died as a result of his injuries.

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

(*Compare Fisher v. City of Memphis*, 234 F.3d 312, 318, 319 (6th Cir. 2001) (“Here, Becton's car was the intended target of Defendant's intentionally applied exertion of force. By shooting at the driver of the moving car, he intended to stop the car, effectively seizing everyone inside, including the Plaintiff. Thus, because the Defendant ‘seized’ the Plaintiff by shooting at the car, the district court did not err in analyzing the Defendant's actions under the Fourth Amendment.”)).

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

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

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

See also Cain v. Rock, 67 F. Supp.2d 544, 552-53 (D. Md. 1999) (“Whether a random act of violence by a prison guard constitutes ‘cruel and unusual punishment’ for Eighth Amendment purposes is a question of first impression in the Fourth Circuit. . . . This Court agrees with the reasoning of the Second and Fifth Circuits. The assault at issue in the present case plainly falls outside of ‘cruel and unusual punishment’ jurisprudence. Rock’s alleged sexual acts were in direct violation of prison regulations, neither authorized nor condoned by prison officials, and completely removed from the purposes of the correctional facility. These acts, though regrettable, were random, and the Court holds that a random sexual assault

by a prison guard--while cruel and not ordinary-- does not qualify as 'punishment' for Eighth Amendment purposes. Accordingly, the Court rejects Cain's Eighth Amendment claim. Prisoners who are the subject of unauthorized assaults, however, may still have a claim under the Fourteenth Amendment's Due Process Clause. . . . In the present case, the Court finds that Cain's allegations and evidence, if true, set forth a scenario that could shock the judicial conscience. Given the 'power arrangements' in the prison environment, . . . and the custodial role of correctional officers, a sexual assault by a guard is a shocking abuse of power, particularly where the inmate is mentally or physically incapacitated.").

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

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

The more difficult question was the standard of culpability plaintiff would have to demonstrate to make out a substantive due process claim in the pursuit context. In *Lewis*, the Ninth Circuit had held that "deliberate indifference or reckless disregard" was the appropriate standard for a substantive due process claim arising from a high-speed pursuit. *Lewis v. Sacramento County*, 98 F.3d 434, 441 (9th Cir.1996). The Ninth Circuit's holding was in direct conflict with decisions of other Circuits requiring conduct that "shocks the conscience" in high-speed pursuit cases. *See, e.g., Evans v. Avery*, 100 F.3d 1033, 1038 (1st Cir. 1996) (holding that "police officers' deliberate indifference to a victim's rights, standing alone, is not a sufficient predicate for a substantive due process claim in a police pursuit case. Rather, in such

a case, the plaintiff must also show that the officers' conduct shocks the conscience."); *Williams v. City and County of Denver*, 99 F.3d 1009, 1017 (10th Cir. 1996) (concluding that officer's "decision to speed against a red light through an intersection on a major boulevard in Denver without slowing down or activating his siren in non-emergency circumstances . . . could be viewed as reckless and conscience-shocking."), *vacated and remanded for further proceedings in light of County of Sacramento v. Lewis and Bd. of County Comm'rs of Bryan County v. Brown, Williams v. City and County of Denver*, 153 F.3d 730 (10th Cir. 1998) (per curiam) (en banc); *Fagan v. City of Vineland*, 22 F.3d 1296, 1303 (3d Cir. 1994) (en banc) (holding that "the appropriate standard by which to judge the police conduct [in a high speed pursuit case] is the 'shocks the conscience' standard.").

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

Approving of the deliberate indifference standard applied to substantive due process claims of pretrial detainees complaining of inadequate attention to health and safety needs, the Court distinguished high-speed pursuits by law enforcement officers as presenting "markedly different circumstances." *Id.* at 851. The Court noted substantial authority for different standards of culpability being applied to the same constitutional provision. Thus, in the Eighth Amendment prison context, while deliberate indifference to medical needs may establish constitutional liability, the Court has required prisoners asserting excessive force claims in the context of a prison riot to show that the force was used "maliciously and sadistically for the very purpose of causing harm." *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986). The Court analogized police officers engaged in sudden police chases to prison officials facing a riot and concluded:

Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for Due Process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.

523 U.S. at 854. With no suggestion of improper or malicious motive on the part of the officer in *Lewis*, the alleged conduct could not be found "conscience-shocking." Thus, the Court reversed the judgment of the Court of Appeals.

While six of the Justices concurred in the judgment and opinion of the Court, Justices Stevens, Scalia and Thomas concurred only in the judgment. Justice Stevens would have reinstated the judgment of district court which had disposed of the case on qualified immunity grounds on the basis that the law was not clearly established at the time. He would have left resolution of the difficult constitutional question for a case against a municipality. 523 U.S. at 859 (Stevens, J., concurring in the judgment).

Justice Scalia, joined by Justice Thomas, suggested that the appropriate test for a substantive due process claim was "whether our Nation has traditionally protected the right respondents assert" rather than "whether the police conduct here at issue shocks my unelected conscience." *Id.* at 862 (Scalia, J., joined by Thomas, J., concurring in the judgment). Justice Scalia "would reverse the judgment of the Ninth Circuit, not on the ground that petitioners have failed to shock my still, soft voice within, but on the ground that respondents offer no textual or historical support for their alleged due process right." *Id.* at 865.

See also Slusarchuk v. Hoff, 346 F.3d 1178, 1183 (8th Cir. 2003) ("Appellees argue that officers Hoff and Faust evidenced the requisite intent to harm in pursuing Howard because they did not have probable cause to stop him and therefore the pursuit was unrelated to a legitimate object of arrest. This contention is without merit. When Howard refused to stop after the officers activated their emergency lights, they had probable cause to arrest him for committing a felony in their presence, regardless of their initial reasons for the attempted stop. . . . Alternatively, appellees argue that the officers are not entitled to qualified immunity because they intended 'to worsen [Howard's] legal plight.' . . . We decline to read the term expansively, as appellees urge, because every police pursuit is intended to

‘worsen [the] legal plight’ of the suspect by arresting him. Thus, a broad reading would eviscerate the intent-to-harm standard that the Court adopted, at least in part, to sharply limit substantive due process liability. Rather, we construe the term as applying only to a narrow category of pursuits that reflect a conscience-shocking motive beyond the realm of legitimate government action but do not involve an intent to inflict physical harm. The pursuit in this case reflects no such motive.”); *Helseth v. Burch*, 258 F.3d 867, 871 (8th Cir. 2001) (en banc) (“Since *Lewis*, all other circuits that have examined the issue have applied the intent-to-harm standard in high-speed police pursuits cases, without regard to . . .the length of the pursuit, the officer's training and experience, the severity of the suspect's misconduct, or the perceived danger to the public in continuing the pursuit.[citing cases] We now join those circuits and. . .hold that the intent-to-harm standard of *Lewis* applies to all § 1983 substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender.”).

Lewis has been applied in other Fourteenth Amendment contexts where officers are confronted with sudden, tense, rapidly developing or emergency-type situations. See, e.g., *Perez v. Unified Government of Wyandotte County/Kansas City, Kansas*, No. 04-3397, 2005 WL 3529298, at *4, *5 (10th Cir. Dec. 27, 2005) (“We have not had occasion to apply *Lewis* to a situation where a firefighter or police officer is involved in an automobile accident while responding to an emergency call. . . However, it is clear from *Lewis* that the intent to harm standard applies in this case. A firefighter responding to a house fire has no time to pause. He has no time to engage in calm, reflective deliberation in deciding how to respond to an emergency call. Doing so would risk lives. This case presents a paradigmatic example of a decision that must be made in haste and under pressure. Two other circuits and one state supreme court have addressed cases nearly identical to this one and have applied *Lewis*'s intent to harm standard as well. [citing *Carter v. Simpson*, 328 F.3d 948, 949 (7th Cir.2003) ; *Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir.2005) (*en banc*); *Norton v. Hall*, 834 A.3d 928 (Me.2003)]. . . . In holding that there was a question of material fact as to whether the deliberate indifference standard should apply the district court committed a mistake of law. . . Under *Lewis*, the court should have applied the intent to harm standard. We may have remanded the case to the district court for application of the proper standard, but Becerra conceded at oral argument that there were no allegations and no facts in this case that supported a claim that Mots had an intent to harm. Because there is no such allegation in the complaint, we need not reach the question of what showing is necessary to evince an intent to harm.

We simply hold that a bystander hit by an emergency response vehicle in the process of responding to an emergency call cannot sustain a claim under the substantive due process clause without alleging an intent to harm. As such, Mots should be granted qualified immunity.”); *Terrell v. Larson*, 396 F.3d 975, 978-81 & n.2 (8th Cir. 2005) (en banc) (“In determining the requisite level of culpability in this case, we reject the panel majority's conclusion that the controlling force of *Lewis* is limited to high-speed police driving aimed at apprehending a suspected offender. The Supreme Court's analysis of the culpability issue in *Lewis* was framed in far broader terms. . . . [W]e hold that the intent-to-harm standard of *Lewis* applies to an officer's decision to engage in high-speed driving in response to other types of emergencies, and to the manner in which the police car is then driven in proceeding to the scene of the emergency. . . . Because substantive due process liability is grounded on a government official's subjective intent, and because the intent-to-harm standard applies ‘when unforeseen circumstances demand an officer's instant judgment’ and ‘decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance,’ *Lewis*, 523 U.S. at 853, we conclude that this issue turns on whether the deputies subjectively believed that they were responding to an emergency. . . . We need not consider whether a different rule should apply if an official's claim of perceived emergency is so preposterous as to reflect bad faith. Here, it is undisputed that, prior to the accident, Larson and Longen only heard the initial dispatch that a young mother had locked herself in a bedroom and was threatening to harm her three-year-old child. From the perspective of a police officer deciding whether to respond, the dispatch without question described an emergency, that is, a situation needing the presence of law enforcement officers as rapidly as they could arrive, even if that entailed the risks inherent in high-speed driving. . . . On appeal, plaintiffs argue, as they did in the district court, that a jury could find that the situation was not reasonably regarded as an emergency by Larson and Longen because they ‘volunteered’ to provide back-up and then persisted in responding after being advised they were ‘covered’ and could ‘cancel.’ But whether Larson and Longen could reasonably have decided that they were not needed as additional back-up is irrelevant. Under *Lewis*, the intent-to-harm culpability standard applies if they believed they were responding to an emergency call. . . . Alternatively, we conclude that Deputies Larson and Longen are entitled to summary judgment even under the deliberate indifference standard of fault adopted by the panel majority and the district court. To prevail on their substantive due process claim, plaintiffs must prove, not only that the deputies' behavior reflected deliberate indifference, but also that it was ‘so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.’ . . . Not all deliberately indifferent conduct is conscience shocking in the

constitutional sense of the term.”); *Dillon v. Brown County*, 380 F.3d 360, 364, 365 (8th Cir. 2004) (“In practice, therefore, the ‘intent to harm’ standard has not been confined to high-speed police chases aimed at apprehending a suspect. . . . It is undisputed that the officers in this case were confronted with a rapidly developing situation that arose quickly after their arrival on the property of the manufacturing plant. Whether or not they technically were in ‘pursuit’ of Dillon for purposes of Nebraska law, or whether they intended to make a formal arrest, there is no doubt that the officers were seeking to make investigative contact with Dillon concerning the alleged shoplifting and stolen license plates, and in response to the complaints from Dillon’s mother. All agree that when Dillon appeared on the ATV from behind a building, the officers were afforded no more than ten seconds to react to the approaching vehicle. That the officers may have been driving at ‘medium-speed’ rather than ‘high-speed’ is not a constitutionally significant distinction. We believe the scenario plainly qualifies as a ‘rapidly evolving, fluid, and dangerous situation[],’ rather than one which allows for ‘calm and reflective deliberation,’ . . . and that the plaintiff must show an intent to harm in order to establish a violation of substantive due process.”); *Rivas v. City of Passaic*, 365 F.3d 181, 195, 196 (3d Cir. 2004) (“Because conduct that ‘shocks the conscience’ under one set of circumstances may not have the same effect under a different set of circumstances, the standard of culpability for a substantive due process violation can vary depending on the situation. . . . We [have] held that the ‘shock-the-conscience’ standard ‘applied to the actions of emergency medical personnel—who likewise have little time for reflection, typically making decisions in haste and under pressure.’ . . . Thus, the Rivas family can only meet the second element of the *Kneipp* test by presenting evidence that Garcia’s and Rodriguez’s conduct shocks the conscience by consciously disregarding a substantial risk that Mr. Rivas would be seriously harmed by their actions.”); *Bublitz v. Cottey*, 327 F.3d 485, 490, 491 (7th Cir. 2003) (In this case, much of the argument goes to whether the shocks-the-conscience or the deliberate-indifference standard is the appropriate benchmark by which to determine if the defendant officers’ conduct violates the Fourteenth Amendment. Mr. Bublitz attempts to distinguish *Lewis* by noting that Officer Durant had at least three to five minutes in which he had to decide whether to deploy the spikes, giving him adequate time to deliberate. The officers counter that the circumstances of a high-speed police pursuit—which entail constantly changing conditions—do not lend themselves to careful and considered deliberation. But we need not choose between the two formulations of the constitutional standard (even assuming they present different inquiries), as we believe that Mr. Bublitz has not presented facts which rise to either level. At most, Mr. Bublitz has described a scenario in which Durant may have been negligent in

deciding to deploy his Stinger Spike System, but mere negligence is insufficient to give rise to a constitutional violation under the Fourteenth Amendment.”); ***Brown v. Commonwealth of Pennsylvania Dept. of Health Emergency Medical Services Training Institute***, 318 F.3d 473, 480, 481(3d Cir. 2003) (“We derive from these cases the principle that the ‘shocks the conscience’ standard should apply in all substantive due process cases if the state actor had to act with urgency. This has been the law for police pursuit cases, *see, e.g., Fagan II*, and, social workers when they are acting with urgency to protect a child, *see, e.g., Miller; Croft v. Westmoreland County Children & Youth Services*, 103 F.3d 1123 (3d Cir.1997). We now hold that the same ‘conscience shocking’ standard applies to the actions of emergency medical personnel—who likewise have little time for reflection, typically making decisions in haste and under pressure. . . . Although Stewart and Caffey may have ultimately failed to rescue Shacquel successfully from a pre-existing danger, we have already said that they had no constitutional obligation to do so. We cannot say that their actions in attempting a failed rescue shocks the conscience. Thus, Appellants have not demonstrated a viable state-created danger claim.”); ***Darrah v. City of Oak Park***, 255 F.3d 301, 306, 307 (6th Cir. 2001) (“[T]he Supreme Court has held that different conscience-shocking standards should be applied depending on the circumstances in which the governmental action occurred. . . . Officer Bragg, when grabbed from behind in a loud and unruly crowd of people, did not have time to deliberate the best possible course of action. Just the opposite is the case. . . . Given the facts of this case, the plaintiff simply cannot show that any reasonable jury could find that Officer Bragg’s conduct was malicious, sadistic, and imposed not to restore order, but only to cause harm.”); ***Neal v. St. Louis County Board of Police Commissioners***, 217 F.3d 955, 958, 959 (8th Cir. 2000) (“[I]n rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation, a state actor’s action will shock the conscience only if the actor intended to cause harm. . . . Plaintiffs attempt to redirect this Court’s focus to the hour and a half before the shootout to show that Officer Peterson had time to deliberate departmental policies and practices designed to protect officers involved in undercover operations. . . . Given the facts of this case, we believe that it is inappropriate to look outside the time period immediately preceding Peterson’s decision to fire his gun to determine whether Peterson’s conduct was truly conscience shocking.”); ***Claybrook v. Birchwell***, 199 F.3d 350, 360 (6th Cir. 2000) (“[E]ven if, as the plaintiffs have argued, the actions of the three defendant patrolmen violated departmental policy or were otherwise negligent, no rational fact finder could conclude, even after considering the evidence in the light most favorable to Quintana, that those peace enforcement operatives acted with conscience-shocking malice or

sadism towards the unintended shooting victim.”); *Moreland v. Las Vegas Metropolitan Police Department*, 159 F.3d 365, 372-73 (9th Cir. 1998) (“The question we face today is whether [the *Lewis*] newly minted explanation of the ‘shocks the conscience’ standard also controls in cases where it is alleged that an officer inadvertently harmed a bystander while responding to a situation in which the officer was required to act quickly to prevent an individual from threatening the lives of others. We conclude that it does. While the Supreme Court limited its holding in *Lewis* to the facts of that case (i.e., to high-speed police chases), there is no principled way to distinguish such circumstances from this case. Reasoning by analogy from its previous recognition that different types of conduct implicate different culpability standards under the Eighth Amendment, the Court extensively discussed the question of what states of mind trigger the ‘shocks the conscience’ standard that governs substantive due process claims arising from executive action. . . . Expressly declining to draw a bright line rule, the Court described the critical consideration as whether the circumstances are such that ‘actual deliberation is practical.’ . . . [E]ach of the circuits that has interpreted and applied this aspect of the *Lewis* decision has recognized that the critical question in determining the appropriate standard of culpability is whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct. . . . Appellants do not contend Burns intended to harm Douglas, physically or otherwise. Nor do Appellants dispute that Burns was entitled to use deadly force to halt the gunfight occurring in the Chances Arr parking lot. Instead, Appellants simply contend that the officers shot a bystander, and that this creates a triable issue as to whether the officers acted recklessly or with gross negligence. Even if all this is true, Appellants have failed to state a viable substantive due process claim because these matters are not material to the controlling question of whether Burns acted with a purpose to harm Douglas that was unrelated to his attempt to stop the male in the parking lot from endangering others.”); *Schaefer v. Goch*, 153 F.3d 793, 798 (7th Cir. 1998) (“In our case . . . the officers who fired their weapons did intend to harm the suspect, John Nieslowski, but it is not John on whose behalf this suit was brought. . . . Nobody has suggested that the officers intended to harm Kathy Nieslowski, and so the straightforward application of the *Lewis* analysis yields a verdict in favor of defendants. On the other hand, firing a gun when an innocent party who has just attempted to surrender is standing, by most accounts, only inches from the intended target seems even more dangerous a course than pursuing a suspect at high speeds through city or suburban streets. Under the analysis employed in *Lewis*, however, the officers’ decision to fire does not ‘inch close enough to harmful purpose’ to shock the conscience, even assuming that John never swung his weapon in the

direction of the officers. . . . The situation was fluid, uncertain, and above all dangerous, and the officers' decision to shoot, regrettable though its results turned out to be, does not shock the conscience."); *Medeiros v. O'Connell*, 150 F.3d 164, 170 (2d Cir. 1998) (*Lewis* "shocks the conscience" standard not satisfied where bullet intended for suspect deflected and hit hostage); *Radecki v. Barela*, 146 F.3d 1227, 1231-32 (10th Cir. 1998) ("[I]n assessing the constitutionality of law enforcement actions, we now distinguish between emergency action and actions taken after opportunity for reflection. Appropriately, we are required to give great deference to the decisions that necessarily occur in emergency situations. . . . Henceforth, we look to the nature of the official conduct on the spectrum of culpability that has tort liability at one end. On the opposite, far side of that spectrum is conduct in which the government official intended to cause harm and in which the state lacks any justifiable interest. In emergency situations, only conduct that reaches that far point will shock the conscience and result in constitutional liability. Where the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience."); *Logan v. City of Pullman*, 392 F.Supp.2d 1246, 1264, 1265 (E.D. Wash. 2005) ("Here, the Defendant Officers certainly weren't facing the 'extreme emergency of public gunfire' like the officers faced in *Moreland*. Therefore, arguably, the Defendant Officers had time to deliberate about how they were going to break up the fight before opening the door and spraying O.C. However, in *Lewis*, the Supreme Court held that actual deliberation was not practical where the defendant officer, driving a patrol car, was simply pursuing a motorcyclist in a high-speed chase whose only offense was speeding. Further, the concerns of the Defendant Officers at the time of the incident were similar to those concerns of officers involved in dispersing a prison riot. Therefore, since 'deliberate indifference' was insufficient to show officer liability in both a prison riot and a high-speed chase of a motorcyclist who was speeding, the Court concludes that it is also insufficient to show officer liability in a situation such as that confronted by the Defendant Officers in this case. Consequently, the Court concludes that actual 'purpose to cause harm' unrelated to any legitimate use of O.C. must be shown to satisfy the 'shocks the conscience' standard necessary for a due process violation in this case. The Defendant Officers' use of O.C. inside the Top of China Restaurant and the fact that it dispersed throughout the building and affected the individuals inside does not meet the 'purpose to cause harm' standard. . . . However, Plaintiffs have produced evidence that if proven, is adequate to meet this standard. Specifically, Plaintiffs allege the Defendant Officers refused to provide assistance to the injured Plaintiffs, refused to allow the Plaintiffs to assist one another, and tried to keep the Plaintiffs from exiting

the building after O.C. was sprayed. . . If proven, these facts evidence a purpose to cause harm against all of the Plaintiffs unrelated to any legitimate use of force by the Defendant Officers, thereby satisfying the 'shocks the conscience' standard necessary for a substantive due process violation in this case."); **White v. City of Philadelphia**, 118 F. Supp.2d 564, 570, 572 (E.D. Pa. 2000) ("The Officers in this case were . . . facing conflicting responsibilities: on the one hand, according to the complaint, the Officers were being pressured by neighbors to break the door down; on the other hand, the Officers' reluctance to invade a seemingly peaceful residence pulled in the other direction. Under these circumstances, the Court concludes as a matter of law that the Officers' behavior was not conscience-shocking. . . . In response to the 911 call placed by Nadine White's neighbors, the Officers knocked on Nadine White's door several times. . . Upon hearing no response, the Officers refused the neighbors' request to break down the door and left the scene. . . .The Officers did nothing to place Nadine White in jeopardy-- they only failed to protect Nadine White from private violence. Such inaction does not create liability."); **Lizardo v. Denny's Inc.**, No. 97-CV-1234 FJS GKD, 2000 WL 976808, at *12 (N.D.N.Y. July 13, 2000) (not reported)("At the time of the brawl, the parking lot was a volatile, violent environment. In that environment, Adams and Paninski were forced to decide whether it was best to call 911 and wait for back-up, and therefore expose the combatants to harm at the hands of other combatants, or to intervene in the numerous altercations, and therefore risk harm to themselves and others should they lose possession of their firearms. In making that decision, Adams and Paninski were not afforded an opportunity to deliberate; rather, they were required to make a split-second decision under high pressure. In light of those circumstances, the Asian-American Plaintiffs must demonstrate that Adams' and Paninski's actions were motivated by an intent to harm."); **Gillyard v. Stylios**, No. Civ.A. 97-6555, 1998 WL 966010, at *4, *5 (E.D. Pa. Dec. 23, 1998)(not reported)("Every court addressing police conduct since *Lewis* has found its reasoning extends beyond high-speed pursuit of suspected criminals. [citing cases]. . . . Plaintiff claims that the conduct of police officers responding to a fellow officer's radio call and killing two innocent bystanders differs from officers killing a suspect in a high-speed pursuit as in *Lewis*. Officers Stylios and Fussell were assisting a fellow officer they erroneously believed to be in peril; the officers were on-duty and responding to a police radio request. The fact that they were not pursuing a suspect does not foreclose the application of *Lewis*."); **White v. Williams**, No. 94 C 3836, 1998 WL 729643, *5 (N.D. Ill. Oct. 16, 1998) (not reported) ("There are two substantive due process standards that have been applied to the conduct of law enforcement officers. The first is the deliberate indifference standard, which is generally applied to prison officials who 'subject an

inmate under their authority to dangers that [the officials] might have prevented.' . . . The second is the 'shocks the conscience' standard, which is applied to situations like high-speed car chases in which actual deliberation is impractical. . . . Though the situation in this case does not fall neatly into either category, it seems closer to the high-speed chase setting than to the prison setting. It is undisputed that Williams believed it was appropriate to arrest White, that Williams was attempting to do so when he leaned into White's car with his gun drawn, that White attempted to get away from Williams, rather than surrendering to him, and that Williams' gun accidentally fired in the process. . . . It is also undisputed that all of these events 'happened really quickly.' . . . Given the pace of these events and the unpredictability of White's reaction, Williams had little opportunity for deliberation before he leaned into White's car. As a result, we hold that the 'shocks the conscience' standard is more appropriate for this case than the deliberate indifference standard. . . . Because Williams did not intend to harm White, Williams' behavior does not shock the conscience."); *Smith v. City of Plantation*, 19 F. Supp.2d 1323, 1330 (S.D. Fla. 1998) (Applying *Lewis* to find no substantive due process violation arising from hostage situation, where officer "was confronted by an emergency situation that he did not precipitate."), *aff'd*, 198 F.3d 262 (11th Cir. 1999); *Jarrett v. Schubert*, No. 97-2628-GTV, 1998 WL 471992, *5 (D. Kan. July 31, 1998) (not reported) ("To help sort through the quagmire, the Supreme Court has adopted a fluctuating standard of review. In emergency situations, a government official will be liable only if he intended to inflict harm on the plaintiff and the government has no justifiable interest in his particular conduct. . . . If, on the other hand, the government official has the luxury of deliberating about the decision he is making, 'something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience.'").

See also *Marino v. Mayger*, 118 Fed. Appx. 393, 402, 403, 2004 WL 2801795, at *8 (10th Cir. Dec. 7, 2004) ("[E]ven if sufficient affirmative conduct had been alleged, the ultimate measure of whether conduct by state actors violates due process is whether 'the challenged government action "shocks the conscience" of federal judges.' . . . We consider the following three factors in making such a determination: '(1) the need for restraint in defining the scope of substantive due process claims; (2) the concern that § 1983 not replace state tort law; and (3) the need for deference to local policymaking bodies in making decisions impacting public safety.' . . . 'These factors counsel that application of danger creation as a basis for § 1983 claims is reserved for exceptional circumstances.' . . . Lastly, '[w]e have noted that ordinary negligence does not shock the conscience, and that even

permitting unreasonable risks to continue is not necessarily conscience shocking[.] Rather, a plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.’ . . While we agree that the sheriff defendants’ alleged conduct in this case, if accurately portrayed, was inconsistent with what we expect from public officials, we cannot conclude that their actions were so egregious or fraught with unreasonable risk as to ‘shock the conscience.’ To the extent that Hill, Waterman, and Hiler permitted a potentially volatile situation to persist, we do not believe their cumulative inaction rises above the level of negligence. Nor do we believe that the sheriff defendants created the danger that Michael Marino would be assaulted by Francis Hiemer with a shovel on that particular day. Therefore, because the Marinos have failed to allege affirmative conduct that shocks the conscience, we conclude that the district court properly dismissed the Marinos’ substantive due process claim.”); *Coyne v. Cronin*, 386 F.3d 280, 288, 289 (1st Cir. 2004) (“The conscience-shocking standard is not a monolith; its rigorosity varies from context to context. . . In situations where a substantive due process claim might lie but where government officials must act in haste, under pressure, and without an opportunity for reflection, even applications of deadly force by those officials cannot be conscience-shocking unless undertaken maliciously and sadistically for the very purpose of causing harm. . .By contrast, in situations where a substantive due process claim might lie and where actual deliberation on the part of a governmental defendant is practical, the defendant may be held to have engaged in conscience-shocking activity even without actual malice (to take one familiar example, if a government official assumes custody of a person and then displays deliberate indifference to his ward’s basic human needs). . . The spectrum is wide because substantive due process violations tend to come in various shapes and sizes and in a multitude of configurations. We need not probe too deeply where along this spectrum of levels of fault Coyne’s claim against Cronin may lie because the complaint does not fairly allege deliberate indifference, let alone any more serious level of scienter. . . . If matters were at all different or there were any concrete suggestion as to what might plausibly be developed against Cronin that would suggest conscience-shocking behavior, we would be sympathetic to discovery. But everything we know from the complaint and Coyne’s own allegations show that this is basically a negligence case to which the government must respond but for which Cronin may not be sued under the Due Process Clause.”); *Upsher v. Grosse Pointe Public School System*, 285 F.3d 448, 453, 454 (6th Cir. 2002) (“This court made clear in *Lewellen* . . .that in a non-custodial setting, in order to establish liability for violations of substantive due process under § 1983, a plaintiff must prove that the governmental actor either intentionally injured the plaintiff or acted arbitrarily in the

constitutional sense. . . The *Lewellen* court expressed doubt as to whether, in a non-custodial case, ‘deliberate indifference’ could give rise to a violation of substantive due process. . . . Similarly, here, we cannot find, nor was our attention invited to, any evidence in the record which suggests that any of the defendants made a deliberate decision to inflict pain or bodily injury on any of the plaintiffs. Neither is there proof that the defendants engaged in arbitrary conduct intentionally designed to punish the plaintiffs--conduct which we have recognized may result in the deprivation of a constitutionally protected interest. . . . Without more, we conclude that the plaintiffs' evidence establishes, at best, a case sounding in negligence and not a constitutional tort under § 1983.”); *Cummings v. McIntire*, 271 F.3d 341, 345, 346 (1st Cir. 2001) (“ This is a case whose factual context falls within the middle ground, neither so tense and rapidly evolving as a high-speed police pursuit nor so unhurried and predictable as the ordinary custodial situation. Some courts approach such cases by assessing the facts pursuant to a test formulated by Judge Friendly in *Johnson*, 481 F.2d at 1033, with which we substantially agree: In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. . . . While there is no doubt that McIntire unnecessarily utilized physical force, we agree with the district court that the record does not permit a finding that he did so ‘maliciously and sadistically for the very purpose of causing harm,’ At the time he acted, McIntire was juggling drivers and runners in a busy location, swiveling his head to be sure no problems arose. . . . In such circumstances, a hard shove accompanied by abusive language, whose evident purpose--as even appellant acknowledges--was to get Cummings out of the way, . . . does not in our view constitute the ‘brutal’ and ‘inhumane’ conduct necessary to establish a due process violation. The Due Process Clause is intended to prevent government officials ‘from abusing [their] power, or employing it as an instrument of oppression,’ . . . here, the officer's action was reactive rather than reflective, seemingly inspired by a ‘careless or unwise excess of zeal’ in communicating his displeasure with Cummings' interruption, rather than by a purpose to harm.”); *Purvis v. City of Orlando*, 273 F.Supp.2d 1321, 1327, 1328 (M.D. Fla. 2003) (“Even though Reeve reacted to a situation that he allegedly caused, the Court cannot properly analogize Reeve to a prison official enjoying the luxuries of unhurried judgments. Logan was not detained in a jail cell. Similarly, given Reeve's knowledge of Logan's suicidal state, the flight risk he posed, and his alleged willingness to let him flee, the Court cannot properly analogize Reeve to an

officer in the midst of a completely unexpected high-speed car chase. The Court, unable to find a situation in existing case law analogous to the instant case, finds that Logan's situation falls somewhere between these situations. Viewing the facts in the light most favorable to Plaintiff, Reeve allowed Logan to escape. This implies some degree of forethought by Reeve. Nevertheless, Reeve cannot be held accountable for Logan's actions subsequent to his escape. Reeve had no way of knowing Logan would jump the fences he jumped, or enter the retention pond where he drowned. There are no allegations that Reeve herded Logan over the fences and into the pond, or that he released Logan with the specific intention of causing Logan's death. The allegations are simply that Reeve pursued Logan to the retention pond and failed to aid him. The question before the Court is one of Reeve's intent. . . . Plaintiff makes no specific factual allegations concerning Reeve's actions or intent in allowing Logan to escape. In the absence of such allegations, the Court cannot assume that Plaintiff can prove facts that she has not alleged. . . . Consequently, the Court finds that Plaintiff has not stated a Fourteenth Amendment violation. . . . If Reeve indeed herded or forced Logan into the pond, it could constitute conscience-shocking behavior. In the absence of such allegations, however, the Court will not hold that Reeve's failure to wade into a pond to apprehend a 'struggling' escaped prisoner violates the Constitution.”).

But see Pena v. DePrisco, 432 F.3d 98, 113, 114 (2d Cir. 2005) (“The case before us does not involve a chase of a suspect or a prison riot where we need to ‘capture the importance of [state officials'] competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.’ . . . Not condoning egregious drunk driving ‘does not ordinarily clash with other equally important governmental responsibilities.’ . . . The defendants here, on the facts as alleged, had ample opportunity, not only during the day in question, but also during the days, weeks and months that preceded it, in which to decide what to do and say in response to the alleged practice of drinking and driving by off-duty officers. Nor does it require a sophisticated exercise in judicial notice for us to acknowledge that the extreme danger of drinking and driving is widely known. We conclude that the alleged behavior of the pre-accident individual defendants here, over an extended period of time and in the face of action that presented obvious risk of severe consequences and extreme danger, falls within the realm of behavior that ‘can properly be characterized as ... conscience shocking, in a constitutional sense.’ . . . Accordingly, we think that the allegations in the complaints before us, even if they do not accuse the defendants of acting with specific intent or desire to cause physical

injury, are sufficient to assert that the defendants created a serious danger by acting with deliberate indifference to it. Whether termed ‘deliberate indifference’ or ‘recklessness,’ this mental state is sufficient to establish liability in such cases ‘because it requires proof that the defendant focused upon the risk of unconstitutional conduct and deliberately assumed or acquiesced in such risk.’”); *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596, 603 (6th Cir. 2005) (“The Cincinnati police officers argue that this case is more analogous to vehicular chase cases than traditional prisoner or pretrial detainee cases, essentially because only about six minutes passed between the time Owensby was taken into custody and the time medical care was provided. This argument assumes, however, that actual deliberation was not possible within those six minutes. That assumption is erroneous. During the six minutes that Owensby was denied medical care after being taken into custody, the officers had time to do such things as greet each other, prepare for the arrival of their superiors, pick up dropped items and straighten their uniforms; some officers even had time to observe and discuss the apparent severity of Owensby's injuries. Under these circumstances, there is no question that the officers had ‘time to fully consider the potential consequences of their conduct.’ . . . Accordingly, the district court properly applied the traditional deliberate indifference standard.”); *Terrell v. Larson*, 396 F.3d 975, 981, 984 (8th Cir. 2005) (en banc) (Lay, J., joined by Heaney, J., and Bye, J., dissenting) (“Today's decision has the effect of giving police officers *un* qualified immunity when they demonstrate deliberate indifference to the safety of the general public. A police officer may now kill innocent bystanders through criminally reckless driving that blatantly violates state law, police department regulations, accepted professional standards of police conduct, and the community's traditional ideas of fair play and decency so long as the officer subjectively, though unreasonably, believed an emergency existed. The majority's holding extends *Lewis*'s high-speed pursuit rule from its intended purpose of protecting officers forced to make split-second decisions in the *field* to a per se rule that now shields officers even after they have had an actual opportunity to deliberate at the *police station*. Believing that 28 U.S.C. § 1983 gives citizens a remedy for egregious abuses of executive power that deprive citizens of their constitutional right to life, we dissent. . . . We submit there are significant distinctions between this high-speed response case and suspect pursuit cases such as *Lewis* and *Helseth*. First, while officers pursuing suspected offenders generally find themselves, when acting in their official duties, in situations which are thrust upon them, *see Lewis*, 523 U.S. at 853, here Larson made a conscious, voluntary decision to respond to the domestic disturbance call even after he was informed that other deputies were responding and he could cancel. Second, while suspect pursuits require instantaneous decisions and on-the-spot

reactions, *see id.*, Larson and Longen were eating dinner and doing paperwork when they received the call and were afforded the opportunity to deliberate their response before leaving the police station. Finally, officers involved in suspect pursuits may be required to violate traffic laws or risk losing the suspect. In contrast, Larson and Longen were not in danger of losing a suspect or of leaving the primary officers in this case without adequate backup, as they were aware other deputies were on their way to the scene. In view of these distinctions, we conclude the obvious lack of exigent circumstances convince us that the intent-to-harm standard is inappropriate in non-emergency response situations.”); *A.M. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 579 (3d Cir. 2004) (“As in a prison setting, we believe the custodial setting of a juvenile detention center presents a situation where ‘forethought about [a resident’s] welfare is not only feasible but obligatory.’ . . . We therefore conclude that this case is properly analyzed using the deliberate indifference standard. The circumstances of this case present a situation where the persons responsible for A.M. during his detention at the Center had time to deliberate concerning his welfare.”); *Bukowski v. City of Akron*, 326 F.3d 702, 710 (6th Cir. 2003) (“After reviewing the Supreme Court’s decision in *City of Sacramento v. Lewis*, . . . we have come to view the justification for a heightened standard in noncustodial cases as coming from the fact that the reasoning in noncustodial situations is often, by necessity, rushed. . . . The guiding principle seems to be that a deliberate-indifference standard is appropriate in ‘settings [that] provide the opportunity for reflection and unhurried judgments,’ but that a higher bar may be necessary when opportunities for reasoned deliberation are not present. . . . For the case at bar, a deliberate-indifference standard is clearly the appropriate one, given the fact that the defendants not only had time to deliberate on what to do with Bukowski but actually did deliberate on this point. The plaintiffs here, however, cannot meet that standard.”); *Estate of Smith v. Marasco*, 318 F.3d 497, 508, 509 (3d Cir. 2003) (*Smith I*) (“In this case, the officers were confronted with what Fetterolf described as a ‘barricaded gunman’ situation. This case, however, did not involve the ‘hyperpressurized environment’ of an in-progress prison riot or a high-speed chase. . . . Indeed, the official incident report shows that at least one hour passed between the time Marasco and Scianna approached Smith’s residence and the time Fetterolf authorized a request to activate SERT. During that time no shots were fired and the officers did not see a firearm brandished. Moreover, at least after the police arrived at the Smith residence, the police had no reason to be concerned about the safety of third parties. Thus, this case does not involve a ‘hyperpressurized environment’ such that the Smiths to recover would have to demonstrate that the defendants had an actual purpose to cause harm. At the same time, however, this case is not one in

which the police had ‘the luxury of proceeding in a deliberate fashion, as prison medical officials can.’ . . . Because the urgency and timing involved in this case is more like the situation in *Miller*, the Smiths here must demonstrate ‘a level of gross negligence or arbitrariness that indeed “shocks the conscience.”’ . . . We think based on our reading of the precedents in this elusive area of the law that, except in those cases involving either true split-second decisions or, on the other end of the spectrum, those in which officials have the luxury of relaxed deliberation, an official’s conduct may create state-created danger liability if it exhibits a level of gross negligence or arbitrariness that shocks the conscience.”); *Ewolski v. City of Brunswick*, 287 F.3d 492, 511 & n.5, 513 (6th Cir. 2002) (“Applying this framework, we agree with the district court that this case ‘falls within the “middle-range” between custodial settings and high-speed chases,’ and likewise conclude that, on balance, ‘the more appropriate standard of review is “deliberate indifference.”’ . . . Although the Brunswick police officers conducting the standoff undoubtedly faced competing obligations and intense pressures in making their decisions, the facts viewed most favorably to the plaintiffs reveal that this was a situation where actual deliberation was practical. The police waited five hours to initiate the first ‘tactical solution,’ which strongly suggests that split-second decision making was not required. Many more hours passed before the decision was made to deploy the armored vehicle. Indeed, in his deposition, Chief Beyer indicated that the decision to initiate a tactical assault was made after consulting two mental health professionals and requesting input from the officers on the scene. Beyer also indicated that he discussed the pros and cons of using tear gas. Clearly, this testimony demonstrates not only that deliberation was practical, but that some effort at deliberation was in fact made. . . . Nevertheless, even under the more exacting deliberate indifference standard, we conclude that the Appellant has not shown a genuine issue of material fact as to whether the conduct of the police rose to the level of the conscience shocking under the particular circumstances presented. . . . We note that although the issue has never been decided, cases from this circuit decided before *Lewis* have ‘expressed doubt’ as to whether the deliberate indifference standard should apply in noncustodial settings. . . . Such doubt, we believe, has been resolved by the Court’s opinion in *Lewis*, which made clear that the key variable is whether actual deliberation is practical, not whether the claimant was in state custody. As the Court explained, deliberate indifference applies in custodial settings because these settings provide the opportunity for reflection and unhurried judgments. . . . Custodial settings, however, are not the only situations in which officials may have a reasonable opportunity to deliberate.”); *Wilson v. Lawrence County*, 260 F.3d 946, 956 & n.9 (8th Cir. 2001) (“The general test of whether executive action denying a

liberty interest [footnote omitted] is egregious enough to violate due process is whether it shocks the conscience. . . . The Supreme Court has taken a context specific approach to determining whether intermediate culpable states of mind, such as recklessness, support a section 1983 claim by shocking the conscience and, thus, violating due process. . . . In *Neal* . . . , we stated, based on *Lewis*, that in situations where state actors have the opportunity to deliberate various alternatives prior to selecting a course of conduct, such action violates due process if it is done recklessly. . . . This statement from *Neal* certainly applies to the present claim. . . . In the present situation, officers conducting the post-arrest investigation certainly had the luxury of unhurried judgments and repeated reflections, which make a reckless standard appropriate. . . . It is important to recall that this reckless standard normally contains a subjective component similar to criminal recklessness.”); ***Young v. City of Mount Ranier***, 238 F.3d 567, 574-77 (4th Cir. 2001) (“Although the original complaint refers to ‘malicious abuse’ by the law enforcement officers, the Parents’ claims are not grounded in the Fourth Amendment--in their brief and during oral argument they specifically disavowed any contention that the law enforcement officers improperly took Young into custody or that they used excessive force when taking him into custody. Instead, the Parents proceed solely under the Fourteenth Amendment, contending that the defendants violated Young’s constitutional rights by failing to protect him from a known risk of harm (the risk of asphyxiation when restrained in a prone position, particularly after being sprayed with pepper spray), or, stated somewhat differently, that the defendants violated Young’s constitutional rights by their indifference to his serious medical needs brought about by the pepper spray, restraints, and face-down positioning. . . . These claims fall within the limited circumstances where conduct in the ‘middle range’ of culpability--specifically, conduct that amounts to ‘deliberate indifference’--is viewed as sufficiently shocking to the conscience that it can support a Fourteenth Amendment claim. . . . Reading the original complaint in the light most favorable to the Parents and giving the Parents the benefit of all reasonable inferences, . . . the complaint simply establishes that Young struggled with law enforcement officers, was sprayed with pepper spray, restrained, transported to a hospital in a prone position, and died sometime thereafter. While the complaint alleges that the officers knew or should have known about the potential problems with the use of pepper spray and restraints on PCP users, these allegations, particularly absent any suggestion that Young exhibited any distress during the time he was in the custody of the officers, at most support an inference that the defendants were negligent in some unidentified way. Negligence, however, is insufficient to support a claim of a Fourteenth Amendment violation.”); ***Butera v. District of Columbia***, 235 F.3d 637, 652 (D.C. Cir. 2001) (“As in the context of

State custody, the State also owes a duty of protection when its agents create or increase the danger to an individual. Like prison officials who are charged with overseeing an inmate's welfare, State officials who create or enhance danger to citizens may also be in a position where 'actual deliberation is practical.' . . . In the instant case, the officers had the opportunity to plan the undercover operation with care. In view of the officers' duty to protect Eric Butera, he may prove that the officers' treatment of him in connection with the attempted undercover drug buy 'shocked the conscience' by meeting the lower threshold of 'deliberate indifference.'"); **Claybrook v. Birchwell**, 199 F.3d 350, 362, 363 (6th Cir. 2000) (Clay, J., concurring in part and dissenting in part) ("When conducting an 'exact analysis' of the facts of this case in the light most favorable to Ms. Claybrook, it is clear that the officers had sufficient time to make an unhurried judgment about their conduct upon seeing Mr. Claybrook with his weapon such that a lower level of fault should be applied. As the officers testified, they were aware of department rules requiring them to radio for a marked car and uniformed officers, and they made a conscious decision to request such support. The officers were also aware that the department rules mandated that they refrain from investigating the situation unless emergency circumstances arose. Significantly, at the point when they discovered Mr. Claybrook standing outside with this gun, Officer Birchwell testified that he did not believe that the officers were in imminent danger or that exigent circumstances requiring the use of force existed. However, after having made a decision to request backup, the officers inexplicably proceeded to engage Mr. Claybrook in a violent confrontation without awaiting the arrival of the uniformed officers. Contrary to the majority's assertion, the officers here were hardly involved in a high-speed pursuit or any high-pressure confrontation at the time that they decided to act, as were the officers in *Lewis*. . . As such, Ms. Claybrook's claims should be analyzed using the 'deliberate indifference' standard; which is to say, her claim should be viewed in the context of whether the officers had time to make a reasoned judgment about their conduct. . . . Notably, there were no emergency circumstances present so as to require the officers to begin shooting without following protocol and without making a reasoned decision as to whether the vehicle was occupied. Accordingly, under these circumstances, a jury should decide whether the officers acted with deliberate indifference to Ms. Claybrook's rights."); **Brown v. Nationsbank Corp.**, 188 F.3d 579, 592 (5th Cir. 1999) ("Applying the *Lewis* analysis to the FBI's alleged activity in this case, we conclude that the FBI made decisions which harmed the Plaintiffs after ample opportunity for cool reflection. In fact, they invested almost two years and thousands of man hours in developing the sting operation. Thus, the due process clause protects the Plaintiffs from any harm that arose from the officers' deliberate

indifference. The facts, as pleaded, establish at least that level of federal agent culpability as Operation Lightning Strike evolved into a disastrous boondoggle. We therefore hold that Hodgson's allegations that federal agents inflicted damages on him, an innocent non-target, during this particular undercover operation and refused him compensation states a claim under *Bivens*.”); *Armstrong v. Squadrito*, 152 F.3d 564, 576 (7th Cir. 1998) (“[T]he Court [in *Lewis*] endorsed the use of the deliberately indifferent standard for cases in which the defendants have the luxury of forethought The Court explained that prison is the quintessential setting for the deliberately indifferent standard.”); *Leisure v. City of Cincinnati*, 267 F. Supp.2d 848, 853, 854 (S.D. Ohio 2003) (“The Court . . . finds that Plaintiffs have also sufficiently alleged a violation of Thomas' due process rights. Such allegation can also serve as the basis for the case to proceed on an alternatively pleaded constitutional violation. The Supreme Court, in *County of Sacramento v. Lewis*, established that although substantive due process claims based upon clearly deliberate decisions intended to harm or injure are ‘most likely to rise to the conscience-shocking level,’ those claims are not exclusive. . . . Claims based upon ‘something more than negligence but less than intentional conduct, such as recklessness or gross negligence’ or ‘mid-level fault’ could also be actionable in some circumstances. . . . Plaintiffs allege that Defendant Roach pursued Thomas with ‘his gun out and his hand on the trigger’ . . . , contrary to the policy of the Cincinnati Police Department . . . Such conduct, even if only the result of ‘mid-level fault,’ inches close enough to harmful purpose to spark shock under *County of Sacramento*. Though Defendants read *County of Sacramento* to foreclose due process liability in a pursuit case absent purpose to cause harm . . . , the Court finds that the specific holding of the case pertains to high-speed chases. . . Defendants further try to frame a pursuit on foot as high-speed, but the Court does not find this proposition convincing, as a person on foot cannot travel as fast as a person on a motorcycle. The urgency and the obvious danger to the public is not the same. For these reasons, the Court finds that consonant with *County of Sacramento*, Plaintiffs' allegations of violation of due process can serve as an alternative basis for a constitutional violation.”); *Sanders v. Bd. Of County Commissioners of Jefferson County*, 192 F. Supp.2d 1094, 1114, 1115 (D. Colo. 2001) (“[I]n assessing the constitutionality of law enforcement actions, I must distinguish between emergency action and actions taken after opportunity for reflection. Appropriately, I must give great deference to the decisions that necessarily occur in emergency situations. With that caveat in mind, I look to the nature of the official conduct on the spectrum of culpability that has tort liability at one end; conduct in which the state actor intended to cause harm and in which the state lacks any justifiable interest on the other. In emergency situations, only conduct that reaches that far point will shock the

conscience and result in constitutional liability. Where the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience. . . . The result here comes clear when focused through the lens of the *Lewis* standard. From the time when the attack on Columbine High School began on April 20, 1999 at approximately 11:15 a.m. until approximately 12:30 p.m. when the hostile gunfire ceased and the Command Defendants knew that Harris and Klebold were dead, the competing interests of public and officer safety outweighed the rescue needs of the students and staff inside Columbine High School, including Dave Sanders. This first hour and fifteen minutes of the attack is closely analogous to the prison riot discussed in *Lewis* during which state officials were forced to make ‘split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving.’ . . . Under such circumstances, unless an intent to harm a victim is alleged, there is no liability under the Fourteenth Amendment redressible by an action under § 1983. . . . In this case, the pertinent time frame falls between approximately 12:30 p.m. when the Command Defendants learned that Harris and Klebold were dead and 4:00 p.m. when a SWAT team finally reached Dave Sanders in Science Room 3. Pursuant to Plaintiff’s allegations, during that time, the Command Defendants knew Dave Sanders’ exact location and the nature of his wounds. Yet they took repeated affirmative actions to block access to or rescue of Dave Sanders by private citizens or other state actors notwithstanding his readily-accessible location. Under the factual allegations of Plaintiff’s complaint I cannot say precisely at what moment between 12:30 p.m. and 4:00 p.m., the circumstances facing the Command Defendants changed. I do conclude that at some point during the afternoon, the Command Defendants gained the time to reflect and deliberate on their decisions. At that point, the Command Defendants demonstrated a deliberate indifference towards Dave Sanders’ plight shocking to the conscience of this federal court.”); *Glaspay v. Malicoat*, 134 F. Supp.2d 890, 896 (W.D. Mich. 2001) (“The Court concludes that the deliberate indifference test rather than the higher ‘malicious or sadistic’ test is appropriate in this case because Glaspay’s request to Malicoat to use the restroom did not involve a ‘rapidly evolving, fluid, and dangerous predicament which preclude[d] the luxury of calm and reflective pre-response deliberation.’ [citing *Claybrook*] Rather, Malicoat had sufficient time to consider different alternatives and act on them. While it is true that prisoner count, an important prison function, was being conducted at the time, unlike a prison riot, prisoner count is a routine procedure that does not require snap judgments requiring balancing of competing interests. Furthermore, although no more than 22-24 minutes elapsed between William’s first request that Glaspay be permitted to use the restroom and the end of count, Malicoat

had sufficient time to determine how to accommodate Glaspy's need. Applying the deliberate indifference standard to the facts of this case, the Court concludes that Malicoat's conduct shocks the conscience because Malicoat was deliberately indifferent to Glaspy's federally protected rights.”); **Williams v. City and County of Denver**, No. 90 N 1176, slip op. at *17 (D. Colo. Sept. 27, 1999) (on remand) (“I find that a reasonable juror could conclude that Murawski’s back-up call did not require an emergency response and, thus, Williams need not satisfy the intent to harm culpability requirement. Further, I find that a reasonable juror could conclude that, under the totality of the circumstances, Farr’s conduct was sufficiently reckless to shock the conscience.”).

See also Childress v. City of Arapaho, 210 F.3d 1154, 1157, 1158 (10th Cir. 2000) (“The *Lewis* principles therefore apply whether the claimant is a police suspect or an innocent victim.”); **Onossian v. Block**, 175 F.3d 1169, 1171 (9th Cir. 1999) (“As we read the Court's opinion [in *Lewis*], if a police officer is justified in giving chase, that justification insulates the officer from constitutional attack, irrespective of who might be harmed or killed as a consequence of the chase.”).

See also Fraternal Order of Police Department of Corrections Labor Committee v. Williams, 375 F.3d 1141, 1145, 1146 (D.C. Cir. 2004) (“As we explained in *Butera*, . . . the ‘lower threshold’ for meeting the shock the conscience test by showing deliberately indifferent as opposed to intentional conduct applies only in ‘circumstances where the State has a heightened obligation toward the individual.’ The opportunity for deliberation alone is not sufficient to apply the lower threshold to substantive due process claims. Instead, it is ‘[b]ecause of ... special circumstances’ like custody that ‘a State official's deliberate indifference ... can be “truly shocking.”’); **Waddell v. Hendry County Sheriff’s Office**, 329 F.3d 1300, 1306 & n.5, 1309 (11th Cir. 2003) (“In this non-custodial setting, a substantive due process violation would, at the very least, require a showing of deliberate indifference to an extremely great risk of serious injury to someone in Plaintiffs' position. . . . We stress the phrase ‘at the very least.’ We do not rule out today that the correct legal threshold for substantive due process liability in a case like this one is actually far higher. For example, the standard could be that the government official acted with ‘deliberate indifference to a substantial certainty of serious injury’ or maybe that the government official acted ‘maliciously and sadistically for the very purpose of creating a serious injury’ or perhaps some different standard. We feel comfortable today that the standard we use today is the low point--may well be too low a point--for a possible standard in a case like this one and that we can decide this

case without being more definite about the law as an academic matter. . . . To act with deliberate indifference, a state actor must know of and disregard an excessive--that is, an extremely great--risk to the victim's health or safety. . . . In summary, we, in circumstances such as these, are unwilling to expand constitutional law to hold police departments responsible for the tortious acts of their confidential informants. No decision by Defendants in this case involved such an obviously extremely great risk that Garnto would become intoxicated and then drive an automobile and then crash into another automobile causing serious injury as to shock the conscience. We conclude that the district court properly determined that Plaintiffs failed to establish a substantive due process violation.”); *May v. Franklin County Bd. of Commissioners*, No. 01-4000, 2003 WL 1134499, at *6, *7 (6th Cir. Mar. 12, 2003) (unpublished) (“May therefore has not alleged a constitutional violation based upon either a custodial-type setting or a situation in which the police displaced other means of help or protection. Under the facts alleged, however, she has sufficiently pled that Ratliff had a duty to protect her after emboldening Moss by going to her apartment, knocking, and then leaving. According to the facts alleged in the complaint, then, Ratliff had a duty to protect Kirk from Moss. Under the two-part test for alleging a constitutional violation, the next question this court must address is whether Ratliff was ‘sufficiently culpable to be liable under a substantive due process theory.’ . . . Not only must the state actor's behavior shock the conscience, but it must also consist of affirmative acts. . . . May says that Ratliff's arrival, minimal investigation, and subsequent departure were affirmative acts that emboldened Moss to hurt Kirk. Ratliff argues that May's real complaint is that he did not force entry into May's apartment and that his failure to do so was an act of omission and thus not actionable under Section 1983. May's factual claim that Ratliff's actions emboldened Moss must be accepted as true for purposes of a 12(b)(6) motion. Although May's real complaint is the failure to do anything else--an act of omission, this Court will consider the question of whether the affirmative actions taken by Ratliff shock the conscience. They do not. . . . His actions do not even indicate a deliberate indifference to Kirk's welfare, the standard that would be applied were this a custodial situation, where qualified immunity is less easily granted.”); *Schieber v. City of Philadelphia*, 320 F.3d 409, 417, 420, 423 (3d Cir. 2003) (“Whether executive action is conscience shocking and thus ‘arbitrary in the constitutional sense’ depends on the context in which the action takes place. In particular, the degree of culpability required to meet the ‘shock the conscience’ standard depends upon the particular circumstances that confront those acting on the state's behalf. . . . While it is true that Woods and Scherff were not required to exercise an instantaneous judgment, like an officer in a chase situation, this was

nevertheless far from the situation of prison doctors where ‘extended opportunities to do better [may be] teamed with protracted failure even to care.’ . . . Woods and Scherff were required to make a decision without delay and under the pressure that comes from knowing that the decision must be made on necessarily limited information. . . . I believe that a comparison of the situation confronting Officers Woods and Scherff with those confronting the social worker in *Miller* and the paramedics in *Ziccardi* suggests that liability could exist here only if Woods and Scherff subjectively appreciated and consciously ignored a great, i.e., more than substantial, risk that the failure to break down Schieber's door would result in significant harm to her. Clearly, the record would not support such a finding. Nevertheless, just as I have found it unnecessary to determine whether the Lewis ‘intent to harm’ standard is applicable, I also find it unnecessary to adopt the *Miller/Ziccardi* standard. Because the record would not support a finding of more than negligence on the part of Woods and Scherff, the result we reach follows a fortiori from that reached in *Miller* and *Ziccardi*.”); ***Ziccardi v. City of Philadelphia***, 288 F.3d 57, 66, 67 (3d Cir. 2002) (“In summary, then, we understand *Miller* to require in a case such as the one before us, proof that the defendants consciously disregarded, not just a substantial risk, but a great risk that serious harm would result if, knowing Smith was seriously injured, they moved Smith without support for his back and neck. On remand in the present case, we believe that the district court should apply this standard and instruct the jury accordingly if one is empaneled.”); ***Gottlieb v. Laurel Highlands School District***, 272 F.3d 168, 173 (3d Cir. 2001) (applying “shocks the conscience” standard to claim of excessive force in school context and analyzing claim in terms of following four elements: “a) Was there a pedagogical justification for the use of force?; b) Was the force utilized excessive to meet the legitimate objective in this situation?; c) Was the force applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm?; and d) Was there a serious injury?”); ***Shrum v. Kluck***, 249 F.3d 773, 778, 779 (8th Cir. 2001) (“Shrum accuses Elwood of maintaining a policy or custom which deprived her son of his constitutional right to bodily integrity. She defines that infringing policy or custom as Elwood's official decision to terminate Kluck and enter into a confidential settlement agreement with him, even though Kluck should have been terminated for his sexually inappropriate behavior with students. Because Shrum's claim against Elwood depends upon her son's constitutionally-protected liberty interest in his bodily integrity--a substantive due process theory--the district court correctly applied the culpability standard for a § 1983 substantive due process claim as mandated by *Lewis*. . . . [I]n some circumstances, official policy that is deliberately indifferent to unconstitutional

conduct may satisfy the ‘shocks the conscience’ standard required by *Lewis*. . . . We therefore must consider whether Elwood's official decision to enter into the confidential settlement agreement with Kluck is a policy that is so deliberately indifferent to a predictable constitutional violation that it shocks the conscience. . . . In the present case, Elwood's actions--entering into a confidential settlement agreement with Kluck rather than terminating him outright, and providing him with a neutral letter of recommendation--do not rise to the level of deliberate indifference. . . . We agree with the district court that Kluck's subsequent sexual misconduct was not so obvious a consequence as to impute § 1983 liability to Elwood for its deliberate indifference to that consequence.”); *Neal v. Fulton County Bd. of Educ.*, 229 F.3d 1069, 1074-76 (11th Cir. 2000) (“[W]e think for a number of reasons that a student-plaintiff alleging excessive corporal punishment can in certain circumstances assert a cause of action for a violation of his rights under the Fourteenth Amendment's Due Process Clause. . . . [A]most all of the Courts of Appeals to address the issue squarely have said that a plaintiff alleging excessive corporal punishment may in certain circumstances state a claim under the substantive Due Process Clause. [citing cases] We agree, and join the vast majority of Circuits in confirming that excessive corporal punishment, at least where not administered in conformity with a valid school policy authorizing corporal punishment as in *Ingraham*, may be actionable under the Due Process Clause when it is tantamount to arbitrary, egregious, and conscience-shocking behavior. . . . Consistent with the cases, we hold that, at a minimum, the plaintiff must allege facts demonstrating that (1) a school official intentionally used an amount of force that was obviously excessive under the circumstances, and (2) the force used presented a reasonably foreseeable risk of serious bodily injury. . . . In determining whether the amount of force used is obviously excessive, we consider the totality of the circumstances. In particular, we examine: (1) the need for the application of corporal punishment, (2) the relationship between the need and amount of punishment administered, and (3) the extent of the injury inflicted. . . . We need not decide today how ‘serious’ an injury must be to support a claim. The injury alleged by Plaintiff here--the utter destruction of an eye--clearly was serious. Moreover, courts elsewhere treat the extent and nature of the injury as simply one factor (although an important one) to be considered in the totality of the circumstances. . . . The test we adopt today will, we think, properly ensure that students will be able to state a claim only where the alleged corporal punishment truly reflects the kind of egregious official abuse of force that would violate substantive due process protections in other, non-school contexts. We do not open the door to a flood of complaints by students objecting to traditional and reasonable corporal punishment.”); *Nicini v. Morra*, 212 F.3d 798, 810-12 (3d Cir.

2000) (“*Lewis* therefore makes clear that a plaintiff seeking to establish a constitutional violation must demonstrate that the official's conduct ‘shocks the conscience’ in the particular setting in which that conduct occurred. In some circumstances, conduct that is deliberately indifferent will shock the conscience. Indeed, in the foster care context, most of the courts of appeals have applied the deliberate indifference standard, although they have defined that standard in slightly different ways. . . . Cyrus, unlike the social worker in *Miller*, had time ‘to make unhurried judgments’ in investigating whether to permit Nicini to remain with the Morras. . . In the context of this case, we agree that Cyrus's actions in investigating the Morra home should be judged under the deliberate indifference standard. . . . This case does not require us to determine whether an official's failure to act in light of a risk of which the official should have known, as opposed to failure to act in light of an actually known risk, constitutes deliberately indifferent conduct in this setting. We will assume *arguendo* that Nicini's proposed standard of ‘should have known’ is applicable. Nevertheless, as *Lewis* makes clear, the relevant inquiry is whether the defendant's conduct ‘shocks the conscience.’ Under the circumstances of this case, we cannot agree that Cyrus's conduct meets that standard. To the contrary, we conclude that Cyrus's conduct in investigating the Morras amounted, at most, to negligence. For the same reason, we need not consider whether failure to perform a specific duty can ever amount to deliberate indifference, . . . as there is no evidence that Cyrus failed to perform any required duty.”); ***Davis v. Township of Hillside***, 190 F.3d 167, 171 (3d Cir. 1999) (“Here, the chase ended when the pursuing police car bumped into the rear of Cook's car, causing him to lose control of the car, which led to the collision in which plaintiff was injured. Plaintiff argues that the deliberate ramming of Cook's car by the police vehicle amounted to use of a deadly weapon, which permits the drawing of an inference that the police acted with the intent to cause physical injury. We disagree. *Lewis* does not permit an inference of intent to harm simply because a chase eventuates in deliberate physical contact causing injury. Rather, it is ‘conduct intended to injure in some way unjustifiable by any government interest [that] is the sort of official action most likely to rise to the conscienceshocking level.’”); ***White v. Lemacks***, 183 F.3d 1253, 1258 (11th Cir. 1999) (“Although *Lewis* leaves open the possibility that deliberate indifference on the part of the state will ‘shock the conscience’ in some circumstances, . . . it is clear after *Collins* that such indifference in the context of routine decisions about employee or workplace safety cannot carry a plaintiff's case across that high threshold.”); ***Miller v. City of Philadelphia***, 174 F.3d 368, 375 (3d Cir. 1999) (“We recognize that a social worker acting to separate parent and child does not usually act in the hyperpressurized environment of a prison riot or a high- speed chase. However, he

or she rarely will have the luxury of proceeding in a deliberate fashion, as prison medical officials can. As a result, in order for liability to attach, a social worker need not have acted with the ‘purpose to cause harm,’ but the standard of culpability for substantive due process purposes must exceed both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed ‘shocks the conscience.’”); ***Culberson v. Doan***, 125 F. Supp.2d 252, 272 (S.D. Ohio 2000) (“Having reviewed this matter, the Court finds that the ‘shocks the conscience’ test is applicable to Chief Payton's alleged conduct, and that Chief Payton's alleged intentional or reckless actions in allowing the pond in question to be unguarded for 24 hours, in order to allow the Baker Family or Doan enough time to permanently remove and secrete Carrie's body, are sufficiently brutal, demeaning, and harmful as to ‘shock the conscience’ of this Court.”); ***Leddy v. Township of Lower Merion***, 114 F. Supp.2d 372, 376 (E.D. Pa. 2000) (“The circumstances of the present case lie between the parameters of deliberate and spontaneous. Unlike the police officer in *Lewis* who was engaged in a pursuit, Officer Bedzela was on a non-emergency call, albeit one that required immediate attention. Also unlike the *Nicini* caseworker, he did not have time to make unhurried judgments. More akin to *Miller* and *Cannon*, while full deliberation may not have been practicable, the needs of the situation were not so exigent that only a purpose to cause harm would shock the conscience. As articulated in *Miller*, culpability in an intermediate setting requires at least ‘gross negligence or arbitrariness.’ . . . Under this criterion, if Officer Bedzela was driving between 57 and 61 miles per hour without lights and sirens, his conduct, while not condonable, cannot be said to have shocked the conscience.”); ***Cannon v. City of Philadelphia***, 86 F. Supp. 2d 460, 469-71 (E.D. Pa. 2000) (“*Lewis* and *Miller* require that the actions of the state actor must shock the conscience to trigger § 1983 liability. Therefore, under *Lewis* and *Miller*, in order for the plaintiff to prevail on the second *Kneipp* prong, a plaintiff must prove that the state actor's behavior shocks the conscience. A determination of whether the actions of the state actor shock the conscience requires an evaluation of the context in which they acted. In other words, because *Lewis* and *Miller* hold that a determination of what shocks the conscience depends on the circumstances in which the incident occurred, identical actions of a state actor may be sufficient to set forth a state-created danger claim in one context, while it will not suffice in another context. . . . As in *Lewis* and *Miller*, the officers in this case did not have the luxury of proceeding in a deliberate fashion. Although the police activity in this case may not rise to the level of the ‘hyperpressurized’ environment of a police chase, the situation did not unfold in a vacuum. The police radio transmissions during the relevant time reveal that the events took place while officers were searching for alleged suspects and while officers were attempting to

secure a crime scene. The officers' actions must be considered within the context of this surrounding police activity. As *Lewis* indicates, police officers frequently have obligations that tug in different directions. . . Here, the officers were attempting to apprehend a suspect and secure a crime scene and at the same time address the plaintiff's request for transportation to the hospital.”), *aff'd by Cannon v. Beal*, 261 F.3d 490 (3d Cir. 2001); *Pickard v. City of Girard*, 70 F. Supp.2d 802, 808 (N.D. Ohio 1999) (“[T]he Sixth Circuit has cautioned against applying the ‘shocks the conscience’ standard for cases not involving physical abuse or excessive force. *Cassady v. Tackett*, 938 F.2d 693, 698 (6th Cir.1991) . . . Consequently, Plaintiffs' remaining claims that the Girard Defendants did not subject Estes to a field sobriety test, or arrest Estes for assault, simply do not rise to the level of ‘physical abuse’ and, thus, do not state a substantive due process claim.”).

See also *O'Connor v. Pierson*, 426 F.3d 187, 204 (2d Cir. 2005) (“*County of Sacramento* did not distinguish between different types of substantive due process claims, so ‘constitutionally arbitrary’ action for purposes of a property-based substantive due process claim is action that shocks the conscience.”); *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 123 S.Ct. 1389, 1396 (2003) (“The subjection of the site-plan ordinance to the City's referendum process, regardless of whether that ordinance reflected an administrative or legislative decision, did not constitute *per se* arbitrary government conduct in violation of [substantive] due process.”); *DePoutot v. Raffaelly*, 424 F.3d 112, 118 & n.4 (1st Cir.2005) (“This case involves executive branch action. Thus, we must proceed incrementally. First, we must determine whether the official's conduct shocks the conscience. . . Only if we answer that question affirmatively can we examine what, if any, constitutional right may have been violated by the conscience-shocking conduct and identify the level of protection afforded to that right by the Due Process Clause. . . . The parties correctly note that our pre-*Lewis* jurisprudence paved two avenues that a plaintiff might travel in pursuing a substantive due process claim. *See, e.g., Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 531 (1st Cir.1995) (indicating that a plaintiff may establish a violation of substantive due process by showing either the deprivation of a fundamental right or conduct that shocks the conscience). *Lewis*, however, clarified the law of substantive due process and made pellucid that conscience-shocking conduct is an indispensable element of a substantive due process challenge to executive action.”); *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 286 (3d Cir. 2004) (“[T]he misconduct alleged here does not rise sufficiently above that at issue in a normal zoning dispute to pass the ‘shocks the conscience test.”); *Levin v. Upper Makefield Township*, No. 03-1860, 90

Fed.Appx. 653, 2004 WL 449189, at *7 n.2 (3d Cir. Mar. 8, 2004) (“Levin argues that the ‘shocks the conscience’ test only applies where the state executive actor had to act with urgency. . . But, says Levin, because the Township did not have to act, and did not in fact act, with any urgency, the ‘shocks the conscience’ test does not apply to his substantive due process claim. Consequently, the less-stringent *Bello* ‘improper motive’ test applies. However, there's nothing in *United Artist* that supports the distinction Levin urges upon us. In fact, *United Artist* makes it clear that the ‘shocks the conscience’ test applies to all substantive due process claims. Levin also ‘takes issue’ with the *United Artist* decision, claiming that it does not afford an individual any ‘protection from the irrational and arbitrary actions of the government and its officials.’ . . However, *United Artist* is the law of this circuit and, therefore, his distaste for it is irrelevant. Moreover, the *United Artist* ‘shocks the conscience standard’ is precisely designed to protect an individual from arbitrary and irrational executive action.”); *Galdikas v. Fagan*, 342 F.3d 684, 690 n.3 (7th Cir. 2003) (“As noted by many courts and commentators, the majority opinion in *Lewis* leaves a number of questions unresolved. The principal ambiguity is whether the ‘shocks the conscience’ standard replaces the fundamental rights analysis set forth in *Glucksberg* whenever executive conduct is challenged or whether the ‘shocks the conscience’ standard supplements or informs the *Glucksberg* paradigm in such situations. Certain language in the majority opinion in *Lewis* suggests that the ‘shocks the conscience’ standard should be applied as an antecedent or threshold inquiry in all cases of executive conduct. . . Other passages suggest that the ‘shocks the conscience’ inquiry may be employed to inform the historical inquiry into the nature of the asserted liberty interest. . . This ambiguity has been noted as well in our own earlier cases. [discussing cases] Our case law on this point seems to reflect a more generally perceived confusion as to the interrelationship of *Lewis* and *Glucksberg*. . . Resolution of this ambiguity is not necessary to our decision today. For the reasons set forth in the text, the plaintiffs' substantive due process claim fails under any reading of *Lewis*. The Supreme Court has not recognized a fundamental right to education. It certainly has not recognized a fundamental right to a post-secondary accredited degree program. Taking the plaintiffs' allegations that the defendants acted improperly by misleading them about the accreditation status of the MSW program as true, such conduct is not sufficiently egregious to shock the conscience.”); *Bowers v. City of Flint*, 325 F.3d 758, 764 (6th Cir. 2003) (Moore, J., concurring) (“[T]his court should undertake a three-step analysis of the residents' substantive due process claim. First, we should consider whether the asserted interest constitutes a fundamental constitutional right. [footnote omitted] If the asserted interest is not a fundamental right, we then must evaluate whether Flint's conduct depriving the

residents of that interest shocks the conscience. Finally, if Flint's conduct does not shock the conscience, then this court must consider whether that conduct is rationally related to a legitimate state interest.”); *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 400, 401 (3d Cir. 2003) (“Despite *Lewis* and the post-*Lewis* Third Circuit cases cited above, United Artists maintains that this case is not governed by the ‘shocks the conscience’ standard, but by the less demanding ‘improper motive’ test that originated with *Bello v. Walker*, 840 F.2d 1124 (3d Cir.1988), and was subsequently applied by our court in a line of land-use cases. In these cases, we held that a municipal land use decision violates substantive due process if it was made for any reason ‘unrelated to the merits,’ *Herr v. Pequea Township*, 274 F.3d 109, 111 (3d Cir.2001) (citing cases), or with any ‘improper motive.’ [citing cases] These cases, however, cannot be reconciled with *Lewis*'s explanation of substantive due process analysis. Instead of demanding conscience-shocking conduct, the *Bello* line of cases endorses a much less demanding ‘improper motive’ test for governmental behavior. Although the District Court opined that there are ‘few differences between the [shocks the conscience] standard and improper motive standard,’ we must respectfully disagree. . . . The ‘shocks the conscience’ standard encompasses ‘only the most egregious official conduct.’ . . . In ordinary parlance, the term ‘improper’ sweeps much more broadly, and neither *Bello* nor the cases that it spawned ever suggested that conduct could be ‘improper’ only if it shocked the conscience. We thus agree with the Supervisors that the *Bello* line of cases is in direct conflict with *Lewis*. . . . [W]e see no reason why the present case should be exempted from the *Lewis* shocks-the-conscience test simply because the case concerns a land use dispute. . . . We thus hold that, in light of *Lewis*, *Bello* and its progeny are no longer good law.”), *reh'g en banc denied*, 324 F.3d 133 (3d Cir. 2003); *Moran v. Clarke (Moran I)*, 296 F.3d 638, 651 (8th Cir. 2002) (en banc) (Bye, J., concurring) (“In *County of Sacramento v. Lewis*, the Court held that all substantive due process claims against executive officials proceed under one theory, not two separate theories. . . . In every case in which a plaintiff challenges the actions of an executive official under the substantive component of the Due Process Clause, he must demonstrate both that the official's conduct was conscience-shocking, . . . and that the official violated one or more fundamental rights that are ‘deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.’”); *Gurik v. Mitchell*, No. 00-4068, 2002 WL 59641, at *4 (6th Cir. Jan. 15, 2002) (not published) (“Our requirement that terminated public employees allege violations of fundamental rights in order to allege violation of a substantive due process property interest in their employment simply standardizes the

'shocks the conscience' test for purposes of termination from public employment. In other words, a public employee's termination does not 'shock the conscience' in this court if it was not based on the violation of some fundamental right. Thus, Gurik's criticism of this court's precedent based on *Lewis* is inappropriate, and Gurik must allege violation of a fundamental right in order to allege violation of his substantive due process interest in public employment."); *Cruz-Erazo v. Rivera-Montanez*, 212 F.3d 617, 622 (1st Cir. 2001) ("There are two theories under which a plaintiff may bring a substantive due process claim. Under the first, a plaintiff must demonstrate a deprivation of an identified liberty or property interest protected by the Fourteenth Amendment. Under the second, a plaintiff is not required to prove the deprivation of a specific liberty or property interest, but, rather, he must prove that the state's conduct 'shocks the conscience.' [citing *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525, 531 (1st Cir.1995)]; *Hawkins v. Freeman*, 195 F.3d 732, 738, 739, 741, 750 (4th Cir. 1999) (en banc) ("Depending upon whether the claimed violation is by executive act or legislative enactment, different methods of judicial analysis are appropriate. . . This is so because there are different 'criteria' for determining whether executive acts and legislative enactments are 'fatally arbitrary,' an essential element of any substantive due process claim. . . In executive act cases, the issue of fatal arbitrariness should be addressed as a 'threshold question,' asking whether the challenged conduct was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' . . If it does not meet that test, the claim fails on that account, with no need to inquire into the nature of the asserted liberty interest. If it does meet the threshold test of culpability, inquiry must turn to the nature of the asserted interest, hence to the level of protection to which it is entitled. . . If the claimed violation is by legislative enactment (either facially or as applied), analysis proceeds by a different two-step process that does not involve any threshold 'conscience-shocking' inquiry. The first step in this process is to determine whether the claimed violation involves one of 'those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition,"' [citing *Glucksberg*], and ' "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."' . . The next step depends for its nature upon the result of the first. If the asserted interest has been determined to be 'fundamental,' it is entitled in the second step to the protection of strict scrutiny judicial review of the challenged legislation. . . . If the interest is determined not to be 'fundamental,' it is entitled only to the protection of rational-basis judicial review. . . . [W]e are satisfied that whether the claim is analyzed under the *Lewis* or *Glucksberg* methodologies, it fails as a matter of law. . . . Specifically, we hold that the precise liberty interest asserted here-- that of continuing in a state of freedom

erroneously granted by government and enjoyed for a significant time by a convict who yet remains under an unexpired lawful sentence--cannot be found one of 'those fundamental rights and liberties which are objectively "deeply rooted in this Nation's history and tradition."' . . . Nor, unless possibly when solely animated by a vindictive or oppressive purpose that is not suggested here, could the executive act of re-imprisoning under such circumstances be declared 'shock[ing to] the contemporary conscience.'").

See also Cherry Hill Towers, LLC v. Township of Cherry Hill, No. 03-4744 (JEI), (D.N.J. Jan. 6, 2006) ("Even if the Court accepts Plaintiff's statement of the facts as true, what happened here does not rise to the level of 'the kinds of gross misconduct that have shocked the judicial conscience.' . . . Whether union officials unconnected to the Township attempted to persuade, or even threaten, the parties involved in the Cherry Hill Towers project to use union labor is not relevant to the question of whether these Defendants deprived Plaintiff of a property right in a manner that shocks the conscience. Nor is it surprising that a high-profile project such as this would attract the attention of the unions, or that Township officials would recognize this and point it out to Plaintiff. Defendants' actions do not reflect the egregious abuse of power that substantive due process was intended to correct."); *Robinson v. Limerick Township*, No. 04-3758, 005 WL 15469, at * (E.D. Pa. Jan. 4, 2005) (not reported) ("The Robinsons allege the Township has taken action motivated by bias, bad faith, and improper motives and intended to threaten, intimidate, and harass them. There are no allegations of self dealing, or unjust enrichment of the Township Supervisors or anyone related to them. . . . Instead, the Robinsons argue that the Township's conduct is automatically conscience shocking due to its improper motive. I am unable to agree. . . . [T]he Robinsons must go considerably further than mere allegations that the Township's conduct was taken with an improper motive. . . . The latest jurisprudence of the Third Circuit Court of Appeals evinces a preference for evidence of self dealing or other unjust enrichment of the municipal decision makers as a way to meet the shocks the conscience standard."); *Nicolette v. Caruso*, Civil Action 02-1368, 2003 WL 23475027, at *9 (W.D. Pa. Nov. 4, 2003) ("The United States Court of Appeals for the Third Circuit specifically extended the *Lewis* 'shocks the conscience' test to cases alleging that a municipal land-use decision violated substantive due process. . . . *United Artists* was decided in January, 2003 and there have not been many subsequent municipal land-use decisions applying the new 'shocks the conscience' standard. There, however, is at least one court which dealt with that standard. In *Associates in Obstetrics & Gynecology v. Upper Merion Township*, 270 F.Supp.2d 633, 656 (E.D.

.Pa.2003), the court held that the plaintiff stated a claim under section 1983 that met the ‘shocks the conscience’ standard by alleging that zoning regulations were enforced with the intent to harm and/or restrict the business interests of the plaintiff who was a lessee. . . . [T]he court finds that, albeit this is a close question, plaintiff's complaint implicated the ‘shocks the conscience’ test sufficiently to survive the motion to dismiss.”)

Lewis did not settle the question of who makes the determination of "conscience-shocking." See, e.g., *Terrell v. Larson*, 396 F.3d 975, 981 (8th Cir. 2005) (en banc) (“Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury.”); *Moran v. Clarke (Moran I)*, 296 F.3d 638, 643 (8th Cir. 2002) (en banc) (“[W]hether the plaintiff has presented sufficient evidence to support a claimed violation of a substantive due process right is a question for the fact-finder, here the jury.”); *Armstrong v. Squadrito*, 152 F.3d 564, 577 (7th Cir. 1998) (“[T]he question of whether the defendants' conduct constituted deliberate indifference is a classic issue for the fact finder. We know that the submission of the issue to the fact finder may create some confusion because, technically, the question is the second consideration in our inquiry into the existence of a violation of substantive due process. Nevertheless, because this question is a factual mainstay of actions under § 1983, we do not believe it should receive consideration as a question of law. Any concern about allowing the fact finder to determine a constitutional question is ameliorated by the overlap between this inquiry and the third step in our analysis--an examination of the totality of the circumstances--which is a question of law.”); *Bovari v. Town of Saugus*, 113 F.3d 4, 6 (1st Cir. 1997) (“Under *Evans [v. Avery]*, the question is not whether the officers' decision to dog the Honda was sound--decisions of this sort always involve matters of degree--but, rather, whether a rational jury could say it was conscience-shocking.”); *Crowe v. County of San Diego*, 359 F.Supp.2d 994, 1030 (S.D. Cal. 2005) (“Although Michael contends that whether defendants' conduct ‘shocks the conscience’ is an issue for the jury, he has failed to cite any case law in support of his contention, and the court's own research reveals case law holding that this determination is an issue of law for the court.”); *Busch v. City of New York*, No. 00 CV 5211(SJ), 2003 WL 22171896, at *6 (E.D.N.Y. Sept. 11, 2003) (not reported) (whether conduct shocks the conscience is a question for jury); *Johnson v. Freeburn*, No. 96-74996, 2002 WL 1009572, at *4, *5 (E.D. Mich. April 24, 2002) (not reported) (“The concerns of Justices O'Connor, Scalia, and Thomas, suggest that the risks of unrestrained and unelected subjectivity--the antithesis of a rule of law--would be far greater if the nearly unreviewable personal

sentiments of jurors are added to the mix in the application of this substantive due process standard. While courts have routinely submitted this standard to juries, *see, e.g., Walker v. Bain*, 257 F.3d 660, 671-73 (6th Cir.2001); *United States v. Walsh*, 194 F.3d 37 (2d Cir.1999); *Boveri v. Town of Saugus*, 113 F.3d 4, 6-7 (1st Cir.1997), much can be said that this should be accompanied by judicial guidance, if not preempted totally by judges once a jury has resolved all the material disputed issues of fact, as is often done in the qualified immunity area under [*Harlow*]. . . . It may be that the tradition of generally giving ‘shocks the conscience’ issues to the jury will continue notwithstanding many arguments against it. Nonetheless, on facts such as those in this case, a judge would have been warranted in directing the jury that after ruling for Plaintiff on the disputed factual questions (answered in jury question 1), the gratuitous threat or instruction to armed guards to have an inmate shot if he moves--given by a corrections officer who earlier that day threatened to have the inmate killed, and given for no legitimate penological purpose, but to retaliate against the inmate for reporting to authorities the correction officer's earlier threat on the inmate's life--does ‘shock the conscience’ as a matter of law.”); *Escatel v. Atherton*, No. 96 C 8589, 2001 WL 755280, at *6 n. 14 (N.D. Ill. July 2, 2001) (not reported) (“The Supreme Court has not made clear whether the ‘shocks the conscience’ analysis is normally a question for the jury or whether it is a question of law for the court. . . The Seventh Circuit has said that it is a question of law. . . Other courts have indicated it is a decision for the court, not the jury, to decide.”); *Mason v. Stock*, 955 F. Supp. 1293, 1308-09 (D. Kan. 1997) (“[T]he ‘shock the conscience’ determination is not a jury question. . . . Under the rules pertaining to summary judgment, a plaintiff who wishes to assert a *Collins*’ claim must, at minimum, point to conduct or policies which would require the court to make a ‘conscience shocking’ determination.”); *Mellott v. Heemer*, 1997 WL 447844, *15 (M.D. Pa. July 23, 1997) (not reported) (“The question of whether conduct is ‘truly conscience shocking’ is one for the jury.”), *rev'd on other grounds*, 161 F.3d 117 (3d Cir. 1998).

D. Derivative Nature of Entity Liability

In *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), the Court held that if there is no constitutional violation, there can be no liability on the part of the individual officer or the government body. "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *Id.* at 799 (emphasis in original). To borrow an analogy from Judge

Rosenn, where there is no "kick," neither the foot nor the head can be inculpated. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1481 (3d Cir. 1990).

See also *Hicks v. Moore*, 422 F.3d 1246, 1251, 1252 (11th Cir. 2005) (“Plaintiff contends Clouatre (pursuant to the Jail's practice) violated Plaintiff's rights under the Fourth Amendment by strip searching her without reasonable suspicion. She also claims that Sheriff Moore, Captain Ausburn, and Sergeant Gosnell are liable to her based on a theory of supervisory liability because they failed to train jailers properly about when to conduct strip searches, instead adhering to the general practice that required strip searches of all detainees regardless of the charge or circumstances. We will assume that it was the practice of Habersham County to strip search every detainee who was to be placed in the general population of the Jail. . . . And given the Circuit's precedent, we must conclude the search of Plaintiff cannot be justified under the Constitution on the single ground that Plaintiff was about to be placed in the Jail's general population. . . . That conclusion, however, does not mean that Plaintiff's own constitutional rights were violated when she was searched: just because she was strip searched at a jail that had a search practice that would generally violate the Constitution does not mean every search that was conducted actually violated the Constitution. . . . We said in *Skurstenis* that ‘“reasonable suspicion” may justify a strip search of a pretrial detainee.’ . . . Because we conclude that reasonable suspicion existed for this particular strip search, we also must conclude that no constitutional right was violated by the search.”); *Young v. City of Providence*, 404 F.3d 4, 26, 27 (1st Cir. 2005) (“At the outset, we agree with the district court's reasoning that any proper allegation of failure to train must be aimed at Solitro's lack of training and not at the deficiencies in Saraiva's or Cornel's training, and must allege that Solitro's lack of training caused him to take actions that were objectively unreasonable and constituted excessive force on the night he shot Cornel. Such a theory, when the evidence is looked at most favorably to the plaintiff, can be made out in this case: a jury could find that Solitro's shooting of Cornel was unreasonable, *inter alia*, because he should have recognized Cornel as an off-duty officer (due to Cornel's demeanor and verbal commands) or not shot Cornel so rapidly without making sure of his identity. A jury could find that Solitro made such mistakes because of the PPD's lack of training on on-duty/off-duty interactions, avoiding misidentifications of off-duty officers, and other issues relating to the City's always armed/always on-duty policy. Further, a jury could find that this training deficiency constituted deliberate indifference to Cornel's rights.”); *Crocker v. County of Macomb*, No. 03-2423, 2005 WL 19473, at *5, *6 (6th Cir. Jan. 4, 2005) (unpublished) (“If the plaintiff fails to establish a constitutional violation by an

individual officer, the local government unit cannot be held liable for a failure to train under § 1983. . . More specifically, where there exists no constitutional violation for failure to take special precautions to prevent suicide, then there can be no constitutional violation on the part of a local government unit based on its failure to promulgate policies and to better train personnel to detect and deter jail suicides. . . Because no individual defendant violated Tarzwell's constitutional rights, Macomb County necessarily is not liable to plaintiff under a failure to train theory or on the theory that the County failed to promulgate effective policies for suicide prevention. Even if the County could be held liable absent liability on the part of an individual defendant, plaintiff has not identified any policy or custom that evidences deliberate indifference on the County's part either to the risk that Tarzwell would try to kill himself or to the problem of suicide attempts by pretrial detainees in general. The court notes in this regard that the alleged failure to comply with a regulation governing the visibility of holding cells alone does not rise to the level of a constitutional violation. . . Finally, plaintiff has not shown that defendant had a deliberate and discernible county policy to maintain a jail that was inadequately designed and equipped for the prevention of suicides. For these reasons, the district court did not err by granting summary judgment in favor of Macomb County.”); ***Bowman v. Corrections Corporation of America***, 350 F.3d 537, 546, 547 (6th Cir. 2003) (“In *Speer*, the Eighth Circuit held that there must be a violation of the plaintiff's constitutional rights in order for liability to attach to either the individual defendants or to the municipal authority under §1983. In *Speer*, the plaintiff's constitutional rights were violated, but not by the Mayor. Here, if we uphold the jury's findings as to Dr. Coble and Warden Myers, there was no violation of Bowman's rights by anyone, even if CCA's policy implicitly authorized such a violation. The similarity between this case and *Heller* is that the constitutional violation claimed either occurred or did not occur as a direct result of the actions of at least one person, in this case Dr. Coble. This is not a scenario in which the ‘combined actions of multiple officials’ could give rise to the violation at issue. For these reasons, we affirm the district court's denial of Bowman's motion for a judgment as a matter of law against the defendants in this case.”); ***Jarrett v. Town of Yarmouth***, 331 F.3d140, 151 (1st Cir. 2003) (per curiam) (“[I]t appears that the jury initially concluded that the Town of Yarmouth's bite and hold policy was unconstitutional, and reasoned that any application of that policy must be unconstitutional per se. Their reasoning was erroneous as a matter of law. We conclude after conducting the *Graham* balancing test that Officer McClelland's release of a dog trained to bite and hold did not violate Jarrett's Fourth Amendment rights as a matter of law. Our determination that Jarrett suffered no constitutional

injury is dispositive of his municipal liability claim against the Town of Yarmouth.”); ***Cuesta v. School Bd. Of Miami Dade County***, 285 F.3d 962, 970 n.8 (11th Cir. 2002) (“Because we hold that Cuesta suffered no deprivation of her constitutional rights, we need not decide the question of whether the County’s policy, in which all felony arrestees are strip searched, might deprive others of their constitutional rights.”); ***Curley v. Village of Suffern***, 268 F.3d 65, 71 (2d Cir.2001) (“Following *Heller*, we have recognized that a municipality cannot be liable for inadequate training or supervision when the officers involved in making an arrest did not violate the plaintiff’s constitutional rights. . . . Further, the verdict form in this case reveals the jury found no deprivation of rights in the first instance, without ever reaching the question of whether qualified immunity insulated defendants’ conduct as objectively legally reasonable. This point is significant because case law further suggests *Heller* will not save a defendant municipality from liability where an individual officer is found not liable because of qualified immunity.”); ***Trigalet v. City of Tulsa***, 239 F.3d 1150, 1154-56 (10th Cir. 2001) (“[W]e consider whether a municipality can be held liable for the actions of its employees if those actions do not constitute a violation of a plaintiff’s constitutional rights. We conclude, based on *Lewis* and *Brown*, as well as decisions from this and other circuits, . . . that a municipality cannot be held liable under these circumstances. . . . Here, the threshold issue is whether the action causing the harm (police pursuit resulting in death of innocent bystander) states a constitutional violation at all. Because there was no evidence that the officer intended to harm the decedents, *Lewis* dictates that no constitutional harm has been committed. Therefore, plaintiffs cannot meet the first prong of the test set forth in *Collins v. City of Harker Heights*. . . . Thus, even if it could be said that Tulsa’s policies, training, and supervision were unconstitutional, the City cannot be held liable where, as here, the officers did not commit a constitutional violation. . . . In sum, we hold that absent a constitutional violation by the individual police officers whose conduct directly caused plaintiffs’ injuries, there can be no municipal liability imposed on the City of Tulsa on account of its policies, customs, and/or supervision with regard to the individual defendants.”); ***Young v. City of Mount Ranier***, 238 F.3d 567, 579 (4th Cir. 2001) (“The law is quite clear in this circuit that a section 1983 failure-to-train claim cannot be maintained against a governmental employer in a case where there is no underlying constitutional violation by the employee. . . . Because the Parents have failed to allege a constitutional violation on the part of any law enforcement officer, the district court properly dismissed the failure-to-train claims asserted against the governmental employers.”); ***Treese v. Hochstetler***, 213 F.3d 360, 364 (7th Cir. 2000) (“[B]ecause a jury has determined that Hochstetler was not liable for committing a constitutional deprivation (tort)

against Treece, it is impossible under existing case law for the City to be held liable for its knowledge or inaction concerning its officer's activity."); *Hayden v. Grayson*, 134 F.3d 449, 455 (1st Cir. 1998) ("Normally . . . a municipality cannot be held liable unless its agent actually violated the victim's constitutional rights."); *S.P. v. City of Takoma Park*, 134 F.3d 260, 272, 274 (4th Cir. 1998) ("Even assuming for the purposes of summary judgment that the training of its officers was unconstitutional, Takoma Park cannot be held liable when, as here, no constitutional violation occurred because the officers had probable cause to detain Peller. . . . Because the officers had probable cause to detain Peller for the limited purpose of transporting her to WAH for an emergency mental evaluation, no constitutional violation occurred. As such, Takoma Park necessarily is not liable for any alleged injuries."); *Wyke v. Polk County School Board*, 129 F.3d 560, 568-69 (11th Cir. 1997) ("[T]o prevail on a § 1983 claim against a local government entity, a plaintiff must prove both that her harm was caused by a constitutional violation and that the government entity is responsible for that violation. . . *Canton* discussed only the second issue, i.e., whether the city's 'policy' was responsible for its employee's violation of the plaintiff's constitutional rights. For purposes of its discussion, the Court assumed that those rights had indeed been violated. . . . We cannot make the same assumption. Before addressing whether the School Board can be held liable for a failure to train its employees, we must first determine whether those employees violated any of Wyke's constitutional rights by failing to discharge some constitutional duty owed directly to Shawn (and thus indirectly owed to Wyke), or some constitutional duty owed directly to Wyke. . . *DeShaney*, at least in part, mandates that we answer that question in the negative."); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997) ("Neither the City nor the police officers' supervisor can be held liable on a failure to train theory or on a municipal policy theory absent a finding that the individual police officers are liable on the underlying substantive claim."); *Hunt v. Applegate*, No. 95-1062, 1996 WL 748158, *2 (6th Cir. Dec. 31, 1996) (unpublished) (Panel decision on petition to rehear) ("It is impossible to establish deliberate indifference to a constitutional violation through the failure to train when the constitutional violation itself does not exist or is left completely undefined and unformed and when the municipal policy makers at fault are not identified. Thus, in the absence of a constitutional injury committed by municipal employees and caused by a lack of training, there is no viable 'failure to train' theory under *City of Canton v. Harris*"); *Wilson v. Meeks*, 98 F.3d 1247, 1255 (10th Cir. 1996) ("The district court correctly concluded no municipal liability could be found in this case because there was no constitutional violation committed by any of the individual defendants."); *Quintanilla v. City of Downey*, 84 F.3d 353, 355 (9th Cir. 1996)

("Plaintiff cites [*Chew and Hopkins v. Andaya*] for the proposition that a police department may be liable under §1983 for damages caused by unconstitutional policies notwithstanding the exoneration of the individual officer whose actions were the immediate cause of the constitutional injury. While this may be true if the plaintiff established that he suffered a constitutional injury, and the officer's exoneration resulted from qualified immunity, . . . this proposition has no applicability here. Plaintiff failed to establish that he suffered a constitutional injury. . . ."); *Hinkle v. City of Clarksburg*, 81 F.3d 416, 420 (4th Cir. 1996) ("In the absence of any underlying use of excessive force against [plaintiff], liability cannot be placed on either the non-shooting officers, a supervisor, or the City."); *Thompson v. City of Lawrence*, 58 F.3d 1511, 1517 (10th Cir. 1995) (no municipal liability where no underlying constitutional violation by officers); *Webber v. Mefford*, 43 F.3d 1340, 1344 (10th Cir. 1994) ("Because Defendant Griffin did not violate Plaintiffs' constitutional rights, the district court correctly dismissed Plaintiffs' claims against the City of Sapulpa for inadequate training, supervision, and pursuit policies. A claim of inadequate training, supervision, and policies under § 1983 cannot be made out against a supervisory authority absent a finding of constitutional violation by the person supervised."); *Scott v. Henrich*, 39 F.3d 912, 916 (9th Cir. 1994) ("[Plaintiff] contends that even if the conduct of the individual officers was objectively reasonable, the municipal defendants may still face liability under *City of Canton v. Harris*, 489 U.S. 378 (1989). While the liability of municipalities doesn't turn on the liability of individual officers, it is contingent on a violation of constitutional rights. Here, the municipal defendants cannot be held liable because no constitutional violation occurred."); *Thompson v. Boggs*, 33 F.3d 847, 859 (7th Cir. 1994) (where no underlying constitutional violation by officer, no liability on the part of the City or Police Chief); *Abbott v. City of Crocker*, 30 F.3d 994, 998 (8th Cir. 1994) ("The City cannot be liable in connection with either the excessive force claim or the invalid arrest claim, whether on a failure to train theory or a municipal custom or policy theory, unless Officer Stone is found liable on the underlying substantive claim."); *Spears v. City of Louisville*, 27 F.3d 567 (Table), 1994 WL 262054, *3 (6th Cir. June 14, 1994) ("[T]here must be a constitutional violation for there to be § 1983 municipal liability ... Because there was no deprivation of constitutional rights here, there is no basis for liability under § 1983, municipal or otherwise. Whether Louisville had an 'informal' policy of permitting its police officers to engage in high-speed pursuits for non-hazardous misdemeanors is irrelevant to the question of whether there was a deprivation of constitutional rights, a prerequisite to the imposition of § 1983 liability."); *Temkin v. Frederick County Commissioners*, 945 F.2d 716, 724 (4th Cir. 1991) (no claim of inadequate training

can be made against supervisory authority, absent finding of constitutional wrong on part of person being supervised); *Apodaca v. Rio Arriba County Sheriff's Dept.*, 905 F.2d 1445, 1447 (10th Cir. 1990) (when no underlying constitutional violation by a county officer, no action for failing to train or supervise the officer); *Belcher v. Oliver*, 898 F.2d 32, 36 (4th Cir. 1990) (where it was clear there was no constitutional violation, no need to reach question of whether a municipal policy was responsible for the officers' action); *Williams v. Borough of West Chester*, 891 F.2d 458, 467 (3d Cir. 1989) (where no viable claim against any individual officer, no *Monell* claim against the Borough); *Dye v. City of Warren*, 367 F.Supp.2d 1175, 1189, 1190 (N.D. Ohio 2005) (“As the United States Supreme Court explained in *City of Canton v. Harris*, . . . a municipality's failure to train is in general not enough to prove a constitutional violation. . . Instead, Section 1983 plaintiffs can use a municipality's failure to train as one way to make the required showing that a municipal policy or custom was the ‘moving force’ behind an already established constitutional deprivation. . . Therefore, Mr. Dye's failure-to-train claim, like his basic excessive force claim against the Chief, requires a predicate showing that Chief Mandopoulos did violate Mr. Dye's Fourth Amendment right to be free from excessive force. Accordingly, this Court's finding that the Chief was not liable for any constitutional deprivation against Mr. Dye forecloses the plaintiff's Fourth Amendment claims against the City.”); *Jicarilla Apache Nation v. Rio Arriba County*, 376 F.Supp.2d 1096, 1100 (D.N.M. 2004) (“The Defendants assert that there no longer exists any genuine issue of material fact because the Court previously held that the individual Defendants, in their individual capacities, did not violate the Constitution. Thus, the Defendants assert it is improper to allow the suit to proceed against the County and the individual Defendants in their official capacities. The Nation argues that its claims against the County and its officials should proceed because the Court ruled on whether the Defendants were entitled to qualified immunity, but did not determine whether the Defendants actually violated the Nation's constitutional rights. Because this Court previously granted summary judgment, and in doing so held that the Nation had not produced evidence that the individual Defendants in their individual capacity violated the Constitution, . . . there can be no liability for County or the individual Defendants in their official capacities. There is no underlying constitutional violation.”); *Butler v. Coitsville Township Police Dep't*, 93 F. Supp.2d 862, 868 (N.D. Ohio 2000) (“Because the Court has found insufficient evidence of any constitutional violation by the defendant law enforcement officers, the defendant government entities cannot be held liable under § 1983 and are therefore entitled to judgment as a matter of law.”); *Sanchez v. Figueroa*, 996 F. Supp. 143, 147 (D.P.R. 1998) (In action against supervisory official

for failure to train and failure to screen/supervise, plaintiff must first establish that non-supervisory officer violated plaintiff's decedent's constitutional rights.); *Friedman v. City of Overland*, 935 F. Supp. 1015, 1018 (E.D. Mo. 1996) ("It is clearly established that a municipality cannot be held liable under s 1983, whether on a failure to train theory or a municipal custom and policy theory, unless the municipal/state employee is found liable on the underlying substantive constitutional claim."); *Dismukes v. Hackathorn*, 802 F. Supp. 1442, 1448 (N.D. Miss. 1992) ("[T]he court's conclusion that there is insufficient evidence to raise a factual issue as to the officer's recklessness [in high speed pursuit] requires summary judgment in the claims against Starkville and the police chief. If Officer...did not violate plaintiffs' constitutional rights, the same applies to the police chief and the city of Starkville."); *Montgomery v. County of Clinton, Michigan*, 743 F. Supp. 1253, 1257 (W.D. Mich. 1990) ("If [officers] inflicted no constitutional injury, though their conduct was enabled by policy, custom or deficient training, the County and Sheriff could bear no liability."), *aff'd*, 940 F.2d 661 (6th Cir. 1991) (Table).

But see Gray v. City of Detroit, 399 F.3d 612, 617-19 (6th Cir. 2005) ("When an officer violates a plaintiff's rights that are not 'clearly established,' but a city's policy was the 'moving force' behind the constitutional violation, the municipality may be liable even though the individual officer is immune. . . . It is arguable, therefore, that the District Court erred in its conclusion that '[i]f no constitutional violation by the individual defendants is established, the municipal defendants cannot be held liable under S 1983.' Assuming for the sake of argument that this Circuit permits a municipality to be held liable in the absence of any employee's committing a constitutional violation, the remaining question for us then is whether the City's policy makers' decisions regarding suicide prevention were themselves constitutional violations, as plaintiff contends. . . . A municipality may be liable under §1983 where the risks from its decision not to train its officers were 'so obvious' as to constitute deliberate indifference to the rights of its citizens. . . . As applied to suicide claims, the case law imposes a duty on the part of municipalities to recognize, or at least not to ignore, obvious risks of suicide that are foreseeable. Where such a risk is clear, the municipality has a duty to take reasonable steps to prevent the suicide. Very few cases have upheld municipality liability for the suicide of a pre-trial detainee. . . . Pre-trial detainees do not have a constitutional right for cities to ensure, through supervision and discipline, that every possible measure be taken to prevent their suicidal efforts. Detainees have a right that city policies, training and discipline do not result in deliberate indifference to foreseeable and preventable suicide attempts. Here, the plaintiff never made any statements that could reasonably be interpreted as

threatening to harm himself, and none of his destructive acts were self-directed. There was no indication that he would turn his anger and agitation upon himself. The city's agents complied with city policies regarding medical care. Gray was transferred to the Receiving Hospital because of his physical complaints. He was screened by an intake nurse before being placed in a cell. . . . Plaintiff has documented twenty in-custody deaths, other than Gray's, that occurred in the city's various holding facilities over the eight year period between June 24, 1993, and August 3, 2001. Of these, only two were suicides, with one occurring in 1998 and one in 1999. Plaintiff argues that policymakers failed to adequately discipline or enforce their policies with respect to monitoring, but as of Gray's death no other inmate had ever committed suicide in a Receiving Hospital cell.”); ***Epps v. Lauderdale County***, No. 00-6737, 2002 WL 1869434, at *2, *3 (6th Cir. Aug. 13, 2002) (Cole, J., concurring)(unpublished) (“I concur with the majority that this high speed pursuit is governed by *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and that Appellants fail to allege facts sufficient to establish individual officer liability for injuries pursuant to the substantive due process doctrine. I also agree that no municipal liability exists in the present case. I write separately, however, to clarify my understanding of *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (per curiam), that a municipality may still be held liable for a substantive due process violation even when the individual officer is absolved of liability. . . . I read *Heller* to prohibit municipal liability only when the victim suffers no constitutional injury at all, not when the victim fails to trace that constitutional injury to an individual police officer. . . . A given constitutional violation may be attributable to a municipality's acts alone and not to those of its employees--as when a government actor in good faith follows a faulty municipal policy. . . . A municipality also may be liable even when the individual government actor is exonerated, including where municipal liability is based on the actions of individual government actors other than those who are named as parties. . . . Moreover, it is possible that no one individual government actor may violate a victim's constitutional rights, but that the ‘combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights.’”); ***Gibson v. County of Washoe***, 290 F.3d 1175, 1186 n.7, 1188, 1189 n.9 & n.10 (9th Cir. 2002) (“The municipal defendants . . . assert that if we conclude, as we do, . . . that the individual deputy defendants are not liable for violating Gibson's constitutional rights, then they are correspondingly absolved of liability. Although there are certainly circumstances in which this proposition is correct, . . . it has been rejected as an inflexible requirement by both this court and the Supreme Court. For example, a municipality may be liable if an individual officer is exonerated on the basis of the defense of qualified immunity,

because even if an officer is entitled to immunity a constitutional violation might still have occurred. . . Or a municipality may be liable even if liability cannot be ascribed to a single individual officer. . . And in *Fairley v. Luman*, 281 F.3d 913 (9th Cir.2002), we explicitly rejected a municipality's argument that it could not be held liable as a matter of law because the jury had determined that the individual officers had inflicted no constitutional injury. . .In any event, in this case, the constitutional violations for which we hold the County may be liable occurred *before* the actions of the individual defendants at the jail, so the County is not being held liable for what those deputies did. The County's violations . . . involved the decision to commit Gibson to the custody of the jail deputies despite his mental illness, and to do so with no direction to treat that illness while he was in jail or to handle him specially because of it. . . . When viewed in the light most favorable to Ms. Gibson, the record demonstrates that the County's failure to respond to Gibson's urgent need for medical attention was a direct result of an affirmative County policy that was deliberately indifferent, under the *Farmer* standard, to this need. . . Because that is so, we do not address whether it is necessary to prove the subjective *Farmer* state of mind in suits against entities rather than individuals. . . . [T]he Supreme Court has commented that it is difficult to determine the subjective state of mind of a government entity. . . This statement does not, however, preclude the possibility that a municipality can possess the subjective state of mind required by *Farmer*. First, it is certainly possible that a municipality's policies explicitly acknowledge that substantial risks of serious harm exist. Second, numerous cases have held that municipalities act through their policymakers, who are, of course, natural persons, whose state of mind can be determined. . . .To find the County liable under *Farmer*, the County must have (1) had a policy that posed a substantial risk of serious harm to Gibson; and (2) known that its policy posed this risk.”); *Fairley v. Luman*, 281 F.3d 913, 916, 917 (9th Cir. 2002) (per curiam) (“The City claims the Supreme Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), and this court's decisions in *Scott v. Henrich*, 39 F.3d 912 (9th Cir.1994), and *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir.1996), preclude municipal liability as a matter of law under § 1983 when the jury exonerates the individual officers of constitutional wrongdoing. . . . *Heller*, *Scott* and *Quintanilla* control John's excessive force claim. Exoneration of Officer Romero of the charge of excessive force precludes municipal liability for the alleged unconstitutional use of such force. To hold the City liable for Officer Romero's actions, we would have to rely on the § 1983 *respondeat superior* liability specifically rejected by *Monell*. However, these decisions have no bearing on John's Fourth and Fourteenth Amendment claims against the City for arrest without probable cause and deprivation of liberty without due process. These alleged

constitutional deprivations were not suffered as a result of actions of the individual officers, but as a result of the collective inaction of the Long Beach Police Department. . . . The district court did not err by denying the City's motion for judgment as a matter of law on the *Monell* claim based on the jury's exoneration of the individual officers alone. If a plaintiff establishes he suffered a constitutional injury *by the City*, the fact that individual officers are exonerated is immaterial to liability under § 1983. . . . Otherwise, municipal liability may attach where a constitutional deprivation is suffered as a result of an official city policy but no individual officer is named as a defendant, *see City of Canton*, but not where named individual officers are exonerated but a constitutional deprivation was in fact suffered. In either case, a constitutional deprivation--the touchstone of § 1983 liability--was a consequence of city policy.”); *Speer v. City of Wynne*, 276 F.3d 980, 985-87 (8th Cir. 2002) (“Our court has previously rejected the argument that *Heller* establishes a rule that there must be a finding that a municipal employee is liable in his individual capacity as a predicate to municipal liability. . . . The appropriate question under *Heller* is whether a verdict or decision exonerating the individual governmental actors can be harmonized with a concomitant verdict or decision imposing liability on the municipal entity. The outcome of the inquiry depends on the nature of the constitutional violation alleged, the theory of municipal liability asserted by the plaintiff, and the defenses set forth by the individual actors. We do not suggest that municipal liability may be sustained where there has been no violation of the plaintiff's constitutional rights as a result of action by the municipality's officials or employees. *Cf. Trigalet v. City of Tulsa*, 239 F.3d 1150, 1156 (10th Cir.2001) (concluding that a municipality may be held liable only if the conduct of its employees directly caused a violation of a plaintiff's constitutional rights); *Schulz v. Long*, 44 F.3d 643, 650 (8th Cir.1995) (“It is the law in this circuit ... that a municipality may not be held liable on a failure to train theory unless an underlying Constitutional violation is located.”). After all, a municipality can act only through its officials and employees. However, situations may arise where the combined actions of multiple officials or employees may give rise to a constitutional violation, supporting municipal liability, but where no one individual's actions are sufficient to establish personal liability for the violation. . . . The district court's decision to impose liability on the City here is *potentially* reconcilable with its judgment in favor of Mayor Green. The district court found that Mayor Green publicized the allegations against Speer, but the constitutional violation accrues only when an employee is denied the opportunity to clear his name. It is possible, for instance, that the district court relied on the fact that some other city official or officials with final employment-policymaking authority (such as the city council)

refused Speer the opportunity to clear his name. If so, Mayor Green's conduct would have been insufficient to support individual liability, yet the City would be liable for the act of its policymaker who did deny Speer that opportunity. Municipal liability may attach based on the single act or decision of a municipal decisionmaker if the decisionmaker possesses final authority to establish municipal policy over the subject matter in question. . . It may also be possible that the district court found that a final policymaker ratified the decision to discharge Speer without a hearing, which could also form the basis for municipal liability. . . . Because the district court did not make findings concerning which City policymakers violated Speer's rights and did not make specific conclusions of law concerning the theory of municipal liability supporting its judgment against the City, we cannot say with any certainty that the court's decisions can or cannot be harmonized. We therefore find it necessary to remand this case to the district court to make specific findings of fact and conclusions of law explaining the basis for the City's liability and explaining the basis for Mayor Green's dismissal."); *Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996) ("The precedent in our circuit requires the district court to review the plaintiffs' municipal liability claims independently of the section 1983 claims against the individual police officers, as the City's liability for a substantive due process violation does not depend upon the liability of any police officer."); *Chew v. Gates*, 27 F.3d 1432, 1438 (9th Cir. 1994) ("A judgment that [police officer] is not liable for releasing [police dog], given all of the circumstances, would not preclude a judgment that by implementing a policy of training and using the police dogs to attack unarmed, non-resisting suspects, including [plaintiff], the remaining defendants caused a violation of [plaintiff's] constitutional rights. Supervisorial liability may be imposed under section 1983 notwithstanding the exoneration of the officer whose actions are the immediate or precipitating cause of the constitutional injury."); *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3d Cir. 1994) (*Fagan I*) (holding, in context of "a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution A finding of municipal liability does not depend automatically or necessarily on the liability of any police officer. Even if an officer's actions caused death or injury, he can only be liable under section 1983 and the Fourteenth Amendment if his conduct 'shocks the conscience.' [footnote omitted] The fact that the officer's conduct may not meet that standard does not negate the injury suffered by the plaintiff as a result. If it can be shown that the plaintiff suffered that injury, which amounts to deprivation of life or liberty, because the officer was following a city policy reflecting the city policymakers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 for causing a violation of the

plaintiff's Fourteenth Amendment rights. The pursuing police officer is merely the causal conduit for the constitutional violation committed by the City."); *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1058-65 (3d Cir. 1991) (no inconsistency in jury's determination that police officer's actions did not amount to constitutional violation, while city was found liable under § 1983 on theory of policy of deliberate indifference to serious medical needs of intoxicated and potentially suicidal detainees and failure to train officers to detect and meet such needs); *Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992) ("A public entity or supervisory official may be liable under § 1983, even though no government individuals were personally liable."); *Rivas v. Freeman*, 940 F.2d 1491, 1495-96 (11th Cir. 1991) (Sheriff found liable in his official capacity for failure to train officers regarding identification techniques and failure to properly account for incarcerated suspects, while deputies' actions which flowed from lack of procedures were deemed mere negligence); *Gibson v. City of Chicago*, 910 F.2d 1510, 1519 (7th Cir. 1990) (dismissal of claim against officer on grounds that he did not act under color of state law not dispositive of claim against City where allegations of municipal policy of allowing mentally unfit officers to retain service revolvers); *Arnold v. City of York*, 340 F.Supp.2d 550, 552, 553 (M.D. Pa.2004) ("We find that Plaintiffs have properly pled a Section 1983 claim against Defendants by alleging that they acted with deliberate indifference in failing to provide adequate training for handling encounters with mentally ill and emotionally disturbed persons, and that this failure to train resulted in Decedent's death. . . Defendants argue that because Plaintiffs are not suing the individual officers involved in the incident, this fact somehow establishes that the officers did not violate Decedent's constitutional rights and, in turn, the City and its Police Chief cannot be held liable. We disagree. As Magistrate Judge Mannion correctly noted, the Third Circuit has held that a municipality can be liable under Section 1983 and the Fourteenth Amendment for a failure to train its police officers, even if no individual officer violated the Constitution. . . The Third Circuit so held because claims against officers at the scene differ from claims against a municipality in that they 'require proof of different actions and mental states.' . . Even if we were to agree with Defendants' argument that *Fagan's* holding is on dubious grounds,. . . based on Plaintiffs' allegations and at this early stage in the litigation, we are unwilling to hold that no constitutional violation occurred."); *Thomas v. City of Philadelphia*, No. Civ.A. 01-CV-2572, 2002 WL 32350019, at *3, *4 (E.D. Pa. Feb. 7, 2002) (not reported) ("In this case, the fact that no individual police officer may be liable under § 1983 for lack of the requisite intent under *Lewis* does not necessarily mean that Plaintiff has not suffered a constitutional injury for which the municipality may be held independently liable. . . . Other circuit courts have explicitly disagreed with the

decision in *Fagan* regarding independent municipal liability, and some Third Circuit case law subsequent to *Fagan* appears to cast doubt upon its analysis. Until the Court of Appeals decides to the contrary, however, the Court must follow the law in this circuit as laid out in *Fagan*.” [footnotes omitted]); *Estate of Cills v. Kaftan*, 105 F. Supp.2d 391, 402, 403 (D.N.J. 2000) (In the context of a prison suicide case, the court relied on *Simmons* and *Fagan* to conclude that “in the present case, the fact that the Court finds that none of the Low-Level Employees violated Cills' constitutional rights does not preclude the Court from finding that the Department may be independently liable for an unconstitutional policy. . . . A reasonable factfinder could conclude that the absence of qualified mental health personnel who could assist the Department employees in making an assessment of an inmate's suicidal vulnerability was a serious deficiency in the Department's suicide policy that created a serious risk that injury or death would result from an inmate's attempted or successful suicide.”); *Kurilla v. Callahan*, 68 F. Supp.2d 556, 557, 565 (M.D. Pa. 1999) (“I find that the momentary use of force by a school teacher is to be judged by the shocks the conscience standard. I also find that Callahan's conduct, which consisted of striking a blow to Kurilla's chest that resulted in bruising but otherwise did not require medical care, was not so “brutal” and “offensive to human dignity” as to shock the judicial conscience. . . . While Callahan's conduct did not violate substantive due [process] standards, Mid-Valley School District may nonetheless be held accountable for having established a policy or custom that caused the injury allegedly sustained by Kurilla. . . . Consistent with the reasoning of *Fagan*, *Kneipp*, and *Simmons*, Mid-Valley School District may be held liable if it had a custom or policy condoning use of excessive force by teachers that evidenced a deliberate indifference to the student's constitutional rights in bodily integrity protected by the Due Process Clause of the Fourteenth Amendment.”); *Burke v. Mahanoy City*, 40 F. Supp.2d 274, 285, 286 (E.D. Pa. 1999) (“This court finds that we are required to follow Third Circuit law and examine the possibility of municipal liability under § 1983, although the individual officers have not been held liable in this situation. The present case is close in identity to *Fagan* because Plaintiff has alleged substantive due process claims. . . . Moreover, Plaintiff has also independently alleged constitutional claims against the City, Police Department and Chief of Police. . . . Under either scenario for municipal liability, the deliberate indifference or policy and custom of the municipality must inflict constitutional injury. . . . Thus, the mere existence of a policy of inaction or inadequate training of officers with respect to drinking and disorderly conduct is not actionable under § 1983 if such conduct does not inflict constitutional injury. . . . Even if we accept that the existence of a municipal policy or custom resulted in the failure of individual officers to address the

city's problems of underage drinking, loitering and fighting, such municipal inaction cannot be said to inflict constitutional injury. Thus, we need not reach the issue of whether Defendants are subject to *Monell* liability where, as here, we have concluded that no constitutional right was violated.”), *aff’d*, 213 F.3d 628 (3d Cir. 2000); ***Gillyard v. Stylios***, No. Civ.A. 97-6555, 1998 WL 966010, at **6-8 (E.D. Pa. Dec. 23, 1998) (not reported) (“The City maintains that, if the individual officers are not liable under § 1983, then the municipality is not liable. [citing cases] But in the Third Circuit a municipality can be liable for ‘failure to train its police officers with respect to high-speed automobile chases, even if no individual officer participating in the chase violated the Constitution,’ [citing *Kneipp* and *Fagan*] The City of Philadelphia may be liable for its failure to train police officers with respect to emergency use of their vehicles even if Stylios and Fussell did not individually violate the Constitution for lack of the requisite intent. The Court of Appeals may reexamine municipal liability; language in *Lewis* casts doubt on the continued tenability of this position. . . But until the Court of Appeals decides to the contrary, this court must follow the clearly established law in this circuit. Defendants correctly assert that there is no municipal liability absent a constitutional violation but that does not mean an individual officer must be liable for that violation. . . A municipal body may violate the Constitution if its policies reflect deliberate indifference towards the constitutional rights of those with whom its agents have contact. . . . The court cannot say that a reasonable jury could not find the City of Philadelphia deliberately indifferent to the harm to private citizens caused by its failure to prevent the reckless driving of its police officers; summary judgment will be denied.”); ***Lawson v. Walp***, 4:CV-94-1629, 1995 WL 355733, *4 (M.D. Pa. June 6, 1995) (not reported) (“[A] municipality may be held liable for a policy or failure to train which causes one of its employees to deprive a person of a constitutional right. Regardless of whether the individual employee is liable for the independent constitutional tort or whether the policy itself is unconstitutional, the municipality may be liable under a theory of a substantive due process violation for its policy or failure to train. The elements of the cause of action are: (1) an individual is deprived of a constitutional right (2) through the action of an officer or employee of the municipality (3) caused by (4) a policy or failure to train on the part of the municipality (5) if the policy was implemented with deliberate indifference to constitutional rights.”); ***Carroll v. Borough of State College***, 854 F. Supp. 1184, 1195 (M.D. Pa. 1994) (“The absence of individual liability on the part of [defendant police officer] is not a bar to plaintiff’s proceeding with his claim against the Borough.”), *aff’d*, 47 F.3d 1160 (3d Cir. 1995); ***Plasko v. City of Pottsville***, 852 F. Supp. 1258, 1265 (E.D. Pa. 1994) (“Although we acknowledge that plaintiff can fail to state a cause of action under Section 1983 as

to individual municipal employees while properly pleading a case with respect to the municipality directly, we nonetheless find that this action cannot be maintained against the City on the basis of the bare allegations that Pottsville's safety policies and failure to train officers amount to deliberate indifference to the needs of a detainee."); *Andrade v. City of Burlingame*, 847 F. Supp. 760, 767 (N.D. Cal. 1994) ("In certain circumstances, a municipality may also be held liable under section 1983 even if no individual employee can be held liable."), *aff'd by Marquez v. Andrade*, 79 F.3d 1153 (9th Cir. 1996); *Fulkerson v. City of Lancaster*, 801 F. Supp. 1476, 1485 (E.D. Pa. 1992) (acknowledging in high speed pursuit context that "the individual police officer named as a defendant could be a causal conduit for the constitutional violation, without committing such a violation himself."), *aff'd*, 993 F.2d 876 (3d Cir. 1993) (Table).

See also Barrett v. Orange County Human Rights Commission, 194 F.3d 341, 349, 350 (2d Cir. 1999) ("Barrett argues that under the Supreme Court's decision in *Monell* a municipality may be found liable for constitutional violations under 42 U.S.C. § 1983 even if no named individual defendants are found to be liable. He asserts that it was therefore error for the district court to remove the question of municipal liability from the jury once the jury determined that Lee and Colonna were not liable. We agree. Other circuits have recognized that a municipality may be found liable under § 1983 even in the absence of individual liability. [citing cases] We agree with our sister circuits that under *Monell* municipal liability for constitutional injuries may be found to exist even in the absence of individual liability, at least so long as the injuries complained of are not solely attributable to the actions of named individual defendants. *Cf. City of Los Angeles v. Heller*, 475 U.S. 796, 798-99, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (per curiam) (where alleged constitutional injury is caused solely by named individual defendant who is found not liable, municipal liability cannot lie). It is therefore possible that a jury could find the Commission and the County of Orange liable for the alleged violations of Barrett's First Amendment rights even after finding that Lee and Colonna are not liable. Lee and Colonna may have been the most prominent figures in Barrett's termination; they may have issued plaintiff's termination letter. But the Commission is a multi-member body that makes its determinations as a group, and many of the adverse employment actions complained of by Barrett, including the decision to terminate him as Executive Director of the Commission, were taken by the Commission as a whole, not by Lee and Colonna by themselves. It is therefore possible that the defendant commissioners did not as individuals violate Barrett's rights, but that the Commission did.").

See also Lopez v. LeMaster, 172 F.3d 756, 763 (10th Cir. 1999) (“The district court determined that appellant failed to establish causation sufficient to hold the county liable for conditions at the jail. The district court relied on the principle that to hold the county liable, a plaintiff must demonstrate that its policy was the moving force behind the injury alleged; that is, that the county took official action with a requisite degree of culpability and there is a direct causal link between the action and deprivation of federal rights. [citing *Brown*] While these rigid standards of proof clearly apply to appellant's claim that an improperly-trained jailer returned him to a cell with inmates who attacked him, they do not govern his claim that the county maintained a policy of understaffing its jails which resulted in his injury. If appellant's summary judgment materials demonstrate the existence of an official municipal policy which itself violated federal law, this will satisfy his burden as to culpability, and the heightened standard applicable to causation for unauthorized actions by a municipal employee will not applyAppellant has made a sufficient showing, for purposes of summary judgment, that the county maintains an unconstitutional policy of understaffing its jail and of failing to monitor inmates. He must also show, however, that this policy is maintained with the requisite degree of culpable intent. . . The requisite degree of intent in this case is, of course, deliberate indifference to inmate health or safety. . . Appellant has shown the requisite deliberate indifference in this case in two different ways. First, there is evidence that the county's legislative body was itself deliberately indifferent to conditions at the jail. As mentioned, Sheriff LeMaster told a jail investigator that the county commissioners failed to provide funding for correction of deficiencies at the jail likely to lead to assaults against inmates even though such funding was required by the Oklahoma statutes. . . . Alternatively, the county may be liable on the basis that Sheriff LeMaster is a final policymaker with regard to its jail, such that his actions ‘may fairly be said to be those of the municipality.’ . . There is evidence sufficient to survive summary judgment showing that Sheriff LeMaster's failure to provide adequate staffing and monitoring of inmates constitutes a policy attributable to the county, and that he was deliberately indifferent to conditions at the jail.”).

See generally the following discussion of this problem in *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 (3d Cir. 1995):

In *Monell*, the Supreme Court held that "when execution of a government's policy or custom, whether by its lawmakers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the injury then the government as an entity is responsible

under § 1983." [cite omitted] Post-*Monell* cases often have reflected confusion with the actual standard governing the imposition of liability, but two subsequent Supreme Court cases have delineated those situations more clearly. In *City of Canton v. Harris*, ... the Court held that 'the inadequacy of police training may serve as the basis for § 1983 liability ... where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.' In that case, however, the Court 'assume[d] that respondent's constitutional right ... was denied by city employees,' ... and went on to assess whether the failure to train ever could give rise to municipal responsibility. Thus, the case cannot be read to stand for the proposition that a policy evincing willful disregard, though not causing a constitutional violation, can be the basis for section 1983 liability. In short, *City of Canton* dealt with responsibility for an assumed constitutional violation. In *Collins v. City of Harker Heights* ... the Court clarified still further the issue of when a municipality may be liable. In that case, the plaintiff's decedent, a city employee, died of asphyxia after entering a manhole. The plaintiff claimed that her decedent 'had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees.' ... The Court this time assumed that the municipality was responsible for the injury and asked whether the injury was of constitutional proportions. Thus, it reversed its focus from that in *City of Canton*. In so doing, it inquired into: (1) whether 'the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause,'...; and (2) whether 'the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense.'... Reasoning that there was no affirmative constitutional duty, and that the city's actions were not conscience-shocking or arbitrary, a unanimous Court held that there could be no section 1983 liability. It did not matter whether a policy enacted with deliberate indifference to city employees caused the injury, because the injury could not be characterized as constitutional

in scope. Thus, *Collins* made clear that in a *Monell* case, the ‘proper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff’s harm was caused by a constitutional violation, and if so, (2) whether the city is responsible for that violation.’

The panel opinion in *Mark* made this observation about *Fagan*:

[T]he *Fagan* panel opinion appeared to hold that a plaintiff can establish a constitutional violation predicate to a claim of municipal liability simply by demonstrating that the policymakers, acting with deliberate indifference, enacted an inadequate policy that caused an injury. It appears that, by focusing almost exclusively on the ‘deliberate indifference’ prong of the *Collins* test, the panel opinion did not apply the first prong-establishing an underlying constitutional violation.

51 F.3d at 1153 n.13.

See also Grazier v. City of Philadelphia, 328 F.3d 120, 124 n.5 (3d Cir. 2003) (“Our Court has distinguished *Heller* in a substantive due process context, *Fagan v. City of Vineland*, 22 F.3d 1283, 1291-94 (3d Cir.1994), but not in a way relevant to this case. In *Fagan*, we observed that a municipality could remain liable, even though its employees are not, where the City’s action itself is independently alleged as a violation and the officer is merely the conduit for causing constitutional harm. . . We were concerned in *Fagan* that, where the standard for liability is whether state action ‘shocks the conscience,’ a city could escape liability for deliberately malicious conduct by carrying out its misdeeds through officers who do not recognize that their orders are unconstitutional and whose actions therefore do not shock the conscience. . . Here, however, like *Heller* and unlike *Fagan*, the question is whether the City is liable for causing its officers to commit constitutional violations, albeit no one contends that the City directly ordered the constitutional violations. Therefore, once the jury found that Hood and Swinton did not cause any constitutional harm, it no longer makes sense to ask whether the City caused them to do it. Additionally, recognizing that *Heller* had addressed a closely related issue, we carefully confined *Fagan* to its facts: a substantive due process claim resulting from a police pursuit. . . By contrast, both this case and *Heller* involve primarily a Fourth Amendment excessive force claim.”); *Brown v. Commonwealth of Pennsylvania Dept. of*

Health Emergency Medical Services Training Institute, 318 F.3d 473, 482 & n.3, 483 (3d Cir. 2003) (“It is possible for a municipality to be held independently liable for a substantive due process violation even in situations where none of its employees are liable. [citing *Fagan* and noting in footnote that there is a split among the courts of appeals on this issue] However, for there to be municipal liability, there still must be a violation of the plaintiff’s constitutional rights. . . . It is not enough that a municipality adopted with deliberate indifference a policy of inadequately training its officers. There must be a ‘direct causal link’ between the policy and a constitutional violation. . . This is where Appellants’ municipal liability claim fails. They allege that the City of Philadelphia had a number of policies involving EMTs which were enacted with deliberate indifference and which caused harm to them and their son. Even if we accept everything Appellants allege as true, they will have still failed to establish that the City’s policies caused *constitutional* harm. The City was under no constitutional obligation to provide competent rescue services. The failure of the City and its EMTs to rescue Shacqui Douglas from privately-caused harm was not an infringement of Appellants’ constitutional rights. [footnote omitted] There has been no constitutional harm alleged. Hence, there is no municipal liability under § 1983.”); ***Hansberry v. City of Philadelphia***, 232 F. Supp.2d 404, 412, 413 (E.D. Pa. 2002) (“[L]ocal government bodies may be held liable if a state actor acts unconstitutionally pursuant to a government policy or custom. . . Plaintiffs do not, however, have to demonstrate unconstitutional actions by Lt. Herring or Officers Schneider and Hood to make our their claim under § 1983. The Third Circuit has held that plaintiffs can establish liability based solely on a municipal policy or custom if the plaintiffs have both connected the policy to a constitutional injury and ‘adduced evidence of scienter on the part of a municipal actor [with] final policymaking authority in the areas in question.’ *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1062 (3d Cir.1991). . . . Plaintiffs cannot establish municipal liability based on *Monell* for two reasons. First, they cannot demonstrate that a municipal policy or custom, as carried out by the individual defendants, inflicted an unconstitutional injury because they have presented no evidence that the officers violated Raymond’s 14th Amendment rights. Second, were they to argue under *Simmons* that a municipal policy by itself deprived Raymond of his substantive due process rights, they would have needed to present evidence of a constitutional violation, a particular policy, and an identifiable policymaker. *See Simmons*, 947 F.2d at 1062. They have presented no such evidence. Consequently, they cannot satisfy the requirements of *Monell*.”); ***White v. City of Philadelphia***, 118 F. Supp.2d 564, 575, 576 (E.D. Pa. 2000) (“In this case, plaintiffs allege separate, independent claims against the City, claiming that the City was deliberately indifferent in its (1) failure

to adopt and implement a 911 policy to handle Priority 1 calls and (2) failure to train. . . . Regardless of the theory under which suit is brought against the City, the first inquiry in any § 1983 claim ‘is to identify the specific constitutional right allegedly infringed.’ [citing *Albright* and *Collins*]As the Court determined above, this claim fails to identify a cognizable constitutional injury because the Officers' conduct did not satisfy the four part test set forth in *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir.1995). In addition, even if the Court assumes that the City has a policy or custom of providing poor 911 service or failing to train officers to perform adequate rescue services, this failure did not inflict constitutional injury--substantive due process under the Fourteenth Amendment does not secure a right to rescue services under the facts of this case.”); *Russoli v. Salisbury Tp.*, 126 F. Supp.2d 821, 863 n.26 (E.D. Pa. 2000) (*Fagan* applies only to “acts challenged under substantive due process.”); *Leddy v. Township of Lower Merion*, 114 F. Supp.2d 372, 377 (E.D. Pa. 2000) (“As *Mark* suggests, the first prong is essential to the rationale of *Monell*--that a municipality should be held accountable not on the basis of vicarious liability, but only for misconduct it has approved or fostered. Or as succinctly and metaphorically couched in *Andrews*: [I]t is impossible on the delivery of a kick to inculcate the head and find no fault with the foot." *Andrews*, 895 F.2d at 1481.”); *Cannon v. City of Philadelphia*, 86 F. Supp. 2d 460, 475, 476 (E.D. Pa. 2000)(“In sum, I am presented with various conflicting interpretations of the appropriate level of culpability applicable in a § 1983 case against a municipality in which the individual state actors are not liable. The confusion regarding how to evaluate a municipality's liability is buttressed by the seeming disagreement between present Chief Judge Becker and past Chief Judge Sloviter in *Simmons* and the Third Circuit's recognition in *Mark* of *Fagan* I's failure to evaluate the applicable standard for the underlying constitutional violation. . . . While *Lewis* did not address municipal liability, the instruction of *Lewis* arguably intimates that a contextual approach may be applied in evaluating a municipality's liability in the absence of an individual state actor's liability. In order for a municipality to commit the necessary underlying constitutional tort, an expansive reading of *Lewis* may suggest that the municipality's policy, custom or failure to train, viewed contextually, must shock the conscience. The conduct that satisfies this standard may differ depending on the circumstances. Therefore, while a state actor's behavior may not shock the conscience, the municipality's policy, custom or failure to train may be conscience shocking. . . . [R]egardless of which standard applies plaintiff fails to demonstrate that the City's policies, customs, or failure to train are deliberately indifferent or shock the conscience. Therefore, even assuming the existence of an underlying constitutional

violation and that the City need only be deliberately indifferent to trigger municipal liability, I will grant the defendants' summary judgment motion.”).

See also Contreras v. City of Chicago, 119 F.3d 1286, 1294 (7th Cir. 1997) (“We would first note that much of the plaintiffs' argument reflects a confusion between what constitutes a constitutional violation and what makes a municipality liable for constitutional violations. Both in the District Court and here on appeal, the plaintiffs invoked ‘failure to train’ and ‘deliberate indifference’ theories as the basis for the substantive due process claim. . . . Notions of ‘deliberate indifference’ and ‘failure to train,’ however, are derived from municipal liability cases such as [*Monell, Canton*] and most recently [*Bryan County*.] Those cases presume that a constitutional violation has occurred (typically by a municipal employee) and then ask whether the municipality itself may be liable for the violations. . . . The liability of the City of Chicago for any deliberate indifference or for failing to train DCS inspectors is therefore secondary to the basic issue of whether a constitutional guarantee has been violated.”); *Evans v. Avery*, 100 F.3d 1033, 1039 (1st Cir. 1996) (declining invitation to adopt *Fagan* analysis “because we believe that the *Fagan* panel improperly applied the Supreme Court's teachings.”); *Regalbuto v. City of Philadelphia*, No. CIV. A. 95-5629, 1995 WL 739501, *4 (E.D. Pa. Dec. 12, 1995) (not reported) (“In [*Mark*], . . . the [Court] reiterated the *Collins* standard that unless plaintiff first establishes that he or she has suffered a constitutional injury, it is irrelevant for purposes of § 1983 liability whether the city's policies, enacted with deliberate indifference, caused an injury.”).

NOTE ON BIFURCATION

Heller is often cited as support for motions to bifurcate in police misconduct cases where recovery is sought against both the individual officer[s] involved, as well as the government entity. *See generally* Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 *Hastings L.J.* 499 (1993). *See Wilson v. Town of Mendon*, 294 F.3d 1, 7 (1st Cir. 2002) (“Without a finding of a constitutional violation on the part of a municipal employee, there cannot be a finding of section 1983 damages liability on the part of the municipality. [citing *Heller*] Thus, a defendant's verdict in a bifurcated trial forecloses any further action against the municipality, resulting in less expense for the litigants, and a lighter burden on the court. . . . On the other hand, a verdict against the municipal employee will almost always result in satisfaction of the judgment by the municipality because of the indemnification provisions typically found in bargaining agreements between municipalities and their employee unions. There is, however, nothing to prevent a

plaintiff from foregoing the naming of an individual officer as a defendant and proceeding directly to trial against the municipality. . . . The added expense aside, the reasons that plaintiffs almost never choose to proceed against the municipality directly are self-evident. The predicate burden of proving a constitutional harm on the part of a municipal employee remains an element of the case regardless of the route chosen and is much easier to flesh out when the tortfeasor is a party amenable to the full powers of discovery. The burden of placing that harm in the context of a causative municipal custom and policy is significantly more onerous than the task of simply proving that an actionable wrong occurred. And finally, an abstract entity like a municipality may present a much less compelling face to a jury than a flesh and blood defendant.”); *Treese v. Hochstetler*, 213 F.3d 360, 365 (7th Cir. 2000) (upholding trial judge’s discretion to bifurcate especially in light of fact that City agreed to entry of judgment against itself should jury find individual officer liable); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 318, 321 (2d Cir. 1999) (upholding bifurcation and 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 equivalent of, a judgment against the municipality.”); *Green v. Baca*, 226 F.R.D. 624, 633 (C.D. Cal. 2005) (“As plaintiff notes, cases in which courts have bifurcated whether there has been an underlying constitutional violation from *Monell* liability for trial have all involved claims against individual officers as well as against the municipality. Bifurcation is appropriate in such a situation to protect the individual officer defendants from the prejudice that might result if a jury heard evidence regarding the municipal defendant's allegedly unconstitutional policies. . . .Here, where there are no claims against any officers in their individual capacities, . . .such concerns are not present.”); *Lopez v. City of Chicago*, No. 01 C 1823, 2002 WL 335346, at *2, *3 (N.D. Ill. Mar. 1, 2002) (not reported) (discussing advantages and disadvantages of bifurcation; concluding bifurcation not appropriate at time where “individual police officers have not offered to waive the defense of qualified immunity and the City has not offered to stipulate to a judgment against the City for any compensatory damages awarded against the individual police officers.”); *Brunson v. City of Dayton*, 163 F.Supp.2d 919, 924, 925, 929 (S.D. Ohio 2001) (“The Court concludes that separate trials of Plaintiff’s claims against the individual Defendants and her claim under *Monell* against Dayton are necessary in order to avoid prejudice. If a single trial were held on all of the claims in this case, evidence offered against Dayton regarding incidents of alleged misconduct by police officers, unrelated to the incident in question in this case but relevant to the question of municipal liability for a policy or practice, would be highly prejudicial to the individual Defendants. The questions regarding the liability of these

individual Defendants must be decided by the jury only on the facts of the particular encounter on which this case is based. That is to say, these individual Defendants cannot be made to bear the burden of answering for all of the alleged misdeeds of every past and current Dayton police officer, when defending against the allegations of the Plaintiff as to the incidents that occurred in this case. A jury must be allowed to consider the evidence regarding *this incident*, with its focus on that evidence unimpaired by a torrent of information concerning the conduct of police officers in other unrelated situations at other times. . . . The first trial will most probably moot the need for a second trial. A finding by the jury in the first trial, during which the Plaintiff's claims against the individual Defendants will be resolved, that those Defendants had not violated Brunson's constitutional rights, would resolve Plaintiff's claims against Dayton. When the jury finds that an officer did not deprive the plaintiff of her constitutional rights, *Monell* liability cannot be imposed upon his governmental employer. . . On the other hand, if the first trial were to result in a verdict in favor of the Plaintiff, and Dayton agreed to pay the amount of that verdict, i.e., to indemnify the individual officers for the amount of the jury's verdicts, there would be no need for a second trial to resolve the Plaintiff's *Monell* claim against Dayton, since she is only entitled to a single recovery for her damages, which would have been accomplished as a result of the jury's verdict in the first trial and the City's agreement to indemnify. If Dayton were to refuse to indemnify the individual Defendants for the amount of the verdict and the Plaintiff could not secure satisfaction of that verdict from payment by the individual officers, then a second trial would be necessary. . . . It is, however, possible that the first trial will not eliminate the need for a second trial. A second trial would be required to resolve Plaintiff's *Monell* claim against Dayton, if the jury were to find that, although the individual Defendants violated Brunson's constitutional rights, they were protected from liability by qualified immunity. . . However, in this Court's experience, the possibility that the jury will find both that the individual Defendants violated Brunson's rights and that qualified immunity prevents liability from being imposed upon them is quite remote. . . . With this motion, the Defendants request that the Court delay discovery on the Plaintiff's *Monell* claim against Dayton until such time as the Plaintiffs' claims against the individual Defendants have been resolved. . . This Court will deny that request. Allowing all discovery to be conducted before the initial trial will avoid delaying the ultimate resolution of this litigation. For instance, in the event that the individual Defendants were to be granted summary judgment on the basis of qualified immunity, a trial of the Plaintiff's claims against Dayton could proceed expeditiously, if the Plaintiff had already conducted discovery on her *Monell* claim. In addition, permitting all discovery to be conducted before the first trial will

allow the second trial to commence quickly, in the event that such a trial becomes necessary, perhaps even before the same jury which heard the first phase of this litigation. Accordingly, the Court overrules Defendants' Motion to Bifurcate or to Stay Discovery"); *Medina v. City of Chicago*, 100 F. Supp.2d 893, 896-98 (N.D. Ill. 2000) (noting advantages of bifurcation and 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 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 officer found liable were still on the table, but deferring discovery on *Monell* claim). See also *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996); *Carson v. City of Syracuse*, No. 92-CV-777, 1993 WL 260676 (N.D.N.Y. July 7, 1993) (not reported); *Myatt v. City of Chicago*, 1992 WL 370240 (N.D. Ill. Dec. 3, 1992) (not reported); *Marryshow v. Bladensburg*, 139 F.R.D. 318 (D. Md. 1991).

See also *Jeanty v. County of Orange*, 379 F.Supp.2d 533, 549, 550 (S.D.N.Y. 2005) ("Defendants contend that severance of the excessive force claims against the individual defendants from the policy and practice claims against the County is warranted because plaintiff's excessive force claim 'involve[s] different witnesses, different factual circumstances, different claimed uses of force, different claimed injuries, different correctional officer defendants involved, and different claimed incident dates' from the alleged excessive force claims which would be presented by other witnesses to establish plaintiff's *Monell* claim. . . Defendants further maintain that failure to sever the claims would result in prejudice to the individual defendants because the proposed witnesses on the *Monell* claim will be testifying about incidents of alleged excessive force in which the individual defendants had no part. . . Additionally, defendants acknowledge that plaintiff has alleged claims based upon the same general facts and theories of law, but contend that this alone is insufficient to require the claims against the individual defendants and the County to be tried together. . . Plaintiff, however, contends that severing his claims against the individual defendants from his claims against the County, or holding separate trials, 'would waste judicial resources and further delay resolution of plaintiff's claims.' . . Although we agree with defendants that the individual defendants may be prejudiced [footnote omitted] by the testimony of witnesses in support of the *Monell* claim, we believe any such prejudice could be cured by 'carefully crafted' limiting instructions. . . [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.”); *Rosa v. Town of East Hartford*, No. 3:00CV1367 (AHN), 2005 WL 752206, at *4, *5 (D.Conn. Mar. 31, 2005) (not reported) (“Defendants move to bifurcate the *Monell* claim from Rosa's other claims on the grounds that separate trials would avoid prejudice to the defendant officers and ensure judicial efficiency. Rosa asserts that bifurcation is not necessary and will hamper his ability to present an effective case. The court agrees. Under Fed.R.Civ.P. 42(b), district courts have broad discretion to try issues and claims separately in order to ‘further convenience, avoid prejudice, or promote efficiency.’ . . . In particular, ‘bifurcation may be appropriate where, for example, the litigation of the first issue might eliminate the need to litigate the second issue ... or where one party will be prejudiced by evidence presented against another party[.]’ . . . Even though bifurcation is not unusual, it nonetheless remains the exception rather than the rule. . . . In the present case, bifurcation is not necessary either to avoid prejudice to the defendants or to further convenience. Defendants' concern that evidence Rosa will introduce in support of his *Monell* claim will prejudice the individual officers is exaggerated. Any spillover prejudice to the individual officers that may be caused by the admission of Rule 404(b) evidence to establish the *Monell* claim could be cured by limiting instructions. Moreover, contrary to defendants' assertion, the presence of the *Monell* claim in this action does not create an order of proof that favors bifurcation. That is, the mere fact that the jury might return a verdict on Rosa's § 1983 claim in favor of the police officers and thereby avoid its consideration of the *Monell* claim does not compel bifurcation. There are far less burdensome ways to deal with that situation, including use of a special verdict form, a well-adapted jury charge, and carefully crafted limiting instructions. Contrary to defendants' assertions, separate trials would not be efficient and would inconvenience the court, the jury, and the plaintiff. Accordingly, defendants' motion to bifurcate is denied.”).

X. No Exhaustion Requirement/Qualifications

A plaintiff whose federal constitutional rights have been violated need not exhaust state judicial or administrative remedies before bringing suit in federal court under § 1983. See *Monroe v. Pape*, 365 U.S. 167, 183 (1961); *McNeese v. Board of Education*, 373 U.S.668, 671-72 (1963); *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982); *McGreevy v. Stroup*, 413 F.3d 359, 368 (3d Cir. 2005) (no

exhaustion requirement under §1983). As the Court clearly stated in *Monroe*, "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not first be sought and refused before the federal one is invoked." 467 U.S. at 183.

A. Prison Litigation Reform Act (PLRA)

Note, however, that under the Prison Litigation Reform Act, prisoners must exhaust "such administrative remedies as are available" before bringing an action "with respect to prison conditions." 42 U.S.C. § 1997(e)(a). *See, e.g., Porter v. Nussle*, 534 U.S. 516, 122 S.Ct. 983, 992 (2002) (holding "that the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."); *Booth v. Churner*, 531 U.S. 956, 121 S. Ct. 1819, 1825 (2001) (exhaustion required "irrespective of the forms of relief sought and offered through administrative avenues.").

The Circuits are split on the question of whether the plaintiff has the burden of pleading exhaustion under the PLRA with particularity. Compare *Anderson v. XYZ Correctional Health Services, Inc.*, 407 F.3d 674, 681 (4th Cir. 2005) ("In our view, the language and structure of the PLRA make it clear that an inmate is not required to allege exhaustion of remedies in his §1983 prison-conditions complaint. Instead, an inmate's failure to exhaust his administrative remedies must be viewed as an affirmative defense that should be pleaded or otherwise properly raised by the defendant."); *Wyatt v. Terhune*, 315 F.3d 1108, 1112 (9th Cir. 2003) (appeal after remand) (adopting rule of majority of circuits and holding burden of establishing nonexhaustion falls on defendants) and *Ray v. Kertes*, 285 F.3d 287, 297 (3rd Cir. 2002) (no provision of the PLRA requires pleading exhaustion with particularity) with *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1211 (10th Cir. 2003) (Agreeing with Sixth Circuit that in the PLRA, "Congress, not this court, has required a prisoner to plead specific exhaustion information."); *Baxter v. Rose*, 305 F.3d 486, 489 (6th Cir. 2002) (Supreme Court's recent decision in *Swierkiewicz* does not displace heightened pleading standard for exhaustion in PLRA cases).

The majority of circuits have held that while the exhaustion requirement is mandatory, it is not a prerequisite to the exercise of jurisdiction. *See, e.g., Casanova v. DuBois*, 289 F.3d 142 (1st Cir. 2002); *Ali v. District of Columbia*, 278 F.3d 1 (D.C. Cir. 2002). *But see Spruill v. Gillis*, 372 F.3d 218, 222 (3d Cir. 2004) (PLRA's

exhaustion requirement includes a procedural default component, thus, prisoner must properly exhaust administrative remedies as prerequisite to suit in federal court). See also *Kounelis v. Sherrer*, No. 04-4714 (DRD), 2005 WL 2175442, at **6-8 (D.N.J. Sept. 6, 2005) (“The determination of whether a prisoner has properly exhausted his administrative remedies is made by evaluating the prisoner’s compliance with the prison’s administrative regulations governing inmate grievances, and the waiver, if any, of such regulations by prison officials. . . . [C]ompliance with the administrative remedy scheme will be satisfactory if it is substantial.” *Nyhuis v. Reno*, 204 F.3d 65, 77-78 (3d Cir.2000) . . . Failure to exhaust administrative remedies is an affirmative defense. *Spruill*, 372 F.3d at 223 n. 2, and Defendants have the burden of pleading and proving the defense in a motion for summary judgment or at trial. Here, Defendants argue that Kounelis failed to exhaust his administrative remedies at the prison regarding the alleged assault on November 14, 2003 and that, as a result, Defendants were deprived of an opportunity to review Kounelis’s allegations before court intervention. According to Defendants, the New Jersey Department of Corrections procedure for filing an administrative grievance requires an inmate to file an Administrative Remedy Form, which is given to an appropriate supervisor for a response. The Administrative Remedy/Grievance Policy Statement provides the following information: The ADMINISTRATIVE REMEDY FORM is the final step of the Request/Remedy process, and is designed to permit inmates to identify possible problem areas and to allow the Institutional Administration to effect timely and appropriate responses to these problems.... Inmates are expected to use this final area of the Grievance Process prior to applying to the courts for relief. . . . When the inmate receives a response, his remedies are considered to have been exhausted. Defendants acknowledge that Kounelis filed an Administrative Remedy Form on December 23, 2003 concerning the November 14, 2003 incident. However, they contend that since it was determined that Kounelis’s grievances did not meet the definitions of issues to be included on an Administrative Remedy Form, Kounelis did not exhaust his administrative remedies. Specifically, Defendants argue that ‘Staff advised Kounelis that Administrative Remedy Forms are not to be utilized for matters concerning disciplinary matters.’ Defendants do not explain why an Administrative Remedy Form should not be utilized. Defendants’ argument fails because Kounelis properly exhausted his administrative remedies for at least three reasons. First, the Department of Corrections issued a Staff Response Form in response to Kounelis’s Administrative Remedy Form. Importantly, the Staff Response Form which informed Kounelis that an Administrative Remedy Form should not be utilized for disciplinary matters or appeals further stated that ‘[t]his matter should be addressed through the appeals process in the courts.’ . . . By filing the

Complaint in this action, Kounelis appears to be following the procedure as instructed by the Department of Corrections on the Staff Response Form. Second, Kounelis effectively exhausted his 'available' administrative remedies through the disciplinary hearing and subsequent appeal. The Court of Appeals has ruled that a prisoner has satisfied the exhaustion requirement when the prisoner's allegations have been fully examined on the merits by the ultimate administrative authority and have been found wanting. *Camp v. Brennan*, 219 F.3d 279 (3d Cir.2000). In *Camp*, the prisoner attempted to file an excessive force grievance, which was not processed because he was on a grievance restriction. The prisoner then submitted a grievance which was forwarded to the Office of the Secretary of Corrections, which was the appropriate office for review. The Office of the Secretary of Corrections wrote a letter to the prisoner advising him that his 'allegations were investigated thoroughly and a determination was made that his complaint lacked credibility and that the officers' actions were justified.' . . . The Court of Appeals in *Camp* rejected the defendants' argument that the prisoner did not exhaust his administrative remedies. The Court of Appeals found that the prisoner was entitled to judicial consideration because he exhausted available administrative remedies and had received an adverse decision on the merits from the ultimate administrative authority. . . . In this case, Kounelis was charged with Improper Contact With A Person. Kounelis was accused of instigating the altercation on November 14, 2003 and defended himself by arguing that he was the victim of assault, not the perpetrator. Kounelis's version of the facts of the November 14, 2003 incident in the disciplinary action was substantially the same as it is in the Complaint. The hearing officer considered these arguments when it ruled against Kounelis and found Kounelis guilty of Improper Contact with a Person. The hearing officer's ruling was affirmed on appeal, which found that the officers had acted in accordance with procedure. Thus, all of the fact-finding necessary for a charge of excessive force was already done in the disciplinary proceeding and appeal, which were decisions on the merits regarding the November 14, 2003 incident. Having effectively exhausted his available administrative remedies, Kounelis could thereafter receive judicial consideration. . . . Third, the purposes of the exhaustion requirement of 42 U.S.C. S 1997e(a) have been served by the process Kounelis pursued. The purposes are: (1) to return control of the inmate grievance process to prison administrators; (2) to encourage development of an administrative record, and perhaps settlements, within the inmate grievance process; and (3) to reduce the burden on the federal courts by erecting barriers to frivolous prisoner lawsuits.")

Salvador v. Brown, No. Civ. 04-3908(JBS), 2005 WL 2086206, at *5 (D.N.J. Aug. 24, 2005) (“[I]n *Concepcion v. Morton*, 306 F.3d 1347 (3d Cir.2002), the Third Circuit held that the PLRA's exhaustion requirement applies to grievance procedures set forth in a New Jersey Department of Correction's inmate handbook, even if that handbook is not formally adopted by a state administrative agency.”)

Gibbone v. D'Amico, No. Civ.05-2225(FLW), 2005 WL 2009896, at *2 & n.2 (D.N.J. Aug.15, 2005) (“The Prison Litigation Reform Act . . . requires a district court to review a complaint in a civil action in which a prisoner is proceeding *in forma pauperis* or seeks redress against a governmental employee or entity. The Court is required to identify cognizable claims and to *sua sponte* dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. . . . The PLRA also requires the courts to determine whether a prisoner has, on three or more prior occasions while incarcerated or detained in any facility, brought an action or appeal in federal court that was dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted. If so, the prisoner is precluded from bringing an action *in forma pauperis* unless he or she is under imminent danger of serious physical injury.”)

See also Doe v. Delie, 257 F.3d 309, 314 n. 13 (3d Cir.2001) (“However, § 1997e(e) does not bar claims seeking nominal damages to vindicate constitutional rights, nor claims seeking punitive damages.”); *Allah v. Al-Hafeez*, 226 F.3d 247, 251-52 (3d Cir.2000) (Holding that § 1997e(e) does not bar nominal and punitive damages for violations of constitutional rights even in the absence of physical injury); **Shaheed-Muhammad v. DiPaolo**, No. 99-11842-NG, 2005 WL 2385199, at *20, *21 (D. Mass. Sept. 26, 2005) (“Finally, defendants argue that the PLRA precludes plaintiff from seeking compensatory damages under § 1983 because he fails to allege a physical injury. *See* 42 U.S.C. § 1997e(e) (“No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”). I addressed the scope of § 1997e(e) in a Memorandum and Order issued on March 19, 2001, concluding as follows:

Where the harm that is constitutionally actionable *is* physical or emotional injury occasioned by a violation of rights, § 1997e(e) applies. In contrast, where the harm that is constitutionally actionable is the violation of intangible rights--regardless of actual physical or emotional injury-- § 1997e(e) does not govern.

Shaheed-Muhammad, 138 F.Supp.2d at 107 (emphasis in original). . . .Lawsuits in which constitutional issues predominate were not the focus of the PLRA. Accordingly, I reasoned that the violation of a constitutional right is an independent injury that is immediately cognizable and outside the purview of § 1997e(e). The First Circuit has not addressed this question, and other courts are split. The D.C. and Eleventh Circuits have concluded that prisoner suits alleging constitutional violations without accompanying physical injury must be dismissed in their entirety. [citing cases] The Seventh and Ninth Circuits, on the other hand, have concluded that suits alleging constitutional violations are outside the purview of 1997e(e).[citing cases] Still other courts have chosen a middle path, holding that claims for constitutional violations absent physical injury need not be dismissed outright, but that § 1997e(e) limits recovery to nominal and punitive damages (in addition to injunctive and declaratory relief). These courts reason that allowing compensatory damages in the absence of physical injuries would amount to recovery for mental or emotional injury. *See, e.g., Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir.2002); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir.2000); *Royal v. Kautzy*, 375 F.3d 720, 722-23 (8th Cir.2004); *Searles v. Van Bebber*, 251 F.3d 869, 875-76 (10th Cir.2001). *See also Meade v. Plummer*, 344 F.Supp.2d 569 (E.D.Mich.2004) (collecting cases). Along with the Seventh and Ninth Circuits, I continue to believe that § 1997e(e) is inapplicable to suits alleging constitutional injuries. The PLRA does not, therefore, limit the type of relief that may be sought. Accordingly, I conclude that plaintiff is entitled to seek compensatory damages and DENY the motion for summary judgment on this ground.”).

B. *Heck v. Humphrey*: Habeas v. Section 1983 Actions

The doctrine announced in *Heck v. Humphrey*, 512 U.S. 477 (1994), may be viewed as another qualification on the general no-exhaustion principle. In *Heck*, the Supreme Court held that a state prisoner cannot bring a § 1983 suit for damages where a judgment in favor of the prisoner would “necessarily imply the invalidity of his conviction or sentence.” *Id.* at 486. If a successful suit would necessarily have such implications on an outstanding conviction or sentence, the complaint must be dismissed and no § 1983 action will lie unless and until the conviction or sentence has been invalidated, either on direct appeal, by executive order, or by writ of habeas corpus. *Id.* at 487. The statute of limitations on the section 1983 claim would then begin to run from the time of the favorable termination.

In the wake of *Heck*, there has been considerable confusion and debate about whether and when certain Fourth Amendment claims might run afoul of the *Heck* rule that requires deferral of the § 1983 action until there has been a favorable termination of the criminal proceeding. Much of the confusion stems from a footnote in *Heck*, where the Court noted:

For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the §1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery. . .and especially harmless error. . . such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful. In order to recover compensatory damages, however, the §1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury. . . which, we hold today, does not encompass the 'injury' of being convicted and imprisoned (until his conviction has been overturned).

Heck, 512 U.S. at 487 n.7.

In *Gibson v. Superintendent of New Jersey Dep't of Law and Public Safety-Division of State Police*, 411 F.3d 427 (3d Cir. 2005), the Court of Appeals for the Third Circuit engages in a comprehensive discussion of the issue, canvassing and comparing cases from the Circuits, noting that "the general trend among the Courts of Appeals has been to employ the fact-based approach[.]" which "precludes automatic exemption of all Fourth Amendment claims from the *Heck* deferred accrual rule." *Id.* at 449. In a case like *Gibson*, however, where the constitutional challenge would taint the only evidence supporting the conviction, *Heck* applies and the § 1983 claim must be deferred until the conviction is overturned. *Id.* at 451. *See also Ballenger v. Owens*, 352 F.3d 842 , 846, 847 (4th Cir. 2003) (*Heck* precluded §1983 claim where suppression of evidence seized pursuant to challenged search would necessarily invalidate criminal conviction). *But see Apampa v. Laying*, 157 F.3d 1103, 1105 (7th Cir. 1998) (as in the parallel case of an illegal search, a Title III suit by a convicted defendant need not challenge the conviction and so does not fall afoul of *Heck*); *Simpson v. Rowan*, 73 F.3d 134, 136 (7th Cir. 1995) (claims relating to illegal search and arrest not barred by *Heck* because neither claim, if successful, would necessarily undermine validity of conviction for felony murder).

Depending upon the facts of the case, the courts have found *Heck* applicable to both false arrest claims and excessive force claims. For false arrest claims, *see, e.g., Wiley v. City of Chicago*, 361 F.3d 994, 997 (7th Cir. 2004) (“If, as alleged, Wiley was arrested and prosecuted solely on the basis of drugs planted by the arresting officers, then any attack on the arrest would necessarily challenge the legality of a prosecution premised on the planted drugs.”), *cert. denied*, 125 S. Ct. 61 (2004); *Case v. Milewski*, 327 F.3d 564, 567, 568 (7th Cir. 2003) (“Because Case plead guilty to resisting arrest . . . his claim is barred by *Heck* If this court were to allow Case to recover damages because he was arrested without probable cause, Case's conviction would be rendered invalid because, under Illinois law, so long as there is physical resistance an officer has probable cause to arrest someone who resists an arrest attempt.”); *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892, 899 (7th Cir. 2001) (“The issuance of an arrest warrant is an act of legal process that signals the beginning of a prosecution. Therefore, Snodderly's sec.1983 wrongful arrest claim seeks damages for confinement imposed pursuant to legal process, thereby making it akin to a malicious prosecution claim and triggering the application of *Heck*.”); *Covington v. City of New York*, 171 F.3d 117, 123 (2d Cir. 1999) (“[I]n a case where the only evidence for conviction was obtained pursuant to an arrest, recovery in a civil case based on false arrest would necessarily impugn any conviction resulting from the use of that evidence.”); *Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996) (“[B]ecause a successful section 1983 action for false arrest on burglary charges necessarily would imply the invalidity of Hudson's conviction as a felon in possession of a firearm, *Heck* precludes this claim.”).

But see Nelson v. Jashurek, 109 F.3d 142, 145-46 (3d Cir. 1997) (*Heck* did not bar § 1983 suit where plaintiff did not charge officer falsely arrested him, but charged officer effected a lawful arrest in an unlawful manner); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 182 (4th Cir. 1996) (“[A] charge that probable cause for a warrantless arrest was lacking, and thus that the seizure was unconstitutional, would not necessarily implicate the validity of a subsequently obtained conviction—at least in the usual case.”); *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (claim of unlawful arrest, standing alone, does not necessarily implicate validity of criminal prosecution following arrest).

For cases involving excessive force claims, *see, e.g., Hainze v. Richards*, 207 F.3d 795, 796, 797 (5th Cir. 2000) (Where plaintiff had been convicted of aggravated assault under Texas law, court held, “as in *Sappington*, the force used by the deputies to restrain Hainze, up to and including deadly force, cannot be deemed excessive.”);

Sappington v. Barte, 195 F.3d 234, 237 (5th Cir. 1999) (§ 1983 suit barred where plaintiff's criminal conviction "required proof that he caused serious bodily injury to [officer]. [Officer] was justified in using force up to and including deadly force to resist the assault and effect an arrest. As a matter of law, therefore, the force allegedly used by [officer] cannot be deemed excessive."); . *Hudson v. Hughes*, 98 F.3d 868, 873 (5th Cir. 1996) ("Because self-defense is a justification defense to the crime of battery of an officer, Hudson's claim that Officers . . . used excessive force while apprehending him, if proved, necessarily would imply the invalidity of his arrest and conviction for battery of an officer.").

But see Smith v. City of Hemet, 394 F.3d 689, 696 (9th Cir. 2005) (en banc) ("A conviction based on conduct that occurred before the officers commence the process of arresting the defendant is not 'necessarily' rendered invalid by the officers' subsequent use of excessive force in making the arrest."); *Washington v. Summerville*, 127 F.3d 552, 556 (7th Cir. 1997) ("Washington's success on either his unlawful arrest or excessive force claim would not have necessarily implied the invalidity of a potential conviction on the murder charge against him."); *Smithart v. Towery*, 79 F.3d 951, 952 (7th Cir. 1996) ("Because a successful section 1983 action for excessive force would not necessarily imply the invalidity of Smithart's arrest or conviction, *Heck* does not preclude Smithart's excessive force claim."); *Gravelly v. Speranza*, No. 02-1444 (JED), 2006 WL 91308, at *3 (D.N.J. Jan. 17, 2006) ("*Heck* does not serve as a complete bar to all civil rights claims related to a prisoner's arrest. See *Nelson v. Jashurek*, 109 F.3d 142 (3d Cir.1997)(holding that plaintiff's conviction for resisting arrest did not preclude excessive force claim under *Heck*). A plaintiff may claim that an officer used excessive force in effecting an otherwise lawful arrest without running afoul of *Heck*."); *Allah v. Whitman*, No. Civ.02-4247(SRC), 2005 WL 2009904, at *4 (D.N.J. Aug. 17, 2005) ("Defendants argue that because Plaintiff seeks remedy for a constitutional violation, a verdict in his favor would necessarily undermine his state court conviction. . . This contention is ludicrous. There is simply no logical or legal argument that would allow a court to conclude that a lawful conviction for drug possession would be called into question by a finding that excessive force was unlawfully used at the time of arrest. . . . The Plaintiff's underlying state conviction was for drug possession. It is entirely possible for Plaintiff to be guilty of this offense, as he so pled, while also finding that excessive force was unlawfully used in his arrest."); *Bramlett v. Buell*, No. Civ.A.04-518, 2004 WL 2988486, at *3, *4 (E.D. La. Dec. 9, 2004) (Distinguishing *Hainze*, *Sappington*, and *Hudson* as cases in which "the force used by the officer occurred simultaneously with the force exhibited by the plaintiff." Here, "if the jury

were to conclude that the officers' decision to shoot Bramlett was excessive in light of their asserted goal of protecting the bystanders, that would do nothing to undermine the fact that seconds earlier Bramlett had committed an aggravated battery upon Officer Major.”).

In *Smith v. Holtz*, 87 F.3d 108, 113 (3d Cir. 1996), the court applied the rationale of *Heck* to a claim under § 1983 “that, if successful, would necessarily imply the invalidity of a conviction on a pending criminal charge. . . .” See also *Harvey v. Waldron*, 210 F.3d 1008, 1014 (9th Cir. 2000) (“We agree with the Second, Third, Sixth, Seventh, Tenth and Eleventh Circuits and hold that *Heck* applies to pending criminal charges, and that a claim, that if successful would necessarily imply the invalidity of a conviction in a pending criminal prosecution, does not accrue so long as the potential for a conviction in the pending criminal prosecution continues to exist.”); *Beck v. City of Muskogee Police Dep’t*, 195 F.3d 553, 557 (10th Cir. 1999) (“*Heck* precludes § 1983 claims relating to pending charges when a judgment in favor of the plaintiff would necessarily imply the invalidity of any conviction or sentence that might result from prosecution of the pending charges. Such claims arise at the time the charges are dismissed.”); *Sanchez v. Gonzalez*, No. Civ. 05-2552(RBK), 2005 WL 2007008, at *5 (D.N.J. Aug. 16, 2005) (“In this case, if Plaintiff’s § 1983 case alleging a violation of his constitutional rights due to an improper search and seizure were successful, it would have the hypothetical effect of rendering his future conviction invalid. Thus, the *Heck* deferred accrual rule is triggered, and Plaintiff’s complaint must be dismissed, without prejudice.”). Accord *Cummings v. City of Akron*, 418 F.3d 676 (6th Cir. 2005); *Shamaeizadah v. Cunigan*, 182 F.3d 391, 397-99 (6th Cir. 1999); *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999). But see *Brown v. Taylor*, No. 04-51280, 2005 WL 1691376, at *1 (5th Cir. July 19, 2005) (unpublished) (“To the extent that Brown’s allegations concerned pending criminal charges, however, the district court’s dismissal of his civil-rights complaint under *Heck* was erroneous. Insofar as it remains unclear whether Brown has been tried or convicted on those charges, the district court should have stayed the instant action until the pending criminal case against Brown has run its course. [citing *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir.1995)].”); *Samuels v. DeVille*, No. Civ.A. 05-1062-M, 2005 WL 2106159, at *7 (W.D. La. Aug. 11, 2005) (“Based on the foregoing, the undersigned concludes that the *Heck* analysis does in fact apply to bar civil rights suits which call into question the validity of pending criminal charges. The court also concludes that the Fifth Circuit’s cautious approach, that is, the use of a stay as opposed to a dismissal, has been deemed appropriate in those instances where there exists

uncertainty as to whether a victory in the civil rights suit would impact the pending criminal prosecution. The undersigned has also concluded that dismissal of the civil rights suit is an appropriate response when it is clear beyond any doubt that the plaintiff's victory in his civil rights claim would necessarily implicate the validity of the potential conviction. In the instant case, the plaintiff does not contend that he was the victim of excessive force or other police misconduct. Indeed, his sole contention is that he is actually innocent of the charges that are pending against him and that the defendants' investigation should have confirmed his innocence. Under such circumstances, it is clear that his success in this suit would necessarily implicate the validity of the pending charges. Thus, the undersigned concludes that the instant complaint need not be stayed; instead, plaintiff's claims should be dismissed with prejudice to their being asserted again until the *Heck* conditions are met.”).

In *Edwards v. Balisok*, 520 U.S. 641 (1997), the Supreme Court extended the principle of *Heck* to prisoners' § 1983 challenges to prison disciplinary proceedings, claiming damages for a procedural defect in the prison administrative process, where the administrative action taken against the plaintiff resulted in the deprivation of good-time credits. Where prevailing in the challenge would necessarily affect the duration of confinement, by restoration of good-time credits, the § 1983 claim will be dismissed and plaintiff will have to invalidate the disciplinary determination through appeal or habeas corpus before pursuing a damages action. *Id.* at 648. The prisoner in *Edwards* also sought prospective injunctive relief, "requiring prison officials to date-stamp witness statements at the time they are received." The Court recognized that "[o]rdinarily, a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983." However, because neither the Ninth Circuit nor the District Court considered the claim for injunctive relief, the Supreme Court left the matter for consideration by the lower courts on remand. 520 U.S. at 648, 649. Compare, e.g., *Clarke v. Stalder*, 154 F.3d 186, 189-91 (5th Cir. 1998) (*en banc*) ("[U]nlike the sort of prospective relief envisioned by the Supreme Court in *Edwards* that may have only an 'indirect impact' on the validity of a prisoner's conviction, . . . the type of prospective injunctive relief that Clarke requests in this case--a facial declaration of the unconstitutionality of the 'no threats of legal redress' portion of Rule 3--is so intertwined with his request for damages and reinstatement of his lost good-time credits that a favorable ruling on the former would 'necessarily imply' the invalidity of his loss of good-time credits.") *with id.* at 194 (Reynaldo G. Garza, J., dissenting) ("The majority must remember that Justice Scalia in *Heck* established that if a federal judicial action would 'necessarily imply' the invalidity of a prison conviction the

court may not act. . . . Justice Scalia's words are 'necessarily imply' not 'possibly imply' or 'probably imply.'").

In *Muhammad v. Close*, 540 U.S. 749 (2004) (per curiam), the Supreme Court confirmed the view of a majority of the circuits that “*Heck's* requirement to resort to state litigation and federal habeas before § 1983 is not . . . implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence.” *Id.* at 751. Thus, assuming a challenge to such disciplinary administrative determinations raises no implication for the underlying conviction and has no impact on the duration of the sentence through revocation of good-time credits, the *Heck* favorable-termination rule will not apply. *Id.* at 754, 755; *Taylor v. United States Probation Office*, 409 F.3d 426, 427(D.C. Cir. 2005) (“Because Taylor's complaint challenges only the fact that he was confined at one facility rather than another and, thus, does not challenge the fact or duration of his confinement, the rule of *Heck* is inapplicable.”).

See also *Nelson v. Campbell*, 541 U.S. 637, 644 (2004) (“A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the ‘fact’ or ‘validity’ of the sentence itself--by simply altering its method of execution, the State can go forward with the sentence.”); *Hill v. Crosby*, No. 05-8794, 2006 WL 163607, at *1 (11th Cir. Jan 24, 2006) (claim “that death by lethal injection causes pain and unnecessary suffering and thus constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments” could not be brought under section 1983, but was functional equivalent of successive habeas petition and district court was without jurisdiction), *cert. granted*, No. 05-8794, 2006 WL 171583 (U.S. Jan. 25, 2006). The questions presented in *Hill* are (1) Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254? and (2) Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983?

In *Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005), the Court held that *Heck* and *Edwards* did not apply to a prisoner's challenge to the procedures used for determining parole eligibility. As the Court pointed out, success for plaintiff would not mean immediate release from confinement or a shorter stay in prison; success meant “at most new eligibility review, which at most will speed consideration of a

new parole application.” *Id.* at 1248. *See also Bogovich v. Sandoval*, 189 F.3d 999, 1004 (9th Cir. 1999) (not all challenges to parole board's policy implicate invalidity of continued confinement); *Anyanwutaku v. Moore*, 151 F.3d 1053, 1055-56 (D.C. Cir. 1998) (noting that “a majority of our sister circuits have held that challenges to state parole procedures whose success would not necessarily result in immediate or speedier release need not be brought in habeas corpus, even though the prisoners filed their suits for the very purpose of increasing their chances of parole. [citing cases]”). *But see Goodwin v. Ghee*, 330 F.3d 446 (6th Cir. 2003) (en banc) (evenly divided en banc court affirming district court’s application of *Heck* to bar prisoner’s § 1983 claim that Parole Board’s decision was in retaliation for his exercise of First Amendment rights). *See also Docken v. Chase*, 393 F.3d 1024, 1031(9th Cir. 2004) (holding “that when prison inmates seek only equitable relief in challenging aspects of their parole review that, so long as they prevail, *could* potentially affect the duration of their confinement, such relief is available under the federal *habeas* statute. Whether such relief is *also* available under § 1983 depends on the application of *Heck*'s favorable termination rule in this case, an issue not before us and one that we do not decide.” (emphasis original)).

There are conflicts in the Circuits as to the applicability of *Heck* to challenges to extradition procedures. *See Harden v. Pataki*, 320 F.3d 1289, 1301, 1302 (11th Cir. 2003) (“We hold that a claim filed pursuant to 42 U.S.C. § 1983 seeking damages and declaratory relief for the violation of a state prisoner's federally protected extradition rights is not automatically barred by *Heck*. We also hold that such a claim is not barred by *Heck*, where the specific allegations are that law enforcement officials failed to provide an extradited prisoner with a pretransfer habeas corpus hearing or a signed warrant by the governor of the asylum state, or released him into the hands of a private extradition service instead of government agents.”), disagreeing with Seventh Circuit’s analysis in *Knowlin v. Thompson*, 207 F.3d 907 (7th Cir.2000).

There are also conflicts regarding suits seeking access to evidence for purposes of DNA testing. *Compare Osborne v. District Attorney’s Office for the Third Judicial District*, 423 F.3d 1050, 1053, 1054 (9th Cir. 2005) (“Although the district court recognized that Osborne raises ‘a direct challenge to [neither] the fact nor duration of imprisonment,’ it ruled that his claim was *Heck*-barred because he seeks to ‘set the stage’ to attack his underlying conviction. Though this circuit has not yet applied *Heck* in the context of a §1983 action seeking post-conviction access to DNA evidence, the district court was not without guidance in assessing Osborne's

claim. As it observed, three circuits--the Fourth, Fifth, and Eleventh--have previously confronted the very question we now face. These opinions provide valuable guidance to us as well. . . . We agree with Osborne, and join the Eleventh Circuit in holding that *Heck* does not bar a prisoner's §1983 action seeking post-conviction access to biological evidence in the government's possession. It is clear to us, as a matter of logic, that success in such an action would not 'necessarily demonstrate the invalidity of confinement or its duration.' . . . First, success would yield only access to the evidence--nothing more. . . . Second, further DNA analysis may prove exculpatory, inculpatory, or inconclusive; thus, there is a significant chance that the results will either confirm or have no effect on the validity of Osborne's confinement. . . . And third, even if the results exonerate Osborne, a separate action--alleging a separate constitutional violation altogether--would be required to overturn his conviction. . . . Any remaining doubt as to the propriety of this approach is removed, we believe, by the Court's recent opinion in *Dotson*, which reads 'necessarily' to mean 'inevitably' and rejects the notion that a claim which can be brought in habeas must be brought in habeas."); *Bradley v. Pryor*, 305 F.3d 1287, 1290, 1291(11th Cir. 2002) (*Heck* does not bar §1983 suit for the production of evidence for the purpose of DNA testing) with *Kutzner v. Montgomery County*, 303 F.3d 339, 341 (5th Cir. 2002) ("[P]risoner's request for DNA testing of evidence relevant to his prior conviction is "so intertwined" with the merits of the conviction as to require habeas corpus treatment.") and *Harvey v. Horan*, 278 F.3d 370, 375 (4th Cir.2002), *pet. for reh'g and reh'g en banc denied*, 285 F.3d 298 (4th Cir. 2002) (action under § 1983 barred by *Heck* where prisoner seeks access to DNA testing as first step in undermining conviction).

Finally, there are conflicting opinions on the question of whether and under what circumstances *Heck* applies when *habeas* is unavailable. In *Spencer v. Kemna*, 523 U.S. 1 (1998), the Court addressed the question of whether a petition for a writ of *habeas corpus* for the purpose of invalidating a parole revocation was made moot by the plaintiff's having completed the term of imprisonment underlying the challenged parole revocation. One of plaintiff's "collateral consequences" arguments was that under the doctrine of *Heck*, he would be precluded from seeking damages under § 1983 for the alleged wrongful parole revocation unless he could establish the invalidity of the revocation through the *habeas* statute. In an opinion authored by Justice Scalia, the Court noted the following:

[Petitioner] contends that since our decision in *Heck* . . . would foreclose him from pursuing a damages action under 42 U.S.C. §

1983 unless he can establish the invalidity of his parole revocation, his action to establish that invalidity cannot be moot. This is a great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available. It is not certain, in any event, that a § 1983 damages claim would be foreclosed. If, for example, petitioner were to seek damages `for using the wrong procedures, not for reaching the wrong result,' . . . and if that procedural defect did not `necessarily imply the invalidity of the revocation, . . . then *Heck* would have no application all.

523 U.S. at 17.

A majority of the Justices, in *dicta*, expressed the view that *Heck* has no applicability where the plaintiff is not "in custody" and, thus, habeas corpus is unavailable. See *Spencer v. Kemna*, 523 U.S. 1, 20, 21 (1998) (Souter, J., joined by O'Connor, Ginsburg, and Breyer, JJ., concurring) ("[W]e are forced to recognize that any application of the favorable-termination requirement to § 1983 suits brought by plaintiffs not in custody would produce a patent anomaly: a given claim for relief from unconstitutional injury would be placed beyond the scope of § 1983 if brought by a convict free of custody (as, in this case, following service of a full term of imprisonment), when exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas. The better view, then, is that a former prisoner, no longer `in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy. Thus, the answer to Spencer's argument that his habeas claim cannot be moot because *Heck* bars him from relief under § 1983 is that *Heck* has no such effect. After a prisoner's release from custody, the habeas statute and its exhaustion requirement have nothing to do with his right to any relief.") and *id.* at 25 n.8 (Stevens, J., dissenting) ("Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that he may bring an action under § 1983."). See also *Jiron v. City of Lakewood*, 392 F.3d 410, 413 n.1 (10th Cir.2004) (noting that *Heck* might not apply where plaintiff is no longer "in custody" for offense and therefore "has no vehicle, such as a petition for a writ of *habeas corpus*, available to her by which she could seek to challenge the underlying felony menacing conviction.").

In *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002), the plaintiff had fully served the period of incarceration imposed as a result of the deprivation of good-time credits and the imposition of administrative segregation, and his release made habeas unavailable. The Ninth Circuit joined the Second, see *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001), and Seventh Circuits, see *DeWalt v. Carter*, 224 F.3d 607, 616-18 (7th Cir. 2000), in concluding that, under such circumstances, where the unavailability of habeas was due to mootness caused by release from the period of incarceration imposed, which incarceration a successful civil suit would impugn, a §1983 action was not barred by *Heck*. *Nonnette*, 316 F.3d 872, 876, 877 n.6 (9th Cir. 2002). See also *Limone v. United States*, 271 F.Supp.2d 345 (D. Mass. 2003) (unfair to apply *Heck* where government had blocked effective access to post-conviction remedies “by actively subverting [attempts to prevail through] commutation procedures and by withholding critical evidence until years after [convicted men] had died.”), *aff’d in part and remanded in part*, *Limone v. Condon*, 372 F.3d 39 (1st Cir. 2004); *Lueck v. Wathen*, 262 F. Supp.2d 690, 699 & n.7 (N.D. Tex. 2003) (“[A] prisoner who is effectively barred from raising a non-frivolous claim in a federal habeas proceeding because the state has interfered with his right of access to the courts should be able to sue for money damages, to the extent those damages can be quantified.”).

The court distinguished its decision in *Cunningham v. Gates*, 312 F.3d 1148 (9th Cir. 2003), *as amended on denial of reh’g*, (Jan. 14, 2003) and *cert. denied*, 538 U.S. 960 (2003), where *Heck* was held to bar plaintiff’s claim in a situation where the unavailability of habeas was due to a failure to timely pursue habeas remedies. 312 F.3d at 1153 n.3. Accord *Guerrero v. Gates*, 357 F.3d 911, 917, 918 (9th Cir. 2004) (refusing to relax *Heck*’s requirements as to claims of plaintiff “whose failure to timely achieve habeas relief is self-imposed”). See also *Vickers v. Donahue*, No. 04-14848, 2005 WL 1519353, at *4, *5 (11th Cir. June 28, 2005) (not published) (applying *Heck* where plaintiff had failed to avail himself of appeal with respect to revocation order and resulting nine month sentence); *Figueroa v. Rivera*, 147 F.3d 77, 80, 81 (1st Cir. 1998) (“The appellants counter that strict application of *Heck* works a fundamental unfairness in this case. After all, Rios was attempting to impugn his conviction when death intervened. Although this plaint strikes a responsive chord, it runs afoul of *Heck*’s core holding: that annulment of the underlying conviction is an element of a section 1983 ‘unconstitutional conviction’ claim. . . . Creating an equitable exception to this tenet not only would fly in the teeth of *Heck*, but also would contravene the settled rule that a section 1983 claimant bears the burden of proving all the essential elements of her cause of action.”); *Huey v. Stine*, 230 F.3d

226, 229, 230 (6th Cir. 2000); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000).

See also *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1139-42 (9th Cir. 2005) (holding “*Heck* applies to SVPA [Sexually Violent Predators Act] detainees with access to *habeas* relief; detainee argued *Heck* shouldn’t apply “because he was no longer civilly committed and hence was unable to file a *habeas* corpus petition[,]” but court of appeals found that “[u]nder California’s SVPA scheme, the current petition to recommit Huftile is directly traceable to his initial term of confinement and is thereby sufficient to confer standing for federal *habeas* purposes.”).

Compare *Gilles v. Davis*, 427 F.3d 197, 209-12 (3d Cir. 2005) (“Petit’s underlying disorderly conduct charge and his § 1983 First Amendment claim require answering the same question--whether Petit’s behavior constituted protected activity or disorderly conduct. If ARD [“Accelerated Rehabilitative Disposition” (“ARD”) program, which permits expungement of the criminal record upon successful completion of a probationary term] does not constitute a favorable termination, success in the §1983 claim would result in parallel litigation over whether Petit’s activity constituted disorderly conduct and could result in a conflicting resolution arising from the same conduct. We recognize that concurring and dissenting opinions in *Spencer*. . . question the applicability of *Heck* to an individual, such as Petit, who has no recourse under the *habeas* statute. . . . But these opinions do not affect our conclusion that *Heck* applies to Petit’s claims. We doubt that *Heck* has been undermined, but to the extent its continued validity has been called into question, we join on this point, our sister courts of appeals for the First and Fifth Circuits in following the Supreme Court’s admonition ‘to lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court “the prerogative of overruling its own decisions.”’ . . . Because the holding of *Heck* applies, Petit cannot maintain a §1983 claim unless successful completion of the ARD program constitutes a ‘termination of the prior criminal proceeding in favor of the accused.’ . . . We have not had occasion to address this issue directly. Our trial courts have held that ARD is not a termination favorable for purposes of bringing a subsequent § 1983 malicious prosecution claim. We find instructive opinions from the Second and Fifth Circuits that have addressed whether similar pre-trial probationary programs are a favorable termination sufficient to bring a subsequent civil suit. [discussing cases] Viewing these factors together, we hold the ARD program is not a favorable termination under *Heck*. Petit’s participation in the ARD

program bars his §1983 claim.” footnotes omitted) *with id.* at 216-19 (Fuentes, J. dissenting in part) (“Like the District Court, the majority assumes that the favorable termination rule in *Heck* applies to Petit's claim. But because Petit was not in custody when he filed his §1983 action, *Heck* does not apply to his claims. Under the best reading of *Heck* and *Spencer v. Kemna*, 523 U.S. 1 (1998), the favorable termination rule does not apply where habeas relief is unavailable. . . . I now turn to the critical question on this point: whether Petit could have brought a habeas petition instead of the present §1983 action. The duration of Petit's ARD program is not on record, but it could not have exceeded two years. . . . Since Petit filed suit about one and a half years after his arrest, his ARD program was likely completed before he brought this suit. Thus, Petit could not have pursued habeas relief. . . . Even if the ARD program was not complete when Petit initiated the instant action, based on my review of the record, I conclude that the ARD program never placed Petit ‘in custody’ for habeas purposes. ARD is a pre-trial diversionary program, the purpose of which ‘is to attempt to rehabilitate the defendant without resort to a trial and ensuing conviction.’ . . . Although we do not know the precise conditions imposed upon Petit, they do not appear to have required Petit to report anywhere in Pennsylvania since his stated reason for entering ARD was to enable his return to Kentucky as quickly as possible for work. . . . I therefore conclude that, even in the unlikely event that Petit was still in ARD at the time that he filed the present suit, his ARD program was not sufficiently burdensome to render him ‘in custody’ for habeas purposes. Accordingly, the favorable termination rule does not apply to his claims and the dismissal of his claim on that basis was error.”).

In *Muhammad v. Close*, 540 U.S. 749 (2004), the Supreme Court left this issue unresolved. *See Muhammad*, 540 U.S. at 752 n.2 (2004) (“Members of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement. . . . This case is no occasion to settle the issue.”).

See also Vickers v. Donahue, No. 04-14848, 2005 WL 1519353, at *4, *5 (11th Cir. June 28, 2005)(not published) (“While we have not explicitly ruled on whether a plaintiff who has no federal habeas remedy available to him may proceed under §1983 despite the fact that success on the merits would undermine the validity of, in this case, an order of revocation and the resulting nine month sentence, we decline to do so here because it is unnecessary to the outcome of Vickers's case. First, as the district court pointed out, Vickers was not without a remedy to seek post-revocation relief. He could have appealed the revocation order and, had he

prevailed, his § 1983 claims would not be barred by *Heck*. Second, unlike in *Harden*, Vickers's claim here would imply the invalidity of the order of revocation and nine-month sentence he received. . . . Finally, the three cases cited above that permitted a plaintiff to pursue a §1983 claim because no habeas relief was available did not involve a situation where a conviction itself was called into question. In *Nonnette* and *Carr*, the issue was the validity of prison disciplinary proceedings revoking good-time credits, and in *Huang* the issue was the denial of credit for prison time served and the conviction was not challenged. . . . Here, Vickers's factual basis for his § 1983 claim directly undercuts a signed court order, which found that Vickers had violated his community control for two violations of condition 12. As the district court noted, Vickers insists he did not plead guilty or *nolo contendere* to these violations, but even taking his assertion as true, the undisputed fact remains that he was found to be in violation, convicted for the violation, and sentenced to nine months' imprisonment. Accordingly, we conclude that the *Heck* bar applies to Vickers's claim despite the unavailability of relief.”).

A lengthy discussion of the problem, along with a good collection of the cases, can be found in *Dible v. Scholl*, No. C05-4089-MWB, 2006 WL 172237, at *1, **10-14 & *14 n.15, *16 (N.D. Iowa Jan. 24, 2006) (“This controversy brings before the court an issue of first impression within the Eighth Circuit--namely whether the unavailability of a remedy under 28 U.S.C. § 2254, the federal habeas corpus statute, permits a former state prisoner to maintain an action under 42 U.S.C. § 1983, . . . even though success in such an action would necessarily imply the invalidity of a conviction or sentence. Specifically, in this case, the court confronts the question of whether a former state prisoner--who is precluded from pursuing a habeas claim--can maintain an action for damages as a result of alleged due process violations that occurred during a prison disciplinary proceeding under § 1983 or whether his rights are nothing more than a mirage--appearing to exist at first glance, but transforming into an illusion upon careful inspection due to the lack of a federal forum in which to enforce them. . . . Following the Court's opinion in *Spencer*, the federal district and appellate courts have been left to carve out the precise contours of the favorable termination requirement with respect to prisoners who can not access a federal forum via § 2254. Generally, these federal courts have split into two camps. First, are those courts that find *Heck* directly controls this issue. Therefore, because *Spencer* did not overrule *Heck*, these courts conclude that a prisoner not in custody within the meaning of the habeas statute or whose habeas action has been mooted upon release from incarceration, remains nonetheless precluded from bringing a claim for damages under § 1983 under the language in *Heck*. Second, are those courts

that follow Justice Souter's logic in *Spencer* and find that *Heck* did not affirmatively decide the issue, leaving these courts free to conclude that a prisoner without recourse under the habeas statute may bring an action under the broad scope of § 1983. There is no existing Eighth Circuit precedent on this issue. . . . The Fifth, Sixth, and Third Circuits have followed the First Circuit's logic pronounced in *Figueroa*. See, e.g., *Randell v. Johnson*, 227 F.3d 300, 301-02 (5th Cir.2000) (relying on the reasoning set forth in *Figueroa*); *Huey v. Stine*, 230 F.3d 226, 229-30 (6th Cir.2000) (citing *Figueroa*), *overruled on other grounds by Muhammad v. Close*, 540 U.S. 749 (2004); *Gilles v. Davis*, 427 F.3d 197, 209-10 (3d Cir.2005) (following *Figueroa*). . . Based on an unpublished opinion, it also appears the Fourth Circuit would follow this same reasoning. See *Gibbs v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, No. 97-7741, 1999 WL 9941, at *2 (4th Cir. Jan. 12, 1999) (affirming district court's grant of summary judgment with respect to released prisoner's claims under § 1983 on the grounds the claim was precluded by *Heck*). To summarize, the conclusion reached by these courts is premised upon the belief that *Heck* definitively decided, in the negative, the question of whether a prisoner who is precluded from pursuing habeas relief can file a § 1983 action without first meeting the favorable determination requirement. Based upon this belief, although these courts question the continued viability of *Heck's* favorable termination requirement when habeas is unavailable, these decisions reflect that ultimately, these courts conclude that they are precluded from following *Spencer*, when to do so would overrule *Heck*, a determination solely within the province of the Supreme Court. . . . In contrast, several circuit and district courts have adopted the view articulated by Justice Souter in *Spencer* and have held that a person who is legally precluded from pursuing habeas relief may bring a § 1983 action challenging a conviction without satisfying the favorable termination requirement of *Heck*. See *Nonnette*, 316 F.3d at 875-77 & n. 6.; *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001); *DeWalt v. Carter*, 224 F.3d 607, 616-17 (7th Cir.2000); . . . *Dolney v. Lahammer*, 70 F.Supp.2d 1038, 1041, 1042 n. 1 (D.S.D.1999); *Haddad v. California*, 64 F.Supp.2d 930, 938 (C.D. Cal.1999); *Zupan v. Brown*, 5 F.Supp.2d 792 (N.D.Cal.1998). This line of case law does not, as alluded to by the First Circuit in *Figueroa*, rely upon the contention that *Spencer* overruled *Heck's* favorable termination requirement. See, e.g., *Nonnette*, 316 F.3d at 877 n. 6 ("We conclude that *Heck* does not control, and reach that understanding of *Heck's* original meaning with the aid of the discussions in *Spencer*.") (citing *DeWalt*, 224 F.3d at 617 n. 5). Rather, these authorities conclude that *Heck* should be read as creating a favorable termination requirement only for those persons who, like *Heck*, had the remedy of habeas corpus available to them. . . . After a review of the pertinent case law, this court concludes that it will adhere to

Justice Souter's reasoning in *Spencer*. In doing so, this court aligns itself with the circuit and district courts that have concluded *Heck* only hints at an answer to the current issue before this court in dicta and therefore, does not constitute directly applicable precedent. . . This is because the prisoner in *Heck* had the remedy of habeas available to him. . . . This court does not believe its holding will encourage prisoners to delay their challenges to loss of good time credits until their release from incarceration. As the Ninth Circuit has noted, 'The possibility of release from incarceration is the strongest incentive for prisoners to act promptly to challenge such administrative action by habeas corpus after administrative remedies are exhausted.' *Nonnette*, 316 F.3d at 878 n. 7. Further, the court's holding today is not without limitations. For example, other courts have declined to hold that a failure to timely pursue habeas remedies takes a prisoner's § 1983 claim out of *Heck's* purview. *See, e.g., Cunningham v. Gates*, 312 F.3d 1148, 1154 n. 3 (9th Cir.2002). Thus, the court's holding today potentially affects only a small number of prisoners--former prisoners challenging the loss of good time credits or revocation of parole whose claims, under *Spencer*, have been mooted by their release from incarceration, or those prisoners challenging their underlying convictions who were never 'in custody,' or served too short of time to physically file a petition for habeas corpus while 'in custody.' This latter group of potentially affected prisoners is further reduced by the fact that, unlike challenges to parole revocation or loss of good time credits, challenges to an underlying conviction are not mooted upon the prisoner's release from incarceration, and a habeas action may still be maintained provided that it was filed at the time the individual was 'in custody.' *See Spencer*, 523 U.S. at 7-8 (noting collateral consequences have been presumed in cases challenging an underlying conviction) (citing *Sibron v. New York*, 392 U.S. 40, 55-56 (1968)). . . . The decision issued by this court today ensures that prisoners seeking redress from constitutional violations will have a federal forum available to them. A contrary conclusion would have the untoward consequence of creating a right without a remedy, which is in essence, no right at all.'").

On "expungement by executive order," *see Wilson v. Lawrence County*, 154 F.3d 757, 760-61 (8th Cir. 1998) ("Wilson asserts that his conviction was 'expunged by executive order' by virtue of his full pardon from the governor. The defendants disagree. The district court, relying on Missouri law, concluded that a person who is pardoned by the governor remains guilty in the eyes of the Missouri court and therefore cannot bring a 1983 claim for wrongful incarceration. In our view, however, the issue in this case is one of federal law. . . . The relevant question is whether Wilson's pardon invalidated his conviction within the meaning of *Heck*. We find that

it did. . . . The gist of *Heck* is that section 1983 is not an appropriate vehicle for attacking the validity of a state conviction. Wilson does not seek to put it to this improper use. He used the executive clemency process, which the Supreme Court has expressly approved, as the forum in which to challenge his criminal conviction."); *Walden v. City of Chicago*, 391 F.Supp.2d 660, 670, 671 (N.D. Ill. 2005) ("A substantial portion of this case turns on the meaning and significance of a general pardon, on the one hand, and a pardon of innocence, on the other, under Illinois law. . . . Defendant's argument in this regard boils down to the following: Governor Thompson's pardon of Walden in 1978 amounted to an acquittal, and an acquittal is tantamount to an invalidation of his conviction (under *Heck*) (D.E. 20 at 5) and a termination of the proceedings in Walden's favor (under state law). If 1978 is the point of accrual, then all of Plaintiff's claims are time-barred. Plaintiff, however, maintains that his claims did not accrue until January 13, 2003, the time at which he received a pardon of innocence. Plaintiff alleges that the general pardon differs from a pardon of innocence and that while the 1978 pardon 'acquitted' Plaintiff of further punishment, it did not undermine or negate the validity of Walden's prior conviction. . . . [T]he Court holds that the gubernatorial pardon Plaintiff received on June 30, 1978 was a general pardon. As such, it did not invalidate his conviction or act to terminate Plaintiff's conviction in his favor for purposes of *Heck* and the corresponding state law requirements. Walden's causes of action thus did not accrue with the signing of Walden's 1978 general pardon.").

See also Montgomery v. De Simone, 159 F.3d 120, 125 (3d Cir. 1998) ("We hold today that the Restatement's rule that an overturned municipal conviction presumptively establish[es] probable cause contravenes the policies underlying the Civil Rights Act and therefore does not apply to a section 1983 malicious prosecution action."); *St. Germain v. Isenhower*, 98 F.Supp.2d 1366, 1369, 1370 (S.D.Fla. 2000) ("[T]he question presented is whether a § 1983 action for malicious prosecution can be maintained with respect to the initial criminal charges lodged against the plaintiff if the prosecution resulted in the plaintiff's conviction on lesser-included offenses and no outright acquittals. . . . Those courts which have addressed the issue presented here have held that a malicious prosecution action will not lie if the plaintiff has been convicted of a lesser-included offense. [citing cases] The rationale is that a conviction on a lesser-included offense does not constitute a favorable termination for the accused. . . . Simply put, a judgment in favor of Mr. St. Germain in this case would necessarily call into doubt his convictions on the lesser-included offenses. Although Mr. St. Germain says that he is only attacking the original (and more serious) charges lodged against him, he alleges unlawful behavior

(e.g., perjury) that would also undermine his convictions on the lesser-included offenses. Thus, the difficulty of parallel litigation over the issues of probable cause and guilt and the danger of conflicting resolutions arising out of the same or identical transaction exist in this case just as they did in *Heck*."); *Nuno v. County of San Bernardino*, 58 F. Supp.2d 1127, 1135, 1136 (C.D. Cal. 1999) ("The Court concludes that, for purposes of the *Heck* analysis, a plea of nolo contendere in a California criminal action has the same effect as a guilty plea or jury verdict of guilty. . . . Thus, the Court concludes that the fact that plaintiff's obstruction of an officer conviction was by plea of nolo contendere does not have any effect on the application of the rule of *Heck v. Humphrey* which precludes his section 1983 cause of action based on Moreno's alleged use of excessive force in arresting plaintiff.").

See also Grant v. Sotello, No. 2:98-CV-0347, 1998 WL 740826, at *1 (N.D. Tex. Oct. 19, 1998) (not reported) ("While the question may be raised whether a cause dismissed pursuant to *Heck* considerations should be considered for purposes of computing the three strikes under . . . section 1915(g), research reveals other courts facing this issue have adopted this approach. . . ."). *Accord, Armentrout v. Tyra*, 175 F.3d 1023 (Table), 1999 WL 86355, at *1 (8th Cir. Feb. 9, 1999) (unpublished), citing *Rivera v. Allin*, 144 F.3d 719, 730-31 (11th Cir.1998); *Patton v. Jefferson Correctional Ctr.*, 136 F.3d 458, 462-64 (5th Cir.1998).

On the question of *Heck*'s application to immigration orders, *see Humphries v. Various Federal USINS Employees*, 164 F.3d 936, 946 & n.11 (5th Cir. 1999) ("[I]f *Heck* were to apply in the context of immigration orders, it would, by analogy, bar only those claims that 'necessarily imply' the invalidity of an INS or BIA order. . . . Assuming arguendo that Humphries were to recover damages for the alleged involuntary servitude as well as the alleged mistreatment while in detention, these judgments would in no way imply the invalidity of Humphries' detention or exclusion. . . . [A]t least one scenario comes to mind in which *Heck* may bar a claim over which we retain jurisdiction under § 1252(g). An alien whose claim arises from INS misconduct during an exclusion proceeding, for instance, may be able to invoke our jurisdiction despite § 1252(g), but because that error may in fact impugn the validity of the underlying proceeding, *Heck* may prove relevant.").

Note that *Heck* has been applied to federal prisoners and *Bivens* actions. *See, e.g., Martin v. Sias*, 88 F.3d 774 (9th Cir.1996). *See also Mohamed v. Tattum*, 380 F.Supp.2d 1214, 1223 (D. Kan. 2005) ("Just as the actions in *Heck* and *Edwards* implied the invalidity of the plaintiffs' conviction and disciplinary action, a finding

that defendant failed to protect plaintiff from an attack by his cellmate implies the invalidity of the disciplinary adjudication whereby plaintiff was adjudged guilty of fighting. Plaintiff's *Bivens* claim bears a sufficient relationship to the disciplinary adjudication such that the claim is not cognizable absent the invalidation of the disciplinary adjudication. If plaintiff's injuries were actually the result of defendant's failure to protect rather than plaintiff's *active participation* in a fight, the disciplinary hearing findings are necessarily erroneous and must be invalidated. But plaintiff admitted guilt during the disciplinary hearing and has not appealed the disciplinary hearing findings, despite being given an opportunity to do so. Accordingly, his failure to protect action against defendant is not cognizable pursuant to the principles announced in *Heck* and *Edwards*.").

C. Procedural Due Process Claims

In *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part, Daniels v. Williams*, 474 U.S. 327 (1986), an inmate claimed that he was deprived of property without due process of law when prison officials lost a set of his hobby materials, valued at \$23.50. *Id.* at 530. The Court held that a negligent deprivation of property, resulting from random and unauthorized conduct of a state actor, does not give rise to a procedural due process claim under the Fourteenth Amendment so long as the state provides an adequate postdeprivation remedy. *Id.* at 543. In *Daniels v. Williams*, *supra*, the Court overruled *Parratt* to the extent that the case had held that a deprivation within the meaning of the fourteenth amendment due process clause could be effected by mere negligent conduct.

The rationale of *Parratt* was extended to intentional deprivations of property in *Hudson v. Palmer*, 468 U.S. 517 (1984), where an inmate complained of an intentional taking of his personal, noncontraband property during the course of a prison "shakedown" search. *Id.* at 520.

In applying the *Parratt* doctrine to the intentional deprivation in *Hudson*, the Court emphasized that "[t]he controlling inquiry is solely whether the State is in a position to provide for predeprivation process." *Id.* at 534. Where the conduct of state actors is random and unauthorized, the State cannot foresee, predict or prevent deprivations resulting from such conduct and a postdeprivation remedy is all the process a State can be constitutionally required to provide. *Id.* at 531-33.

The *Parratt/Hudson* doctrine does not apply to deprivations by state actors, acting pursuant to established state procedure which failed to provide for predeprivation process where it was possible, practicable and constitutionally required. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court upheld plaintiff's claim where a state statutory scheme destroyed plaintiff's property interest without the proper procedural safeguards. *Id.* at 435-36. *See also Higgins v. Beyer*, 293 F.3d 683, 694 (3d Cir. 2002) (Under *Zinermon*, prisoner was entitled to predeprivation notice and hearing before deduction of funds from his inmate account by prison officials "acting under the authority of an established state procedure for seizing a prisoner's funds to satisfy court-ordered fines."). *But see Tillman v. Lebanon County Correctional Facility*, 221 F.3d 410, 421 n.12 (3d Cir. 2000) ("We recognize that some cases hold that *Parratt* does not apply where an 'established state procedure' destroys an entitlement without proper procedural safeguards. . . . In such a case, a predeprivation hearing is still required. . . . However, the Supreme Court has since noted in an ex parte forfeiture case, i.e., one that involves established state procedures, that in 'extraordinary situations,' predeprivation notice and hearings are unnecessary. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). The case before us presents such an 'extraordinary situation.'").

It is also generally settled that *Parratt/Hudson* is inapposite where plaintiff is claiming the violation of a constitutional right afforded specific protection by the Bill of Rights or where plaintiff is alleging a violation of substantive due process. *See, e.g., Zinermon v. Burch*, 110 S. Ct. 975, 983 (1990) (dictum) ("As to these two types of claims....[a] plaintiff may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.").

In *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 898 (1995), the Eleventh Circuit addressed the issue of "whether, under the Fourteenth Amendment, a government employee possessing a state-created property interest in his employment states a substantive due process claim, rather than a procedural due process claim, when he alleges that he was deprived of the employment interest by an arbitrary and capricious non-legislative government action." *Id.* at 1553. The court unanimously held that "in non-legislative cases, only procedural due process claims are available to pretextually terminated employees." *Id.* at 1560. *See also Nicholas v. Pennsylvania State Univeristy*, 227 F.3d 133, 142 (3d Cir. 2000) (holding tenured public employment is not a fundamental property interest entitled to substantive due process protection).

The matter of what procedural safeguards must attend the deprivation of a constitutionally protected interest is a matter of federal law. *Vitek v. Jones*, 445 U.S. 480, 491 (1980). In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court set out certain factors for consideration:

[I]dentification of the specific dictates of Due Process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Generally, due process requires notice and a meaningful opportunity to be heard prior to the deprivation of a protected interest. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). *But see Gilbert v. Homar*, 117 S. Ct. 1807 (1997) (holding that a State does not violate the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending a tenured public employee without pay.). *See also City of Los Angeles v. David*, 123 S. Ct. 1895, 1897, 1898 (2003) (per curiam) (30-day delay in holding a hearing after car was towed and stored for alleged parking violation “reflects no more than a routine delay substantially required by administrative needs. Our cases make clear that the Due Process Clause does not prohibit an agency from imposing this kind of procedural delay when holding hearings to consider claims of the kind here at issue.”); *City of West Covina v. Perkins*, 525 U.S. 234, 240, 241(1999) (“When the police seize property for a criminal investigation, . . . due process does not require them to provide the owner with notice of state law remedies. . . . Once the property owner is informed that his property has been seized, he can turn to . . . public sources to learn about the remedial procedures available to him. The City need not take other steps to inform him of his options.”).

In *Zinermon v. Burch*, 110 S. Ct. 975 (1990), respondent claimed that he had been deprived of liberty without due process when he was admitted to a state hospital

as a "voluntary" patient, under circumstances indicating that he was incompetent to give informed consent. *Id.* at 977-981.

In concluding that respondent's complaint was sufficient to state a procedural due process claim, the majority in *Zinermon* first made clear that "the fact that a deprivation of liberty is involved . . . does not automatically preclude application of the *Parratt* rule." 110 S. Ct. at 987. The Court went on to hold, however, that the *Parratt/Hudson* analysis did not apply where the erroneous deprivation was foreseeable, where predeprivation process was practicable, and where the challenged conduct could be characterized as "authorized," in the sense that it was an abuse by state officials of "broadly delegated, uncircumscribed power to effect the deprivation at issue." 110 S. Ct. at 989.

Justice O'Connor viewed the complaint as asserting conduct that could be characterized only as a random and unauthorized departure from established state law, thus invoking application of *Parratt* and *Hudson*. *Id.* at 990-997 (O'Connor, J., joined by Rehnquist, C.J., Scalia, J., and Kennedy, J., dissenting).

In *Zinermon*, the majority explicitly disavowed treating the claim as one for a deprivation of due process pursuant to established state procedure, thus invoking the *Logan* exception to the *Parratt/Hudson* doctrine, and requiring an assessment of whether the procedural safeguards provided by state law against erroneous deprivations in this context were constitutionally sufficient under *Mathews*.

The Court noted that "[t]he broader questions of what procedural safeguards the Due Process Clause requires in the context of an admission to a mental hospital, and whether Florida's statutes meet these constitutional requirements, are not presented in this case." *Id.* at 979.

Nor did the majority decide whether the complaint was sufficient to state a custom or practice, since the plurality opinion of the Eleventh Circuit did not rely on such an interpretation in denying the motion to dismiss. *Id.* at 981 n.9.

As the dissent in *Zinermon* notes, 110 S. Ct. at 996-97 (O'Connor, J., joined by Rehnquist, C.J., Scalia, J., and Kennedy, J., dissenting), the Court applied the *Mathews* balancing test in *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028 (1990), a case decided the same day as *Zinermon*. In *Washington*, a mentally ill state prisoner challenged the prison's administration of antipsychotic drugs to him against

his will without a judicial hearing to determine the appropriateness of such treatment. The prison policy required the treatment decision to be made by a hearing committee consisting of a psychiatrist, psychologist, and the prison facility's Associate Superintendent. The Court applied the *Mathews* balancing test and found the established procedure constitutionally sufficient. 110 S. Ct. at 1040-44.

Recognizing that the application of *Mathews* to Florida's admissions procedures "would have required a strained reading of respondent's complaint and arguments . . . ," the dissent in *Zinermon*, nonetheless, would have preferred to reach the result arrived at by the Court through a straightforward assessment of the constitutionality of Florida's established procedure under *Mathews*, rather than by way of "the strained reading of controlling procedural due process law that the Court adopts today." 110 S. Ct. at 997 (O'Connor, J., joined by Rehnquist, C.J., Scalia, J., and Kennedy, J., dissenting). As the dissent concludes, the majority in *Zinermon* construes the complaint to state a claim that is governed neither by the *Mathews* analysis, nor by the *Parratt/Hudson* doctrine. *Id.* at 995-96.

Zinermon suggests that plaintiffs can make out procedural due process claims even where the deprivation has not been pursuant to any formally established state procedure, indeed, even where the conduct effecting the deprivation arguably is in violation of or contrary to formally enacted state procedures. *See Easter House v. Felder*, 910 F.2d 1387, 1410-13 (7th Cir. 1990) (en banc) (Cudahy, J., joined by Cummings, J., and Posner, J., dissenting). *See also Summers v. State of Utah*, 927 F.2d 1165, 1170 (10th Cir. 1991) (suggesting procedural due process claim may exist against individual officer who had effected deprivation in manner inconsistent with established state procedures).

Nor does *Zinermon* require that the deprivation be linked to an official custom, pattern or practice or an established state procedure. Finally, the officials authorized to effect the deprivation need not be policymaking officials whose decisions might be attributable to the entity as official policy. 110 S. Ct. at 994.

The question of whether a "status-conscious exception" to the *Parratt/Hudson* doctrine should be recognized, which would equate conduct and decisions of policymaking officials with established state procedure, has been fully explored in a number of decisions from the Seventh Circuit Court of Appeals.

There is clearly some sentiment on that court for refusing to dismiss on *Parratt/Hudson* grounds when the deprivation results from conduct of a final policymaker, even where such conduct might be directly contrary to formally enacted law. See, e.g., *Swank v. Smart*, 898 F.2d 1247, 1257 (7th Cir. 1990) (*Swank I*) (procedural due process claim stated where discharge of plaintiff took place at policymaking level of town government), *cert. denied*, 498 U.S. 853 (1990); *Matthiessen v. Board of Education of North Chicago Community High School District 123*, 857 F.2d 404, 407 n. 3 (7th Cir. 1988) ("[T]he single act of a sufficiently high-ranking policymaker may equate with or be deemed established state procedure . . . [,]" making *Parratt* inapplicable); *Tavarez v. O'Malley*, 826 F.2d 671, 677 (7th Cir. 1987) (procedural due process claim sufficient to withstand dismissal where deprivation resulted from conduct of senior county and town officials). *Accord Sample v. Diecks*, 885 F.2d 1099, 1114 (3d Cir. 1989) (due process violation stated when policymaking official establishes a constitutionally inadequate state procedure for depriving people of protected interest).

Where state law leaves little latitude in the exercise of discretionary powers and carefully circumscribes the authority and responsibility of an official, decisions made pursuant to that authority will reflect "established state procedure." Isolated departures from the well-defined procedure should be viewed as random, unauthorized conduct, for which adequate postdeprivation state remedies should suffice. See, e.g., *Hadfield v. McDonough*, 407 F.3d 11, 20 (1st Cir. 2005) ("Our cases establish that a government official has committed a random and unauthorized act when he or she misapplies state law to deny an individual the process due under a correct application of state law. . . In other words, conduct is 'random and unauthorized' within the meaning of *Parratt-Hudson* when the challenged state action is a flaw in the official's conduct rather than a flaw in the state law itself. . . . We have applied this doctrine in the public employment context. [citing cases] Here, Hadfield was denied a hearing because the due process defendants erred (if they erred at all) by misapplying Massachusetts civil service law. This determination was not discretionary or governed by a formal or informal policy. . . Rather, if error, it was simply a missapprehension [sic] of state law. This is the sort of random and unauthorized conduct to which *Parratt-Hudson* applies.").

D. Note on *Sandin v. Conner*

In *Sandin v. Conner*, 515 U.S. 472 (1995), the Court held, in the context of a procedural due process claim raised by an inmate placed in disciplinary segregation

for thirty days, that, despite the mandatory language of the applicable prison regulation, a constitutionally protected liberty interest will generally be "limited to freedom from restraint which. . . imposes atypical and significant hardships on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484.

In *Wilkinson v. Austin*, 125 S. Ct. 2384, 2394, 2395 (2005), the Court noted:

In *Sandin's* wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system. . . This divergence indicates the difficulty of locating the appropriate baseline, an issue that was not explored at length in the briefs. We need not resolve the issue here, however, for we are satisfied that assignment to OSP [Ohio State Penitentiary] imposes an atypical and significant hardship under any plausible baseline. . . . For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. . . While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context. It follows that respondents have a liberty interest in avoiding assignment to OSP.

See also Skinner v. Cunningham, 430 F.3d 483, 486, 487 (1st Cir. 2005) ("The hardship test has itself become the source of major disagreement. . . Some circuits compare the confinement conditions to those of the general prison population, while others look to the conditions of nondisciplinary administrative segregation. . . One circuit holds that disciplinary segregation never implicates a liberty interest unless it lengthens a sentence. *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir.1997). Whether *Sandin* should be read as a cookbook recipe for all cases is

unclear. We think it is enough here that Skinner's segregation was rational, that its duration was not excessive, and that the central condition--isolation from other prisoners--was essential to its purpose. Skinner was a prisoner serving a sentence for murder who had just killed another inmate. . . . The prison was waiting on the Attorney General, and six weeks is hardly an excessive time to conduct a preliminary inquiry into a possible murder. . . . As for Skinner's conditions of confinement, isolation from other prisoners was of the essence, and while it was perhaps needless to have denied Skinner amenities such as television or books, these deprivations are largely incidental to Skinner's main complaint, and were in any case short-term. Taking all the circumstances into account, including the prison's need to manage its own administration, . . . Skinner's temporary isolation without a formal hearing was not unconstitutional either in its essential character or in its duration.”); *Westefer v. Snyder*, 422 F.3d 570, 589, 590 (7th Cir. 2005) (“We believe that the allegations of the complaint, which we must accept as true at this stage of the litigation, preclude dismissal under the now-governing standards of *Wilkinson*. There are some differences between the features of the Ohio supermax at issue in *Wilkinson* and those of the Illinois facility at issue here. It is not at all clear, however, that those differences are so qualitatively different as to require a different characterization of the facility for purposes of due process analysis under *Wilkinson*. Illinois' contention that the liberty interest identified in *Wilkinson* turned exclusively on the absence of parole constitutes, our view, far too crabbed a reading of the decision. . . . We also note that, if, after considering all the evidence submitted by the parties, the district court is not of the view that the Illinois situation is, like the Ohio facility, ‘an atypical and significant hardship under any plausible baseline,’ . . . the district court must confront the issue of what does constitute the appropriate baseline for the Illinois system. . . . Assuming that a liberty interest is determined to exist, the district court will then have to confront whether the procedures that we have discussed at some length with respect to the exhaustion of administrative remedies provide sufficient process to protect the prisoners' liberty interest in this case.”); *Lakas v. Briley*, 405 F.3d 602, 608, 609 (7th Cir. 2005) (“[C]ourts today charged with assessing whether conditions of confinement pose an atypical and significant hardship are in essence counseled by *Sandin* to (1) compare the conditions of disciplinary segregation to those of discretionary segregation;. . . (2) compare the conditions of disciplinary segregation to those in the general prison population; and (3) determine whether the disciplinary action affects the length of the inmate's sentence. . . . [W]hat continues to be perplexing is the comparison group against which the conditions of disciplinary segregation are to be compared. While *Sandin* suggests the confinement be compared against both discretionary segregation as well as the general prison population, the

realities of prison administration suggest that these two control groups are in fact one and the same. . . . This is because, in every state's prison system, any member of the general prison population is subject, without remedy, to assignment to administrative segregation or protective custody at the sole discretion of prison officials. . . . Thus, when a court compares disciplinary segregation to the general prison population, it is effectively comparing disciplinary segregation to discretionary segregation. . . . Indeed, taking *Sandin*'s prescribed comparisons to their logical extremes, it is possible that the conditions of discretionary segregation against which the plaintiff's confinement is to be judged are not necessarily those of the prison in which the plaintiff is incarcerated, but rather those of the most restrictive prison in the state penal system . . . and perhaps even those of the most restrictive prison in the entire country. . . . This is a harsh, and perhaps unintentional, result. But it is also inescapable, in light of the fact that a prisoner may be transferred from one state prison to another without implicating the inmate's liberty interest--even where the conditions of the destination prison are 'much more disagreeable' than those of the originating prison."); *Ortiz v. McBride*, 380 F.3d 649, 655 (2d Cir. 2004) ("The district court in the case before us thus erred when it dismissed Ortiz's due process claim based solely on the fact that his SHU confinement was for fewer than 101 days. We need not delineate the precise contours of 'normal' SHU confinement. For present purposes, it is sufficient to note that, ordinarily, SHU prisoners are kept in solitary confinement for twenty-three hours a day, provided one hour of exercise in the prison yard per day, and permitted two showers per week. . . Ortiz alleges that for at least part of his confinement, he was kept in SHU for twenty-four hours a day, was not permitted an hour of daily exercise, and was prevented from showering 'for weeks at a time.' . . Based on these and Ortiz's other allegations relating to his treatment in SHU, we think that, if proved, they could establish conditions in SHU 'far inferior'. . . to those prevailing in the prison in general. We thus conclude that Ortiz has alleged that the ninety-day SHU sentence imposed on him was, under the circumstances, a hardship sufficiently 'atypical and significant' to withstand a Rule 12(b)(6) motion as to the first part of the due process test."); *Palmer v. Richards*, 364 F.3d 60, 64-66 & n.4 (2d Cir. 2004) ("[O]ur cases establish the following guidelines for use by district courts in determining whether a prisoner's liberty interest was infringed. Where the plaintiff was confined for an intermediate duration-- between 101 and 305 days--'development of a detailed record' of the conditions of the confinement relative to ordinary prison conditions is required. . . . A confinement longer than an intermediate one, and under 'normal SHU conditions,' . . . is 'a sufficient departure from the ordinary incidents of prison life to require procedural due process protections under *Sandin*.' . . . And although shorter

confinements under normal SHU conditions may not implicate a prisoner's liberty interest, . . .we have explicitly noted that SHU confinements of fewer than 101 days could constitute atypical and significant hardships if the conditions were more severe than the normal SHU conditions of *Sealey* or a more fully developed record showed that even relatively brief confinements under normal SHU conditions were, in fact, atypical. . . . In the absence of a detailed factual record, we have affirmed dismissal of due process claims only in cases where the period of time spent in SHU was exceedingly short--less than the 30 days that the Sandin plaintiff spent in SHU--and there was no indication that the plaintiff endured unusual SHU conditions. . . .The actual duration of confinement is relevant to determining whether any liberty interest was infringed, . . .but should the analysis proceed to the second prong of the qualified immunity analysis--whether Richards's actions were objectively reasonable in light of the law at the time--the pronounced sentence is the relevant period, *see Hanrahan v. Doling*, 331 F.3d 93, 98 (2d Cir.2003) (per curiam).”); *Mitchell v. Horn*, 318 F.3d 523, 531, 532 (3d Cir. 2003) (“*Sandin* did not pronounce a per se rule, as the District Court's opinion implies. In *Sandin*, to determine whether the prisoner's treatment--thirty days disciplinary segregation for resisting a strip search--implicated a liberty interest, the Supreme Court carefully compared the circumstances of the prisoner's confinement with those of other inmates. . . . In deciding whether a protected liberty interest exists under *Sandin*, we consider the duration of the disciplinary confinement and the conditions of that confinement in relation to other prison conditions. . . .Not surprisingly, our cases engaging in this inquiry have reached differing outcomes, reflecting the fact-specific nature of the *Sandin* test. [collecting cases]”).

Compare Al-Amin v. Donald, No. 05-13803, 2006 WL 197191, at*5,*6(11th Cir. Jan. 27, 2006)(confinement in GSP's administrative segregation for a period of approximately three years, in single cell, with five hours of exercise per week rather than the seven hours available to general population inmates “does not constitute an ‘atypical and significant hardship ... in relation to the ordinary incidents of prison life.’”) with *Fogle v. Pierson*, No. 05-1405, 2006 WL 205367, at *3 (10th Cir. Jan. 27, 2006) (“The district court abused its discretion in concluding that there was no arguable basis that a three-year period of administrative segregation--during which time Fogle was confined to his cell for all but five hours each week and denied access to any outdoor recreation--is not ‘atypical.’”).

See also Asquith v. Department of Corrections, 186 F.3d 407, 411 (3d Cir. 1999) (removal from halfway house did not trigger protections of Due Process

Clause); *Griffin v. Vaughn*, 112 F.3d 703, 707 (3d Cir. 1997) ("It is thus apparent that in the penal system to which Griffin was committed with due process of law, it is not extraordinary for inmates in a myriad of circumstances to find themselves exposed to the conditions to which Griffin was subjected. It is also apparent that it is not atypical for inmates to be exposed to those conditions, like Griffin, for a substantial period of time. Given the considerations that lead to transfers to administrative custody of inmates at risk from others, inmates at risk from themselves, and inmates deemed to be security risks, etc., one can conclude with confidence that stays of many months are not uncommon. For these reasons, we believe that exposure to the conditions of administrative custody for periods as long as 15 months 'falls within the expected parameters of the sentence imposed [on him] by a court of law.' It necessarily follows, in our view, that Griffin's commitment to and confinement in administrative custody did not deprive him of a liberty interest and that he was not entitled to procedural due process protection.").

The Supreme Court has held that a state may create a liberty interest on the part of inmates in the accumulation of good conduct time credits. *Wolff v. McDonnell*, 418 U.S. 539, 563-71 (1974). Before being deprived of good-time credits an inmate must be afforded: (1) 24-hour advance written notice of the alleged violations; (2) the opportunity to be heard before an impartial decision maker; (3) the opportunity to call witnesses and present documentary evidence (when such presentation is consistent with institutional safety); and (4) a written decision by the fact-finder stating the evidence relied upon and the reasons for the disciplinary action. *Id.*

In *Sandin*, the Court did not disturb its holding in *Wolff*. Thus, if disciplinary action would inevitably affect the duration of the inmate's confinement, a liberty interest would still be recognized under *Wolff*. See *Whitford v. Boglino*, 63 F.3d 527, 532 (7th Cir.1995). See also *Boone v. Brown*, No. Civ. 05-750(AET), 2005 WL 2006997, at *11 (D.N.J. Aug. 22, 2005) ("In *Wolff v. McDonnell*, the Supreme Court set forth the requirements of due process in prison disciplinary hearings. An inmate is entitled to (1) written notice of the charges and no less than 24 hours to marshal the facts and prepare a defense for an appearance at the disciplinary hearing; (2) a written statement by the fact finder as to the evidence relied on and the reasons for the disciplinary action; and (3) an opportunity 'to call witnesses and present documentary evidence in his defense when to do so will not be unduly hazardous to institutional safety or correctional goals.' *Wolff*, 418 U.S. at 563-71. However, inmates do not have an absolute federal constitutionally-protected right to confront

and cross-examine witnesses at their prison disciplinary hearings. *Id.* at 567-68.”). Note, however, that "the mere opportunity to earn good-time credits" has been held not to "constitute a constitutionally cognizable liberty interest sufficient to trigger the protection of the Due Process Clause." ***Luken v. Scott***, 71 F.3d 192, 193-94 (5th Cir. 1995) (per curiam).

See also Allah v. Seiverling, 229 F.3d 220, 225 (3d Cir. 2000) (“Our holding that claims alleging retaliation for the exercise of First Amendment rights survive *Sandin* is consistent with those circuits that have considered the issue.”).

In ***Mitchell v. Dupnik***, 75 F.3d 517 (9th Cir. 1996), the court of appeals held that the rationale of *Sandin* did not apply to a pretrial detainee "who had not been convicted or sentenced at the time he was disciplined." *Id.* at 524. The court concluded that *Sandin* left ***Bell v. Wolfish***, 441 U.S. 520 (1979), untouched and that where the purpose and effect of disciplinary segregation was punishment, a pretrial detainee could not be punished without a due process hearing. *Id.* *Accord Surprenant v. Rivas*, 424 F.3d 5, 17 (1st Cir. 2005) (“[T]he *Sandin* Court's rationale applies only to those convicted of crimes--not to pretrial detainees. The courts of appeals that have addressed this question are consentient on the point. [citing cases] We share that view. Pretrial detainees, unlike convicts, have a liberty interest in avoiding punishment--an interest that derives from the Constitution itself. . . Because the plaintiff in this case was a pretrial detainee at and prior to the time of the accusation and the hearing, *Sandin* is inapposite.”); ***Rapier v. Harris***, 172 F.3d 999, 1004, 1005 (7th Cir. 1999); ***Whitford v. Boglino***, 63 F.3d 527, 531 n.4 (7th Cir.1995). *See generally Carlo v. City of Chino*, 105 F.3d 493, 498-99 (9th Cir. 1997) (noting that "[a] majority of the courts that have addressed this question have held that *Sandin* does not govern the assessment of state-created liberty interests for pretrial detainees[,]” citing cases and concluding that "holding an arrestee incommunicado is a restraint atypical of post-arrest detention.”).

See also Tilmon v. Prator, 368 F.3d 521, 523 (5th Cir.2004) (per curiam) (“Tilmon had argued that *Sandin* did not apply, citing ***Fuentes v. Wagner***, 206 F.3d 335 (3d Cir.2000), in which that court held that a convicted inmate awaiting sentencing has the status of a pretrial detainee. The district court rejected Tilmon's argument that because he was convicted but not sentenced, *Sandin* did not apply. . . . We do not read *Bell v. Wolfish* as suggesting that a convicted but unsentenced prisoner should be treated as a pretrial detainee. . . . In our view, the adjudication of guilt, *i.e.*, the conviction, and not the pronouncement of sentence, is the dispositive

fact with regard to punishment in accordance with due process. The Eighth, Ninth, and Tenth Circuits have recognized this principle. [discussing cases]”).

The Court has held that, in certain circumstances, the Constitution itself may give rise to a liberty interest. *See, e.g., Washington v. Harper*, 494 U.S. 210, 221-222 (1990) (involuntary administration of antipsychotic drugs); *Vitek v. Jones*, 445 U.S. 480 (1980) (involuntary commitment to a mental hospital). *See also Kirby v. James*, 195 F.3d 1285, 1292 (11th Cir. 1999) (holding that “the stigmatizing effect of being classified as a sex offender constitutes a deprivation of liberty under the Due Process Clause.”). *But see Overton v. Bazzetta*, 123 S. Ct. 2162, 2170 (2003) (“[W]ithdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline . . . is not a dramatic departure from accepted standards for conditions of confinement.”); *Bazzetta v. McGinnis*, 430 F.3d 795, 802, 803 (6th Cir. 2005) (“We extrapolate from *Overton* and *Sandin* that the substance abuse regulation is neither a ‘dramatic departure,’ nor an ‘atypical and significant hardship’ in relation to the ordinary incidents of prison life. Thus, although the issue was not directly before the *Overton* Court, Court precedent and dictum has signaled against our finding a liberty interest on the face of the substance abuse regulation. . . . As detailed above, the *Overton* Court subsequently foreclosed a facial procedural due process challenge under the standard set forth in *Sandin*. The Court's decision in *Overton* does not preclude individual prisoners from challenging a *particular* application of the substance abuse regulation on First Amendment, Eighth Amendment or Fourteenth Amendment grounds but such ‘[a]n individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards, . . . [does] not support the ruling . . . that the entire regulation is invalid.’ . . . We know of no circuit court that has found an implicit due process right to prison visitation. In fact, the *Sandin* decision perpetuated the Court's general resistance to directly reading the Due Process Clause without support from a positive source of law, absent evidence of a ‘grievous loss.’ Although the substance abuse regulation at issue here is ‘severe,’ . . . we decline to hold that, on its face, it rises to the level of egregious conduct necessary to implicate the implicit guarantees of the Due Process Clause.”).

In *Young v. Harper*, 117 S. Ct. 1148, 1150 (1997), a unanimous Court held that Oklahoma's Preparole Conditional Supervision Program, "a program employed by the State of Oklahoma to reduce the overcrowding of its prisons[,] was sufficiently like parole that a person in the program was entitled to the procedural protections set forth in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) before he could be removed from it." *See also Anderson v. Ricore*, 317 F.3d 194,

200-02 (2d Cir. 2003) (“*Sandin*’s reliance on *Wolff*, which found an important liberty interest in the retention of good time credits, and its earlier citation with approval of *Morrissey*, a parole revocation case, negate any suggestion that *Sandin*’s particularized test should be applied outside the intra-prison disciplinary context. Because Anderson, like the petitioners in *Morrissey* and the plaintiffs in *Tracy*, lived outside the prison, a comparison to the ordinary conditions of prison life is inappropriate.. *Morrissey* itself established that once the State has given an inmate the freedom to live outside an institution, it cannot take that right away without according the inmate procedural due process. . . . [T]he lack of relevance *Sandin* has to work release and similar programs became even more apparent . . . when the Supreme Court decided *Young*. Relying almost exclusively on *Morrissey* and without employing a *Sandin* analysis, the *Young* court held that plaintiff had a liberty interest in Oklahoma’s pre-parole program, which is quite similar to New York’s work release program. . . . Although *Young* had not been decided when New York revoked Anderson’s work release status and thus does not enter into the qualified immunity analysis, it graphically demonstrates why defendants acted unreasonably in comparing the apples of revoking a work release program with the oranges of an intra-prison disciplinary transfer.”); ***Blair-Bey v. Quick***, 151 F.3d 1036, 1047 n.9 (D.C. Cir. 1998) (“In *Sandin v. Conner* . . . the Supreme Court adjusted the *Hewitt* analysis in considering a prisoner’s challenge of his placement in disciplinary segregation. In *Ellis v. District of Columbia*, 84 F.3d 1413 (D.C.Cir.1996), we found that *Sandin* only alters the liberty-interest analysis applicable to claims relating to ‘the day-to-day management of prisons,’ and that it does not apply to parole-related claims.”); ***Lynch v. Hubbard***, 47 F. Supp.2d 125, 128,129 (D. Mass. 1999) (“[T]he Court of Appeals for this circuit has employed the *Sandin* mode of analysis to hold that an inmate does not have a liberty interest in being given an expected, but not mandated, parole hearing, see *Hamm v. Latessa*, 72 F.3d 947, 956 (1st Cir.1995), nor in the loss of work-release privileges. See *Dominique v. Weld*, 73 F.3d 1156, 1161 (1st Cir.1996). It may always have been difficult, but post-*Sandin* it is impossible to conceive how making no change in a prisoner’s incarcerated status could deprive him of liberty. His original sentence deprived him of liberty. . . . The revocation of parole and reincarceration also would deprive him of liberty. See *Morrissey v. Brewer*, 408 U.S. 471 (1972). But the interest that a confined prisoner has in the possibility of being released earlier than the expiration of his sentence is of a quality substantially different from the interest a paroled prisoner at liberty has in not being reconfined. . . . A decision to deny parole, where the grant or denial of parole is subject to the broad discretion of the executive, is not a withdrawal of something that the inmate has, but merely of something he hopes to have.”).