

The Federal Civil Rights Act

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NOTE: This is a rough *draft* of a manual I am preparing for municipal police chiefs. Recent cases have been added using Westlaw summaries and have not yet been integrated into the body of the manual. Recent use of force and other cases to be addressed by Atty. Elliot Spector at the IACP conference have not been updated here.

INTRODUCTION

All police officers, police chiefs and municipalities are subject to civil suits alleging violations of civil rights. This chapter examines misconduct that is actionable under federal law with primary emphasis on Title 42 of the United States Code, Section 1983 (hereinafter “section 1983” or “§ 1983”). Section 1983 is derived from the Civil Rights Act of 1871.^[ii] It provides as follows:

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.

Congress enacted this statute to provide a remedy for “Negroes” whose Fourteenth Amendment civil rights had been violated by the Ku Klux Klan following the Civil War. It also enacted various other laws to ensure the rights of African-Americans as free persons, to combat the “Black codes” and to discourage Ku Klux Klan activity.^[iii]

The Supreme Court has ruled that the purpose of § 1983 is to protect the people from unconstitutional action under color of state law by interposing the federal courts as guardians of the rights secured to the people by the Constitution and federal laws from encroachment by state action.^[iii] The design of the statute was also to compensate injured plaintiffs for the loss of their rights.^[iv] It imposes liability upon an individual who, while acting under color of law, deprives a person of federally guaranteed rights.^[v]

Suits filed under this statute usually identify the constitutional right that has been infringed upon by the police officer and recite that the police officer was acting under color of state law when he or she committed the acts that gave rise to the lawsuit. In most civil rights cases there is no issue concerning whether the officer was acting under color of state law because the police officer was acting within the scope of his or her employment as a police officer. Occasionally there is an issue as to whether the conduct of the officer had the color of state law, but those situations deal with off-duty personal conduct, not off-duty police conduct.^[vi]

The federal civil rights statute is not a negligence statute. It provides a remedy only for actions that exceed normal negligence and amount to an abuse of authority. The Supreme Court has ruled that more than mere negligence is required to maintain an action under § 1983.^[vii] Even where the constitutional provision itself speaks of a specific standard, such as unreasonable search and seizure, liability is predicated on more than negligence because the police officer has qualified immunity for his or her negligent acts. Qualified

immunity is an affirmative defense to a civil rights action and will be covered later in these materials.

The purpose of this chapter is to provide a working knowledge of basic civil rights principles to aid police officers in accomplishing their law enforcement responsibilities in this time of burgeoning civil liability. This is not a comprehensive legal treatise. This provides a primer to police officers on civil rights so they can be cognizant of the types of behavior that will subject them to civil liability and to help them avoid that conduct. The key to many of the practice pointers presented here is to act responsibly and professionally; most cases where liability was found involved poor judgment or malicious conduct by the officer.

ISSUES UNRELATED TO SPECIFIC CONDUCT

EVERY PERSON

Obviously, by its wording, § 1983 applies to the conduct of individual “persons.” It also governs the actions of other entities that are not living, breathing persons. Approximately one hundred years after § 1983 became law, the Supreme Court affirmed its remedial purpose of enforcing Fourteenth Amendment rights by declaring that § 1983 creates a cause of action for individuals deprived of federal rights by police misconduct, even if such misconduct is unauthorized by the state.^[viii] Moreover, the Court allowed a federal remedy without requiring a plaintiff to seek redress in a state court first. Years later, in *Monell v. Department of Social Services*, the Supreme Court held that municipalities could be held liable as “persons” for purposes of a section 1983 action.^[ix] Inasmuch as the municipality can only act by individuals having certain authority, the court limited its holding by concluding that a municipality or other entity can be held liable only where a constitutional wrong results from:

- A policy statement, ordinance, regulation or decision officially adopted and promulgated by the body's officers;
- an action or policy that has received formal approval through the body's official decision making channels;
- governmental custom, even though such a custom has not received formal approval through the body's official decision making channels; or
- acts or omissions by the entity's lawmakers or by those whose edicts or acts may fairly be said to represent official policy.^[x]

The *Monell* court noted that a municipality cannot be held liable for torts committed by municipal employees by virtue of theories of *respondeat superior* or *vicarious liability*. *Respondeat superior* means that an employer is

responsible for the actions of its employees because they are agents of the employer, or superior, who have been given authority to act on behalf of the employer. Vicarious liability means that one party is responsible automatically for the actions of another by virtue of the nature of their legal relationship. Thus, a municipality is not liable for the constitutional deprivations made by its employees simply because they are its employees. Liability can result only from the municipality's own conduct.

While municipalities are "persons" for § 1983 purposes, states are not "persons." The Supreme Court has held that state officers acting under color of state law may not be sued in their *official capacity* for damages because this in essence would be a suit against a state entity which is not a "person" within the meaning of section 1983.^[xii] While this might appear to foreclose official capacity suits against state officials by excluding them from the category of "person," the Supreme Court qualified its holding by stating in a footnote that an official sued in his or her official capacity for prospective relief, such as injunctive or declaratory relief, would be a "person" under section 1983. In addition, plaintiffs may sue state officials in their *individual capacity* under § 1983 for damages.^[xiii]

UNDER COLOR OF LAW

A second element that must be present before an individual may come within the purview of § 1983 liability requires that the person act "under color of law". That phrase has been interpreted to mean "acting within one's general governmental capacity." The determination whether a police officer is acting under color of state law turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his/her official duties.^[xiii] Most on-duty conduct is "under color of law," as is a substantial amount of "off-duty" conduct. Officers working assigned paid details, for example, are generally acting "under color of law." Also "under color of law" are an officer working as a security guard at a bank^[xiv] and another officer who was working as a security guard at a retail store.^[xv] Additionally, a vacationing police officer who used his service weapon to shoot someone he had earlier investigated in connection with a domestic disturbance was acting "under color of law."^[xvi] The department in that case had authorized the carrying of the weapon off-duty. In addition, the incident flowed from earlier on-duty activity, and the individual had called the department, threatening the officer. Likewise, an off-duty officer acted "under color of law" by stopping and searching a suspected shoplifter where he identified himself as a police officer and filed an arrest report.^[xvii]

Occasionally, a court may find government employees to be acting in a purely personal or private, rather than governmental, capacity and thus their wrongful conduct will not be deemed to be "under color of law." A police officer on medical leave was not acting "under the color of law" when he killed a bar patron during a dispute, even though he identified himself as a policeman and

used his service revolver.^[xviii] One federal court found that a police officer who was out of work due to a duty injury and who had been ordered not to exercise police power *should not* be able to subject his employer to suit under section 1983 for unauthorized off-duty conduct.^[xix] Courts are inclined to exclude totally personal actions of municipal employees from categorization as “under color of law,” especially if the conduct occurred off-duty. Examples of conduct excluded from being “under color of law” include:

- Fighting while on vacation (even though disciplined for such action);^[xx]
- Stealing on duty;^[xxi]
- Shooting wife and killing self;^[xxii] and
- Obtaining complaints or arrest warrants in personal disputes.^[xxiii]

PRACTICE POINTERS

When investigating a complaint, chiefs should be sure that a thorough review is done of any personal relationship between the complainant and the municipal employee involved. If the employee is violating rules, carrying out a personal agenda or under orders not to use his/her municipal authority, there may be some basis for avoiding municipal liability. However, there is not much a chief or municipal official can do to avoid municipal liability by claiming that an employee was not acting under color of law when that person violates someone’s rights either on or off-duty if such conduct is found to be within the cloak of governmental authority bestowed upon the employee.

MUNICIPAL LIABILITY

IN GENERAL

As mentioned previously, in order to prevail against a municipality in a § 1983 case, a plaintiff must prove “that official policy is responsible for a deprivation of rights protected by the Constitution”.^[xxiv] Official policy can include by-laws or ordinances as well as regulations, directives or policy statements by upper management officials. In the absence of a written policy, municipal liability can result from the single action (decision) of a final policy-maker. In any event, the policy-maker must have *final* authority in order for the policy to be considered an official policy of the municipality.^[xxv] As *Monell* indicated, municipal policy can be set by either the legislative body, such as the mayor or board of selectmen, or they may expressly or impliedly delegate the authority to a department head or other similarly-situated person. Courts determine which officials are policy-makers usually by reference to state law.^[xxvi] In making such determination, the court looks at “relevant legal materials, including state and local positive law, as well as ‘custom or usage’ having the force of law.”^[xxvii]

Furthermore, the policy-maker must have acted with deliberate indifference to the rights of the persons with whom the municipality's employees could come into contact.^[xxviii] Deliberate indifference in this context is an objective standard based upon the obviousness of the risk of a constitutional violation or upon the constructive notice to the policy-maker of the risk.^[xxix] There must also be an affirmative link between the municipal policy and the constitutional deprivation.^[xxx] Therefore, if there is no constitutional deprivation by the municipality's employees, there is no liability for the municipality where the alleged deprivation comes at the hands of the individual employee.^[xxxi] The municipality may still be liable where the alleged deprivation flows directly from the final policy-maker.^[xxxii]

MUNICIPAL POLICY-MAKERS

In determining whether or not to impute liability to a municipality, the *Pembaur* case suggests that courts will examine the state law on the policy-making authority of the individual.^[xxxiii] Where the existence of a clear governmental policy is uncertain, the court will look to the position held by the person whose conduct is at issue. The higher the degree of authority the person has, the more likely he/she is responsible for establishing municipal policy. In general, lower courts have held that where the official (e.g., chief or department head) is not designated as a policy maker, or where the official is answerable to a higher authority (e.g., board of selectmen, town manager or mayor), his/her conduct does not constitute official policy binding on the municipality. On the other hand, a court has ruled that, although a chief's decisions could theoretically be reviewed by the city manager or city council, the chief's unconstitutional reprimand could be imputed to the city for purposes of municipal liability because the chief's disciplinary decisions were for all intents and purposes final, and any meaningful administrative review was illusory.^[xxxiv]

Additionally, it is not absolutely clear that every act of a governmental official with final authority represents the *policy* of the governmental entity. It is possible that a defendant municipality may still argue that a policy-maker's conduct that clearly violates established governmental rules does not provide a basis for holding the entity liable. The Supreme Court has addressed the question of municipal liability for government policy makers in two cases following the *Pembaur* decision. In one case, *City of St. Louis v. Praprotnik*, the court agreed that simply going along with the discretionary decisions of one's subordinates is not a delegation to them of final policy-making authority.^[xxxv] The second case, *Jett v. Dallas Independent School District*, discussed in greater detail the court's role in determining whether an official has final policy-making authority.^[xxxvi] The Supreme Court in *Jett* stated "the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury."^[xxxvii] When a policy is formally adopted by the municipal body having final legislative power in the particular area involved in the § 1983 suit, it is obviously the action of a municipal policy-

maker. A more difficult question arises when the final municipal authority in a particular area is in the hands of an executive official. It appears that most courts will find such officials to be municipal policy-makers as well.^[xxxviii] *Jett* made it clear that, regardless of who is determined to be the policy-maker, once they have been identified “it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur”.^[xxxix]

The following are summaries of some illustrative cases determining the final policy-maker for a municipality on a particular issue:

- In 1991, the Ninth Circuit held that a police chief had established a city policy permitting the use of more force than was reasonable in violation of the Fourth Amendment rights of the defendant based upon his testimony that he was responsible for formulating police policies and that the department had a policy to forcibly extract blood so long as the force did not shock the conscience.^[xli]
- Also in 1991, the Eleventh Circuit found that the city could be held liable for the firing of a black police officer because either the city manager or the police chief was the ultimate decision maker on police department personnel matters.^[xlii]
- Several cases have held that a police chief who institutes an illegal strip search policy does not act as a policy-maker subjecting his/her municipality to liability.^[xliii]
- In the 2002 First Circuit case of *Kelley v. LaForce*, buyers of a pub sued officers, the police chief, town officials and the municipality for federal civil rights violations.^[xliv] The court ruled that the town could not be liable under § 1983 where the police officers ejected an employee of the pub's buyers from the pub given the absence of evidence that the police chief had final policymaking authority for the town with respect to the ejection, as well as the assertion in the complaint that the town administrator authorized the ejection.
- A New Hampshire police chief who ordered his officers to limit news gatherers' presence at crime scenes was a policy-maker.^[xlv] However, even where a police chief is a policy-maker, and he/she makes a single decision under “unique circumstances”, this may not amount to a *policy* under *Pembaur*.^[xlvi]
- A 2001 case found that the Sheriff of Suffolk County “has final policymaking authority for establishing policies for conducting searches of prisoners at the Nashua Street Jail.”^[xlvii] The County's argument that Sheriff Rouse never directly exercised authority to establish County search policies, but instead relied on the expertise of his staff in promulgating Department policies was unavailing. “Sheriff Rouse's hands-off approach to his job does not absolve him

of responsibility for unconstitutional policies developed and promulgated by his underlings on his watch.^{xxlvii}

- In another case, the court found that as the county's final policy-maker, the sheriff was empowered to define law enforcement objectives and carry them out.^{xxlviii} Similarly, county sheriffs were the final policy-making authority with regard to actions of their enforcement officials' activities outside their jurisdiction since the sheriffs were authorized and responsible for establishing policies and procedures regarding those activities.^{xxlix}
- City police officer did not have authority to make official municipal policy about operation of underage alcohol-sales sting program and child pornography sting, and thus, city would not have §§ 1983 liability for officer's alleged violation of plaintiff's substantive due process rights by allegedly taking nude photographs of plaintiff during underage alcohol-sales sting operation and by allegedly taking semi-nude photographs of plaintiff for supposed purpose of participating in child pornography sting; officer had considerable discretion in implementation of city's undercover alcohol-sales sting operation, officer's decisions regarding such sting operation were subject to overall supervision by his superiors, officer was subject to police department policy that was not of his own making, and no state or local law, or custom or practice with force of law, gave officer policymaking authority for city.^l
- Arrestee, who alleged that county's chief of police and police supervisors were responsible for the training, supervision, and conduct of police officer, and that county, through the actions of its port security officer, falsely arrested and detained him, failed to identify and allege any official or unofficial county custom or policy, and failed to allege that the county's final policymakers knew and failed to stop an unofficial custom or practice, as required to maintain a §§ 1983 claim against county.^{li}

SINGLE UNCONSTITUTIONAL ACT OF POLICY-MAKER

The *Monell* requirement that liability be grounded on official policy was satisfied in *Pembaur v. City of Cincinnati*,^{liii} where the Supreme Court decided that it is possible to find liability, even of a governmental entity for a single decision of its policy maker. The court ruled that the county prosecutor's instruction to law enforcement officers to enter forcibly a medical clinic, presumably in violation of the clinic owner's Fourth Amendment rights, was official policy that exposed the county to liability. The court found that since the decision to adopt this particular course of action was directed by an individual who established governmental policy, the county was liable regardless of whether the action was to be taken only once or repeatedly. Similar results have occurred in other cases involving governmental liability for

the decisions of its policy makers. In one case, a police chief's act of not allowing an officer sufficient time in which to respond to disciplinary charges rendered the city liable for violation of the officer's due process rights.^[liii] A single action by a final decision maker may be sufficient to establish municipal liability. For example, in a case where the city avoided liability because there was no evidence that the city pursued a policy of issuing and executing illegal search warrants or that the police routinely conducted searches beyond authorization, the court stated that a single act may give rise to civil liability only if it is shown that officials responsible for establishing the policy made a calculated choice to follow a course of action deemed unconstitutional.^[liiv]

In another case, a single incident in which the county sheriff allegedly hired a chief jailer who had been charged with kidnapping and raping an arrestee was indicative of a policy giving rise to liability against the county.^[liv] Previously, the Second Circuit found that a sheriff who established a search policy was the policy-maker for the county and thus the county could be held liable for an unconstitutional search based upon that policy.^[lvii]

Similarly, in a 2007 decision, a single incident possibly amounting to a violation of a detainee's rights to medical care did not amount to proof of a municipal policy or custom of constitutional violation so as to warrant municipal § 1983 liability under *Monell*.^[lviii]

CUSTOM OR PRACTICE OF EMPLOYEES AS OFFICIAL POLICY

Where a plaintiff attempts to recover for the actions of a municipality's executive that are in violation of an official policy promulgated by the municipality's final legislative authority, the community usually will not be liable. Two exceptions to this rule apply. One is where the unconstitutional action is part of a widespread practice or custom amounting to official policy. The other would arise where the actual final policy-making authority ratified the subordinate's decision. Unlike policies, which can be traced back to supervisory personnel or policy manuals, customs or practices are more difficult to prove.^[lviii] This is because the custom must be long-standing and condoned by the municipality.^[lix] Condoned customs are those of which the municipal officials were aware, either actually or constructively.

A plaintiff will often assert that a custom of conduct existed at the time he/she was injured. For example, a municipality will never have a policy for improperly training police officers on how to use their guns. However, the weapons training that a municipality may provide might be flawed so that every officer is inadequately trained. If so, then the municipality may be liable for having an improper custom which caused plaintiff's injury and thereby brought it within the ambit of § 1983.^[lx]

In addition to having to show the existence of a municipal custom, the plaintiff must next introduce evidence which shows that the custom was clearly unwise or callous and evidences the municipality's deliberate indifference to the constitutional rights of prospective plaintiffs.^[lxi] Moreover, it is not enough to show that a department may have been callous or otherwise acted improperly because it failed to train properly one or more officers.

To represent a custom, the conduct must be pervasive, and not simply apply to one particular person.^[lxii] A single officer's use of excessive force, for example, does not constitute a "custom". But, if several police officers are collectively charged with excessive force or other improper conduct, those events may sufficiently illustrate the existence of a custom, such as when numerous police officers shot at a fleeing motorist who posed no threat of bodily injury to others.^[lxiii] A custom of deliberate indifference arose when it was shown that the entire "graveyard shift" of a police department was improperly trained.^[lxiv] In that case, the event itself provided some proof of the existence of the underlying policy or custom because the entire night watch was involved in the incident.^[lxv]

The first decision following *Monell* concerning the requirement of an official policy or custom which the U.S. Supreme Court faced was *City of Oklahoma City v. Tuttle*.^[lxvi] The issue was whether a single incident of excessive force by a police officer was enough to establish an official policy or custom thus rendering the municipality liable. The Supreme Court divided on several issues in *Tuttle*, but the majority agreed that the city in this case was not liable. In *Tuttle*, the plaintiff did not allege that the city had a policy or custom of having the police use excessive force to apprehend criminals. Rather, she claimed the city had a policy of inadequately training its officers and supervisors, which resulted in the unconstitutional action.

In the years since *Tuttle*, numerous federal courts have confronted § 1983 municipal liability claims involving allegations of single incidents involving non-policy-makers allegedly amounting to proof of an official policy or custom. The following are examples of cases where no liability on the part of the municipality was found:

- Failure to protect demonstrators did not show policy or custom of insufficient training, monitoring or supervision,^[lxvii]
- Unconstitutional search,^[lxviii]
- Using cruiser to crash with pursued motorcycle,^[lxix]
- Excessive force in making arrest which violated departmental policy and for which officers were disciplined,^[lxx]
- City not liable when police officers act in violation of general procedures,^[lxxi]

- Municipality not liable for false arrest by police chief who violated 4th Amendment;^[lxxii]
- Can't show policy of arresting without probable cause because police have no choice but to comply with law regarding making lawful arrests;^[lxxiii]
- Municipality not liable where officer violated city policy and told arrested person's employer he had AIDS;^[lxxiv]
- No municipal liability for failure to follow suicide prevention policy with suicidal prisoner;^[lxxv]
- City not liable when officer engaged in high speed pursuit with broken siren in violation of policy;^[lxxvi] and
- No municipal liability where police officer engages in sexual harassment which violated city's policy.^[lxxvii]

The following cases are examples of situations where the existence of a policy or practice resulted in municipal liability:

- The well-settled practice of strip searching women (but not men) who were arrested for misdemeanors was ruled unconstitutional and served as the basis for municipal liability;^[lxxviii]
- A department's practice of using roadblocks to stop fleeing cars, without displaying lights on police vehicles, resulted in excessive force and created municipal liability;^[lxxix]
- Since there was an effort made to identify and protect potential suicide "victims" in jail, an unwritten suicide policy was ruled not facially unconstitutional;^[lxxx]
- The practice of destroying internal affairs investigation records after six months was relevant to establishing an unconstitutional policy or custom;^[lxxxii]
- The unconstitutional practice of breaking down doors without a warrant when arresting a felon created municipal liability;^[lxxxiii]
- Municipality found liable when officer shot juvenile burglary suspect as authorized by policy allowing deadly force to stop all fleeing felons, even non-threatening ones;^[lxxxiiii]
- Rules and regulations specified suspension procedures, so any procedural due process violations would be the product of official municipal policy;^[lxxxv]
- Where the mayor, police chief and police supervisors regularly ignore the city's official sexual harassment policy, the city may be found liable for their actions,^[lxxxvi]

- Where supervisory personnel were involved in sexual harassment and discrimination, even though the city had a written policy against it, since the policy was allowed to be ignored, it creates a new policy or custom;^[lxxxvii] and
- Where the chief of police used his position to force sex on a department employee and a minor.^[lxxxviii]

PRACTICE POINTERS

It is rare that a department or municipality would knowingly adopt a policy of depriving individuals of their constitutional or legal rights. In most cases, common sense should alert a chief or municipal official that a written policy is improper. Certainly some comfort can be taken in basing such policies on those developed by other municipalities or policy writing entities such as the International Association of Chiefs of Police or the Municipal Police Institute (MPI). Those specified by the National or State Accreditation Commissions are similarly reassuring. However, regardless of their source, all formally adopted policies should be reviewed by municipal counsel for sufficiency and by the chief and department members to assure they reflect an agency's actual circumstances. Before any policies are approved or ratified by a municipality's final decision making authority (Selectmen, Mayor, Manager, Council, etc.), they should be reviewed by legal counsel. An effort should be made to determine whether some regulations or policies require such approval or ratification, or if they can be adopted solely by the department head.

A department's Policy and Procedure Manual should contain a cover page referring to the authority to adopt the same and the date the final decision maker promulgated or ratified the manual, rule or policy. As additions or changes are made, similar notations should be inserted. In-service training or roll call training should be used to remind employees of the department's official policy. Discussion should be encouraged about instances where practice is different than policy.

A more difficult situation involves the deprivation of rights pursuant to a custom, even if the custom has not received any formal ratification by the chief or municipal officials. An effort should be made to be aware of employees' actions, especially when they involve law enforcement activities. It is possible that actual conduct may vary from a formal policy, regardless of how well the latter is drafted.

Be sure that employees sign receipts for policy manuals or written directives. Also, see to it that training is provided and documented and that employees have an opportunity to seek clarification of any confusing parts. Pre- and post-testing is helpful in teaching employees and documenting that such training has been given.

Periodic discussions with supervisors may help discover instances where formal policies are not being followed. Since it is impossible to cover all situations with a written policy or rule, keeping aware of what is happening “on the street” is important. Citizen complaints are often the first warning of potential problem areas. A formal procedure should be adopted for receiving, investigating and responding to citizen complaints.

The following are recent cases on municipal liability under section 1983:

- Although a municipality is subject to suit pursuant to § 1983, a municipal police department is not; municipal police department is a sub-unit, agency or instrumentality of the municipality through which the municipality fulfills its policing function and not an independent legal entity. *Petaway v. City of New Haven Police Dept.*, D.Conn.2008, 541 F.Supp.2d 504.
- Even where a plaintiff alleges that her injuries were caused by a municipal policy, custom, or practice, the municipality cannot be held liable under § 1983 if the constitutional claim is based solely upon the actions of a named individual defendant who is found not liable. *Fisk v. Letterman*, S.D.N.Y.2007, 501 F.Supp.2d 505.
- Town and police department could not be held liable under § 1983 for actions of police officers in allegedly utilizing excessive force in procuring a blood draw from arrestee suspected of driving under the influence, absent evidence that town and police department had a policy that directed police to violate civil law and use unreasonable and excessive force to obtain evidence. *Laskey v. Legates*, D.Del.2007, 519 F.Supp.2d 449.
- City was not subject to liability under § 1983 for negligent supervision of police officers who allegedly used excessive force while executing “no-knock” warrant, where officers involved with arrest had sufficient supervisor experience and training, officer in charge had completed numerous hours of supervising training, including narcotics supervisor leadership training, and there was no evidence of similar claims against city police department. *Bell v. City of Topeka*, Kansas, D.Kan.2007, 496 F.Supp.2d 1182.
- On a claim against a municipality under § 1983, the necessary causal connection between a municipal policy and the particular violation alleged can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he she fails to do

so; alternatively, the casual connection may be established when a municipality's custom or policy results in deliberate indifference to constitutional rights or when facts support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so. *Whittington v. Town of Surfside*, S.D.Fla.2007, 490 F.Supp.2d 1239, affirmed in part 2008 WL 696685.

- Liability did not arise under § 1983 due to lack of investigation into use of force to arrest in manner specified by municipality's written policy, where there was no evidence that failure to follow written policy caused constitutional injury, arrestee did not complain to municipality concerning excessive force, and there were no other instances of municipality not investigating use of force in relevant scenario. *Morrison v. Board of Trustees of Green Tp.*, S.D. Ohio 2007, 529 F.Supp.2d 807.
- Police officer's conduct in arresting and detaining arrestee for refusing to answer questions was not pursuant to a formal governmental policy or longstanding practice constituting standard operating procedure, as required for municipal liability to attach with respect to arrestee's claim that the city had an unofficial policy or practice which promoted, allowed or facilitated officers to use coercion, threats and assault against detainees, based on their failure to answer questions, provide protected and privileged information, and failure to cooperate with police when not required to do so; in fact, evidence demonstrated that the officer's alleged conduct was contrary to the requirements of the police manual. *Ashley v. Sutton*, D.Or.2007, 492 F.Supp.2d 1230.
- Even if survivors of suspect, who was fatally shot by deputy, presented sufficient evidence to prove a persistent, widespread county practice of under-investigating officer-involved shootings prior to the suspect's incident, survivors failed to show that such practice of under-investigation resulted in a custom of deputies' use of excessive force in officer-involved shootings such that such practice was the "moving force" of suspect's constitutional injury, and therefore county was not subject to § 1983 liability; furthermore, survivors failed to present adequate evidence that the county adopted an under-investigation policy with deliberate indifference as to its known or obvious consequences. *James v. Harris County*, S.D.Tex.2007, 508 F.Supp.2d 535.

- Even assuming that county, in placing arrestees at jail where unconstitutional strip searches were allegedly conducted by sheriff and his deputies, had exhibited a deliberate indifference to arrestees' Fourth Amendment rights, link between county's policy of placing arrestees at jail and strip searches conducted at jail by sheriff and his deputies, over whom county had no control, was too attenuated to impose liability on county under § 1983, notwithstanding arrestees' conclusory allegation that county was "moving force" behind arrestees' injuries. *Powell v. Barrett*, C.A.11 (Ga.) 2007, 496 F.3d 1288, affirmed in part, reversed in part and remanded 246 Fed.Appx. 615, 2007 WL 2404478.
- Police chief's ratification of police officer's conduct in arresting and detaining arrestee who allegedly failed to answer officer's questions, if true, was sufficient to subject the city to § 1983 liability on arrestee's excessive force claim. *Ashley v. Sutton*, D.Or.2007, 492 F.Supp.2d 1230.
- City was not subject to liability under § 1983 in connection with its police officers' alleged warrantless entry, false arrest, and use of excessive force, despite arrestee's contention that city failed to properly respond to his citizen complaint, where officer conducted thorough investigation, which included interviews of parties and relevant witnesses and polygraph of arresting officer, and police captain and chief found officer's report to be accurate under circumstances. *Thorne v. Steubenville Police Officer*, S.D. Ohio 2006, 463 F.Supp.2d 760, affirmed in part, reversed in part and remanded 243 Fed.Appx. 157, 2007 WL 2781151.
- Information as to whether shooter was in uniform, arrived in squad car, was on duty, and identified himself as a police officer was required to determine if municipality could be liable under § 1983 for death of citizen on basis that shooter was working as municipal police officer at that time. *Rossi-Cortes v. Toledo-Rivera*, D.Puerto Rico 2008, 2008 WL 802267.
- County was not liable under the ratification theory for deputy's fatal shooting of suspect where chief deputy affirmatively testified that the sheriff approved of deputy's use of force on the night in question, and that county admitted that deputy's conduct conformed with approved practices and policies of the sheriff's department; there was no evidence that policymaker knew that the shooting violated suspect's civil rights because the shooting was clearly excessive to deputy's apparent need to defend himself. *James v. Harris County*, S.D.Tex.2007, 508 F.Supp.2d 535.

- A single incident alleged in a complaint, especially if it involved only actors below the policymaking level, generally does not suffice to show a municipal policy or custom, as required to make municipal liability claim under §§ 1983. *McCrary v. County of Nassau*, E.D.N.Y.2007, 493 F.Supp.2d 581.
- City police officer did not have authority to make official municipal policy about operation of underage alcohol-sales sting program and child pornography sting, and thus, city would not have § 1983 liability for officer's alleged violation of plaintiff's substantive due process rights by allegedly taking nude photographs of plaintiff during underage alcohol-sales sting operation and by allegedly taking semi-nude photographs of plaintiff for supposed purpose of participating in child pornography sting; officer had considerable discretion in implementation of city's undercover alcohol-sales sting operation, officer's decisions regarding such sting operation were subject to overall supervision by his superiors, officer was subject to police department policy that was not of his own making, and no state or local law, or custom or practice with force of law, gave officer policymaking authority for city. *Wilson v. City of Norwich*, D.Conn.2007, 507 F.Supp.2d 199.
- City was not liable under § 1983 for alleged unlawful arrest made by city police officer; officer was officially disciplined by the city police department for his conduct, suggesting that his alleged actions were inconsistent with city policy, and there was no evidence that a custom or policy of the city was a moving force behind the arrest. *Skop v. City of Atlanta, GA*, C.A.11 (Ga.) 2007, 485 F.3d 1130, rehearing and rehearing en banc denied 254 Fed.Appx. 803, 2007 WL 2789597.
- Municipality was not liable under § 1983, for police officer's use of deadly force against suspect, based on municipality's alleged failure to render medical aid, absent showing that failure to render medical aid was pursuant to city policy or custom. *Long v. City and County of Honolulu*, C.A.9 (Hawai'i) 2007, 511 F.3d 901.
- Arrestee, who alleged that county's chief of police and police supervisors were responsible for the training, supervision, and conduct of police officer, and that county, through the actions of its port security officer, falsely arrested and detained him, failed to identify and allege any official or unofficial county custom or policy, and failed to allege that the county's final policymakers knew and failed to stop an unofficial custom or practice, as

required to maintain a § 1983 claim against county. *Moore v. Miami-Dade County*, S.D.Fla.2007, 502 F.Supp.2d 1224.

- Police department policy of not routinely seizing weapons from law enforcement officers involved in domestic violence situations did not cause the alleged deprivation of Fifth and Fourteenth Amendment due process rights of woman shot and killed by her police-officer boyfriend, as required for § 1983 municipal liability. *Estate of Soberal v. City of Jersey City*, D.N.J., 529.
- Sheriff's office could not be held liable under § 1983 for alleged false arrest and imprisonment of arrestee following domestic dispute, absent evidence to support arrestee's contention that office or county had instituted policy requiring law enforcement officers to effectuate an arrest every time they were dispatched due to a 911 call. *Wolk v. Seminole County, Fla.*, M.D.Fla.2007, 510 F.Supp.2d 786, reversed in part 2008 WL 656236.
- There was no manifest persistent and widespread practice of the use of excessive force by police officers supporting an implication of deliberate indifference on the part of the city to the risks created by that practice, thus precluding imposition of municipal liability under § 1983. *Younger v. City of New York*, S.D.N.Y.2007, 480 F.Supp.2d 723.
- Sheriff's office could not be held liable under § 1983 for alleged false arrest and imprisonment of arrestee following domestic dispute, absent evidence to support arrestee's contention that office or county had instituted policy requiring law enforcement officers to effectuate an arrest every time they were dispatched due to a 911 call. *Wolk v. Seminole County, Fla.*, M.D.Fla.2007, 510 F.Supp.2d 786, reversed in part 2008 WL 656236.
- Regardless of whether city was effective in its investigation into former detainee's allegations that police officer used excessive force in allegedly grabbing detainee, forcing him into the back of a police cruiser, and later hitting the detainee, there was no evidence of municipal policy condoning excessive force, as required to impose liability on city for the officer's actions under §§ 1983. *Engle v. Meister*, S.D.Ohio 2007, 495 F.Supp.2d 826.
- Evidence of more than dozen complaints of excessive force and improper police conduct in one year was insufficient to establish

that city had policy of indifference to excessive use of force, as was necessary to subject city to liability under § 1983 for officer's alleged use of excessive force against arrestee, absent evidence of circumstances surrounding those incidents, or of corresponding figures from other police departments. *Thorne v. Steubenville Police Officer*, S.D.Ohio 2006, 463 F.Supp.2d 760, affirmed in part, reversed in part and remanded 243 Fed.Appx. 157, 2007 WL 2781151.

- Arrestee's belief that police officers engaged in “staring down” or giving dirty looks to citizens was not sufficient to show that municipality had policy or custom regarding searches and seizures that violated citizen's Fourth Amendment civil rights; although officer other than officers involved in matter allegedly had given some people dirty looks or “stared down” another individual, such evidence did not prove that municipality had custom or policy that caused violations of Constitution and single incident did not demonstrate that municipality had wide spread history of abuse or that municipality displayed deliberate indifference to citizens' rights. *Whittington v. Town of Surfside*, S.D.Fla.2007, 490 F.Supp.2d 1239, affirmed in part 2008 WL 696685.
- Even if officer violated plaintiff's constitutional rights by threatening to subject her to a strip search as she and her husband were walking into a public hearing, town was not liable under §§ 1983 since officer did not act pursuant to a town policy or custom, and he was trained in the rules concerning search and seizure. *Cotz v. Mastroeni*, S.D.N.Y.2007, 476 F.Supp.2d 332.
- Sheriff's office could not be held liable under § 1983 for alleged false arrest and imprisonment of arrestee following domestic dispute, absent evidence to support arrestee's contention that office or county had instituted policy requiring law enforcement officers to effectuate an arrest every time they were dispatched due to a 911 call. *Wolk v. Seminole County, Fla.*, M.D.Fla.2007, 510 F.Supp.2d 786, reversed in part 2008 WL 656236.
- Undisputed evidence that over 24,000 instances of floor sleeping occurred in jail system in just a four-month period and that floor-sleeping was result of temporarily insufficient bed space established custom of forcing inmates to sleep on floor for purposes of civil rights class suit on behalf of pretrial detainees and post-conviction inmates alleging Eighth and Fourteenth Amendment violations. *Thomas v. Baca*, C.D.Cal.2007, 514 F.Supp.2d 1201.

- City that did not place in county jail any of arrestee who sufficiently alleged a violation of their Fourth Amendment rights in connection with strip searches conducted at jail by sheriff and his deputies was not liable under § 1983 for any Fourth violation that occurred, and arrestees' strip search claims against city had to be dismissed. *Powell v. Barrett*, C.A.11 (Ga.) 2007, 496 F.3d 1288, affirmed in part, reversed in part and remanded 246 Fed.Appx. 615, 2007 WL 2404478.
- Genuine issues of material fact existed as to whether, notwithstanding any formal policy prohibiting corrections officers from discussing with inmates the nature of the charges pending against detainee's or convicted criminal, there was such a well-settled practice among at least some corrections officers as to constitute a custom, and as to whether county prison warden knew of said risk of such a custom, precluding summary judgment in favor of county on issue of whether it was liable under § 1983 for injuries sustained by detainee at the hands of fellow inmates, after they were informed by corrections officers that detainee was charged with a shooting incident that injured a two-year old boy. *Eichelman v. Lancaster County*, E.D.Pa.2007, 510 F.Supp.2d 377.
- Regardless of whether city was effective in its investigation into former detainee's allegations that police officer used excessive force in allegedly grabbing detainee, forcing him into the back of a police cruiser, and later hitting the detainee, there was no evidence of municipal policy condoning excessive force, as required to impose liability on city for the officer's actions under §§ 1983. *Engle v. Meister*, S.D.Ohio 2007, 495 F.Supp.2d 826.
- City police department's alleged failure to maintain adequate official policy regarding use of pepper spray was not cause of purported use of excessive force against arrestee, and thus city and police chief were not liable under § 1983 for officers' use of pepper spray against arrestee, even if policy was less detailed than guidelines suggested by National Institute of Justice, where, if officers' use of pepper spray constituted constitutionally excessive force, it would also amount to violation of pepper spray policy's requirement that "police officers shall use only force that is reasonably necessary to effectively bring a person resisting arrest and/or presenting a threat of physical harm to officers or others under control." *Carey v. Maloney*, D.Conn.2007, 480 F.Supp.2d 548.

- Absent evidence that county's officer-involved shootings prior to suspect's were unjustified or excessive to the needs faced by the deputies involved, there was no evidentiary basis for finding that county had a custom or practice of deputies' use of excessive force or deadly force so as to subject county to liability under § 1983 for deputy's fatal shooting of suspect. *James v. Harris County, S.D.Tex.2007, 508 F.Supp.2d 535.*
- Motorist's allegation that he was stopped by police officers pursuant to county's pattern, policy, or practice of racial profiling, selective enforcement, and unreasonable searches and seizures was sufficient under notice pleading standards to state claim against county under § 1983 for violations of his Fourth and Fourteenth Amendment rights. *Aikman v. County of Westchester, S.D.N.Y.2007, 491 F.Supp.2d 374.*

ACTIONABLE CONDUCT

IN GENERAL

Section 1983 is not itself a source of substantive rights, but a method of vindicating federal rights elsewhere conferred by the United States Constitution or other federal laws.^[lxxxviii] Also, as well as seeking money damages under section 1983, the plaintiff may, under extraordinary circumstances, seek equitable relief, that is, a court order that the defendant take, or refrain from taking, certain actions.^[lxxxix] As noted above, the federal civil rights statute is not a negligence statute. It provides a remedy only for actions that exceed normal negligence and amount to an abuse of authority. Therefore, cruiser accidents are not violations of federal law. Also not subject to federal law are accidental discharges of firearms. The Supreme Court has ruled that more than mere negligence is required to maintain an action under § 1983.^[xc] Even where the constitutional provision itself speaks of a specific standard, such as unreasonable search and seizure, liability is predicated on more than negligence because the police officer has qualified immunity for his or her negligent acts. Suits filed under this statute usually identify the constitutional right that has been infringed upon by the police officer.

People make substantive claims against police officers for all kinds of reasons. In the context of federal civil rights claims, however, most plaintiffs allege the use of excessive force, false arrest, and/or malicious prosecution. These are all claims under the Due Process Clause of the Fourteenth Amendment for unreasonable seizure. The Supreme Court has moved away from the idea of a general substantive due process constitutional right and directed lower courts to look to the language of specific constitutional provisions, such as the Fourth

Amendment prohibition against unreasonable searches and seizures.^[xci] Not all claims against police officers fall under the unreasonable seizure banner. For example, another common civil rights claim that is not a seizure is deliberate indifference to serious medical needs, usually made where there has been a death in custody. Nevertheless, the classification of most of these claims as Fourth Amendment violations has helped defense attorneys obtain judgments for police officer defendants, many times on all or part of the case, before trial. The following sections will discuss the various legal standards applicable to the most common theories of recovery under headings using the name by which each theory is commonly known.

There are also procedural claims based upon the procedural protections afforded by the Due Process Clause. These protections concern fair notice of the impending loss of entitlements, an opportunity to be heard before entitlements are lost, the ability to present evidence on an individual's behalf or to have an attorney represent an individual. These are addressed later in another part of this chapter.

DUTY TO PROTECT

The following are recent decisions:

- Police officers did not affirmatively place apartment occupant in a position of danger by leaving him asleep or unconscious on couch of apartment while they secured the area to conduct investigation into death of person whose reported cardiac arrest prompted call of officers to apartment, and thus, officers were not liable under [§§ 1983](#) for violating occupant's right to substantive due process; neither officers nor other people removed from apartment by officers knew that occupant needed medical assistance due to a drug overdose, no one tried to enter apartment to render aid to occupant, and officers' act of closing off apartment to conduct investigation of death of person whose cardiac arrest prompted call did nothing in and of itself to increase risk to occupant. [Carver v. City of Cincinnati, C.A.6 \(Ohio\) 2007, 474 F.3d 283](#).
- Backup police officer's failure to intercede and affirmative reinforcement of another officer's actions in tasing residential burglary arrestee beyond reasonable Fourth Amendment limits constituted a failure to protect arrestee from a deprivation of his constitutional rights for which backup officer was responsible under [§§ 1983](#); arrestee had been reasonably tased three times prior to the arrival of backup officer, but, upon arrival, backup officer failed to intercede against a fourth and fifth tasing of arrestee. [Beaver v. City of Federal Way, W.D.Wash.2007, 507 F.Supp.2d 1137](#).

- Corrections officer was not deliberately indifferent to pre-trial detainee's safety and welfare, as required for pre-trial detainee's [§§ 1983](#) due process claim, arising out of a fight with another inmate and resulting in serious injury to detainee; detainee had never before had interacted with inmate involved in altercation nor had he ever communicated to the corrections officer or to anyone else, that inmate might be a specific danger to him, and, immediately after the fight broke out, officer called for back-up and attempted to secure backup. [Guzman v. Sheahan, C.A.7 \(Ill.\) 2007, 495 F.3d 852.](#)
- Genuine issue of material fact existed as to whether corrections officer acted with deliberate indifference to detainee's safety when, knowing that detainee was not in protective custody but rather was in the general population among violent offenders with whom he would have contact and was housed in a cell furthest from the guard post, he informed inmates of the arrival of detainee charged with shooting incident involving a two-year old boy, precluding summary judgment in favor of corrections officer on issue of [§§ 1983](#) liability for failure to protect detainee from injuries sustained at hands of fellow inmates allegedly due to their knowledge of his charged crime. [Eichelman v. Lancaster County, E.D.Pa.2007, 510 F.Supp.2d 377.](#)
- Genuine issues of material fact existed as to whether corrections officer acted recklessly and callously by intentionally inciting animosity in the inmates towards detainee charged with shooting incident involving a two-year old boy, and as to whether he acted with an awareness of the risk that his actions would result in serious harm to detainee when other inmates inevitably would have access to him, precluding summary judgment in favor of the corrections officer on issue of [§§ 1983](#) liability for failure to protect detainee from injuries sustained at hands of fellow inmates allegedly due to their knowledge of his charged crime. [Eichelman v. Lancaster](#)

ERRONEOUS IDENTIFICATION PROCEDURES

A chief is likely to be added as a party to any civil rights lawsuit that results from alleged wrongdoing by police officers, regardless of whether the chief had any direct involvement in the officers' conduct. The most common claim is that the chief was negligent in training the officers and that this failure resulted in the violation of a citizen's civil rights. While there may be very little a chief can do to avoid being sued, there are several things that may help avoid losing any such court action. As with much in the area of police work, documentation is critical. The oft-heard expression that, "if it is not in the report it did not happen" will be paraphrased by plaintiffs' lawyers to say, "if you can't prove the officers were trained, they probably weren't."

With the recent trend towards using DNA analysis to revisit old cases, chiefs are becoming painfully aware of the need to document all training their officers receive. The Innocence Project (IP) reports that as of August 2008, there have been 218 post-conviction exonerations in US history. The IP claims that common themes that run through these cases — from what they refer to as global problems like poverty and racial issues to criminal justice issues such as eyewitness misidentification, corrupt scientists, overzealous police and prosecutors and inept defense counsel — cannot be ignored and continue to plague our criminal justice system. They point out that:

- Sixteen people had been sentenced to death before DNA proved their innocence and led to their release;
- The average sentence served by DNA exonerees has been 12 years;

- About 70 percent of those exonerated by DNA testing are members of minority groups;
- In over 35 percent of the cases profiled on their web site, the actual perpetrator has been identified by DNA testing; and,
- Exonerations have been won in 32 states and Washington, D.C.

Some cases originated a quarter century ago, well before modern DNA procedures were available. Chiefs who have long-since retired, as well as officers that have retired or moved on in their careers and are nearing retirement age are facing court claims that their investigations were flawed and that the errors were the result of inadequate training. This should be a wake-up call to all law enforcement officers and chiefs. As the saying goes: those who do not pay attention to history are doomed to repeat it!

The following are recent cases:

Police officer's use of unduly suggestive procedure in having robbery victim identify arrestee as the person who robbed him was not the cause of the violation of arrestee's right to a fair trial that resulted when testimony regarding victim's stationhouse identification of arrestee was erroneously admitted at trial on the robbery charge, and thus, officer was not liable to arrestee under §§ 1983 for violation of the arrestee's right to fair trial; officer did not mislead or pressure prosecutor or trial judge into admitting the testimony, and actions of prosecutor and judge with respect to admission of the testimony were beyond the officer's control. *Wray v. City of New York*, C.A.2 (N.Y.) 2007, 490 F.3d 189.

Police sergeant, who took police detective's oath for arrest warrant application, assigned and supervised the detective's robbery investigation, and made the determination that it was unnecessary to view personally a surveillance videotape of the robbery depicting the perpetrator, was not liable under § 1983, for detective's alleged violation of arrestee's Fourth Amendment right to be free from unreasonable detention when exculpatory evidence was readily available; although videotape showed untattooed perpetrator and arrestee had multiple tattoos, robbery victim made positive identification of arrestee, and detective had custody of the videotape and purportedly viewed it, so that sergeant's conduct was not deliberately indifferent. *Russo v. City of Bridgeport*, C.A.2 (Conn.) 2007, 479 F.3d 196, certiorari denied 128 S.Ct. 109, 169 L.Ed.2d 24.

Police officer who responded to report of robbery and wrote an incident report was not liable under § 1983 for alleged violation of arrestee's Fourth Amendment right to be free from unreasonable detention when exculpatory evidence was readily available; although surveillance videotape of robbery showed that perpetrator did not have tattoos and arrestee had tattoos, the officer did not have possession of the videotape, he never viewed it, and he had no role in or responsibility for arrestee's detention, or the robbery investigation. *Russo*

v. City of Bridgeport, C.A.2 (Conn.) 2007, 479 F.3d 196, certiorari denied 128 S.Ct. 109, 169 L.Ed.2d 24.

DENIAL OF MEDICAL ATTENTION

SERIOUS MEDICAL NEED

A frequent federal civil rights claim made against police officers is for deliberate indifference to the serious medical needs of someone in custody. Usually, the person has a significant illness or injury or has died in custody. The claim is under the Fourteenth Amendment, but the liability standard is derived from the Eighth Amendment.

The Eighth Amendment places a duty on government officials to care for the medical needs of convicted persons in custody.^[xcii] If an individual is denied necessary medical treatment due to acts or omissions so harmful as to evidence "deliberate indifference" to his/her serious medical needs, then such conduct violates the Eighth Amendment and is actionable under section 1983.^[xciii] The Eighth Amendment prohibition against cruel and unusual punishment applies only to convicted prisoners. *Deliberate indifference* is the sole standard adopted by the Supreme Court for judging any claim that prison conditions have violated the Eighth Amendment, and it is a subjective standard.^[xciv] On the other hand, the Fourteenth Amendment requirement of *due process* applies to persons in jail awaiting trial as well as to persons both in jail or prison being treated as involuntary mental patients.^[xcv]

The Supreme Court addressed the responsibility of the government for providing medical care under the Fourteenth Amendment in *City of Revere v. Massachusetts General Hospital*.^[xcvi] In *City of Revere*, police shot a criminal suspect as he attempted to flee from the crime scene and then transported the suspect to the Massachusetts General Hospital for treatment. The hospital subsequently sued the city to recover the cost of the suspect's medical treatment. The Supreme Judicial Court ruled for the hospital on the grounds that the Eighth Amendment to the Constitution, which prohibits cruel and unusual punishment, required the police to provide medical care and included a duty to pay for such medical care. The U.S. Supreme Court reversed, holding that the duty to pay for medical expenses was not addressed by the Constitution and should be governed by state law. In its opinion, the Supreme Court reaffirmed its ruling in *Estelle v. Gamble* that the Eighth Amendment prohibition of cruel and unusual punishment is violated by deliberate indifference to the serious medical needs of prisoners.^[xcvii] However, the Eighth Amendment protection only applies to prisoners who have been convicted of a crime and incarcerated as a result. Since the suspect had not been convicted, the Eighth Amendment did not apply. That did not absolve the city of a duty to provide medical care, however, because the Due Process Clause of the Fourteenth Amendment also created a duty on the part of government to

provide medical care to persons who become injured during their apprehension by police. The Court found that the city had fulfilled that duty and that the Constitution had been satisfied.

Therefore, police officers have a constitutional duty, once they are aware of a serious medical need, to obtain medical care for those persons in their custody. The standard is subjective, but that does not mean that the officer must be aware of the specific medical problem of the person in custody, only that the person is in medical distress.^[xcviii] There is no duty to treat every scrape, bruise, or bump. Even though the injury may be obvious in the sense that bruises and abrasions are visible, the need for treatment must be so obvious as to make lay persons remiss for failing to arrange for immediate medical attention. In other words, a medical need is serious if it is one that has been diagnosed by a doctor as requiring treatment, such as diabetes or epilepsy, or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention. The seriousness of a person's medical needs may also hinge on the effect of any delay in obtaining treatment. If there is no exacerbation of the injury by the delay in obtaining treatment, meaning there was no urgency in the treatment rendered by medical personnel, then the need probably was not serious.

The subjective nature of the deliberate indifference standard makes the liability determinations in each case somewhat fact-specific. For example, the following claims were sufficient:

- Confiscation and denial of access to prescription drugs;^[xcix]
- Failure to provide drugs to a person suffering from insulin shock;^[cl] and
- Public drunk who was incapable of caring for his own safety died after being placed in a holding cell to sober up.^[cl]

Conversely, there was no liability in the following cases:

- Failure to provide first aid to pedestrian injured in hit and run accident (no constitutional duty involved);^[cii]
- Officer shot suspect who held out a hand containing a gun in response to the officer's demand that he show his hand. There was no clearly established duty to provide medical aid to a shot suspect prior to the arrival of the EMTs;^[ciii] and
- Inebriated driver was taken to the police station after an accident, vomited and died.^[civ]
- Death of a pretrial detainee, who had swallowed methamphetamine during a roadside stop of a vehicle in which he was riding; county's policy instructed jailors to implement a written emergency health care plan when an inmate showed signs of unconsciousness or

serious breathing difficulties, and no other inmate had ever died of a drug overdose while in the jail.^[cvi]

- County sheriff and county jail nurse, in their official capacities, could not be held liable under § 1983 for alleged due process violations in acting with deliberate indifference toward pretrial detainee's medical complaint of a foot rash, absent custom or practice that resulted in detainee being provided with ineffective medical care.^[cvii]
- Guardian of incapacitated individual, a former county jail detainee, failed to allege any facts supporting claim that an unidentified county or public health trust representative's allegedly reckless acts and omissions with respect to detainee's care, whereby it was determined that detainee should be transferred back to his cell rather than a hospital, constituted customs, policies, or practices of the county and county public health trust, as required to state § 1983 claim against the county for detainee's recovery of damages resulting from grand mal seizures which lead to a brain hemorrhage that left detainee in a permanent vegetative state.^[cviii]
- County was not liable to estate of inmate under § 1983 for deliberate indifference to inmate's serious medical needs in violation of Eighth Amendment, since county policy did not directly cause county personnel to fail to seek physician approval to reinstate inmate's prescription medication; although jail had a written policy of abruptly discontinuing any narcotic medications when inmates were initially processed for booking regardless of whether the inmate had a valid prescription for the narcotic, jail also had a policy allowing the narcotic medications to be reinstated with permission of a doctor.^[cvi]
- County sheriff could not be held personally liable in his official capacity under § 1983 to detainee who was allegedly denied medications and medical treatment while he was incarcerated at county jail, absent evidence that there was an unconstitutional county custom or policy to deprive inmates of medical treatment, or that sheriff, as the final policymaker, instituted such a policy or acted with deliberate indifference to detainee's medical needs.^[cix]
- Jail official's alleged conduct of handcuffing detainee to floor-grate toilet in uncomfortable manner for approximately three hours, if proven, did not shock the conscience and thus did not violate detainee's substantive due process rights, inasmuch as official took such action after detainee, who had been diagnosed with manic bipolar depression, had threatened to pull out her own peripherally inserted central catheter (PICC) so that she would bleed to death,

and after detainee had shown that having her hands handcuffed behind her back was alone not adequate form of restraint.^[cx]

- Pre-trial detainee did not have objectively serious medical need on intake, that required immediate medical attention, from perspective of jailer, as layperson, for purpose of qualified immunity analysis of deliberate indifference civil rights claim of detainee's estate under Fourteenth Amendment, even if jailer had been aware that detainee had taken methamphetamine before arrest, since detainee followed directions, answered questions posed, and remained quiet and seated on bench inside jail.^[cxi]
- Neither Arkansas Department of Human Services (DHS) nor county sheriff were deliberately indifferent to serious medical needs of mentally-ill pre-trial detainee/civil committee who died in county jail from peritonitis, nor was there a policy or custom to deprive mentally-ill detainees of treatment, and thus, sheriff and DHS were not liable, for purpose of §§ 1983 claim asserted by administrator of detainee's estate; detainee died from condition that neither defendant knew of or suspected, sheriff and other jail officers attempted to get detainee into a mental health treatment facility, but no facility would accept custody of him.^[cxii]
- Pretrial detainee, who simply alleged that jail officials did not act in accordance with municipal procedures, failed to show that the defendant municipalities' training practices were so deliberately indifferent to the rights of detainees as to warrant § 1983 liability under *Monell* for failure to provide adequate medical care to detainee.^[cxiii]

Consider this illustration of the principle. Officers were not liable under a Fourteenth Amendment claim for denial of medical attention when a person was injured while in protective custody because of apparent intoxication.^[cxiv] The person, who was suffering from an overdose of prescription pills, appeared intoxicated and was held for 24 hours (although under Massachusetts law an incapacitated person may not be held in protective custody for more than 12 hours) because he refused several offers to let him leave. During the time he was in custody, he received neither food nor water, and there were no regular checks on him during the last 12 hours. However, a jury found that the officers did not act with such recklessness as to constitute deliberate indifference to his medical needs.

PRACTICE POINTERS

In order to avoid liability, one leading commentator^[cxv] recommends the following:

- *Serious medical complaints, especially of a continuing nature, should not be ignored (even if suspicious);*
- *Medical judgments should be made by medically-trained personnel, even if not doctors;*
- *Even without specific complaints, serious chronic symptoms require attention; and*
- *In general, a blind eye to serious medical needs cannot excuse inattention where, with any diligence, jail or prison custodians could have known about them.*

Rather than waiting until a medical emergency occurs, departments should confirm arrangements with ambulance services and hospitals. The requirements for payment should be discussed and the municipality's responsibility clarified.

SUICIDES WHILE IN CUSTODY

As a general rule, the police owe no duty to the world at large to protect them from harm. However, once a person becomes a prisoner, a different set of rules applies. Having had his/her freedom taken away, the prisoner is not in a position to do things for him or herself. The place and conditions of confinement are under the control of the department. The agency has assumed or has been given responsibility for the prisoner.

Obviously, therefore, the suicide of a person while in custody at the police station raises issues of civil liability. The usual claim is that the police officer knew the person was suicidal, but took no steps to prevent the suicide. The constitutional standard is deliberate indifference, not negligence. This requires a showing that the officers knew or should have known that there was a danger, yet they took no steps either to eliminate the danger or to protect the prisoner. This involves: (1) a knowing choice (conscious decision); (2) time to evaluate the choices available; and (3) an appreciation of the danger or risk. Only near total neglect of a potentially suicidal prisoner will give rise to constitutional liability, but there may be responsibility under other tort theories, as well as disciplinary action against the officer.

Plaintiffs often make one or more of the following factual arguments in support of their claims:

- Prisoner needed medical treatment;
- Prisoner was intoxicated or under the influence of drugs;
- Failure to remove things from prisoner which he used to harm himself;
- Failure to monitor holding cells;

- Failure to pay attention to tell-tale conditions (despondent, depressed, talked of killing himself, etc.);
- Placed in unsafe area;
- Mixed with other prisoners;
- Failure to do screening;
- Failed to respond to problem;
- No procedures for suicide watches; or
- No training.

The following are recent cases examples:

- Officer responsible for transporting a pretrial detainee in a police car and aware that the detainee was a strong suicide risk was not deliberately indifferent to that risk in violation of due process when the officer left a loaded firearm in the front seat of the car while the detainee was in the rear seat in handcuffs and behind a security screen that the officer erroneously believed was locked. *Gish v. Thomas*, C.A.11 (Ga.), 516 F.3d 952 (2008).
- Mother of pre-trial detainee who committed suicide while in custody stated a claim under §§ 1983 for violations of detainee's Fifth Amendment due process rights by generally recount the circumstances of the suicide and asserting that the District of Columbia's failure to train its police officers in the proper detection and treatment of potentially suicidal detainees amounted to deliberate indifference to the rights of detainees. *Powers-Bunce v. District of Columbia*, D.D.C., 479 F.Supp.2d 146 (2007).
- Material issues of fact, as to whether jail detainee was exhibiting strong signs of suicidal tendencies, whether officials in contact with detainee were or should have been aware of tendencies, and whether officials took steps to address risk, precluded summary judgment that officials were not liable in their individual capacities for violating due process rights of detainee by showing deliberate indifference to his situation. *Gaston v. Ploeger*, D.Kan.2005, 399 F.Supp.2d 1211, reversed in part 2007 WL 1087281.
- Sheriff was not deliberately indifferent to pretrial detainee's suicidal nature, and thus was not subject to liability under § 1983 for failing to take steps to prevent his suicide, even though notation on incident report two months before detainee's suicide indicated that another prisoner reported that detainee "was threatening suicide," where there was no proof that report did not simply inadvertently escape

sheriff's knowledge. *Justus v. County of Buchanan*, W.D.Va.2007, 2007 WL 2947420.

As discussed above, in suicide cases a plaintiff must show that officials unreasonably failed to recognize the danger and failed to prevent the suicide.^[cxvii] There is a difference, however, between simple negligence and deliberate indifference. In the following situations, there was no liability under section 1983 because the officers were not deliberately indifferent:^[cxviii]

- Failure to remove an arrested person's belt and shoe laces;^[cxviii]
- Failure to correct air vents which a prisoner used to hang himself and which had similarly been used by a previous prisoner;^[cxix]
- Where neither officers nor paramedics had reason to believe that an arrested person faced a serious risk of death;^[cxx]
- Failure to remove a drunk driver's belt where officers had no reason to believe that such individual would commit suicide;^[cxxi]
- Failing to get medical attention for drunk prisoner; and,
- Failing to follow standard half hour cell checks when no reason to suspect prisoner would commit suicide.^[cxxii]

PRACTICE POINTERS

Persons assigned to watch prisoners or detainees, as well as all supervisors, should be familiar with the department's policies and procedures on handling prisoners, providing medical attention and preventing suicides. These should be the topic of roll call and in-service training and should be reviewed periodically by counsel.

Following statutory requirements for "Q5" and prisoner monitoring is essential.

All persons responsible for the handling and care of prisoners should be trained in generally recognized profiles of suicidal prisoners. Special care is needed when a prisoner has a prior history of attempted suicide. Persons under the influence of drugs or alcohol also merit special attention, as do those with special needs.

A prisoner's behavior, clothing/appearance, statements, information from family members, as well as warnings or information from medical personnel, all require attention.

Follow the department's procedures for monitoring prisoners; they are there for a purpose. If an officer has any question or concern about how a prisoner is behaving or appears, a call to a supervisor is appropriate. Officers should

be concerned that every person that comes into the police station leaves alive, no matter what kind of drunk or addict he or she may be, and no matter how regularly he or she is taken into custody.

UNREASONABLE SEIZURES

The Fourth Amendment guarantee of “the right of the people to be secure in their persons, houses, papers, and effects” provides the basis for the largest number of federal civil rights claims. These usually challenge the police seizure of persons by arrest or investigatory stop or the seizure of property by search with or without a search warrant. The objective nature of the standard applicable to Fourth Amendment claims means that many such claims never reach trial because the officer is found not to have violated the plaintiff’s rights or to be protected by qualified immunity.

TERRY STOPS

In *Terry v. Ohio*,^[cxxxiii] the Supreme Court held that the Fourth Amendment protections applied to police encounters with suspects that did not rise to the level of an arrest, so-called investigatory stops. In order to be constitutional, probable cause is not required; investigatory stops must result from specific, identifiable facts forming a reasonable suspicion of wrongdoing or distress that justifies further inquiry. Normally, then, there must be an individualized suspicion of wrongdoing to justify such investigatory stops.^[cxxxiv] Exceptions to this rule include random drug testing for certain students and employees,^[cxxxv] administrative searches,^[cxxxvi] border checkpoints,^[cxxxvii] and sobriety roadblocks^[cxxxviii] because the primary purpose of each exception was not to detect evidence of criminal wrongdoing, although that may have been a by-product. Roadblocks for the interdiction of illegal drugs, whose primary purpose was enforcement of criminal laws without individualized suspicion, are illegal.^[cxxxix] On the other hand, the use of a trained, drug-sniffing dog during a valid traffic stop does not implicate the Fourth Amendment, but it may provide information leading to a reasonable suspicion to search for contraband.^[cxxx] Additionally, the officer may require the individual to identify himself or herself during an investigatory stop.^[cxxxxi]

The danger inherent in an investigatory stop is that at some point it will cross the line into a de facto arrest, requiring probable cause rather than a reasonable suspicion. The determination is very fact-specific. Generally, however, courts look to whether a reasonable person in the suspect’s position would have understood that he/she was not free to leave or when the police actions exceed what is necessary to dispel whatever suspicion prompted the stop.^[cxxxii] On the other hand, the stop may uncover additional information that increases the level of suspicion so that further detention is reasonable.^[cxxxiii]

Officers may use force or the threat of force to carry out an investigative stop.^[cxxxiv] The Fourth Amendment standard, rather than a substantive due

process standard, controls the use of force during the course of an investigatory stop.^[cxxxv]

FALSE ARREST

The most common sources of section 1983 lawsuits against police officers are allegations of false arrest. Specifically, plaintiffs argue that the arrest lacked probable cause and was therefore actionable.^[cxxxvi] Probable cause, according to the U.S. Supreme Court, is whether, at the moment the arrest was made, the facts and circumstances within the officer's knowledge, or of which the officer had reasonably trustworthy information, were sufficient to warrant a prudent person in believing that the individual arrested had committed or was committing an offense.^[cxxxvii] False arrest is a constitutional tort in the sense that it is an unreasonable seizure. Arrests must result from specific facts that form probable cause to believe that the person arrested committed or was committing a crime.^[cxxxviii]

In civil rights actions alleging an unlawful arrest, a plaintiff must prove that the police officer's conduct resulted in a deprivation of the plaintiff's liberty without due process of law in violation of the Fourteenth Amendment, or was an unreasonable seizure of his/her person in violation of the Fourth Amendment. An arrest occurs when a person is deprived of freedom of movement for the purpose of commencing a criminal action against him or her. To constitute an arrest, there must be: (1) an actual or constructive seizure or detention of the person; (2) performed with the intention to effect an arrest; and (3) so understood by the person detained. This understanding must be *reasonable*; the test concerns not what the defendant actually thought, but what a reasonable person would have thought had he/she been in the person's shoes at the time of the seizure.^[cxxxix] The validity of an arrest can be crucial, since the validity of the arrest affects the proper amount of force that can be used in making the arrest. Also, a valid arrest can determine whether a search, which was incidental thereto, is valid.^[cxl]

Where the police have probable cause to arrest, it is not material that the individual officer believed he/she had probable cause to arrest for a different offense.^[cxli] Courts use an objective standard in deciding whether an arrest is proper, which is similar to the standard used in determining whether or not excessive force was used in making an arrest. In *Graham v. Connor*, the Supreme Court noted "an officer's evil intention will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."^[cxliii]

There is no federal civil rights liability for failure to comply with the technical arrest parameters or requirements of state law because those are matters of state law not federal law. In the 2001 Supreme Court case of *Atwater v. City of Lago Vista*,^[cxliii] a motorist brought a § 1983 action against the city, its police chief

and the arresting officer after she was arrested, handcuffed, and taken to jail for failing to wear her seat belt, failing to fasten her children in seat belts, driving without license, and failing to provide proof of insurance. The Supreme Court held that: (1) a police officer's authority to make a warrantless arrest for misdemeanors was not restricted at common law to cases of "breach of the peace," and (2) the arrest did not violate the motorist's Fourth Amendment rights. Failure to comply with state procedures could result, however, in liability for the common law tort of false arrest or false imprisonment.

A defendant cannot collaterally attack in a criminal prosecution the authority of the arresting officer to make an arrest, based on the officer's failure to complete the prescribed course of study at the Training Council as required by G.L. c.41, §96B.^[cxliv] Where an individual is harmed by inappropriate, inadequate, or negligent training of police officers, the appropriate remedy lies in a direct suit against either the supervising authority or the municipality under the Tort Claims Act.^[cxlv]

Obviously, making an arrest pursuant to an arrest warrant is better protection for the police officer from civil liability than making an arrest without a warrant. Unless the arrest warrant is facially invalid or the police officer knows either that the warrant is unsupported by probable cause or that the person arrested is not the person named in the warrant, the police officer making the arrest is protected from liability for false arrest by qualified immunity.^[cxlvi] For example, in *Wilson v. City of Boston*,^[cxlvii] the Boston police carried out an arrest warrant sweep by subterfuge. It notified a number of individuals who were subject to unexecuted arrest warrants that they were invited to a Big Dig job fair at the Bayside Expo Center. The plaintiff accompanied her boyfriend to the job fair, but there was no arrest warrant for her. Although arrested and handcuffed for a time, the plaintiff was ultimately unsuccessful. The court decided that her Fourth Amendment rights were violated because there was no arrest warrant supported by probable cause to justify her arrest. The court, however, ruled that the officers were entitled to qualified immunity because of the reasonable steps that were taken to set up and execute the ruse and to correct the error once it was discovered. If a warrant itself is clearly defective, or it is executed improperly, there may be liability for a false arrest.^[cxlviii]

It is possible to bring an action under section 1983 where there are intentional misrepresentations in an affidavit submitted for an arrest warrant.^[cxlix] Where a law enforcement officer deceived the judge issuing an arrest warrant, the officer will be liable in a § 1983 action.^[cl] In *Briggs v. Malley*^[clii], the United States Court of Appeals for the First Circuit held that where a Rhode Island state trooper was "constitutionally negligent" in preparing an affidavit for an arrest warrant, which affidavit contained no evidence establishing probable cause, the trooper could be held liable under § 1983 for the subsequent arrest of the suspects named in the warrant. The court rejected the argument that the

intervening action of a magistrate served to insulate the trooper from liability. The court said:

We recognize, however, that police officers cannot be held to the standards of lawyers or judges. It cannot be considered negligence, therefore, for a police officer to seek an arrest or search warrant in a merely questionable situation. In such a case, the determination by the magistrate that a warrant should issue will insulate the officer from a negligence claim. There is a clear difference, however, between a situation in which there might be probable cause and a situation in which there is **no** probable cause.

It is possible that a municipality may also be liable if officers routinely fail to comply with a state rule concerning warrantless arrests.^[cliii]

In some circumstances, an extended detention or confinement may violate an individual's constitutional rights.^[cliiii] In the 1979 case of *Baker v. McCollan*^[cliv], the plaintiff had been arrested on a valid arrest warrant and detained in jail for eight days before it was discovered that he was not the man named in the warrant, and he was released. He sued the county sheriff under § 1983 for deprivation of his liberty without due process, arguing that the sheriff had failed to establish certain identification procedures which would have revealed that the plaintiff was not the man wanted in connection with the drug charges on which he was arrested. A divided Supreme Court declared that although this situation might give rise to a claim under state tort law, it did not support a claim under the United States Constitution. It noted:

Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most if not all jurisdictions, is largely irrelevant to his/her claim of deprivation of liberty without due process of law. The Constitution does not guarantee that only the guilty will be arrested. If it did, section 1983 would provide a cause of action for every defendant acquitted — indeed, for every suspect released The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished “without due process of law.” . . . Given the requirements that arrests be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent.^[clv]

A number of courts have narrowly interpreted the holding of *Baker* and have found certain detentions, even if lawful at the time begun, may become false imprisonment if certain proceedings are not followed, or the length of the detention is excessive. In one case, the court found liability where the police

held a suspect for over one week after several witnesses failed to identify him in a line-up.^[clvii] In another case, it was improper where the police failed to act on exculpatory evidence which would have cleared the detainee almost immediately after he/she was incarcerated.^[clviii]

Other cases where federal false imprisonment claims are brought often involve delays between the arrest and the probable cause hearings, or because a detainee remained incarcerated beyond the scheduled release date. Regarding the release of detainees or inmates, courts usually will examine the facts on a case by case basis, with primary emphasis placed on whether the officers knew or should have known of the release date.^[clviii] Other courts have held that more than mere negligence needs to be shown for an action to lie for false imprisonment for non-release.^[clix] In one detention case, a detainee claimed he was held beyond a reasonable release date when the court did not conduct its bail hearing within a reasonable period of time.^[clxi] In a similar case, the court found false imprisonment where police officers failed to telephone the magistrate for a bail amount.^[clxii] In another case, the court concluded that no action for false imprisonment would lie unless the plaintiff could show that he would have been able to post bail had it been set.^[clxiii] Most of these cases pre-date the decision in 1991 where the Supreme Court held that a probable cause hearing should take place within forty-eight hours of a warrantless arrest.^[clxiii] The court further stated that even a delay of less than forty-eight hours could be unlawful if based on ill-motives, done to gather additional evidence to justify the arrest, or done merely for the sake of detaining the individual for a longer period of time. In a 1993 decision, the Supreme Judicial Court ruled that the Massachusetts Constitution requires a probable cause determination be made within 24-hours of persons arrested without a warrant except in unusual circumstances.^[clxiv]

Additionally, where there is a prolonged detention following an unlawful arrest, recovery under section 1983 will be possible, especially where aggravated circumstances are shown or where a person is arrested properly but unlawfully detained for an extended period of time, the chances for success in a § 1983 action are enhanced.^[clxv] Even holding someone improperly for a short period of time where there is no basis to do so can be a constitutional violation.^[clxvi] Once there is no doubt about the illegality of a detention, a person must be released. It is improper to detain a person so as to persuade him/her to sign a release.^[clxvii] Liability was found where it was a municipal policy not to inform anyone in a position of authority to release an arrested person once the confiscated substances had been tested and found not to be drugs.^[clxviii]

That does not mean that arrests made without an arrest warrant are unconstitutional. All the Constitution requires is that an arrest be based upon probable cause. Furthermore, warrantless arrests are protected to the extent that a police officer who makes an arrest is not liable if a reasonable police officer could believe that he or she had probable cause, even though it may be

determined later that there really was no probable cause or that the officer's perceptions were mistaken.^[clxix] This is the benefit of qualified immunity.

PRACTICE POINTERS

Training and good policies are the best method of avoiding claims for unlawful arrest and false imprisonment. Periodically, chiefs should be sure that all officers get “back to basics”. The law in this area has changed over the years. It is not a good idea to rely on each officer to keep updated since graduating from the recruit academy. Periodic bulletins, discussions at roll call and inclusion in an in-service curriculum are all worthwhile opportunities for keeping officers up to date.

Chiefs should be sure that all statutorily required notices are posted in the booking area. They should verify that all officers, and especially supervisors, are aware of the requirement that persons arrested without a warrant have a probable cause determination within 24 hours. Similarly, where persons are eligible for bail, a call should be made to the clerk-magistrate in a timely fashion.

Supervisors should make certain that all arrests and applications for warrants are properly motivated. Where there is an attempt to stifle a person's freedom of speech, where a warrant is obtained under false pretenses, or where personal animosity or a vendetta are involved, a § 1983 claim may be brought. Having a supervisor (if not the chief in small departments) review all warrant applications and arrest reports promptly may catch a problem before it mushrooms.

A procedure for checking on claims of mistaken identity should be adopted.

BIAS – RACE

The following are recent cases:

- Jury could find there was causal connection between police department's alleged indifference to rights of African-Americans and killing of African-American motorist by police officer, as required for municipal liability under § 1983; officer could assume he would not be punished for mistreating African-Americans, due to alleged custom of deliberate indifference. *Jones v. Town of East Haven, D.Conn.2007, 493 F.Supp.2d 302.*
- Police chief and city did not selectively enforce laws in violation of equal protection against club with predominantly black clientele, precluding § 1983 liability, absent evidence that

chief treated owners differently compared to similarly situated owners of other nightclubs and that he was motivated by racial animus; there was no direct evidence of bias, and bias could not be inferred from chief's suggestion to another club owner that he should change club's theme on that club's most problem-filled night from hip-hop to country and western to quell violence. *Orgain v. City of Salisbury*, D.Md.2007, 521 F.Supp.2d 465.

- City was liable for police chief's racially discriminatory promotions under the respondeat superior theory of liability embraced by Title VII. *Alexander v. City of Milwaukee*, C.A.7 (Wis.) 2007, 474 F.3d 437.
- Evidence that township police officers at one point allegedly used racial profiling as a way to increase the number of traffic tickets they wrote and allegedly used racial slurs did not demonstrate that township had a custom or policy of raiding bars with African-American patrons, for purpose of establishing municipal liability in bar owner's § 1983 Fourteenth Amendment race discrimination claim; profiling and racial slurs allegedly occurred five years prior to the bar raids by township officers, and there was no showing that township police had custom or policy of raiding bars associated with African-Americans, or that racism permeated the police department to such an extent that causation could be inferred. *Watson v. Abington Tp.*, C.A.3 (Pa.) 2007, 478 F.3d 144.
- Police department was not liable to arrestee under § 1983 for any racial discrimination in violation of Fourteenth Amendment by police officers who made arrest and conducted body-cavity search of arrestee at police station, absent showing of a policy or decision of the police department that could be interpreted to promote intentional discrimination or racial animus. *Harrison v. Christopher*, D.Del.2007, 489 F.Supp.2d 375.
- Police officers' alleged use of excessive force in responding to incident of domestic violence was insufficient to establish that city or city police department had widespread practice of abusing men of color who dated white women, and thus city and police department could not be held liable under § 1983 for officers' alleged constitutional violation, where incident involved only actors below the policy-making level. *McLaurin v. New Rochelle Police Officers*, S.D.N.Y.2005, 373 F.Supp.2d 385, subsequent determination 379 F.Supp.2d 475, affirmed in part, vacated in part 2007 WL 247728.

- Motorist's allegation that he was stopped by police officers pursuant to county's pattern, policy, or practice of racial profiling, selective enforcement, and unreasonable searches and seizures was sufficient under notice pleading standards to state claim against county under § 1983 for violations of his Fourth and Fourteenth Amendment rights. *Aikman v. County of Westchester*, S.D.N.Y.2007, 491 F.Supp.2d 374.
- Jury could find that there was custom or practice of showing deliberate indifference to constitutional rights of African-Americans, as required for § 1983 excessive force action against municipality when police officer shot African-American motorist to death; same police officer had been retained after allegedly hitting with his squad car an African-American he was pursuing and then firing at him, no official action was taken when off-duty policemen wore racially disparaging tee-shirt, and black motorist was mistreated when arrested for skipping court session due to illness, all with knowledge of police chief. *Jones v. Town of East Haven*, D.Conn.2007, 493 F.Supp.2d 302.

BIAS – GENDER

- Victim of alleged sexual assault by town constable failed to offer sufficient evidence beyond speculation indicating an affirmative causal link between constable's conduct toward victim and resident trooper supervisor's failures to supervise constable and to report his earlier "misconduct" to town officials, as was required to establish supervisory liability under § 1983 for any clearly established constitutional violation of victim's right to be free from town constable's assault; there was no evidence of a propensity directed to victim, with whom constable had had no prior contact, nor was there evidence claimed to be predictive of constable's unconstitutional behavior, particularly with women in compromised circumstances. *Atwood v. Town of Ellington*, D.Conn.2007, 468 F.Supp.2d 340.

EXCESSIVE FORCE

An officer authorized to make an arrest may use only such force as is reasonably necessary to effect the arrest (and the use of *deadly force* is subject to additional limitations discussed later).^[clxxi] Even a legal arrest may be accompanied by excessive force which can form the basis for a subsequent action for damages under section 1983.^[clxxii] In appropriate circumstances, the use of excessive force or violence by law enforcement personnel violates a person's constitutional rights, thereby giving rise to a cause of action under section 1983.^[clxxiii] All claims of excessive force during an arrest or while the

suspect is transported to or detained at the police station or lock-up will be measured by the “reasonableness” standards of the Fourth Amendment as described in the Supreme Court case of *Graham v. Connor*.^[clxxiii] Under *Graham*, the court must judge the reasonableness of the force used from the perspective of a reasonable police officer on the scene, not hindsight, and must take into account the frequent need for officers to make split-second judgments in rapidly evolving situations. In determining what amount of force was reasonable, the circumstances of each case are relevant, as are factors such as the severity of the crime at issue, whether the suspect poses an immediate threat to safety, and whether the suspect is actively resisting arrest or attempting to flee.

However, when a seizure is not involved, an excessive force claim will be governed by the Fourteenth Amendment substantive due process standard, which is action that “shocks the conscience.”^[clxxiv] In an excessive force claim, once the specific constitutional right allegedly infringed by the use of force has been identified, the validity of the claim is judged by reference to the specific constitutional standard which governs that right rather than to some generalized excessive force standard.

The Fourth Amendment provides the appropriate constitutional standard when the claim arises out of excessive force used during an arrest. Fourth Amendment liability for use of excessive force is possible only when a “seizure” has occurred. A seizure in the context of a Fourth Amendment claim of excessive force is an intentional acquisition of physical control and occurs only when there is a governmental termination of freedom of movement through means intentionally applied. For a seizure to occur, the officer must use an instrumentality or set in motion events that he/she intends to result in the seizure of the plaintiff. It is immaterial whether the police officer had a subjective intent to harm the plaintiff.

An accidental use of force, even if occurring during the course of an arrest or other physical restraint of a person, does not constitute a seizure because it is not a means intentionally applied to obtain control of the arrestee. The Fourth Amendment protects against misuse of power, not the accidental effects of otherwise lawful government conduct. In the 2002 Massachusetts case of *Gutierrez v. Massachusetts Bay Transp. Authority*, the court pointed out that mere negligent or unreasonable conduct by a transit authority officer who took the arrestee into his control by grabbing her arm would have been insufficient to support a civil rights claim, if the arrestee's arm was broken when the officer accidentally fell on her as she struggled to avoid arrest.^[clxxv]

Even if the arrest that precipitated the case was legal and a conviction was obtained, a plaintiff can still have an actionable section 1983 claim for excessive force if the force used was more than was reasonably necessary to effect the arrest.^[clxxvi] On the other hand, in a 1991 case involving the Worcester

Police Department, the court found that where the police were seeking an escaped felon who had threatened to shoot any officer who tried to apprehend him, but they mistakenly arrested the plaintiff, the minor injuries he suffered were not sufficient to support an inference of inordinate force.^[clxxvii] There is no requirement that there be a serious injury in order to recover for excessive force.^[clxxviii] The Eighth Circuit used *Graham*'s "objectively reasonable" standard in determining that the use of a stun-gun on an agitated, abusive prisoner during booking did not constitute excessive force because he was not under control as evidenced by his kicking of a police officer and repeatedly refusing to comply with the officer's commands.^[clxxix]

PRACTICE POINTERS

Common sense, good policies and proper training are the best ways to preventing claims for the use of excessive force. Where officers do not act maliciously, and are simply attempting to make an arrest or control an unruly prisoner, excessive force suits are not likely to succeed.

The presence of a supervisor during arrest situations, where feasible, may help assure that proper practices are observed. In addition, the presence of an adequate number of officers may deter most subjects from resisting arrest, attempting to escape or becoming unruly in custody.

The chief should see that a written policy for pursuits and roadblocks is adopted and copies are given to all officers. Supervisors should review the same with each officer. This should be the topic of periodic review at roll call and in-service training.

Care should be taken in pursuits and roadblocks that proper procedures are followed. Ramming vehicles and placing barriers in locations which do not afford the fleeing subject sufficient time to stop are likely to result in suits claiming excessive force.

Departments should consider the use of video equipment in cruisers, booking areas and cell-blocks. In some cases it may deter the use of excessive force. In most it will document the reasonableness of officers' conduct.

POLICE DOGS

In *Watkins v. City of Oakland*, the 4th Circuit determined that the use of police dogs is subject to an excessive force analysis.^[clxxx] However, the use of a police dog would not necessarily result in a determination that an officer had used deadly force. This is an important issue because the Supreme Court has outlined specific rules governing the use of deadly force to seize suspects.^[clxxxii] At a minimum, the rules require that a suspect pose an immediate threat before

an officer can use deadly force.^[clxxxiii] Courts consider whether the officer intended to inflict death or serious bodily harm as one factor.^[clxxxiii] An additional factor would be the probability known to the officer that using the dog to effect the arrest would create a substantial risk of death or serious bodily harm as contemplated under *Garner*.^[clxxxiv] Certainly courts would look differently at the use of dogs compared to firing a weapon. For example, sending a dog into an unfamiliar building where a suspect was hiding might very well be appropriate under the circumstances, not only for the officer's self protection but also as a means of apprehending the fugitive.^[clxxxv]

One of the earliest, and most important, opinions regarding the use of police dogs addressed whether their deployment is deadly force. In *Robinette v. Barnes*, the police, while investigating a suspected burglary, released a dog into a building, believing that their suspect was inside.^[clxxxvi] The police issued several verbal warnings before setting the dog free with the command, "Find him." The dog found the suspect and bit him in the neck. The suspect died, and his estate then brought suit under the Fourth Amendment, alleging the use of unnecessary deadly force. Despite the fact that a death resulted, the Sixth Circuit held that "the use of a properly trained police dog to apprehend a felony suspect does not carry with it a 'substantial risk of causing death or serious bodily harm.'"^[clxxxviii] *Robinette* thus established a baseline presumption that canine releases pursuant to general "bite and hold" policies are subject only to the rules governing the use of non-deadly force. Subsequent cases have consistently followed this approach and held that the use of police dogs does not constitute deadly force.^[clxxxviii]

Moreover, the influential Sixth Circuit case of *Matthews v. Jones* held that it was objectively reasonable to use a dog to apprehend a misdemeanor suspect.^[clxxxix] In *Matthews*, a police officer attempted to stop a driver who was speeding and driving erratically. A car chase ensued which ended when the driver pulled into some woods and fled on foot. Shortly thereafter, a K-9 unit arrived on the scene and began to track the fleeing driver. The dog eventually signaled that he had found the target but did not bite. The officers then ordered the driver to stay still. The driver did not comply, and the dog bit him. Based on these facts, the Sixth Circuit concluded that "there is no evidence whatever in this record which could support a claim that [the dog] was not used in an 'appropriate manner.'"^[cxc] Therefore, the court ruled "that no reasonable jury could conclude that the use of the police dog to apprehend Matthews was not objectively reasonable."^[cxcii]

The following cases demonstrate how various federal courts have ruled in cases involving the use of police dogs:

- No liability when dog searching for burglar bites sleeping person no one knew was in house,^[cxciii]

- Use of dog permissible to pursue and hold intoxicated driving suspect who was resisting and fleeing arrest. Officer did not know whether suspect was armed.^[lxcviii]
- Permissible to use dog to apprehend bank robber who failed to submit to arrest;^[lxcvii] and
- Trial ordered on whether L.A.'s policy of using police dogs trained to bite hard and hold all concealed or fleeing suspects constituted a policy authorizing the unreasonable use of force.^[lxcv]

In *Marley v. City of Allentown*, the court held that an officer who released his dog to apprehend a misdemeanor suspect acted in an objectively unreasonable manner under the Fourth Amendment.^[lxcv] However, the court also relied upon the fact that the suspect had visibly surrendered before the officer released the dog. Courts across the country agree that sicking a dog upon a compliant suspect is a clear constitutional violation.^[lxcvii]

In a First Circuit 2002 case entitled *Jarrett v. Town of Yarmouth*, the Plaintiff alleged that the K-9 Officer acted unreasonably when he released a K-9 named Shadow and that this release constituted excessive force because the Fourth Amendment protects against the use of excessive force in the course of arrests and investigatory stops.^[lxcviii] The jury agreed and found that the K-9 Officer acted with excessive force when he released Shadow, knowing only that the Plaintiff was wanted for minor traffic violations and may have been previously wanted in connection with an armed robbery. On appeal, the court assumed, for the sake of argument, that there was sufficient evidence to support this finding and that the Plaintiff suffered a constitutional injury. However, “even state actors who commit constitutional violations may be entitled to qualified immunity,”^[lxcix] depending on whether they acted in an objectively reasonable manner under clearly established law.^[lcci] The court turned then to answer the question of whether a reasonable officer in December of 1994 would have known that releasing a dog pursuant to a general “bite and hold” policy, like the Town of Yarmouth's policy, was unconstitutional. The court noted first that there was no case that held these policies to be unconstitutional.

Actually, other courts had concluded that “bite and hold” policies were not contrary to clearly established law. In *Watkins v. City of Oakland*^[lccii], the Ninth Circuit determined that a “‘bite and hold’ policy did not violate clearly established law concerning the use of excessive force,” and an officer acting in accordance with that policy would be entitled to qualified immunity.^[lccii] Rather than finding releases pursuant to “bite and hold” policies to be constitutionally questionable, courts have principally worried about releases that did not comport with those policies. For example, in *Watkins*, the court denied summary judgment on the basis of qualified immunity because the plaintiff testified that the officer had allowed the dog to continue biting even after the plaintiff was fully compliant and no longer posed a threat.^[lcciii] In *Vathekan v.*

Prince George's County, the Fourth Circuit concentrated on the issue of notice.^[cciv] Instead of finding a burglar when sent into a building, the dog attacked the lawful resident who was asleep in her bed, crushing her skull. The court denied summary judgment on the basis of qualified immunity because it found that there was a genuine issue as to whether the officers had issued a verbal warning before releasing the dog.

In the *Yarmouth* case, the court concluded that releasing Shadow was not excessive force. In fact, the situation was very similar to that addressed in *Matthews* where the Sixth Circuit held that releasing the dog was objectively reasonable.^[ccv]

PRACTICE POINTERS

Departments with their own K-9 unit, or those using the services of another department's dog, should be certain that the handler is properly trained. A written policy for when a police dog is to be used should be developed, even if no use has been made of a K-9 unit previously.

Any policy concerning police dogs should provide that a release of the dog should only be made after a verbal warning has been given.

DEADLY FORCE

The first decision of the United States Supreme Court under § 1983 dealing directly with the use of deadly force by law enforcement officers was *Tennessee v. Garner*.^[ccvi] In *Garner*, a police officer shot and killed an unarmed burglary suspect who was attempting to flee from the scene of the crime. The officer acted pursuant to the state's "fleeing felon" statute. The Supreme Court ruled that apprehension by means of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. Next, the Court determined that the "fleeing felon" statute was unconstitutional to the extent that it authorized the use of deadly force against unarmed, non-dangerous fleeing suspects. Deadly force is constitutionally appropriate to prevent escape of a fleeing felon where: (1) deadly force is necessary to prevent escape; (2) the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical harm to the officer or others; and (3) if feasible, the officer warns the suspect of an intention to use deadly force. The Court's use of the disjunctive "or" suggests that it intended two kinds of suspects who could independently meet the "dangerousness" component - those suspects who threaten an officer or others with a weapon, and those who have committed a crime involving the infliction or threatened infliction of serious bodily harm.

A subsequent decision of the United States Supreme Court regarding police use of force, *Graham v. Connor*, extended the reasoning of *Garner* to include all forcible seizures.^[ccvii] *Graham* involved allegations against police officers

regarding the use of excessive force rather than deadly force. Nonetheless, the Court ruled that, “all claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other ‘seizure’ ... should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard rather than under a ‘substantive due process’ approach.”^[ccviii]

Some federal appellate courts have excluded events leading up to the suspect’s actual seizure from the reasonableness analysis in deadly force cases. For example, in *Carter v. Buscher*, the Seventh Circuit Court of Appeals rejected plaintiff’s claim that a faulty arrest plan devised by police officers created the circumstances leading to a use of deadly force.^[ccix] In *Carter*, the suspect killed one officer and seriously wounded another before being killed by a third. The court ruled that no Fourth Amendment seizure occurred until the suspect was shot and it refused to consider the soundness of the arrest plan which preceded the immediate events occurring at the time of the shoot-out. The court explained, “(e)ven if the defendants concocted a dubious scheme to bring about Ruhl’s arrest, it is the arrest itself and not the scheme that must be scrutinized for reasonableness under the Fourth Amendment.”^[ccxi]

However, the First Circuit Court of Appeals, in *St. Hilaire v. City of Laconia*, suggested that once a seizure occurs, the Fourth Amendment reasonableness inquiry may include an examination of all relevant events leading up to the seizure.^[ccxii] It relied upon the analysis concerning the reasonableness of a search where the Supreme Court has often applied a “totality of circumstances” test.^[ccxiii] That analysis may be flawed because it ignores the plain language of the Supreme Court in *Graham* which instructs the lower courts to examine the objective reasonableness of police use of deadly force “at the moment” the force is used. The officer’s failure to craft the best arrest plan or to do something else more prudent in retrospect should be irrelevant to the analysis of whether deadly force is reasonable.

Most federal appellate courts have agreed that events occurring prior to the actual use of deadly force by police officers are irrelevant to the determination of whether the officers acted with objective reasonableness.^[ccxiiii] For example, in *Schulz v. Long*,^[ccxiv] an officer shot and killed a person who attacked him with a hatchet. The plaintiff argued that actions by the police leading up to the violent encounter created the need to use deadly force because the officers should have waited for a supervisor and called for a Special Weapons and Tactics (SWAT) team before attempting the arrest. The Eight Circuit Court of Appeals rejected this contention and stated that the Supreme Court’s use in *Graham* of phrases “at the moment” and “split-second judgment” are strong indicia that the reasonableness inquiry extends to the events known to the police at the precise moment the officers effectuate the seizure.

Likewise, in *Plakas v. Drinski*, the Seventh Circuit Court of Appeals rejected the plaintiff's arguments that events leading up to the shooting should be examined to determine whether the shooting met the reasonableness standard of *Graham*.^[ccxvi] Plakas attacked officers with a raised fireplace poker and an officer shot and killed him. The court ruled that the reasonableness of the use of force must be judged from the point in time when Plakas raised the poker and charged the officer. The court explained, "(w)e do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct. Reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred."^[ccxvii] The court explained that the Fourth Amendment does not require the use of non-deadly alternatives when deadly force is otherwise reasonable under Supreme Court precedent.

Also, in *Scott v. Henrich*, the Ninth Circuit Court of Appeals rejected claims that police officers who shot and killed an armed suspect should have taken alternative steps before confronting him.^[ccxviii] The officers responding to reports of a person firing a weapon went to the door of the building in which the suspect was believed to be located. The suspect opened the door and pointed a gun at them. The officers shot him. The Ninth Circuit rejected the plaintiff's "lack of necessity" arguments, which focused on the failure of the police to develop a tactical plan, seal off escape routes, call for back-up and negotiate with the suspect, rather than directly approach the front door of his location. As long as the police use of deadly force was reasonable, the Constitution does not require them to use less intrusive alternatives.

A review of the federal appellate cases following the Supreme Court decisions in *Garner* and *Graham* reflects numerous cases in which police officers used deadly force in the face of direct threats to their own lives or the lives of others. Police officers have faced attacks from knives,^[ccxviii] a fireplace poker,^[ccxix] guns,^[ccxx] and motor vehicles.^[ccxxi] On the other hand, there are instances in which officers have perceived a danger to themselves or to others that was not real because the suspect was unarmed. The courts have often ruled in favor of the officers, either because the use of deadly force was reasonable in the circumstances or the officer was entitled to qualified immunity for the use of deadly force in the circumstances apparent to him/her.

In *Reese v. Anderson*, the Fifth Circuit Court of Appeals dismissed an action against a police officer, even though the deceased suspect was later determined to have been unarmed at the time the officer shot him.^[ccxxii] The officer ordered the robbery suspect to keep his hands raised while sitting in a vehicle. The suspect ignored the officer and lowered his hands twice out of the officer's sight. During the second time, the suspect leaned over and reached toward the car floor. When the suspect popped back up, the officer shot and killed him. The Fourth Circuit Court of Appeals ruled in *Greenidge v. Ruffin*, in favor of a police officer who shot and severely wounded a suspect who refused to place

his hands in full view.^[ccxxiii] Instead, the suspect reached for an object in the back seat of a vehicle that appeared to the officer to be a shotgun. It was actually a nightstick.

The following list of cases found liability against police officers for the improper use of deadly force:

- Officer recklessly shot plaintiff who had approached officer on his own property and where innocent parties were exposed to a conscious disregard of a substantial risk of harm”,^[ccxxiv]
- Plainclothes officers approached suspect’s car with weapons drawn, did not identify themselves and shot at plaintiff five times before hitting him after he attempted to flee, amounting to a reckless disregard of his constitutional rights,^[ccxxv] and,
- Officers failed to identify themselves and shot at fleeing plaintiffs who thought they were drug dealers (compounded when one “madman” officer fired an unnecessary second shot.)^[ccxxvi]

In the following cases, the courts found that the use of deadly force was constitutional:

- The officer was justified because the decedent had threatened and hit the officer, and a first wild shot had not deterred the decedent;^[ccxxvii]
- Officer shot at car containing both armed robber and hostage (striking hostage inadvertently) for the purpose of stopping the robber’s flight;^[ccxxviii]
- Officers’ use of deadly force against fleeing suspect was objectively reasonable even if he was not presently armed and his later capture was “inevitable”, given his commission of a violent burglary in which he shot victims, his attempt to escape, and the possibility that he would take hostages in the area if not immediately apprehended;^[ccxxix]
- Deputy’s shooting and killing of a mentally disturbed man was not disability discrimination in the absence of a showing that the decedent was a “qualified individual with a disability” or that he was somehow “denied public services” because of such a disability;^[ccxxx]
- Officer entitled to qualified immunity for shooting a fleeing man armed with a sawed-off shotgun. The officer need not wait until the armed individual “has drawn a bead” on someone before using deadly force;^[ccxxxi]
- Plain clothes officers were entitled to qualified immunity while executing a search warrant on business premises. The officer

reasonably believed that a suspect was reaching for a weapon when he shot and paralyzed him;^[ccxxxi]

- Deadly force may be used when necessary to prevent the escape of a pre-trial detainee, even when he is unarmed and is not thought to be dangerous to an officer or to another person;^[ccxxxi] and,
- Officer acted objectively reasonably in shooting an intoxicated man who moved towards officers with a steak knife in each hand.^[ccxxxi]

PRACTICE POINTERS

It is obvious that the objectively reasonable police officer is one who has been trained by his/her department regarding the constitutional standards pertaining to the use of deadly force. Likewise, this officer must be trained and become proficient in the use of firearms as well. Responsibility for such training falls upon the police departments employing these officers.^[ccxxxi]

Of primary importance to an officer's survival is the fact that an objectively reasonable officer will understand the concept of action/reaction. The fact that officers must often react to a life threatening action directed against them, places them at a distinct disadvantage in deadly confrontations. A fleeing suspect with gun in hand can turn and fire two shots at a pursuing officer before the officer can respond. If the suspect's bullets are accurate, the officer is likely to be killed or seriously wounded without ever returning fire. The concept of action/reaction makes the pursuit of armed fleeing suspects extremely dangerous for police officers. The objectively reasonable police officer will be aware of this significant risk and should not pursue an armed fleeing suspect as an alternative to the use of deadly force. Pursuit in this circumstance is not a safe alternative to the use of deadly force.

Law enforcement officers involved in deadly confrontations are sometimes criticized because they fired their weapons at an armed suspect more than once. Critics incorrectly view this as an excessive use of force. The objectively reasonable officer knows, however, that most gunshot wounds are not fatal, and even fatal wounds do not necessarily cause instant physiological incapacitation

As with so many other areas, training is the best way to avoid civil liability in deadly force situations. Properly trained officers are less likely to have to resort to deadly force. When required to use deadly force, they are more likely to be able to explain its justification.

A written policy and procedure statement should be adopted and copies should be provided to all officers. Supervisors should assure that officers are aware of the department's policy.

HIGH SPEED PURSUIT AND ROADBLOCKS

Police vehicle pursuits are often necessary for the enforcement of criminal and motor vehicle laws. Occasionally, however, these chases result in injuries to passengers or pedestrians. An intentional or willful act is required to produce a *seizure* under the Fourth Amendment. Generally, for federal suit purposes, a chase all by itself would not constitute a seizure, even if the suspect was injured. However, if the chase became more than a show of force, such as the cruiser intentionally sideswiping the pursued vehicle, an actionable seizure might result.^[ccxxxvi] A chase is not a *completed seizure*, thus invoking no Fourth Amendment issues.^[ccxxxvii] Simply signaling someone to pull over does not constitute a seizure under the U.S. Constitution because there is no “acquisition of physical control”, especially where the suspect sped away and suffered no restraint on his/her freedom of movement.^[ccxxxviii] (NOTE: Massachusetts courts have held that the state’s Constitution (Declaration of Rights) is interpreted more strictly than the Fourth Amendment in this area. In this state, a seizure takes place as soon as the police initiate action in an effort to stop a fleeing individual or vehicle. This would include activating a cruiser’s blue lights and/or siren, for example.^[ccxxxix]

In *Brower v. County of Inyo*, the U.S. Supreme Court ruled that it was improper to dismiss a complaint that alleged that the use of a roadblock to apprehend a car thief constituted a violation of section 1983.^[ccxli] The court held that there is a Fourth Amendment seizure where a person is stopped by the very instrumentality set in motion or put in place in order to achieve that result.^[ccxlii] Since the complaint alleged that the roadblock was set up in a manner that was likely to kill (and did kill) the car thief, the court remanded the case for a determination of whether the seizure was unreasonable. The police placed an unlit tractor trailer across a highway behind a curve and then aimed headlights into the suspect's eyes as he approached the roadblock.

The *Brower* decision is important because the Court distinguished between valid “shows of authority” and invalid excessive force “seizures”. By doing so, the Court left plenty of latitude to police officers to conduct vehicle or foot chases that will not give rise to liability if the suspect is injured or killed during the chase. Therefore, on the federal level, a chase merely represents a non-actionable show of authority, whereas a roadblock is actionable when it is unreasonable. Synthesizing *Brower*^[ccxliii] and *Garner*^[ccxliv], force which is employed for the purpose of immediately stopping the suspect, and which does stop the suspect, must be reasonable – i.e., the reason that the officer is using such force is reasonable, and the amount of force he/she actually used was reasonable. However, so long as any contact is unintentional (even though negligent), federal courts are not inclined to treat chase-related collisions as seizures because the collision was not the “means intentionally applied” to bring about the stop, but was only a regrettable accident.^[ccxlv]

The crux of the reasonableness of a given roadblock seems to be that the police need to evaluate all available objective information and the degree of danger

posed by a suspect. If they conclude that these considerations justify a roadblock, then law enforcement officials have the latitude to establish a reasonable one.^[ccxlvi] In a 1993 decision, the First Circuit ruled that partially blocking the road did not constitute a seizure for Fourth Amendment purposes because the officer did not intend this to be the means of ending this pursuit.^[ccxlvii] A few years later, the First Circuit held that officers who set up a road block to stop a fleeing felon acted in an objectively reasonable manner.^[ccxlviii] The Court noted that the roadblock set up in that case was brightly illuminated, was situated at the end of a straight-away with a 50-foot gap around the roadblock to permit vehicular travel, and was visible from 1500 feet away. The Court further noted that the officers had been chasing a fleeing felon who had been driving at speeds of up to 97 miles per hour and had endangered the pursuing officer as well as the public.

As a result of the U.S. Supreme Court's 1998 decision in the case of *County of Sacramento v. Lewis*, the number of § 1983 claims being filed in connection with high speed vehicle pursuits has diminished.^[ccxlix] In that case the Court ruled that a federal civil rights claim could only be sustained if the officer's conduct during a high speed chase was found to "shock the conscience". Lewis was the passenger on a motorcycle being pursued by officers for speeding. In the course of the pursuit, the motorcycle tipped over, dumping Lewis onto the highway where he was struck and killed by a pursuing police vehicle. The Supreme Court noted that "negligently inflicted harm is categorically beneath the threshold of constitutional due process". Essentially the bar has been raised for plaintiffs seeking to make a federal civil rights claim out of the tragic consequences which sometimes result from a high speed police pursuit. Liability requires that the officer act purposely to cause harm unrelated to the legitimate object of arrest in order to satisfy the element of conduct shocking to the conscience necessary for a due process violation.

Although decided the year before the *Lewis* case, the First Circuit, in a Massachusetts case involving the Saugus police department, ruled that officers did not "shock the conscience" by engaging in the high speed pursuit of a vehicle during inclement weather, even if doing so was a violation of a departmental directive.^[cccl] The officers had reason to suspect that the fleeing driver might be intoxicated and could constitute a danger to the public. In addition, the First Circuit Court concluded that an officer's conduct in driving 105 miles per hour on a narrow two-lane highway to apprehend a person suspected of stealing \$17 worth of gasoline, may have been "disturbing, and lacking judgment," but nevertheless, did not "shock the conscience."^[cccli]

The following is a list of some cases involving high speed pursuits that were decided after the *Lewis* case:

- When individual officers involved in the chase did not violate the decedents' constitutional rights, the city could not be held liable for

the deaths of motorists killed in a collision with a pursued car, regardless of the constitutionality of the city's policies, training and supervision on high-speed pursuits;^[ccclii]

- Officer was not entitled to qualified immunity for engaging in high-speed pursuit of a driver operating a stolen vehicle once it began to go the wrong way on an interstate highway; further proceedings ordered in lawsuit by family of deceased motorist struck by pursued vehicle;^[cccliii]
- Officer's alleged conduct of driving 57-61 miles per hour in a 25 M.P.H. zone without lights and sirens while responding to a non-emergency radio call was not conduct that "shocked the conscience," so there was no liability for collision with motorist's vehicle;^[cccliiii]
- Officer's deliberate ramming of fleeing motorist's vehicle did not constitute conduct shocking to the conscience which would render the officer and city liable for the resulting injury to a nearby pedestrian hit by a car pushed by the suspect's vehicle after he lost control of it;^[ccclv]
- Federal appeals court rules that the "shocks the conscience" standard in high-speed pursuit lawsuits applies to injuries suffered by third parties as well as to injuries suffered by the driver or occupants of a pursued vehicle; no liability for pursuit of erratic driver who collided with another motorist's car;^[ccclvi]
- Federal trial court allows civil rights claim over death that resulted from high-speed pursuit to go to trial because the decision to continue pursuit the wrong way down a busy interstate highway at high speed presented a factual issue as to whether the conduct "shocked the conscience;"^[ccclvii] and,
- Officer who pursued at high-speed a truck he reasonably believed was driven by an intoxicated driver did not act in disregard of the safety of others; he activated lights and siren, the pursuit was not in a heavily populated area, and the duration of the chase was relatively brief.^[ccclviii]
- County and police chief's allegedly inadequate training of county police force in proper pursuit procedures was not moving force or direct causal link to the injuries sustained by persons in vehicle struck head-on by vehicle pursued by officer after a 30-second pursuit lasting less than one mile, as required for municipal liability under § 1983. *Best v. Cobb County, Ga.*, N.D.Ga., 510 F.Supp.2d 1181 (2007), affirmed 239 Fed.Appx. 501, 2007 WL 1892148.
- Absence of constitutional violation by county police officer involved in pursuit of vehicle that ended in head-on collision with

plaintiffs' vehicle precluded county's liability under §§ 1983 for failure to train officers on proper police pursuit procedures. *Best v. Cobb County, Ga., N.D.Ga.*, 510 F.Supp.2d 1181 (2007), affirmed 239 Fed.Appx. 501, 2007 WL 1892148.

- City police officer did not violate substantive due process rights of passenger of van that was struck by driver of another vehicle when officer engaged in a high speed pursuit of other driver without using lights and siren, so as to be liable under § 1983, where other driver did not know he was being chased at time of accident, officer did not create or increase danger to passenger, and officer's conduct did not shock the conscience. *Rhoten v. Pase*, C.A.10 (Kan.) 2007, 252 Fed.Appx. 211, 2007 WL 3088226, Unreported.
- Genuine issue of material fact as to whether city police officer, who had been in secondary pursuit of motorist's vehicle, intended to strike motorist with officer's vehicle after motorist exited his own vehicle and fled on foot, precluded summary judgment for officer based on lack of Fourth Amendment "seizure," in motorist's action under § 1983. *Clark v. Thomas*, D.Kan., 505 F.Supp.2d 884 (2007).

PRACTICE POINTERS

High speed pursuits are a serious concern to officers, police administrators, municipal officials and state legislators, as well as the members of the public. Despite the fact that most departments have adopted common sense policies and procedures aimed at minimizing danger while enforcing the law, a troubling number of questionable pursuits continue to result in injury and death to officers, suspects and members of the public. Many of the pursuits which have such tragic conclusions also result in civil liability claims.

The best hope for reducing exposure to such claims is for departments to try even harder to do what they are already doing. Adopting proper policies and procedures and making sure officers are aware of them is crucial. In addition, training officers in pursuit driving and assuring that supervisors take charge and enforce departmental guidelines will help reduce tragic consequences as well as lawsuits.

The enactment of a state statute concerning motor vehicle pursuits could greatly increase a municipality's exposure to civil liability claims. The flexibility needed by various sized departments would be eliminated. Likewise, such a statewide regulation would not be able to factor in the geographical (rural, city, etc.) characteristics which play a big part in how pursuits are carried out by different departments. While the present practice of relying on an officer's training, experience and common sense is not perfect, it has proven itself successful in the vast majority of cases. There is no reason to believe that

statewide legislation will eliminate the relatively few instances where these safeguards have not been fully effective. Finally, the critical role of the supervisor in monitoring the pursuit, coordinating the involvement of others, and the ability to terminate the pursuit when the risks outweigh the benefits, cannot be replicated by any legislation.

Chiefs should make a reasonable effort to assure that their department's policy and procedure on vehicle pursuits is up to date. MPI's (or IACP's) "High Speed Pursuit" policy and procedure is a good place to start. After reviewing the same with officers and supervisors (as well as municipal counsel), the policy statement should be adapted to local conditions and adopted. Where such adoption requires approval of another (Selectmen, Manager, Mayor, etc.) this should be accomplished and documented. Since the adoption of a new and different policy could have an impact on working conditions, providing the union with a copy and, if a timely request is received, engaging in good faith discussions to the point of agreement or impasse before implementing them is advisable.

Documentation of the distribution of the department's policy and procedure statement is important. A receipt should be signed and placed in each officer's personnel or other appropriate file. Likewise, records of all training in the areas of vehicle driving and pursuits should be placed in such files, as should records of attendance at civil liability seminars or training sessions.

FIREARMS LICENSING

Chiefs may be sued after refusing a firearms license for allegedly violating a person's constitutional rights. In the 2002 First Circuit Court case of *Gardner v. Vespia*, an applicant who was previously convicted of misdemeanor domestic assault brought a § 1983 action against a police chief in connection with the denial of his application to purchase a firearm.^{*lccviii*} According to the *Vespia* court, even if the police chief violated state law by conducting a background check in connection with an application to purchase a firearm, such a state law violation was not a violation of the applicant's Second or Fourteenth Amendment rights. The court found that the applicant did not have a federal right to demand that the police chief follow state law in conducting firearm background checks. Therefore, the police chief's denial of the application to purchase a firearm based upon the applicant's prior *nolo contendere* plea for misdemeanor domestic assault did not violate the applicant's Second Amendment right to bear arms, even if such prior conviction did not disqualify the applicant.

UNREASONABLE SEARCHES

Searches that are unlawful may result in liability under § 1983. The Fourth Amendment contains two separate clauses, the first protecting the basic right to

be free from unreasonable searches and seizures, and the second requiring that warrants be particular and supported by probable cause. The Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched.

The first item of note is that the Fourth Amendment requires that searches and seizures not be unreasonable; it does not require that there always be a search warrant. The second item of note is that, where there is a search warrant, the Fourth Amendment requires particular formalities. Therefore, searches and seizures that are unreasonable or that are made pursuant to a defective warrant may subject an officer to liability under section 1983. Obviously, the intricacies of the subject matter of constitutional search and seizure are too broad to be covered in these materials in detail. Instead, the materials will cover some general guidelines in the area and will not address any differences between state law and federal law on the subject because the state law cannot be a basis for liability under section 1983.

WARRANT SEARCHES

Normally, a search made pursuant to a warrant will not give rise to § 1983 liability. When an officer in good faith executes a search warrant in a reasonable manner, he/she will not be liable under section 1983 even if the warrant was improperly issued.^[ccclxi] This is an example of the qualified immunity defense discussed in elsewhere in this manual. Reliance on a warrant is not permitted, however, where officers make deliberately false statements, show a reckless disregard for the truth in the affidavit for the search warrant, or the affidavit in support of the warrant is utterly lacking in facts sufficient to establish probable cause.^[ccclxi] In *B.C.R. Transport Co. Inc. v. Fontaine*, the U.S. Court of Appeals ruled that police officers who obtained warrants and searched the suspect's tractor trailer and arrested him were civilly liable under Federal law because there was no probable cause for the warrants and they did not act in good faith.^[ccclxii] The Court concluded that the police acted recklessly when they relied on an affidavit from a stranger who exhibited signs of instability and whose allegations were not corroborated. Additionally, a police officer can be liable under section 1983 where the officer makes material false statements in obtaining an invalid search warrant, where such statements are either knowingly false or made in reckless disregard for their truthfulness.^[ccclxii]

Usually, an entry into someone's home to search or make an arrest requires a search warrant, but an arrest warrant may suffice in some instances. In *Payton v. New York*, the Supreme Court held that the Fourth Amendment prohibits the police from making a warrantless entry without consent into a suspect's home in

order to make a routine felony arrest.^[cclxiii] The presence of exigent circumstances may do away with the need for a warrant.^[cclxiv] Consent to search will also eliminate the need to have a search warrant. Police officers may approach individuals on the street or other public places and ask them questions even if the officers have no basis for suspecting a particular individual.^[cclxv] They may request consent to search, provided that they do not use coercive means to obtain the consent.^[cclxvii]

Warrants are governed by the Fourth Amendment's requirement of particularity. General warrants may subject officers to civil rights liability.^[cclxviii] Execution of a warrant is also subject to the reasonableness requirement of the Fourth Amendment.^[cclxix] That reasonableness requirement incorporates the common law requirement that officers knock-and-announce their official authority before entering the premises to be searched, including various exceptions to that rule.^[cclxx] For example, in *Commonwealth v. Garner*, the Massachusetts' Supreme Judicial Court ruled that it was not a violation of the Fourth Amendment to use a stun grenade as a diversion for the unannounced entry into an apartment to capture a rape suspect pursuant to a search warrant.^[cclxxi]

Where police officers search the wrong premises, this will not be a violation of the Fourth Amendment standard if the mistake is reasonable.^[cclxxii] On the other hand, if an otherwise properly justified search is carried out in an unreasonable fashion, officers may be held liable for a constitutional violation.^[cclxxiii] The following cases are examples of improper execution of valid search warrants:

- Seizure of firearms not in plain view while executing a warrant for evidence a moonshine still;^[cclxxiv]
- Forcible entry,^[cclxxv]
- Improper treatment of gravely ill, semi-naked man in bed by handcuffing him in living room for two hours while searching his room;^[cclxxvi]
- Shooting dog without justification;^[cclxxvii]
- Seizing items not listed in warrant and destroying property during the search;^[cclxxviii]
- Reducing house to a shambles,^[cclxxix]
- Seizing items not listed in warrant;^[cclxxx] and,
- Inviting a private security officer to accompany police to identify stolen property not listed in warrant.^[cclxxxi]

Similarly, a warrant obtained without informing the magistrate of planned media participation was deemed to be obtained under false pretenses in violation of the Fourth Amendment.^[cclxxxii] Then, in 1999, the U.S. Supreme

Court ruled, in the case of *Wilson v. Layne*, that it violates the Fourth Amendment rights of homeowners for police to bring members of the media or other third parties into their home during the execution of a warrant when the presence of the third parties in the home was not in aid of the warrant's execution.^[cclxxxii] The court explained that the Amendment embodies centuries-old principles of respect for the privacy of the home. It does not necessarily follow from the fact that the officers were entitled to enter the home that they were entitled to bring a reporter and a photographer with them. The Fourth Amendment requires that police actions in execution of a warrant be related to the objectives of the authorized intrusion.^[cclxxxiii] The court noted that, although the presence of third parties during the execution of a warrant may in some circumstances be constitutionally permissible, the presence of *these* third parties was not.

WARRANTLESS SEARCHES

Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment.^[cclxxxiv] Nevertheless, courts have upheld warrantless searches based on probable cause in a variety of situations such as exigent circumstances, incident to lawful arrests, and when items seized were in plain view.^[cclxxxv] Each search tends to turn on the specific factual situation. For example, in *Terry v. Ohio*, the police officer was justified in doing a pat down of the suspect and removing the weapon when he felt it during the frisk.^[cclxxxvi] Yet, in *Bond v. United States*,^[cclxxxvii] it was a Fourth Amendment violation for the officer to squeeze the luggage of passengers during a border immigration check to find contraband. As further proof of the fact-specific nature of the inquiry, consider the case of *United States v. Barboza* where it was reasonable for a police officer to insert his finger between the suspect's shoe and his ankle to discover a weapon based on the officer's past experience in finding weapons there.^[cclxxxviii]

Regardless of whether the police acted in an objectively reasonable manner, it is a violation to engage in a warrantless search which does not fall under any of the exceptions to the warrant requirement.^[cclxxxix] In a 1996 decision by the Massachusetts Supreme Judicial Court, the court ruled there were no exigent circumstances allowing a warrantless entry when an officer learned that the residential house manager of a facility for parolees and drug addicts lied on his firearms permit application and that there were guns in the manager's private apartment in the facility. The court noted that the state's statutory scheme for gun ownership at that time gave the holder of a permit the right to appeal any revocation and to possess the weapons pending any such appeal.^[ccxc]

STRIP AND BODY CAVITY SEARCHES

Plaintiffs may also challenge strip searches, including body cavity searches, as a violation of the Fourth Amendment. The validity of strip searches incident to arrest requires a balancing of the need for the particular search against the

invasion of personal rights that the search entails.^[ccxcii] Courts will apply a reasonableness standard which takes into account demands of department security, officer safety, the seriousness and nature of the offense and the likelihood that the person under arrest is carrying contraband.^[ccxciii] The validity of warrantless strip searches that are not incident to arrest is governed by the probable cause standard. The search will be upheld if there is probable cause to believe that drugs or weapons are concealed on the person's body and there is such compelling necessity for immediate action as would not justify the delay of obtaining a warrant, such as when a woman present in a residence while a search warrant for drugs was executed made repeated requests to use the bathroom.^[ccxciiii]

The Supreme Court indicated more than twenty years ago that strip searches "instinctively give [it] ... pause," and since then courts have used much stronger language.^[ccxciv] The First Circuit, for example, deems such searches "an 'extreme intrusion' on personal privacy and 'an offense to the dignity of the individual.'"^[ccxcv] In addition, the courts have provided a more explicit--if occasionally inconsistent--analytic framework. The foundation for this framework is the Supreme Court's observation in *Bell* that the "test of reasonableness under the Fourth Amendment ... requires a balancing of the need for the particular search against the invasion of personal rights that the search entails."^[ccxcvi]

This is commonly referred to as the "*Bell* reasonableness test."^[ccxcvii] to perform this test the Court instructed future courts to "consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." In applying the test, the First Circuit has looked to whether the suspect was required to assume humiliating poses, to expose himself or herself in an unnecessarily public place or to members of the opposite sex, to remain exposed for excessive durations, or to endure degradation or ridicule.^[ccxcviii] As long as the strip search is done in a professional manner, with no more intrusion than is necessary to accomplish the appropriate law enforcement purpose, a court will approve the search.

Applying the *Bell* test almost two decades later, the First Circuit concluded that strip and visual body cavity searches "must be justified by *at least* a reasonable suspicion that the [*particular*] arrestee is concealing contraband or weapons."^[ccxcix] In the 2003 case of *Savard v. Rhode Island*,^[ccc] the First Circuit again applied the reasonable suspicion standard to strike down two Rhode Island policies under which arrestees were routinely strip-searched prior to admission to a state prison.^[cccii] A year later, it upheld the strip search of a suspect at the police station prior to booking which uncovered a weapon hidden in his underwear.^[ccciii] The suspect had heroin in his possession, appeared jittery and tried to escape during his arrest on a default warrant.

The Seventh Circuit described body cavity searches thusly: “[S]trip searches involving the visual inspection of the anal and genital areas [are] demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.”^{[c]c[cc]iii} Nevertheless, a body cavity search pursuant to a warrant issued on probable cause does not violate the Fourth Amendment if it is conducted reasonably (warrant specifically alleged that appellant trafficked in drugs which she kept hidden in her vagina).^{[c]c[cc]iv}

AUTOMOBILE SEARCHES

One of the few exceptions to the warrant requirement of the Fourth Amendment is for the search of an automobile. In 1925, the Supreme Court ruled that a warrantless search of an automobile based upon probable cause was permissible.^{[c]c[cc]v} The Court later expanded the doctrine to specify that the exigency was to be determined at the time the vehicle was seized and that the police did not have to search it at that time, but could search it later.^{[c]c[cc]vi} In 1982, the Court broadened the ability of police officers to search an automobile to include a probing search of its compartments and containers.^{[c]c[cc]vii} In *California v. Acevedo*, the Supreme Court sought to eliminate some inconsistencies in the approach to vehicle searches that had developed over the years.^{[c]c[cc]viii} It held that the police may search a vehicle and any containers within it where they have probable cause to believe they contain contraband or evidence. The search may extend only so far as the probable cause extends. In *Acevedo* the probable cause extended only to a paper bag that was placed in the vehicle; it did not extend to other containers or parts of the vehicle.

PRACTICE POINTERS

Liability for improper searches and seizures is most likely to result from one of two sources. The first is where there is no probable cause and no warrant. The second is where the manner of carrying out the search or seizure was unreasonable. Both circumstances can be minimized, if not avoided, through proper training and supervision.

Officers should be reminded of the preference for conducting searches only with warrants. Care should be taken to document the exigent circumstances which required officers to forego the securing of a warrant.

The area of “consent searches” of motor vehicles is under scrutiny by the courts. Officers should not use vehicle stops as a pretext or opportunity for conducting a search where there is no basis for suspecting the presence of contraband or evidence of a crime. After obtaining the operator’s license and registration in a routine traffic stop, and finishing their work, unless there is a good reason for doing so, officers must advise a motorist that he or she is free to leave before asking for permission to search the vehicle.

In order to avoid suits for searching the wrong premises, officers and supervisors should double check all warrants. An honest mistake is not likely to result in liability. However, where there is no effort made to be sure the right premises are being searched, a different result may follow. Having and following a written policy will be helpful. Be sure any special instructions on the warrant are followed, such as time of day. Even a “no knock” warrant requires officers to knock and announce their identity and purpose if the reasons for the issuance of the “no knock” provision are no longer present.

DENIAL OF FREE SPEECH RIGHTS

RETALIATION FOR EXERCISE OF FREE SPEECH

Under appropriate circumstances, conduct of law enforcement officials that interferes with an individual's First Amendment rights (freedom of speech, press, association and religion) will be actionable under section 1983.^[cccxi] Usually a First Amendment section 1983 case will involve police misconduct in the area of public demonstrations, picketing, protesting, or where police use illegal techniques for surveillance of certain political or religious activities.^[cccxi] The First Amendment protects the right of every citizen to speak his or her mind free from government censorship or sanction.^[cccxi] Indeed, the Supreme Court has expressly held that the First Amendment protects the rights of public employees to join together as a union^[cccxi] and to have a peaceful picket for a lawful purpose.^[ccciii]

An individual has the free speech right to protest the arrest of a companion, even if the protest distresses or annoys the police.^[ccciv] The arrest of the protester will lead to § 1983 liability if it is made without probable cause and is motivated by a desire to stifle free speech. In *Abraham v. Nagle*, however, the First Circuit found that the protester's physical interference with the police struggling to detain his companion supported a finding of probable cause to make the arrest. The court distinguished the protected speech from the unprotected physical interference. The Supreme Court has held a statute constitutional that made it a crime to oppose, molest, abuse or interrupt a police officer in the execution of his duty.^[cccxv]

The following cases are examples of First Amendment situations that have amounted to a § 1983 violation for law enforcement:

- Taking protest sign from demonstrator and tearing it up as President's motorcade approached;^[cccxvii]
- Enforcing unconstitutional loitering and disturbing the peace statute;^[cccxvii]

- Requiring demonstrators to pay for police overtime where the amount was left totally to the chief's discretion;^[cccxviii]
- Closing the Capitol rotunda early and arresting demonstrators for unlawful entry when Congress was not present and no danger to tourists was present;^[cccxix]
- Prohibiting political canvassing by enforcing for two years a ban on door to door solicitation;^[cccx]
- Fingerprinting door-to-door solicitors to check against latent crime scene prints;^[cccxii]
- Broad residential picketing bans (e.g., in abortion rights protests);^[cccxiii]
- Banning use of sound amplification devices without permission of police chief (since no standards, total discretion);^[cccxiiii]
- Banning distribution of anonymous campaign literature;^[cccxv]
- Banning noncommercial speech within all MBTA areas inside subway turnstiles and some general station areas;^[cccxvi]
- Enforcing obscenity statutes where private possession takes place in home (even with valid search warrant);^[cccxvii]
- Taping a church service as part of an undercover immigration investigation;^[cccxviii]
- Intentionally damaging plaintiff's business by openly conducting surveillance, photographing customers, and conspicuously parking in front of the business;^[cccxix]
- Issuing more serious speeding tickets after plaintiff contested less serious one;^[cccx] and
- Bringing murder charge against baby-sitter in retaliation for hiring an attorney during the investigation.^[cccxii]

However, a court ruled that even if the arrest of a man for fish and game ordinance violations was carried out as part of a vendetta, no constitutional rights were violated.^[cccxiii]

An unusual First Amendment section 1983 case arose in *Rzeznik v. Chief of Police of Southampton*.^[cccxiiii] In *Rzeznik*, a gun license applicant sued the chief seeking declaratory relief and damages based upon allegations that the chief improperly revoked his gun licenses in retaliation for the plaintiff's having testified against the chief in certain grand jury proceedings. The Supreme Judicial Court of Massachusetts agreed that, under the relevant statutes^[cccxv], the plaintiff was not entitled to the gun licenses he sought because he had been previously convicted of two separate felonies. However, the court declared that

the revocation of his licenses, if made in retaliation for the plaintiff's exercise of his First Amendment rights, was actionable under section 1983. In a more recent license revocation case, the owners of company whose license to sell firearms had been revoked made out a potential claim for violation of their First Amendment rights.^[ccccxxiv] There was evidence that the owners' memberships in a Puerto Rico pro-independence movement played a part in the loss of the license.^[ccccxxv] On the other hand, a chief's actions in denying an application for a firearms license may violate a state's licensing law, but there is not always a constitutional violation. In the 2001 First Circuit case of *Gardner v. Vespia*, the chief was incorrect when he denied a firearms license to an applicant who was previously convicted of misdemeanor domestic assault.^[ccccxxvi] Nevertheless, the court ruled that the chief's actions were not a violation of the applicant's rights.

OFFICER DISCIPLINE FOR FREE SPEECH

Absolute First Amendment protection is not accorded to the speech of a public employee regarding his/her employment without regard to content. The threshold question is whether the employee was speaking as a citizen upon matters of public concern, or, alternatively, as an employee upon matters only of personal interest. In order to prevail on a First Amendment retaliation claim under 42 U.S.C. § 1983, a plaintiff must show that government officials took an adverse employment action against him/her in retaliation for the exercise of First Amendment rights.^[ccccxxvii] Specifically, plaintiffs asserting such retaliation claims must establish three elements to state a claim under § 1983:

- (1) that his/her expressions related to matters of public concern;
- (2) that his/her interest in commenting on these matters outweighed the employer's interest in the efficient operation of its public services; and
- (3) that his/her protected speech was a substantial or motivating factor in the adverse employment action taken against hem/her.^[ccccxxviii]

If the plaintiff satisfies this burden, the defendants have an opportunity to demonstrate that the adverse employment action would have been the same regardless of the plaintiff's protected conduct.^[ccccxxix]

Plaintiffs typically allege that two First Amendment clauses are at play here: the free speech clause and the petition clause. The expression in question is constitutionally protected only if it was a matter of public concern to the community, a prerequisite to most First Amendment claims.^[ccccxi] The Court of Appeals for the First Circuit in 1991 made it clear in *Boyle v. Burke* that the petition clause, like the speech clause, requires an employee's legal grievance to touch on a matter of public concern before it can form the basis for a civil rights suit.^[ccccxli] The leading case in this area was the Supreme Court's 1968 decision in *Pickering v. Board of Education*.^[ccccxliii] There the Supreme Court acknowledged "the common-sense realization that government offices could

not function if every employment decision became a constitutional matter.”^[cccxliii] The Court has since explained that “the government as employer has far broader powers than does the government as sovereign.”^[cccxliiv] “The government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.”^[cccxliv]

Oftentimes the determination of whether the employee’s speech touched on a matter of public concern is dispositive. For example, in *Tang v. Rhode Island Department of Elderly Affairs*, the court ruled that an employee’s individual personal complaints about working conditions did not constitute matters of public concern sufficient to allow a free speech-based retaliation claim to survive.^[cccxlv] Her complaints were that she was erroneously placed on administrative leave with pay for a few days; that her work-space was twice relocated; that a filing cabinet was moved to a different floor from her work space and placed alongside other filing cabinets; that she was instructed to take phone calls at her own desk and not elsewhere in the department; that she was harassed and retaliated against when a co-worker repeatedly asked her when she would no longer need the computer that they shared; and that a photocopier was placed near the shared computer.

In *Meaney v. Dever*, the plaintiff police officer blew a truck horn repeatedly outside the location of the Mayor’s inauguration following the conclusion of a union picket of the inauguration.^[cccxlvii] The appeals court reversed the district court, holding that the marginally expressive conduct did not touch on matters of public concern because it was intended to express anger at a supervisor (the Mayor) toward whom the plaintiff bore a personal grudge.

Additionally, the Supreme Court in 2004 found that a San Diego police officer was not expressing matters touching on public concern when he made a video off-duty showing himself stripping off a police uniform and masturbating, selling copies of the video on eBay.^[cccxlviii] The First Circuit addressed the public concern aspect of the test in the case of *Tripp v. Cole* from the State of Maine.^[cccxlix] In that case the police chief complained that the town manager retaliated against him by firing the chief for expressing discomfort about intervening at the direction of the town manager with the district attorney’s office to dismiss a case on behalf of a dog owner. The court held that the chief’s speech conveyed nothing more than his preference not to intercede in the case, which was not clearly a legitimate matter of inherent concern to the electorate. It also adopted the district court’s finding that an employee cannot elevate a personal conflict to an issue of public concern by arguing that his concern might have been of interest to the public under other circumstances.

Frequently, the allegations underlying a retaliation case, although ostensibly civil rights claims, may be peculiar to a disciplinary action taken against the plaintiff for violating a department policy. The Supreme Court’s decision in

Connick v. Myers is instructive in this regard.^[cccl] There, an assistant district attorney brought a civil rights action contending that her employment was terminated because she exercised her right to free speech. The speech at issue involved a questionnaire she had distributed to co-workers the day after she had been notified that she would be transferred. The questionnaire sought the views of her fellow staff members concerning a variety of issues.

According to the Supreme Court, only one question--inquiring if assistant district attorneys “ever feel pressured to work in political campaigns on behalf of office supported candidates”--arguably touched on a matter of public concern. The remaining questions--pertaining to the confidence and trust that the plaintiff’s co-workers possessed in various supervisors, the level of office morale, and the need for a grievance committee--were deemed “mere extensions of [the plaintiff’s] dispute over her transfer” and, as such, were unworthy of First Amendment protection. Thus, the bulk of speech at issue in *Connick*, even though phrased in terms broader than the employee herself, was nonetheless unprotected.

In the 2002 federal court case from Massachusetts of *Vickowski v. Hukowicz*, a former police officer brought an action against the town, its police chief, and the town board of selectmen, alleging he had suffered retaliation in violation of the First Amendment.^[cccli] The court dismissed the claim that the town, police chief, and members of the town board of selectmen had violated the federal constitution by making public the disciplinary actions that were taken against the former police officer because it did not touch a matter of public concern as would support his claims of retaliation in violation of his rights to petition and free speech. His complaints were regarding a personal grievance, rather than as a citizen upon matters of public concern.^[ccclii]

Several other courts reached similar conclusions about the public concern nature of certain expressions by government employees:

- Since speech of terminated city employees pertained to their jobs and affected their working relationship with their supervisor, employees could not maintain a First Amendment retaliatory discharge claim;^[cccliii] and
- Public comment by a high school coach, which might in a general sense be considered a matter of concern, or at least of interest, to some members of the community, does not satisfy the public concern requirement.^[cccliv]

That is not to say that courts have resolved all such public concern determinations against the employee. For example, the court in *O'Connor v. Steeves*, where the plaintiff criticized one member of the Board of Selectmen for purchasing goods for personal use through a government account that was not subject to the sales tax, held that these “revelations directly implicated a

topic of concern to the community--official misconduct by an incumbent elected official.”^[ccclv] The plaintiff’s speech had a “direct bearing” on a local official’s “fitness for elective office.” An employee’s speech can form the basis of a civil rights suit only “when the employee spoke ‘*as a citizen* upon matters of public concern’ rather than ‘*as an employee* upon matters only of personal interest.”^[ccclvi]

Likewise in the case of *Baron v. Suffolk County Sheriff’s Department*, the court ruled that a county corrections officer spoke on matters of public concern when he complained of a co-worker’s violation of prison policy, of retaliation by his co-workers for breaching the code of silence, and of the prison officials’ failure to investigate and put a stop to that retaliation.^[ccclviii] The misconduct of which he complained not only affected him; it also affected the prison inmates under the department’s control. This problem is analogous to the situation in which a public employee feels pressured to work in a political campaign, which the Supreme Court discussed in *Connick*. The extreme harassment in retaliation for such protected speech that resulted in his constructive discharge constituted a claim under § 1983.^[ccclviii]

The next step in the analysis is to balance the interests of the employee and the public in the speech at issue against the interest of the employer in promoting the efficiency of the public services it performs through its employees.^[ccclix] The focus on the employer’s side of the balance is on the government’s legitimate interests in preventing unnecessary disruptions and inefficiencies in carrying out its public service mission.^[ccclxi] On the other side, the greater the value of the subject of the speech to the public, the more the balance tilts toward the employee.^[ccclxi] In some cases, this is the crucial part of the analysis, and the outcome may depend upon the motivations of the manager who took the adverse employment action. In *Mihos v. Swift*, the court reached the balancing test, having resolved the public concern test in favor of Mihos.^[ccclxii]

The case concerned the firing of Mihos from the Turnpike Authority following his vote against a toll increase. If the acting governor had fired him out of concern that the tangible result of his vote would negatively impact the efficient functioning of government services and the financial standing of the Turnpike Authority, she would have an interest of some weight. If, on the other hand, she fired Mihos in a fit of pique to punish him for his vote with which she disagreed, then she would have nothing of value to weigh in the balance. She failed to address this issue in the record and thereby lost the balance.

If the employer can show a countervailing interest in stifling the employee’s speech, then it can win the balance. It did not win that contest in *Guilloty Perez v. Pierluisi*.^[ccclxiii] There, the Puerto Rico Department of Justice failed to show that the complaints about the employee’s conduct were attributable to his protected activity—complaints about irregularities in the operations of the local office that bordered on corruption.

The final test then is whether the protected expression was a substantial or motivating factor in the adverse employment decision. “The First Circuit Court of Appeals [has] described the ‘substantial’ or ‘motivating’ factor test as a ‘but for’ causation test.”^[ccclxiv] Plaintiffs cannot satisfy their burden of causation by “relying solely on the temporal proximity of the [allegedly] protected [speech] to the alleged retaliatory conduct” without identifying “independent facts to support the allegation that his [allegedly] protected speech substantially motivated [the defendants] to punish him.”^[ccclxvi]

In other words, the plaintiff must show sufficient causation to shift the burden to the employer to show that the adverse employment action would have occurred anyway. Illustratively, the defendant in *Wagner v. City of Holyoke* managed to overcome the plaintiff’s evidence on causation by showing that, in making his protected speech, the plaintiff disclosed confidential information protected by department regulations and state law and that he breached the chain of command. This sufficiently demonstrated that he would have been disciplined anyway regardless of the content of his speech for other improprieties incidental to the speech.^[ccclxvii]

In *Rubinovitz v. Rogato*, the First Circuit upheld summary judgment in favor of the defendant municipal officials because the plaintiffs did not provide any evidence of a causal link of retaliation.^[ccclxviii] In *Rogato*, the plaintiffs had submitted a letter in which they complained of incidents of harassment. When the plaintiffs subsequently alleged that they were further harassed for filing the letter, the court found that they did not offer any basis upon which to distinguish between harassment occurring before the letter and that occurring after the letter. The inference upon which the plaintiffs relied rested on a “tenuous insinuation.”

Additionally, the First Amendment protects not only the speech of an employee, but also his political affiliations. In the 2002 Federal District Court case of *Fletcher v. Szostkiewicz*, a police captain brought an action against the former mayor of the city, alleging deprivations of his right to engage in political activity under the First Amendment.^[ccclxviii] The court ruled that to the extent the former mayor disciplined the police captain on the basis of his political activity, such action was an obvious violation of the captain's rights under the First and Fourteenth Amendments unless the captain was classified as a policy-maker. The Supreme Court made it clear in *Rutan v. Republican Party of Illinois* that discipline based on political affiliation or support is an impermissible infringement on the First Amendment rights of public employees.^[ccclxix] Governmental bodies are allowed to engage in patronage practices only with respect to those employees who make policy or occupy positions of confidence.

As the First Circuit observed in yet another Holyoke Police Department case, the Supreme Court does allow governmental bodies to engage in patronage practices with respect to “those employees who ... make policy or occupy positions of confidence.”^[ccclxx] In determining whether a particular position crosses this threshold, “a court’s function ... is to do what courts are often called upon to do--to weigh all relevant factors and make a common sense judgment in light of the fundamental purpose to be served.”^[ccclxxii] “Among the indicia that locate a job along the spectrum between policymaker and clerk are: relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials and responsiveness to partisan politics and political leaders.”^[ccclxxiii]

PRACTICE POINTERS

In order to avoid claims for the unconstitutional denial of First Amendment rights, chiefs should assure that all officers are trained in recognizing and protecting everyone’s First Amendment rights. This should continue beyond the basic (recruit) academy and include roll call and in-service training. Training should also include the need to remain neutral in controversial situations such as demonstrations where the protesters’ views may conflict with those of the officer. Communities with abortion clinics, for example, should be certain that officers receive adequate training.

ILLEGAL INTERROGATION

For a short period of time, the privilege against self-incrimination was no longer a matter solely for the criminal courts and motions to suppress. It formed the basis for a new class of constitutional tort under the federal civil rights act. The Fifth Amendment to the United States Constitution provides individuals with the right against self-incrimination by prohibiting the government from compelling a person to be a witness against himself in a criminal case. It does not prohibit the forcible extraction of information; it prohibits the use of forcibly extracted information as evidence in a criminal case against the person.^[ccclxxiii]

Traditionally, the requirements for a successful § 1983 claim for a Fifth Amendment violation included: (1) official conduct designed to overcome the individual's will in order to produce an involuntary incriminating statement; (2) an involuntary incriminating statement; (3) use of the coerced statement in any criminal proceeding, such as a detention hearing, grand jury proceeding, probable cause hearing, or criminal trial, (4) damage other than the conviction or incarceration of the person, such as the physical pain or mental anguish that produced the statement.^[ccclxxiv]

At least that is the way it appeared before the Supreme Court decided the case of *Chavez v. Martinez* in 2003.^[ccclxxv] Based upon the fractured decision in that case, there is no claim under the Fifth Amendment recognized by section 1983. The elements of an illegal interrogation claim require that the police conduct “shock the conscience” as the Court ruled that substantive due process is the standard by which to measure illegal interrogations where the statement is not part of a criminal case.^[ccclxxvi]

The use of force or other coercion to induce a confession is prohibited by the Fifth Amendment and Fourteenth Amendment to the U.S. Constitution.^[ccclxxvii] If the only basis for the action is that the police officer failed to read the plaintiff his/her rights as required by the *Miranda* case, then there is no constitutional violation actionable under section 1983.^[ccclxxviii]

So far the federal courts have not extended liability for Fifth Amendment violations to situations where the involuntary, incriminating statement is used in a civil or administrative proceeding as opposed to a criminal proceeding. It is not likely that they will because of the nature of the constitutional right. Nevertheless, the police department requires administrative interrogations of its personnel as well as criminal interrogations of suspects. What are the federal and state parameters for the interrelation of these interrogations and proceedings?

In the context of an administrative investigation, a public employer under federal law may compel an employee to answer narrowly drawn questions that specifically relate to the employee’s job performance when the answers cannot be used against the employee in a criminal proceeding; this is called “use immunity”.^[ccclxxix] The compulsion usually takes the form of specific disciplinary repercussions for failure to answer the appropriate inquiries.^[ccclxxx] Massachusetts law places greater restrictions than federal law on the employer’s ability to conduct this type of involuntary interrogation (“transactional immunity”).^[ccclxxxi]

The following cases are indicative of how courts have decided issues related to involuntary statements:

- No liability when detective allegedly slapped arrestee in interrogation room during custodial interrogation when no questions were being asked and the detective’s conduct was not intended to, and did not elicit, incriminating statement.^[ccclxxxii]
- Detective’s failure to read *Miranda* warnings before interrogation, and his threat to place the arrested person in a holding cell if he did not talk, did not give the arrestee a valid federal civil rights claim when no incriminating statements were made in response to the interrogation and all interrogation ceased once the arrestee stated he wished to remain silent until an attorney was present.^[ccclxxxiii]

- Person convicted of second degree murder, after his motion to suppress his confession as coerced was denied, was precluded from pursuing a federal civil rights suit since the state court's consideration gave him a "full and fair" opportunity to litigate.^[ccclxxxiv]
- Failure to give Miranda warnings is not a civil rights violation; it only causes the suppression of the statements.^[ccclxxxv]
- Police detectives were not entitled to qualified immunity while allegedly telling an arrestee during interrogation that he would receive a life sentence if he didn't talk.^[ccclxxxvi]

PRACTICE POINTERS

As supervisors or policy-makers, you are not likely to participate personally in these involuntary interrogations. Clearly you cannot personally oversee every question session by members of your department in order to assure compliance with the Miranda procedures. You can, however, help protect yourself and the members of your department by continually educating and reminding your officers as to the Miranda requirements and by implementing policies that require Miranda warnings whenever the officers place a suspect in custody, whenever they restrict the freedom of a suspect in any significant way, whenever their investigation has become focused on a particular suspect and the length of questioning is more than a brief, preliminary on-the-scene type of investigation, or whenever they are approaching the limits of the six-hour safe harbor time frame for questioning established by the Supreme Judicial Court.^[ccclxxxvii]

Require your subordinates to document compliance with the Miranda procedures at every step of the interrogation, on video or audio tape. Require that they consult with the local District Attorney's office, if they have any concerns as to the continued validity of the interrogation, and make the necessary arrangements with the District Attorney so that someone is always available for consultation.

All officers conducting interrogations should be trained in the proper procedures, especially the giving of Miranda warnings. Documenting the voluntariness of confessions (in writing as well as on audio or video tape) will help avoid exposure to liability for allegedly coercing statements from persons during interrogations.

All officers should be required to read Miranda warnings and never attempt to recite them from memory. This will aid in prosecutions and reduce exposure to illegal interrogation civil liability suits.

FAILURE TO TURN OVER EXCULPATORY MATERIAL

The proliferation of DNA testing as a basis for overturning past criminal convictions has resulted in a new type of constitutional claim under section 1983. These wrongful conviction cases are based upon the suppression of exculpatory or impeachment evidence by law enforcement officers in violation of the disclosure mandated by the Supreme Court in *Brady v. Maryland* and its successive line of cases. ^[ccclxxxviii] In *Brady*, the Court held that it was a violation of the Due Process Clause for the prosecution to suppress evidence favorable to the accused where the evidence is material to guilt or to punishment. In the cases following *Brady* the Supreme Court developed a test for determining whether the accused was entitled to relief from his/her criminal conviction for a failure to disclose exculpatory evidence. “There are three components to a true *Brady* violation: The evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.”^[ccclxxxix]

As framed by the Supreme Court, the right appears to be a procedural right incorporated in the fair trial element of due process. At present it is unclear what liability law enforcement officers have for *Brady* violations. In *Limone v. Condon*, the First Circuit acknowledged that it may not yet be clearly established what duties imposed by *Brady* apply to police officers. ^[ccxc] Nevertheless, one federal district court has framed the elements of this constitutional deprivation as requiring the plaintiff to prove that his *Brady* rights were in fact violated during the course of his underlying conviction, that the defendant officer caused the violation, and that the officer acted in bad faith, recklessly or with deliberate indifference to the plaintiff’s rights. ^[ccxcii] Without addressing the propriety of that formulation, the First Circuit, in a 2005 decision, disposed of a claim against Boston police detectives by holding that the plaintiff had failed to prove an actual *Brady* violation because the suppression of the statement was not prejudicial to him in the underlying criminal case. ^[ccxciii]

The procedural due process nature of the deprivation may provide a basis for avoiding these claims in Massachusetts. Part of the analysis of procedural due process claims requires a determination that there is no adequate state law remedy available for the wrong. The recent adoption of G.L. Chapter 258D (Compensation for Certain Erroneous Felony Convictions) may provide an adequate state law remedy that would defeat this federal claim.

PRACTICE POINTERS

The department should establish procedures to ensure that all paperwork, recordings and other evidence is gathered and transmitted to the prosecutor. There should also be a review with the prosecutor before final disposition of the case to verify that all information is in the hands of the prosecutor. Each

contact with the prosecutor and transmission of paperwork or evidence should be documented.

FAILURE TO INTERVENE

Officers may be held liable not only for their personal use of excessive force, but also for their failure to intervene in appropriate circumstances to protect an arrestee from the use of excessive force by their fellow officers.^[cccxci] A police officer that is in a position to do so must intervene to stop fellow officers who are using excessive force.^[ccxcv] This is because the position of police officer carries with it an affirmative duty to act to prevent such violations.

In the First Circuit case of *Byrd v. Brishke*,^[ccxcvi] the court concluded that one who is given the badge of authority of a police officer may not ignore the duty imposed by his/her office and fail to stop other officers who summarily punish a third person in his/her presence.^[ccxcvii] A similar obligation has been found in a correctional setting where the Sixth Circuit concluded that a prison guard must intervene when another guard uses excessive force against a prisoner.^[ccxcviii] Similarly, the security and nursing staff of a state mental hospital has a duty to intervene.^[ccxcix] The case of *Davis v. Rennie*^[ccxcix] involved nurses at the Westborough State Hospital. The court noted that, as staff members at a state mental hospital, the nurses had a duty to care for an involuntarily committed patient comparable to the duty of the police officers to care for a pretrial detainee.^[cd] (See the 1997 U.S. Supreme Court case of *U.S. v. Lanier*.)^[cdi]

CONSPIRACY

A police officer may be liable for the deprivation of an individual's constitutional rights by participating in a civil conspiracy. The elements of such a conspiracy were set out in the oft-cited 7th Circuit Court case of *Hampton v. Hanrahan*.^[cdii] The elements are a combination of two or more persons acting in concert to commit an individual act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage. This agreement or conspiracy must accomplish an actual deprivation of a protected right.

The 2001 federal district court case from Massachusetts of *Mitchell v. City of Boston* involved a defendant, who was convicted of forcible sexual intercourse with an 11-year-old girl, but was later exonerated by DNA evidence.^[cdiii] He sued the city and two city police officers under the federal civil rights law, alleging that the officers engaged in a conspiracy to convict him with fabricated evidence and perjured testimony. The toughest question, according to the court, was whether the individual police officer defendants were absolutely immune from a damages action by virtue of their roles in Mitchell's criminal trial. In the case of *Briscoe v. LaHue*, decided in 1983, the Supreme Court held

that a police officer is absolutely immune from a damages action under 42 U.S.C. § 1983 for giving testimony at a criminal trial.^[cdv]

The individual defendants in *Mitchell* argued that *Briscoe's* holding and logic immunized them against the alleged conspiracy claims. The District Court judge stated that she agreed with the many courts that have held that a plaintiff cannot use a conspiracy claim to short-circuit *Briscoe's* grant of absolute immunity to testifying witnesses.^[cdvi] However, as several courts, including the First Circuit, have noted, a defendant cannot use *Briscoe's* rule of absolute immunity as a shield to protect a whole course of conduct, but it does protect conduct that is inextricably tied to participation in the judicial process.^[cdvii]

SUPERVISORY LIABILITY

Almost thirty years ago, in *Monell v. Department of Social Services*,^[cdviii] the United States Supreme Court rejected vicarious liability for supervisors and municipalities under the federal civil rights law. That means that each defendant is liable only for his or her own conduct, not just because the defendant employs or supervises the officer who violates the civil rights law. Where the supervisor is on the scene and takes part in depriving someone of his or her constitutional rights, it is easy to understand that the supervisor is liable for the damages. More difficult to comprehend is the situation where damages are sought against the supervisor who was away on vacation or retired when one of his or her officers deprived someone of their civil rights. Liability is predicated on the supervisor's deliberate indifference to the actions or training of his or her subordinate officers that amounts to encouraging or condoning their unconstitutional behavior and that is linked affirmatively to the particular deprivation that is at issue.

The federal courts have defined deliberate indifference as actual or constructive knowledge of a grave risk of harm and the failure to take easily available measures to reduce that risk. In other words, deliberate indifference is when the supervisor disregards a known or obvious consequence of his or her action. The individual becomes liable to another when harm results from that risk. He or she can avoid liability by taking some action to lessen the risk, but the person does not have to act perfectly so as to eliminate the risk. The fact that the individual could have done more than he or she did does not make him or her liable.

One of the most infamous incidents in Massachusetts law enforcement, The King Arthur Motel Incident, spawned the First Circuit decision of *Bordanaro v. McLeod*.^[cdviiii] On July 23, 1982, an off duty Everett police officer went to the bar at the King Arthur Motel in Chelsea. He soon ran afoul of other patrons there, was bested in a fight and thrown out of the bar. Although the bar was in Chelsea, the officer called the Everett Police Department for reinforcements, and the entire night shift responded to assist. Chelsea also sent officers. Upon arrival at the motel, the officers armed themselves with nightsticks, bats, clubs,

tire irons, and a fire-axe. They broke the glass on the doors of the bar, beat the motel owner and the bar manager and pursued the patrons upstairs into a room of the motel. They attacked the door with their weapons, even drilled a hole to spray mace inside, and fired two gunshots at the door. Eventually gaining entry, they beat the occupants severely. One man died from his head injuries.

A multitude of the patrons at the King Arthur Motel brought suit against the officers, the chiefs of Chelsea and Everett, and the two municipalities. The first theory of liability was an unconstitutional custom of breaking down doors without a warrant when apprehending a felon. The second theory was the deliberate indifference in the recruitment, training and supervision of police officers. While the first theory bears directly on the city's liability through the chief as a policymaking authority, the focus of the second is on the chief individually.

The Appeals Court affirmed the findings of liability against the mayor and chief. The following are a few of the evidentiary items supporting the finding of deliberate indifference highlighted by the court in its opinion:

- The Police Department Rules and Regulations were from 1951 and had last been distributed to officers in the mid-sixties. They failed to address contemporary standards for search and seizure, hot pursuit and the use of deadly force.
- Everett police officers received little or no formal training after the recruit police academy other than medical first responder training.
- Everett affirmatively discouraged officers from seeking supplemental training courses.
- Everett officers had to sue the city to obtain Quinn Bill benefits for college law enforcement courses.
- There was no command training for officers promoted to higher rank.
- Background checks were superficial and did not include psychological screening.
- The chief failed to provide written monthly reports to the mayor as required by city ordinance.
- Discipline was haphazard and inconsistent. There was no full internal investigation into the incident for over one year. The discipline imposed against the officers was not immediate and resulted solely from their indictment by the grand jury. The short suspension of the sergeant who was cleared by the jury was overturned on appeal because he had received inadequate supervisory training.

- Review of citizen complaints was nearly nonexistent.
- The chief and mayor refused to address numerous written requests for better training and for organizational improvements. Significantly, a lieutenant in the department had warned in writing that something bad would happen if training was not improved.
- Within a year after the incident, the chief wrote, “Gone are the days when accountability is scoffed at.” This implied that the department had given little attention to police misconduct in the past.

Awareness of a culpable police officer’s violent history provided the basis for liability in the First Circuit case of *Gutierrez-Rodriguez v. Cartagena*.^[cdix] The case arose out of a police shooting in 1983 that rendered the plaintiff a paraplegic. The supervisory defendants were the director of the Narcotics Bureau to which the shooters were assigned and the superintendent of the Police Department of Puerto Rico. The director was acquainted with one of the problem officers from past work together at the Metropolitan Narcotics Division so that he knew of the officer’s reputation for violence and mistreating civilians. He was aware of the officer’s five-day suspension for holding a gun to a civilian doctor’s head while other officers beat the doctor. He never initiated a complaint against the officer, never asked his boss to transfer the officer, and never requested a psychological evaluation of the officer. Additionally, in the five evaluations he made of the officer he always gave the officer the second highest possible rating for community relations and self-control. In short, despite knowing of the danger to the public, the director did nothing to rein in the officer.

The superintendent’s liability came from his willful blindness rather than his actual knowledge, based mainly on the opinion testimony of the plaintiff’s police expert. The expert faulted the disciplinary system administered by the superintendent because it was not designed to discover the truth, but it merely went through the procedural motions. The court found that the superintendent’s failure to identify the officer as a problem and to take needed remedial action in conjunction with his use of a grossly deficient disciplinary system made the affirmative link to the unconstitutional shooting.

In *Santiago v. Fenton*, the plaintiff claimed that providing only four hours of training to Springfield police officers on constitutional issues at the police academy was inadequate.^[cdxi] The claim failed because the training was in accordance with state law and there was no showing that it was inferior by the standards of the profession. Additionally, claims that the failure to discipline the officer for two earlier incidents fell on deaf ears because the evidence was that the department had a policy of investigating complaints and imposing discipline when appropriate. After the department investigated and conducted hearings concerning the complaints, it determined that discipline was not appropriate in those two incidents. In fact, failure to discipline in a specific

incident is not by itself an adequate basis for municipal liability, but it may be evidence of a municipal custom or practice.

In another Springfield case, the chief had to defend himself against a claim that he was liable for a suicide in the holding cells because he failed to supervise his officers sufficiently to reduce the risk that detainees would hang themselves with their shoelaces.^[cdxi] In the three years preceding the suicide, sixteen people had attempted suicide while in the holding cells. Four people used shoelaces, which were supposed to be removed from prisoners according to policy.

Ten other individuals used items that were not required to be removed by policy, such as shirts, sweaters, and socks. The chief received reports on each of the suicides, but was unaware that the suicide prevention policy specifically directed the removal of shoelaces among other items. He had, however, promulgated standard suicide prevention policies, directed the commanding officers to distribute and post the policies, promulgated additional suicide prevention policies which shortened the time between mandated cell inspections of prisoners, and provided in-service training to the officers on suicide prevention.

The Appeals Court agreed that the chief failed to realize from the suicide reports that an unusual number of suicide attempts involved shoelaces and that he therefore failed to insist that the officers remove shoelaces. The court held that this was only negligence, not deliberate indifference. Although highlighted for purposes of the suit by being grouped together, the four prior shoelace attempts would not have been similarly highlighted for the chief, having crossed his desk at different times in conjunction with other important material on other events.

It was understandable to the court that the chief might not recall a specific prohibition against shoelaces in one policy among all of the other department policies. The court agreed with the district court that the presence of typical suicide prevention policies and the existence of some officer training were insufficient to find deliberate indifference on the part of the chief.

Finally, in the 2004 case of *Clancy v. McCabe*, Trooper Ramon Rivera stopped a motor vehicle on Route 495 in Middleborough and made lewd comments to the female driver and also strip-searched her.^[cdxiii] The incident resulted in the criminal conviction of Rivera. The female motorist brought suit against the superintendent of the State Police, alleging that he had failed to fire Rivera in 1988 following an investigation into allegations that Rivera had engaged in inappropriate behavior with female motorists that he stopped. When that investigation substantiated the allegations of conduct unbecoming an officer, the deputy superintendent and the superintendent both agreed that termination was the appropriate solution.

The superintendent did not have the authority to terminate Rivera on his own, however. Unless Rivera agreed, the matter had to proceed to a court martial which would decide Rivera's guilt or innocence and would recommend a punishment. After the initiation of the court martial process, Rivera's attorney discussed with the superintendent a means of settling the matter, noting that no white trooper had ever been fired for violating the rule against conduct unbecoming an officer. They agreed that Rivera would receive an unpaid suspension of six months and that he would report to the department's stress unit, for counseling.

The suspension cost Rivera approximately \$25,000. The superintendent did not follow up with the stress unit nor did he monitor Rivera's compliance. He delegated that to the deputy superintendent. Rivera completed the agreed punishment and was returned to road duty with no restrictions. He did not come before the superintendent again for disciplinary action prior to the incident with the plaintiff.

In ruling in the superintendent's favor, the Supreme Judicial Court noted that although he could have done more, that is not the appropriate standard. It rejected the stance taken by the plaintiff's police expert as to other steps that could have been taken to better monitor Rivera. It categorized the disciplinary action taken as substantial, finding that the superintendent acted promptly and forcefully to address the first report he received of Rivera's misconduct. The sanction sent a clear message that the trooper's conduct was not approved and that more severe action would follow a repeat of that behavior.

The following are recent cases in the area of supervisory liability:

- County sheriff's deputy was a "person" subject to liability under § 1983, for purposes of pretrial detainee's claim that deputy violated his constitutional rights by using excessive force while transporting him to detention center, and, thus, the claim was not a claim against state itself, as would be barred under the Eleventh Amendment, although detainee did not explicitly state in his complaint that claims against deputy were asserted against him "in his individual capacity," where detainee clearly requested actual and punitive damages against deputy, and detainee sought recovery from deputy rather than from the state. *Stewart v. Beaufort County*, D.S.C., 481 F.Supp.2d 483 (2007).
- Sheriff was not liable, in his individual capacity, in § 1983 action brought by parents and estate of motorist killed in a collision with a patrol car, where deputy who drove the patrol car committed no Fourth or Fourteenth Amendment violations and there was no affirmative link between the sheriff and unidentified deputies who allegedly engaged in harassing behavior toward parents after they brought suit, in violation of

their free exercise rights. *Moore v. Board of County Com'rs of County of Leavenworth*, D.Kan.2007, 470 F.Supp.2d 1237, affirmed 507 F.3d 1257.

- Lack of showing of affirmative causal link between county sheriff's failure to comply with court order to transfer pretrial detainee housed at county jail to mental health facility, and beating death of detainee at hands of fellow jail inmate, precluded finding of sheriff's supervisory liability, in detainee's survivors' § 1983 action alleging violation of detainee's right against cruel and unusual punishment; purpose of transfer order was likely to get detainee treatment for mental illness, not to protect him. *Jenkins v. DeKalb County, Ga.*, N.D.Ga.2007, 528 F.Supp.2d 1329.
- Arrestee's widow stated claim for supervisory liability under § 1983 when she alleged that supervisor was responsible for training police officers who were involved in allegedly unlawful arrest and death of arrestee, and that supervisor's failure to supervise and train officers proximately caused incidents leading to arrestee's drowning. *Mangual v. Toledo*, D.Puerto Rico 2008, 536 F.Supp.2d 127.
- City police chief's awareness that city police officer, years earlier, had taken nude and semi-nude photographs of consenting female colleague would not have made it plainly obvious to police chief that officer might abuse his authority in running underage alcohol-sales sting operation or in fabricating a child pornography sting, and thus, police chief was not liable under § 1983 based on deliberate indifference to rights of others through grossly negligent supervision of officer, who allegedly violated female plaintiff's substantive due process rights by allegedly taking nude photographs of plaintiff during underage alcohol-sales sting operation and by allegedly taking semi-nude photographs of plaintiff for supposed purpose of participating in child pornography sting. *Wilson v. City of Norwich*, D.Conn.2007, 507 F.Supp.2d 199.
- Sheriff's office captain could not be held liable for alleged excessive force used by police officer with highway patrol under § 1983 supervisory liability theory, where captain had never been employed by highway patrol, had never trained any officers of highway patrol, had never worked with highway patrol officer in any capacity, had never met the highway patrol officer until the day of incident, and had never had any supervisory authority over any officer with the highway patrol. *Maradiaga v. Wilson*, D.S.C.2007, 518 F.Supp.2d 760, affirmed 2008 WL 925147.

City police chief could not held liable under § 1983 in his professional capacity for incident of alleged excessive force directed to arrestee which took place during booking incident, where chief's only contact with arrestee was when she was released from custody, after incident in booking room occurred. *Willette v. City of Waterville*, D.Me.2007, 516 F.Supp.2d 139.

- City police chief could not held liable under § 1983 in his professional capacity for incident of alleged excessive force directed to arrestee which took place during booking incident, where chief's only contact with arrestee was when she was released from custody, after incident in booking room occurred. *Willette v. City of Waterville*, D.Me.2007, 516 F.Supp.2d 139.
- District attorneys were not personally liable under § 1983 for any alleged constitutional injuries arrestee suffered as a result of alleged denial of arrestee's right to be taken before a magistrate judge for probable cause hearing, in action against city, county, city police officers and district attorney, alleging denial of probable cause hearing violated his due process rights; arrestee failed to plead facts to establish that attorneys were personally involved in any alleged constitutional violations. *Burkett v. City of El Paso*, W.D.Tex.2007, 513 F.Supp.2d 800.
- Arrestee's allegations, in § 1983 action, that police officers' supervisor was informed of improper screening, selection, recruitment, and training of officers and did nothing, that supervisor had information or was aware that officers had the practice and custom of entering people's homes illegally and yet he failed to address and remedy the situation, and that supervisor took part in the planning of the operative in which arrestee's rights were violated, pled sufficient facts to show that supervisor's actions and inactions infringed arrestee's constitutional rights. *Roman-Carmona v. Cartagena*, D.Puerto Rico 2007, 502 F.Supp.2d 232.
- Lack of personal involvement precluded individual capacity § 1983 suits against town's deputy mayor and police chief, by homeowner alleging his Fourth Amendment rights were violated when his property was searched for abandoned cars and he was arrested for assaulting searching officers; deputy mayor had only suggested that officers take dog along when they conducted search, and police chief had only initially ordered ticketing of abandoned vehicles. *Brocuglio v. Proulx*, D.Conn.2007, 478 F.Supp.2d 309.

- Failure to connect county commissioners with any events leading up to suicide of jail detainee precluded individual capacity liability for being deliberately indifferent to detainee in violation of his due process rights. *Gaston v. Ploeger*, D.Kan.2005, 399 F.Supp.2d 1211, reversed in part 229 Fed.Appx. 702, 2007 WL 1087281, on remand 2008 WL 169814.
- Supervisory capacity liability under § 1983 did not arise based upon supervising police officer's order to other officer to remove arrestee from area where other arrestee was being treated by paramedics, since supervising officer did not order other officer to take arrestee into custody or place him under arrest, he did not order officer to do anything that might have violated arrestee's constitutional rights, he did not know and should not have known what happened between arrestee and other officer after he gave order to other officer to remove arrestee from scene. *Morrison v. Board of Trustees of Green Tp.*, S.D.Ohio 2007, 529 F.Supp.2d 807.
- Plaintiff failed to articulate what municipal policy making decision had been used by defendant mayor and police chiefs in allegedly assaulting, harassing, threatening, and arresting plaintiff in violation of his civil rights, as required to state § 1983 claim against the municipality for the officials' actions; complaint simply alleged an unconstitutional policy and named the mayor and police chiefs as defendants without establishing any connection between them. *Lucas v. District of Columbia*, D.D.C. 505 (2007).
- Allegations in plaintiffs' proposed amended complaint, namely, that city police chief created policies under which officers acted, and that he failed to remedy alleged violations after being informed of them, were sufficient to state § 1983 claim against police chief in his individual capacity. *Hines v. City of Albany*, N.D.N.Y.2008, 2008 WL 366020.
- Arrestees sufficiently stated that affirmative causal link existed between inaction of wardens of central booking and intake center, as supervisors, and illegal strip searches and over detention suffered by arrestees, as required to impose respondeat superior §§ 1983 liability upon wardens under Fourth and Fourteenth Amendments, on allegations that such conduct was inflicted by staff of center, wardens had actual or constructive knowledge of such practices and did not stop them, and as supervisors they were liable for natural consequences of their actions. *Jones v. Murphy*, D.Md.2007, 470 F.Supp.2d 537.

- Police officers' alleged use of excessive force against medical emergency victim in violation of Fourth Amendment could not be imputed to emergency medical technicians (EMTs), even though EMTs were on the scene at the time of the officers' alleged use of excessive force and the EMTs and officers were jointly engaged in trying to get victim from his bedroom to the ambulance, where there was no agreement or conspiracy between the EMTs and the officers, the EMTs never directed or supervised the officers, the EMTs were not in control of the situation, and the EMTs could not have ordered the officers to stop. *Schwartz v. Town of Plainville*, D.Conn.2007, 483 F.Supp.2d 192.

NEGLIGENT TRAINING

The following are recent cases in the area of negligent training:

- The inadequacy of police training 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. *Robinette v. Jones*, C.A.8 (Mo.) 2007, 476 F.3d 585.
- Material issues of fact, as to whether there was causal connection between absence of any training provided by village police department, and police officer's filing of criminal disorderly conduct complaint against village councilman, precluded summary judgment of municipal non-liability in § 1983 action by councilman claiming violation of First Amendment rights. *Kinkus v. Village of Yorkville*, S.D.Ohio 2007, 476 F.Supp.2d 829.
- County was not deliberately indifferent to need for more or different training, and thus was not liable for due process violation under § 1983, pursuant to unconstitutional policy or practice theory, in connection with placement of 14-year-old child in non-foster home where he was subsequently shot and killed, where there was no history of such type of violence in county. *Arledge v. Franklin County, Ohio*, C.A.6 (Ohio) 2007, 509 F.3d 258.
- Failure to show deliberate indifference on part of sheriff concerning actions of his subordinates, detectives who had submitted facially invalid arrest warrant, precluded sheriff's failure-to-train supervisory liability in arrestee's § 1983 action against detectives and sheriff alleging *Malley* violation. *Spencer*

v. Staton, C.A.5 (La.) 2007, 489 F.3d 658, opinion withdrawn in part on rehearing.

- Where the § 1983 claim is premised upon supervisor's alleged failure to properly train his or her subordinates, the plaintiff must identify a failure to provide specific training that has a causal nexus with their injuries and must demonstrate that the absence of that specific training can reasonably be said to reflect a deliberate indifference to whether the alleged constitutional deprivations occurred. *Hayes v. Erie County Office of Children and Youth*, W.D.Pa.2007, 497 F.Supp.2d 684, amended on reconsideration 497 F.Supp.2d 709.
- Inadequacy in training of police officers to handle emotionally disturbed persons was not result of deliberate indifference to rights of arrestee, who was emotionally disturbed person, as required for arrestee's deliberate indifference claim against municipality under § 1983, where there were no other complaints by other persons against municipality with respect to officers' responses to calls regarding emotionally disturbed persons. *Morrison v. Board of Trustees of Green Tp.*, S.D.Ohio 2007, 529 F.Supp.2d 807.
- Genuine issues of material fact as to whether a police officer directly participated in the alleged fabrication of evidence against an arrestee prosecuted for murder or, at a minimum, as to whether he was grossly negligent in supervising subordinates engaged in such acts, precluded summary judgment in his favor on the arrestee's § 1983 claim for supervisory liability. *Blake v. Race*, E.D.N.Y.2007, 487 F.Supp.2d 187.
- In suit arising from police officer's use of deadly force, evidence failed to establish § 1983 claim against District of Columbia and its police chief for failure to properly hire, train, and supervise police officers; there was no showing that chief was personally involved in training the officers, that police department failed to maintain an adequate system of disciplining police officers, or that police culture had an attitude of discriminating against black citizens. *Reed v. District of Columbia*, D.D.C.2007, 474 F.Supp.2d 163.
- Municipality's alleged failure to adequately train and supervise arresting officer did amount to deliberate indifference towards the constitutional rights of persons in its domain, as required to support municipality's liability in arrestee's § 1983 action

alleging that officer used excessive force. *Tafler v. District of Columbia*, D.D.C.2008, 539 F.Supp.2d 385.

- City police chief was not deliberately indifferent to subordinate officers' alleged misuse of pepper spray in effecting arrests, and thus was subject to liability under § 1983, absent evidence tending to suggest that chief had notice that his subordinates were likely to use pepper spray inappropriately, or that need for corrective action was obvious. *Carey v. Maloney*, D.Conn.2007, 480 F.Supp.2d 548.
- County sheriff was not liable under § 1983 based on his alleged failure to properly train or supervise deputy with regard to theft investigations, where deputy's purportedly inadequate investigation did not violate suspect's due process rights, state trained officers on how to take and file theft report, and sheriff periodically sent his officers to remedial training that focused on investigations and report writing. *Brockinton v. City of Sherwood, AR*, C.A.8 (Ark.) 2007, 503 F.3d 667.
- Supervisor or municipality will not be liable under § 1983 for failure to train officer where one-time negligent administration of training program or factors peculiar to officer involved in particular incident, is moving force behind plaintiff's injury. *Carey v. Maloney*, D.Conn.2007, 480 F.Supp.2d 548.
- Arrestee's personal experience with allegedly suggestive lineups conducted by city's police officers did not, without more, show that city acted with deliberate indifference to the rights of its inhabitants, as required to impose liability against city on a failure-to-train theory in arrestee's § 1983 action for false arrest and malicious prosecution; arrestee did not identify procedural manuals or training guides, or any particular aspect of police training or supervision that was responsible for how his lineups were conducted. *Jenkins v. City of New York*, C.A.2 (N.Y.) 2007, 478 F.3d 76.
- Fact that arrestee was arrested by city police officers without probable cause did not, without more, show that city's training program for its police officer was inadequate, for purposes of determining whether city's alleged failure to properly train its police officers supported imposition of liability against city in arrestee's § 1983 action for false arrest and malicious prosecution. *Jenkins v. City of New York*, C.A.2 (N.Y.) 2007, 478 F.3d 76.

- City properly trained officer who operated blood alcohol content testing device on arrestee, and thus city was not liable under § 1983 for failure to train; officer had completed his breath test operator certification and that such certification was valid and up-to-date at the time he administered the test, and officer also had a complete and adequate training record. *Dier v. City of Prestonburg, Ky.*, E.D.Ky.2007, 480 F.Supp.2d 929.
- Municipality was not liable for allegedly excessive force exerted by police officer, when he discharged firearm in course of arrest, on grounds that police department had not adequately trained police in firearm use and arrest procedures; department provided all state mandated training in those areas, and no amount of training would have prevented accidental discharge involved in present case. *Brice v. City of York, M.D.Pa.*2007, 528 F.Supp.2d 504.
- Municipality was not liable, in § 1983 action, for failing to train police officers regarding Fourth Amendment aspects of abandoned vehicle searches, when police officers made illegal warrantless entry to homeowner's back yard, looking for abandoned vehicles; it was sufficient that officers had received general instruction on Fourth Amendment and its significance. *Brocuglio v. Proulx*, D.Conn.2007, 478 F.Supp.2d 309.
- County did not act with deliberate indifference in its training and supervision of county jail personnel in dealing with inmates' medical needs, as required for county to be liable under § 1983 to estate of inmate who died in county jail for violating Eighth Amendment by failure to train or supervise county jail personnel, absent showing of a pattern or a recurring situation of tortious conduct by inadequately trained employees. *Wakat v. Montgomery County*, S.D.Tex.2007, 471 F.Supp.2d 759, affirmed 246 Fed.Appx. 265, 2007 WL 2461793.
- Material issues of fact, as to whether county sheriff in charge of jail adequately trained officials in jail detainee suicide prevention, precluded summary judgment on individual capacity nonliability for violating due process rights of detainee who committed suicide. *Gaston v. Ploeger*, D.Kan.2005, 399 F.Supp.2d 1211, reversed in part 229 Fed.Appx. 702, 2007 WL 1087281, on remand 2008 WL 169814.
- To prevail on § 1983 claim against municipality for failure to train and supervise officers regarding uses of force, plaintiffs must show that need for more or different training is so obvious, and inadequacy so likely to result in violation of constitutional

rights, that municipal policymakers can reasonably be said to have been deliberately indifferent to need. *Massasoit v. Carter*, M.D.N.C.2006, 439 F.Supp.2d 463, affirmed 253 Fed.Appx. 295, 2007 WL 3390462, petition for certiorari filed 2008 WL 672916.

- Municipality was not liable for officer's unlawful, warrantless entry into plaintiff's home to enforce visitation orders where officers were not acting pursuant to police department policy; furthermore, department's failure to train or instruct its officers with specific respect to handling visitation disputes did not cause plaintiff's injury in light of basic tenet of police procedure requiring a warrant prior to a search of a person's home absent exigent circumstances. *Cotz v. Mastroeni*, S.D.N.Y.2007, 476 F.Supp.2d 332.
- Pretrial detainee, who simply alleged that jail officials did not act in accordance with municipal procedures, failed to show that the defendant municipalities' training practices were so deliberately indifferent to the rights of detainees as to warrant §§ 1983 liability under *Monell* for failure to provide adequate medical care to detainee. *Hollenbaugh v. Maurer*, N.D. Ohio 2005, 397 F.Supp.2d 894, affirmed 2007 WL 843802.

PRACTICE POINTERS

Not every transgression by a police officer is a firing offense, and not every misstep by a police chief is a federal civil rights offense. The courts have said there is no liability for considering disciplinary options that may help rehabilitate or educate a misbehaving officer. It is acceptable to consider ways to retain the officer so as not to lose the manpower, experience, and other resources that the officer represents and that are invested in him or her, as well as having to incur replacement costs.

On the other hand, do not turn a blind eye to what is going on in your department. Although you cannot know, remember or do everything (you may delegate), you cannot be deaf, dumb and blind.

Also, there is less need to be overly concerned about training as a basis of liability in Massachusetts because the Municipal Police Training Committee provides an effective barrier so long as you train your officers in accordance with the statutory mandates through the Committee. In short, the best advice is to do the best job that you can, assuming that you are a reasonable supervisor. That does not mean that you will not be sued, but it does lessen your chances of being found liable for your officers' conduct.

PROCEDURAL DUE PROCESS

The Due Process Clause of the Fourteenth Amendment safeguards life, liberty and property interests by requiring procedural barriers to the deprivation of those interests. The source of those interests may be the Due Process Clause itself or it may be state law.^[cdxiii] Regardless of its source, once identified, the interest is protected from deprivation by any established state procedure until there have been certain pre-termination proceedings.^[cdxiv] For example, once an officer begins receiving injured-on-duty benefits under G.L. c. 41, § 111F, the officer is entitled under the Constitution to adequate notice and an opportunity to be heard before those benefits may be discontinued.^[cdxv] The procedure contained in the statute for an independent medical examination has passed constitutional muster. Consider also the provisions of the state Civil Service law, Chapter 31. It, too, provides a process for the termination of property rights.^[cdxvi] In *Whalen v. Massachusetts Trial Court*, the court held that an assistant court clerk had a due process right to the minimal procedural protections of notice and a hearing to respond where he was selected for layoff and his job performance played a role in his selection.^[cdxvii]

On the other hand, so long as the right is not a substantive constitutional right, there is no pre-termination hearing requirement for a deprivation by the random, unauthorized conduct of state or municipal officials. According to the cases, an official engages in random, unauthorized conduct when he/she misapplies state law to deny an individual the process due under a correct application of the state law.^[cdxviii] It is a flaw in the official's actions, not in the state law. In that situation the only process due is a post-deprivation hearing that is constitutionally adequate.^[cdxix] The remedy does not have to be the same as that available under section 1983 in order to be adequate. Various forms of post-deprivation remedies are acceptable, such as grievance procedures,^[cdxx] Civil Service appeals,^[cdxxi] and Board of Health appeals.^[cdxxii] Thus, it can be subject to a damages cap; it does not have to permit the award of attorney's fees or punitive damages.^[cdxxiii]

AFFIRMATIVE DEFENSES

The discussion up to this point has concerned mainly the elements of a section 1983 claim that a plaintiff must prove in order to be successful. We are now going to explore the affirmative defenses that can avoid liability for section 1983, but the defendant bears the burden of establishing the elements of these defenses. If these defenses are available, the law enforcement officer can usually raise them early in the litigation because they are intended to head off unnecessary litigation and its concomitant time and expense.

ABSOLUTE IMMUNITY

The doctrine of absolute immunity protects certain activities because of the overriding public importance of those activities sufficient to justify leaving the

victims of unconstitutional conduct uncompensated. The defendant must assert the defense and then show that his/her activities come within the recognized immunities. Legislators engaged in a traditional legislative capacity have immunity.^[cdxxiv] Judges are immune for their judicial activities,^[cdxxv] but not for their conduct as employers.^[cdxxvii] Prosecutors have immunity for engaging in prosecutorial activities, but not for other activities.^[cdxxviii] As mentioned earlier, witnesses in court proceedings are immune from suits based upon their testimony.^[cdxxviii] Complaining witnesses, even if they are judges, prosecutors or legislators do not have immunity.^[cdxxix]

This functional approach to absolute immunity under section 1983 means that occasionally a law enforcement officer will be entitled to immunity for his/her activities because of the nature of those activities. For example, in *Cignetti v. Healy*, the judge examined the roles that the defendants played in the disciplinary actions brought against the plaintiff and over which he filed suit, claiming constitutional violations.^[cdxxx] The court found that the individuals had acted in a prosecutorial capacity or in a testimonial capacity in the administrative hearings so they were immune for their conduct.

QUALIFIED IMMUNITY

The doctrine of qualified immunity shields public officials of all types from liability under section 1983 so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.^[cdxxxi] It protects all but the plainly incompetent and those who knowingly violate the law.^[cdxxxii] Because it serves as an entitlement not to stand trial or face the other burdens of litigation, the court should determine the applicability of qualified immunity at the earliest possible stage.^[cdxxxiii]

Qualified immunity shields an officer from suit when he or she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.^[cdxxxiv] Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

The Supreme Court has adopted a sequential analysis to determine whether a defendant violated clearly established rights of which a reasonable person would have known. The analysis requires the court to determine first whether the plaintiff's allegations establish a constitutional violation; second, whether the constitutional right at issue was clearly established at the time of the alleged violation; and, third, whether a reasonable officer similarly situated to the defendant would have understood the challenged conduct to contravene the constitutional right.^[cdxxxv] The third step channels the analysis from abstract principles to the specific facts of each case.

Qualified immunity will shield a defendant who shows that he/she acted in an objectively reasonable manner in applying clearly established law to the specific facts he/she confronted.^[cdxxxvii] Stated differently, the operative inquiry at the third level is whether the officer's actions were obviously inconsistent with the constitutional right, not whether his/her actions actually abridged the right. Therefore, in a false arrest case, if the presence of probable cause is arguable or subject to some legitimate question, then qualified immunity will prevent the officer from being liable.^[cdxxxviii] The arrest is actionable only if its unlawfulness would have been apparent to an objectively reasonable police officer standing in the defendant's shoes.

The upshot of the doctrine is that where the material facts of a case are not in dispute, police officers can often obtain qualified immunity and bring the case to an early end. That is not possible where there is a wide difference in the version of events between the parties. Qualified immunity does not resolve such factual disputes.

CONCLUSION

Review of these materials should provide you with some helpful hints on how to decrease your chances of being sued in connection with the performance of your official duties and, if you are sued, to increase your chances of obtaining a favorable result. The goal of civil liability programs should go beyond that, however. The purpose, and indeed the theme, should be to instill confidence in each of you to perform your job to the highest level of professionalism by reducing your reluctance to act for fear of incurring civil liability. Very simply, the tips contained in these materials boil down to: act professionally, document as much as you can, and use common sense. The greatest dangers you may face daily that can lead to civil liability are laziness, arrogance, and anger.

The civil rights area of federal law is constantly changing, sometimes slightly, sometimes greatly. Courts decide cases every day that impact the law in this area, beginning with the trial court resolution of disputes between parties, to the appellate courts that move those disputes to a larger arena of applicability, and ending with the Supreme Court that affects the law of the land. It is oftentimes difficult for attorneys that regularly practice in the civil rights area to keep current with this moving landscape. It is obviously much more difficult for law enforcement officers to keep a firm grasp on it. Portions of these materials were probably outdated before the printer finished them. The intended purpose was not to provide the most current source of civil rights law, but to provide a fairly current summary of the civil rights law so that you could know when and where to learn more. Learn and be safe.

ENDNOTES

^[li] Civil Rights Act of 1871, c. 22, 17 Stat. 13 (1871).

^[lii] See Zavagno, *Constitutional Law, Civil Rights*, 51 U. of Cinn. L. Rev. 484, 486 (1982); and Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952) for history of the Civil Rights Act.

^[liii] *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

^[liv] *Carey v. Phipus*, 435 U.S. 247 (1978).

^[lv] *Camilo-Robles v. Hoyos*, 151 F.3d 1 (1st Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999).

^[lvi] *Barreto-Rivera v. Medina-Vargas*, 168 F.3d 42 (1st Cir. 1999); *Martinez v. Colon*, 54 F.3d 980, 986-987 (1st Cir.), *cert. denied*, 516 U.S. 987, 116 S.Ct. 515 (1995).

^[lvii] *Daniels v. Williams*, 474 U.S. 327 (1986).

^[lviii] *Monroe v. Pape*, 365 U.S. 167 (1961), overruled in part by *Monell v. Dept. of Soc. Svcs. of City of New York*, 436 U.S. 658 (1978).

^[lix] 436 U.S. 658 (1978).

^[lx] 436 U.S. at. 658-694. Also see *Einhorn, Monell and Owen in the Police Injury Context: Municipal Liability Under Section 1983 Without Supervisional Fault*, 16 U. San Francisco L. Rev. 517 (1982).

^[lxi] *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 105 L. Ed.2d 45, 109 S. Ct. 2304 (1989).

^[lxii] *Kentucky v. Graham*, 473 U.S. 159, 87 L. Ed.2d 114, 105 S. Ct. 3099 (1985).

^[lxiii] *Martinez v. Colon*, 54 F. 3d 980, 986-987 (1st Cir.), *cert. denied*, 516 U.S. 987, 116 S.Ct. 515 (1995).

^[lxiv] *Traver v. Meshriy*, 627 F.2d 934 (9th Cir. 1980).

^[lxv] *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984), *cert. denied*, 106 S.Ct. 65, 88 L.Ed.2d 53, *reh'g. denied*, 106 S.Ct. 40 (1985) *vacated and remanded, sub nom., City of Lawton v. Lusby*, 107 S.Ct. 275 (1986).

- [xvi] *Layne v. Sampley*, 627 F.2d 12 (6th Cir. 1980).
- [xvii] *Alvarado v. City of Dodge City*, 10 Kan. App. 3rd 363, 702 P.2d 935 (1985), *modified on other grounds*, 238 Kan. 48, 708 P.2d 174 (1985).
- [xviii] *Parilla-Burgos v. Hernandez-Rivera*, 108 F. 3d 445 (1st Cir. 1997).
- [xix] *See Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990).
- [xx] *Manning v. Jones*, 696 F.Supp. 1231 (S.D. Ind. 1988).
- [xxi] *Rogers v. Fuller*, 410 F.Supp. 187 (M.D. N.C. 1976).
- [xxii] *Bonsignore v. City of New York*, 683 F.2d 635 (2d Cir. 1982); *see also*, *Revenue v. Charles County Comm'rs*, 882 F.2d 870 (4th Cir. 1989); *Whitney v. Mallet*, 442 So.2d 1361 (La. App. 1983).
- [xxiii] *Motes v. Myers*, 810 F.2d 1055 (11th Cir. 1987); *Perkins v. Rick*, 204 F.Supp. 98 (D.Del. 1962) *aff'd.*, 316 F.2d 236 (3rd Cir. 1963).
- [xxiv] *Monell v. Department of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 52 (1974).
- [xxv] *Rookhard v. Health and Hospitals Corporation*, 710 F.2d 41 (2d Cir. 1983).
- [xxvi] *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed. 107 (1988).
- [xxvii] *Jett v. Dallas Indep. School Distr.*, 491 U.S. 701, 109 S.Ct. 2702, 2723, 106 L.Ed.2d 598 (1989).
- [xxviii] *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).
- [xxix] *Farmer v. Brennan*, 511 U.S. 825, 841 (1994).
- [xxx] *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985).
- [xxxi] *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).
- [xxxii] *Collins v. City of Harker Heights*, 503 U.S. 115 (1992).
- [xxxiii] *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).
- [xxxiv] *Flangan v. Munger*, 890 F.2d 1557 (10th Cir. 1989).

[xxxv] *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed.2d 107 (1988).

[xxxvi] *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed.2d 598 (1989).

[xxxvii] *Jett v. Dallas Independent School Dist.*, 491 U.S. at 737 (emphasis in original).

[xxxviii] *See Auriemma v. Rice*, 957 F.2d 397 (7th Cir. 1992).

[xxxix] *Jett v. Dallas Independent School Dist.*, 491 U.S. at 737 (emphasis in original).

[xli] *Hammer v. Gross*, 932 F.2d 842 (9th Cir. 1991).

[xlii] *Brown v. City of Fort Lauderdale*, 923 F.2d 1474 (11th Cir. 1991).

[xliii] *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986), *cert. denied* 483 U.S. 1020, 107 S.Ct. 3263 (1987); *Himple v. Moore*, 673 F.Supp. 758 (E.D. Va. 1987); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), *reh. denied* 779 F.2d 1129, *cert. denied* 480 U.S. 916, 107 S.Ct. 1369 (1987); *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), *cert. denied* 110 S.Ct. 2617 (1990). *See also*, Schnapper, *Civil Rights Liability After Monell*, 79 Colum. L.Rev. 13 (1979) (suggests that the dispositive inquiry is whether there is anyone within the same department as the rule promulgator who is vested with authority to formulate official edicts. If not, then the decision maker is the final authority for purposes of § 1983 policy making).

[xliv] *Kelley v. LaForce*, 288 F.3d 1, 10 (1st Cir. 2002).

[xlv] *Connell v. Town of Hudson*, 733 F.Supp. 465 (D.N.H. 1990).

[xlvi] *Spratlin v. Montgomery County*, 772 F.Supp. 1545 (D. Md. 1990) *aff'd*, 941 F.2d 1207 (4th Cir. 1991).

[xlvii] *Ford v. City of Boston*, 154 F.Supp.2d 131 (D.Mass. 2001).

[xlviii] *Ford v. City of Boston*, 154 F.Supp.2d at 146-147.

[xlix] *Turner v. Upton County, Tex.*, 915 F.2d 133 (5th Cir. 1990) *cert. denied*, 111 S. Ct. 788 (1991), 967 F.2d 181 (5th Cir. 1992) on remand; *see also*, *Anderson v. Gutschenritter*, 836 F.2d 346 (7th Cir. 1988) and *Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1988); *Colle v. Brazos Co., Texas*, 981 F.2d 237 (5th Cir. 1993).

[[xlix](#)] *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 2617 (1990).

[[li](#)] *Wilson v. City of Norwich*, D.Conn., 507 F.Supp.2d 199 (2007).

[[lii](#)] *Moore v. Miami-Dade County*, S.D.Fla., 502 F.Supp.2d 1224 (2007).

[[liii](#)] *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1996).

[[liiii](#)] *Los Angeles Police Protective League v. Gates*, 907 F.2d 879 (9th Cir. 1990).

[[liv](#)] *Pachaly v. City of Lynchburg*, 897 F.2d 723 (4th Cir. 1990).

[[lv](#)] *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989).

[[lvi](#)] *Webber v. Dell*, 804 F.2d 796 (2nd Cir.), *cert. denied*, 107 S. Ct. 3263 (1987).

[[lvii](#)] *Hollenbaugh v. Maurer*, N.D. Ohio, 397 F.Supp.2d 894 (2005), affirmed 221 Fed.Appx. 409, 2007 WL 843802.

[[lviii](#)] *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989).

[[lix](#)] *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir.), *cert. denied*, 493 U.S. 820 (1989).

[[lx](#)] *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989).

[[lxi](#)] *Jackson v. City of Chicago*, 645 F.Supp. 920 (N.D. Ill. 1986).

[[lxii](#)] *Id.*

[[lxiii](#)] *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985); *cert. granted*, 475 U.S. 1064(1986), *cert. dismissed*, 480 U.S. 257, *reh'g denied*, 481 U.S. 1033 (1987).

[[lxiv](#)] *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir.), *cert. denied*, 493 U.S. 820 (1989).

[[lxv](#)] *Bordanaro v. McLeod*, 871 F. 2d 1151 (1st Cir.), *cert. denied*, 493 U.S. 820 (1989).

[[lxvi](#)] *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985).

[lxvii] *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993).

[lxviii] *Bills v. Aseptine*, 958 F.2d 697 (6th Cir. 1992).

[lxix] *Morgan v. City of Marmaduke*, 958 F.2d 207 (8th Cir. 1992).

[lxx] *Wedemeier v. City of Ballwin*, 931 F.2d 24 (8th Cir. 1991); *see also*, *Tomasso v. City of Chicago*, 782 F.Supp. 1231 (N.D. Ill., 1991); *Judge v. City of New York*, 785 F.Supp. 366 (S.D.N.Y. 1991); *Baldwin v. City of Seattle*, 55 Wash. App. 241, 776 P.2d 1377 (1989).

[lxxi] *Brown v. District of Columbia*, 638 F.Supp. 1479 (D.D.C. 1986).

[lxxiii] *Adamson v. Volkmer*, 680 F.Supp. 1191 (N.D. Ill. 1987).

[lxxiiii] *Mann v. Purcell*, 718 F.Supp. 868 (D. Ky. 1989).

[lxxiv] *Doe v. City of Cleveland*, 788 F.Supp. 979 (N.D. Ohio 1991).

[lxxv] *Hood v. Itawamba County*, 819 F.Supp. 556 (N.D. Miss. 1993); *Campos v. City of Warner Robins*, 822 F.Supp. 724 (M.D. Ga. 1993); *Havey v. County of DuPage*, 820 F.Supp. 359 (N.D. Ill. 1993).

[lxxvi] *Jones v. Chieffo*, 833 F. Supp. 498 (E.D. Pa. 1993), *aff'd*, 22 F. 3d 301 (3rd Cir. 1994).

[lxxvii] *Ball v. City of Cheyenne*, 845 F.Supp. 803 (D. Wyo. 1993).

[lxxviii] *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1984).

[lxxix] *City of Amarillo v. Langley*, 651 S.W.2d 906 (Tex. Ct. App. 1983).

[lxxx] *Schmelz v. Monroe Co.*, 945 F.2d 1540 (11th Cir. 1992) (*per curiam*).

[lxxxii] *Kopf v. Wing*, 942 F.2d 265 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1179, 117 L.Ed.2d 423 (1992).

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

[lxxxiiii] *Garner v. Memphis Police Department*, 8 F.3d 358 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 1219 (1994).

[lxxxiv] *Golbeck v. City of Chicago*, 782 F.Supp. 381 (N.D. Ill. 1992).

[lxxxv] *Dirksen v. City of Springfield*, 842 F.Supp. 1117 (C.D. Ill. 1994).

[lxxxvi] *Barcume v. City of Flint*, 819 F.Supp. 631, (E.D. Mich. 1993).

[lxxxvii] *Hubbard v. City of Middleton*, 782 F.Supp. 1573 (S.D. Ohio 1990).

[lxxxviii] *See Baker v. McCollan*, 443 U.S. 137, 145-146 (1979).

[lxxxix] *See Rizzo v. Goode*, 423 U.S. 362, 379 (1976).

[xc] *Daniels v. Williams*, 474 U.S. 327 (1986).

[xcii] *Heck v. Humphrey*, 512 U.S. 477 (1994); *Albright v. Oliver*, 510 U.S. 266 (1994); *Brower v. County of Inyo*, 499 U.S. 593 (1989); *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1984).

[xciii] *See Estelle v. Gamble*, 429 U.S. 97 (1976), *reh'g den.* 429 U.S. 1066 (1977).

[xciv] *Id.*

[xcv] *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991).

[xcvi] *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992); *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990).

[xcvii] 463 U.S. 239, 103 S. Ct. 2979 (1983).

[xcviii] 429 U.S. 97, *reh'g den.* 429 U.S. 1066.

[xcix] *Farmer v. Brennan*, 511 U.S. 825 (1994); *Mahan v. Plymouth County House of Corrections*, 64 F.3d 14, 18 (1st Cir. 1995).

[cl] *Mitchell v. Aluisi*, 872 F.2d 577 (4th Cir. 1989); *Wood v. Worachek*, 618 F.2d 1225 (7th Cir. 1980)

[cl] *Thompson v. City of Portland*, 620 F.Supp. 482 (D.Me. 1985)

[cl] *Pantoja v. City of Gonzales*, 538 F.Supp. 335 (N.D. Cal. 1982).

[cii] *Mueller v. County of Westchester*, 943 F. Supp. 357 (S DNY 1996).

[ciii] *Wilson v. Meeks*, 52 F. 3d 1547 (10th Cir. 1995).

[civ] *Salazar v. City of Chicago*, 940 F.2d 233 (7th Cir. 1991).

- [[cv1](#)] *Hall v. County of Nemaha*, Neb., D.Neb., 509 F.Supp.2d 821 (2007).
- [[cv1](#)] *Cox v. Hartshorn*, C.D.Ill., 503 F.Supp.2d 1078 (2007).
- [[cvii](#)] *Rosario v. Miami-Dade County*, S.D.Fla., 490 F.Supp.2d 1213 (2007).
- [[cviii](#)] *Wakat v. Montgomery County*, S.D.Tex., 471 F.Supp.2d 759 (2007), affirmed 246 Fed.Appx. 265, 2007 WL 2461793.
- [[cix](#)] *Tatum v. Simpson*, D.Colo., 399 F.Supp.2d 1159 (2005), affirmed in part, reversed in part and remanded 202 Fed.Appx. 301, 2006 WL 2831159, on remand 2007 WL 2914453.
- [[cx1](#)] *Norris v. Engles*, C.A.8 (Ark.), 494 F.3d 634 (2007).
- [[cx1](#)] *Grayson v. Ross*, C.A.8 (Ark.), 454 F.3d 802 (2006), certified question accepted 367 Ark. 230, certified question answered 2007 WL 766333.
- [[cxii](#)] *Winters v. Arkansas Dept. of Health and Human Services*, C.A.8 (Ark.) 2007, 2007 WL 1855802.
- [[cxiii](#)] *Hollenbaugh v. Maurer*, N.D. Ohio, 397 F.Supp.2d 894 (2005), affirmed 2007 WL 843802.
- [[cxiv](#)] *Ringuette v. City of Fall River*, 146 F. 3d 1 (1st Cir. 1998).
- [[cxv](#)] POLICE CIVIL LIABILITY, Isadore Silver, Matthew Bender, 1994.
- [[cxvi](#)] *Jones v. County of DuPage*, 700 F.Supp. 965 (N.D. Ill. 1988).
- [[cxvii](#)] *Bowen v. City of Manchester*, 894 F.Supp. 561 (D.N.H. 1991) *aff'd*, 966 F.2d 13 (1st Cir. 1992).
- [[cxviii](#)] *Belcher v. Oliver*, 898 F.2d 32 (4th Cir. 1990).
- [[cxix](#)] *Wayland v. City of Springdale*, 933 F.2d 668 (8th Cir. 1991).
- [[cxx](#)] *Salazar v. City of Chicago*, 940 F.2d 233 (7th Cir. 1991).
- [[cxxi](#)] *Francis v. Pike County*, 708 F.Supp. 170 (S.D. Ohio 1988), *aff'd* 875 F.2d 863 (6th Cir. 1989).
- [[cxxii](#)] *Campodagli v. Wilson*, 180 Ill. App.3d 456, 356 N.E.2d 135, 129 Ill. Dec. 451, *cert. denied*, 493 U.S. 919 (1989).
- [[cxxiii](#)] *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

[cxxiv] *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

[cxxv] *Veronia School Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989).

[cxxvi] *New York v. Burger*, 482 U.S. 691 (1987); *Michigan v. Tyler*, 436 U.S. 499 (1978).

[cxxvii] *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

[cxxviii] *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

[cxxix] *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

[cxxx] *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 837-838, 160 L.Ed.2d 842 (2005); *Com. v. Feyenord*, 445 Mass. 72, 833 N.E.2d 590 (2005).

[cxxxii] *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cty.*, 542 U.S. 177 (2004).

[cxxxiii] *Flowers v. Fiore*, 359 F.3d 24, 29 (1st Cir. 2004).

[cxxxiiii] *United States v. Lee*, 317 F.3d 26, 31 (1st Cir.), *cert. denied*, 538 U.S. 1048 (2003).

[cxxxv] *Flowers v. Fiore*, 359 F.3d 24, 30 (1st Cir. 2004).

[cxxxvi] *Graham v. Connor*, 490 U.S. 386, 104 L. Ed.2d 443, 109 S. Ct. 1865 (1989)

[cxxxvii] *Lewis v. Kendrick*, 944 F. 2d 949 (1st Cir. 1991).

[cxxxviii] *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

[cxxxix] *Sheehy v. Town of Plymouth*, 191 F.3d 15 (1st Cir. 1999).

[cxxxix] *Mass. Gen. Hosp. v. City of Revere*, 385 Mass. 772, 778, 434 N.E.2d 185, 188 (1982), *reversed*, 463 U.S. 239, 77 L.Ed.2d 605, 103 S.Ct. 2979 (1983).

[cxl] For constitutional standard on probable cause, *see generally Draper v. U.S.*, 358 U.S. 307 (1959); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Payton v. New York*, 445 U.S. 573 (1980).

[[cxlj](#)] *Whren v. United States*, 517 U.S. 806, 813 (1996); *Bolton v. Taylor*, 367 F.3d 5, 10 (1st Cir. 2004).

[[cxlii](#)] *Graham v. Connor*, 490 U.S. at 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

[[cxliii](#)] *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).

[[cxliv](#)] *Com. v. Vaidulas*, 433 Mass. 247, 741 N.E.2d 450 (2001).

[[cxlv](#)] *Id.*

[[cxlvi](#)] *Miller v. Kennebec County*, 219 F.3d 8 (1st Cir. 2000).

[[cxlvii](#)] *Wilson v. City of Boston*, 421 F.3d 45 (1st Cir. 2005).

[[cxlviii](#)] *Scannell v. City of Riverside*, 152 Cal. App. 3rd 596, 199 Cal. Rptr. 644 (1984).

[[cxlix](#)] *LoSacco v. City of Middletown*, 745 F.Supp. 812 (D. Conn. 1990).

[[cl](#)] *In re: Scott County Master Docket*, 618 F.Supp. 1534 (D. Minn. 1985), *cert. den'd.* 484 U.S. 828 (1987).

[[clj](#)] *Briggs v. Malley*, 748 F.2d 715 (1st Cir. 1984), *aff'd*, 475 U.S. 335, 106 S. Ct. 1092 (1986).

[[cljii](#)] *Anela v. City of Wildwood*, 790 F.2d 1063 (3rd Cir.), *cert. denied*, 479 U.S. 949 (1986).

[[cljiii](#)] *Briggs v. Malley*, 748 F.2d 715 (1st Cir. 1984), *aff'd*, 475 U.S. 335 (1986); *see, generally*, *Schiller v. Strangis*, 540 F. Supp. at 613; *Pierson v. Ray*, 386 U.S. 547 (1967); *Street v. Surdyka*, 492 F.2d 368 (4th Cir. 1974).

[[cljiv](#)] *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979).

[[cljv](#)] 443 U.S. at 145-146.

[[cljvi](#)] *Gay v. Wall*, 761 F.2d 175 (4th Cir. 1985).

[[cljvii](#)] *Sanders v. English*, 950 F.2d 1152 (5th Cir. 1992). *See also*, *Simmons v. McElveen*, 846 F.2d 337 (5th Cir. 1988).

[[cljviii](#)] *Brown v. Coughlin*, 704 F.Supp. 41 (S.D. N.Y. 1989).

[clix] *Martin v. Dallas County, Tex.*, 822 F.2d 553 (5th Cir. 1987).

[clx] *Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987).

[clxi] *Talbert v. Kelly*, 799 F.2d 62 (3rd Cir. 1986).

[clxiii] *Lambert v. McFarland*, 614 F.Supp. 1252 (N.D. Ga. 1985).

[clxiiii] *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661 (1991).
See also, Coleman v. Franz, 754 F.2d 719 (7th Cir. 1985) (eighteen day delay was too long).

[clxiv] *Jenkins v. Chief Justice of the District Court Department*, 416 Mass. 221, 619 N.E.2d 324 (1993).

[clxvi] *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969) (nearly nine months); *Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985) (eighteen day post arrest detention without an appearance before a judicial officer); *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989); *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989) (detention for five days before a hearing on probable cause may be a deprivation of Fourth Amendment rights).

[clxvii] *Angara v. City of Chicago*, 897 F.Supp. 355 (N.D. Ill. 1995).

[clxviii] *Hall v. Ochs*, 817 F.2d 920 (1st Cir.) *aff'd in part, reversed in part*, 817 F.2d 920 (1st Cir. 1987).

[clxviiii] *Lambert v. McFarland*, 612 F.Supp. 1252 (N.D. Ga. 1984).

[clxix] *Logue v. Dore*, 103 F.3d 1040 (1st Cir. 1997); *Lowinger v. Broderick*, 50 F.3d 61 (1st Cir. 1995).

[clxx] *Julian v. Randazzo*, 380 Mass. 391, 403 N.E.2d 931 (1980); *see also, Gaudreault v. Town of Salem, Mass.*, 923 F.2d 203 (1st Cir. 1990), *cert. denied*, 500 U.S. 956, 111 S.Ct. 2266 (1991).

[clxxi] *See Delaney v. Dias*, 415 F. Supp. 1351, 1353 (D. Mass. 1976).

[clxxii] *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694 (1985); *Human Rights Commission of Worcester v. Assad*, 370 Mass. 482, 349 N.E.2d 341 (1976); *Landrigan v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980); *Schiller v. Strangis*, 540 F. Supp. 605, 613 (D. Mass. 1982); *Delaney v. Dias*, 415 F. Supp. 1351 (D. Mass. 1976).

[clxxiii] *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 443 (1989).

[clxxiv] *Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708 (1998).

[clxxv] *Gutierrez v. Massachusetts Bay Transp. Authority*, 437 Mass. 396, 772 N.E.2d 552 (2002).

[clxxvi] See *Human Rights Commission of Worcester v. Assad*, 370 Mass. 482, 349 N.E.2d 341, (1976) (and cases cited therein).

[clxxvii] *Dean v. City of Worcester*, 924 F.2d 364 (1st Cir. 1991).

[clxxviii] *Bastien v. Goddard*, 279 F.3d 10 (1st Cir. 2002).

[clxxix] *Moore v. Novak*, 146 F. 3d 531 (8th Cir. 1998).

[clxxx] 145 F.3d 1087 (9th Cir. 1998).

[clxxxi] See *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

[clxxxii] *Id.* at 11, 105 S.Ct. 1694.

[clxxxiii] *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988).

[clxxxiv] *Id.*

[clxxxv] *Chew v. Gates*, 27 F.2d 1432 (9th Cir. 1994) *cert. denied*, 513 U.S. 1148, 115 S.Ct. 1097 (1995); *Mathews v. Jones*, 35 F.3d 1046 (6th Cir. 1994).

[clxxxvi] *Robinette v. Barnes*, 854 F.2d 909 (6th Cir.1988).

[clxxxvii] *Id.* at 912.

[clxxxviii] See *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir.1998).

[clxxxix] *Mathews v. Jones*, 35 F.3d 1046 (6th Cir.1994).

[cxc] *Id.* at 1051 (citing *Robinette*, 854 F.2d at 913).

[cxci] *Id.* at 1052.

[cxcii] *Vathekan v. Prince George's County, Md.*, 935 F. Supp. 699 (DMd 1996).

[cxciii] *Carey v. Cassista*, 939 F. Supp. 136 (D Conn 1996).

[cxciv] *Mendoza v. Block*, 27 F. 3d 1357 (9th Cir 1994).

[[cxcv](#)] *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148, 115 S.Ct. 1097 (1995).

[[cxcvi](#)] *Marley v. City of Allentown*, 774 F.Supp. 343 (E.D.Pa.1991), *aff'd* 961 F.2d 1567 (3d Cir.1992).

[[cxcvii](#)] *Mendoza*, 27 F.3d at 1362.

[[cxcviii](#)] *Jarrett v. Town of Yarmouth*, 331 F.3d 140 (1st Cir.), *cert. denied*, 540 U.S. 1017 (2003). *See also* *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (holding that all claims of excessive force should be analyzed under the Fourth Amendment); *Aponte Matos v. Toledo Dávila*, 135 F.3d 182, 191 (1st Cir.1998) (same).

[[cxcix](#)] *Camilo-Robles v. Hoyos*, 151 F.3d 1, 6 (1st Cir.1998), *cert. denied*, 525 U.S. 1105 (1999).

[[cc](#)] *Kelley*, 288 F.3d at 6.

[[ccii](#)] *Watkins v. City of Oakland*, 145 F.3d 1087, 1092 (9th Cir.1998).

[[cciii](#)] *Id.* at 1093.

[[cciv](#)] *Vathekan v. Prince George's County*, 154 F.3d 173 (4th Cir.1998).

[[ccv](#)] *See Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (emphasizing that the reasonableness prongs for excessive force and qualified immunity are distinct inquiries).

[[ccvi](#)] 471 U.S. 1 (1985).

[[ccvii](#)] 490 U.S. 386 (1989).

[[ccviii](#)] *Id.* at 395.

[[ccix](#)] 973 F.2d 1328, 1333 (8th Cir. 1993).

[[ccx](#)] *Id.* at 1333. *See also*, *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993).

[[ccxi](#)] 71 F.3d 20 (1st Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996). The court reiterated this position in *Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005) and acknowledged that it was in the minority. It reasoned that the Supreme Court had mandated consideration of the totality of the circumstances in *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989).

[ccxiii] See, e.g., *Illinois v. Gates*, 459 U.S. 1028 (1983).

[ccxiii] *Greenidge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991); *Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993); *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992).

[ccxiv] 44 F.3d 643 (8th Cir. 1995).

[ccxv] 19 F.3d 1143 (7th Cir. 1994).

[ccxvi] *Id.* at 1150.

[ccxvii] 39 F.3d 912 (9th Cir. 1994).

[ccxviii] *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691 (1st Cir. 1994).

[ccxix] *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994).

[ccxx] *Carter v. Buscher*, 972 F.2d 1328 (7th Cir. 1992); *Scott v. Henrich*, 39 F.2d 912 (9th Cir. 1994); *Menuel v. City of Atlanta*, 25 F.3d 990 (11th Cir. 1994).

[ccxxi] *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992); *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992); *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993).

[ccxxii] 926 F.2d 494 (5th Cir. 1991).

[ccxxiii] 927 F.2d 789 (4th Cir. 1991). See also, *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991).

[ccxxiv] *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), *reh'g. en banc denied*, 779 F.2d 1129 (5th Cir. 1986), *cert. denied*, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed. 2d 686 (1987).

[ccxxv] *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989).

[ccxxvi] *Carter v. Rogers*, 805 F.2d 1153 (4th Cir. 1986).

[ccxxvii] *Tom v. Volda*, 963 F.2d 952 (7th Cir. 1992).

[ccxxviii] *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990).

[ccxxix] *Forrett v. Richardson*, 112 F.3d 416 (9th Cir. 1997).

- [ccxxx] *Thompson v. Williamson County*, 965 F. Supp. 1026 (M.D. Tenn. 1997).
- [ccxxxii] *Montoute v. Carr*, 114 F. 3d 181 (11th Cir. 1997).
- [ccxxxiii] *St. Hilaire v. City of Laconia*, 71 F 3d 20 (1st Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996).
- [ccxxxiiii] *Brothers v. Klevenhagen*, 28 F. 3d 452 (5th Cir 1994), *cert. denied*, 115 S. Ct. 639 (1994).
- [ccxxxv] *Roy v. Inhabitants of City of Lewiston*, 42 F 3d 691 (1st Cir. 1994).
- [ccxxxvi] *City of Canton v. Harris*, 489 U.S. 378 (1989).
- [ccxxxvii] *Patterson v. City of Joplin*, 878 F.2d 262 (8th Cir. 1989) (per curiam); *Roach v. City of Fredericktown*, 693 F.Supp. 795 (E.D. Mo. 1988), *aff'd*. 882 F.2d 294 (8th Cir. 1989); *but see Reed v. Hoy*, 909 F.2d 324 (9th Cir. 1990) *cert. denied*, 501 U.S. 1250, 111 S.Ct. 2887, 114 L.Ed. 2d 1053 (1991).
- [ccxxxviii] *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986); *Montgomery v. County of Clinton*, 743 F.Supp. 1253 (W.D. Mich. 1990), *aff'd. mem.*, 940 F.2d 661 (6th Cir. 1991).
- [ccxxxix] *Willhauck v Halpin*, 953 F.2d 689 (1st Cir. 1991).
- [ccxl] *Com. v. Smigliano*, 427 Mass. 490, 694 N.E.2d 341 (1998).
- [ccxli] *Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378 (1989).
- [ccxlii] *Brower v. County of Inyo*, 489 U.S. 593, 103 L. Ed.2d 628, 109 S. Ct. 1378 (1989) *on remand*, 884 F.2d 1316 (1989)
- [ccxliii] *Id.*
- [ccxliv] *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985)
- [ccxlv] *Campbell v. White*, 916 F.2d 421 (7th Cir. 1990), *cert. denied*, 499 U.S. 922, 111 S.Ct. 1314, 113 L.Ed. 2d 248 (1991).
- [ccxlvi] *Seekamp v. Michaud*, 109 F.3d 802, 807 (1st Cir. 1997).
- [ccxlvii] *Horta v. Sullivan*, 4 F. 3d 2 (1st Cir. 1993).
- [ccxlviii] *Seekamp v. Michaud*, 109 F.3d 802 (1st Cir. 1997).
- [ccxlviiii] *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708 (1998).

- [ccxlix] *Boveri v. Town of Saugus*, 113 F.3d 4 (1st Cir. 1997).
- [cccl] *Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996), *cert. denied*, 520 U.S. 1210, *reh'g denied*, 521 U.S. 1129 (1997).
- [cccli] *Trigalet v. City of Tulsa*, 239 F.3d 1150 (10th Cir. 2001).
- [cccliii] *Feist v. Simonson*, 222 F.3d 455 (8th Cir. 2000), *overruled by Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001).
- [cccliii] *Leddy v. Township of Lower Merion*, 114 F. Supp. 2d 372 (E.D. Pa. 2000).
- [cccliv] *Davis v. Township of Hillside*, 190 F.3d 167 (3rd Cir. 1999).
- [ccclv] *Onossian v. Block*, 175 F.3d 1169 (9th Cir. 1999).
- [ccclvi] *Feist v. Simonson*, 36 F. Supp. 2d 1136 (D. Minn. 1999).
- [ccclvii] *Hall v. Village of Bartonville Police Dept.*, 699 N.E.2d 148 (Ill. App. 1998).
- [ccclviii] *Gardner v. Vespia*, 252 F.3d 500, (1st Cir. 2001).
- [ccclix] *Kinan v. City of Brockton*, 876 F.2d 1029 (1st Cir. 1989); *Donata v. Hooper*, 774 F.2d 716 (6th Cir. 1985), *cert. denied*, 483 U.S. 1019 (1987).
- [ccclx] *Malley v. Briggs*, 475 U.S. 335, 345 (1986); *Hurvey v. Estes*, 65 F.3d 784 (9th Cir. 1995).
- [ccclxi] *B.C.R. Transport Co. v. Fontaine*, 727 F.2d 7 (1st Cir. 1984).
- [ccclxiii] *Hill v. McIntyre*, 884 F.2d 271 (6th Cir. 1989); *Hale v. Fish*, 899 F.2d 390 (5th Cir. 1990); and *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988)
- [ccclxiii] *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371 (1980).
- [ccclxiv] *Fletcher v. Town of Clinton*, 196 F.3d 41, 51 (1st Cir. 1999).
- [ccclxv] *Florida v. Bostick*, 501 U.S. 429, 434-435 (1991); *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984).
- [ccclxvi] *United States v. Drayton*, 536 U.S. 194, 200-201 (2002); *United States v. Lee*, 317 F.3d 26 (1st Cir. 2003).
- [ccclxvii] *Groh v. Ramirez*, 540 U.S. 551 (2004).

[cclxviii] *Dalia v. United States*, 441 U.S. 238 (1979).

[cclxix] *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995).

[cclxx] *Commonwealth v. Garner*, 423 Mass. 735 (1996).

[cclxxi] *Pray v. City of Sandusky*, 49 F.3d 1154 (6th Cir. 1995); *Velardi v. Walsh*, 40 F.3d 569 (2d Cir. 1994); *Samuels v. Smith*, 839 F.Supp. 959 (D.Conn. 1993), *but see*, *Dawkins v. Graham*, 50 F.3d 532 (8th Cir. 1995).

[cclxxii] *Tarpley v. Green*, 684 F.2d 1 (D.C. Cir. 1982); *Duncan v. Barnes*, 592 F.2d 1336 (5th Cir. 1979).

[cclxxiii] *Danta v. Hopper*, 774 F.2d 716 (6th Cir. 1995), *cert. den.*, 483 U.S. 1019 (1987).

[cclxxiv] *Bird v. Stewart*, 811 F.2d 554 (11th Cir. 1987).

[cclxxv] *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994).

[cclxxvi] *Fuller v. Vines*, 36 F.3d 65 (9th Cir. 1994), *cert. denied sub nom.*, *City of Richmond v. Fuller*, 514 U.S. 1017, 115 S.Ct. 1361 (1995).

[cclxxvii] *McCrimmon v. Caine County*, 606 F.Supp. 216 (N.D. Ill. 1985).

[cclxxviii] *Brown v. District of Columbia*, 636 F.Supp. 1479 (D.D.C. 1986).

[cclxxix] *Handschuh v. Superior Court (Osborne)*, 166 Cal.App.3d 31, 212 Cal.Rpt. 296 (1985).

[cclxxx] *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), *cert. denied*, 516 U.S. 865, 116 S.Ct. 179 (1995).

[cclxxxi] *Berger v. Hanlon*, 129 F. 3d 505 (9th Cir. 1997).

[cclxxxii] *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999).

[cclxxxiii] *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 325, 107 S.Ct. 1149, 94 L.Ed.2d 347.

[cclxxxiv] *Payton v. New York*, 445 U.S. 573, 585 (1980); also, *compare Michigan v. DeFillippo*, 443 U.S. 31 (1979); *State of Delaware v. Prouse*, 440 U.S. 648 (1979); *Brown v. Texas*, 443 U.S. 47 (1979); 442 U.S. 200 (1979).

[[cclxxxv](#)] *Horton v. California*, 496 U.S. 128, 136-137 (1990) (plain view warrantless seizure).

[[cclxxxvi](#)] *Terry v. Ohio*, 392 U.S. 1 (1968).

[[cclxxxvii](#)] *Bond v. United States*, 529 U.S. 334 (2000).

[[cclxxxviii](#)] *United States v. Barboza*, 412 F.3d 15 (1st Cir. 2005).

[[cclxxxix](#)] *Specht v. Jensen*, 832 F.2d 1516 (1987), *cert. denied*, 488 U.S. 1009 (1989).

[[ccxc](#)] *Pasqualone v. Gately*, 422 Mass. 398, 662 N.E. 2d 1034 (1996).

[[ccxci](#)] *Bell v. Wolfish*, 441 U.S. 520 (1979).

[[ccxcii](#)] *Swain v. Spinney*, 117 F. 3d 1 (1st Cir. 1997); *Webber v. Dell*, 804 F. 2d 796 (2d Cir. 1986); *Watt v. City of Richardson Police Dept.*, 849 F. 2d 195 (5th Cir. 1988); *Hay v. Waldron*, 835 F. 2d 481 (5th Cir. 1988).

[[ccxciii](#)] *Burns v. Loranger*, 907 F. 2d 233 (1st Cir. 1990) quoting *U.S. v. Adams*, 621 F. 2d 41 (1st Cir. 1980).

[[ccxciv](#)] *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

[[ccxcv](#)] *Roberts*, 239 F.3d at 110 (citing *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir.1996)).

[[ccxcvi](#)] *Bell*, 441 U.S. at 559.

[[ccxcvii](#)] *E.g., Roberts*, 239 F.3d at 108.

[[ccxcviii](#)] *United States v. Cofield*, 391 F.3d 334, 337 (1st Cir. 2004).

[[ccxcix](#)] *Swain v. Spinney*, 117 F.3d 1, 7 (1st Cir. 1997) (emphasis added).

[[ccc](#)] *Savard v. Rhode Island*, 320 F.3d 34 (1st Cir. 2003), *reh'g en banc denied*, 338 F.3d 23, *cert. denied*, 540 U.S. 1109 (2004).

[[ccc](#)] *Roberts*, 239 F.3d at 108.

[[cccii](#)] *United States v. Cofield*, 391 F.3d 334 (1st Cir. 2004).

[[ccciii](#)] *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir.1983) (internal citations omitted).

[[ccciv](#)] *Rodrigues v. Furtado*, 950 F. 2d 805 (1st Cir. 1991).

[[cccvi](#)] *Carroll v. United States*, 267 U.S. 132, 158-159 (1925).

[[cccvi](#)] *Chambers v. Maroney*, 399 U.S. 42 (1970).

[[cccviii](#)] *United States v. Ross*, 456 U.S. 798 (1982).

[[cccvi](#)] *California v. Acevedo*, 500 U.S. 565 (1991).

[[cccix](#)] *See, Spratlin v. Montgomery County*, 941 F.2d 1207 (4th Cir. 1991); *Hansen v. Bennett*, 948 F.2d 397 (7th Cir. 1991), *cert. denied*, 504 U.S. 910, 112 S.Ct. 1939 (1992); *City of Milwaukee v. Wroten*, 466 N.W.2d 861 (Wisc. 1991). *See Rzeznik v. Chief of Police of Southampton*, 374 Mass. 475, 373 N.E.2d 1128 (1978); *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Guardianship of Hurley*, 394 Mass. 554, 476 N.E.2d 941, 945 (1985).

[[cccxi](#)] *See, e.g., Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977) *cert. denied*, 438 U.S. 916, *reh'g denied*, 439 U.S. 886 (1978); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.) *cert. denied*, 423 U.S. 930 (1975).

[[cccxi](#)] *Pickering v. Board of Education*, 391 U.S. 563, 572-73, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

[[cccxi](#)] *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 465, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979).

[[cccxi](#)] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982).

[[cccxi](#)] *Abraham v. Nagle*, 116 F. 3d 11 (1st Cir. 1997).

[[cccxi](#)] *City of Houston*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987).

[[cccxi](#)] *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.) *cert. denied*, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975); *see also Dellums v. Powell*, 566 F.2d 167 (D.C. Cir.) *cert. denied*, 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed. 1161 (1977); *Angola v. Civiletti*, 666 F.2d 1 (2nd Cir. 1981).

[[cccxi](#)] *Brimfield v. Jones*, 849 F.2d 152 (5th Cir. 1988); *State v. Richard*, 836 P. 622 (Nev. 1992) (*per curiam*); *City of Bismark v. Schoppert*, 469 N.W.2d 808 (N.D. 1991).

[[cccxi](#)] *Central Florida Nuclear Free Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120, 106 S.Ct. 1637, 90 L.Ed.2d 183 (1986).

[[ccccxix](#)] *Wheelock v. U.S.*, 552 A.2d 503 (D.C. App. 1988) *distinguishing Shiel v. U.S.*, 515 A.2d 405 (D.C.App. 1986), *cert. denied*, 485 U.S. 1010, 108 S.Ct. 1477, 99 L.Ed.2d 706 (1988).

[[ccccxx](#)] *City of Watseka v. Illinois Public Action Committee*, 796 F.2d 1547 (7th Cir. 1986), *aff'd. mem.*, 479 U.S. 1048, 107 S.Ct. 919, 93 L.Ed.2d 972 (1987), *reh'g. denied*, 480 U.S. 926, 107 S.Ct. 1389, 94 L.Ed.2d 703 (1987).

[[ccccxxi](#)] *Greenpeace U.S.A. v. City of Glendale*, 3 Cal. App. 4th 340, 4 Cal. Rptr. 2d 672 (1992).

[[ccccxxii](#)] *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989); *National People's Action v. Village of Wilmette*, 914 F.2d 1008 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1311, 113 L.Ed. 2d 245 (1991); *Cannon v. City & Co. of Denver*, 998 F.2d 867 (10th Cir. 1993).

[[ccccxxiii](#)] *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948).

[[ccccxxiv](#)] *Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987).

[[ccccxxv](#)] *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319 (1st Cir. 1993).

[[ccccxxvi](#)] *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

[[ccccxxvii](#)] *Presbyterian Church v. U.S.*, 742 F. Supp. 1505 (D. Ariz. 1990), *on remand of* 870 F.2d 518 (9th Cir. 1989).

[[ccccxxviii](#)] *McGee v. Hester*, 815 F.2d 1193 (8th Cir.), *cert. denied*, 484 U.S. 963, 108 S.Ct. 451, 98 L.Ed.2d 392 (1987).

[[ccccxxix](#)] *Ruscavage v. Zuratt*, 821 F. Supp. 1078 (ED Pa 1993).

[[ccccxxx](#)] *DeLoach v. Bevers*, 922 F 2d 618 (10th Cir. 1990).

[[ccccxxxi](#)] *Gunderson v. Schlueter*, 904 F 2d 407 (8th Cir. 1990).

[[ccccxxxii](#)] *See Rzeznik v. Chief of Police of Southampton*, 374 Mass. 475, 373 N.E.2d 1128 (1978); *Broderick v. Roache*, 996 F.2d 1294 (1st Cir. 1993); *Horta v. Sullivan*, 4 F.3d 2 (1st Cir. 1994).

[[ccccxxxiii](#)] M.G.L. c. 140, §§. 122, 122B and 131.

[[ccccxxxiv](#)] *Rivera-Ramos v. Roman*, 156 F. 3d 276 (1st Cir. 1998).

[[ccccxxxv](#)] *Id.*

[[ccccxxvi](#)] *Gardner v. Vespia*, 252 F.3d 500 (1st Cir. 2001).

[[ccccxxvii](#)] *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 675-676, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996).

[[ccccxxviii](#)] *Lewis v. City of Boston*, 321 F.3d 207, 218 (1st Cir. 2003).

[[ccccxxix](#)] *Lewis v. City of Boston*, 321 F.3d 207, 218 (1st Cir. 2003); *see also* *Mullin v. Town of Fairhaven*, 284 F.3d 31, 37-38 (1st Cir. 2002); *see Connick v. Myers*, 461 U.S. 138, 147-48, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Mt. Healthy City Sch. Dist. Bd. of Educ. V. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d. 811 (1968).

[[ccccxli](#)] *See Tang v. Rhode Island Dep't of Elderly Affairs*, 163 F.3d 7, 12 (1st Cir.1998); *Boyle v. Burke*, 925 F.2d 497, 505 (1st Cir.1991) (citing *Connick v. Myers*, 461 U.S. 138, 140, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)).

[[ccccxlii](#)] *Boyle v. Burke*, 925 F.2d 497 (1st Cir.1991).

[[ccccxliii](#)] *Pickering v. Board of Education*, 391 U.S. 563, 569, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

[[ccccxliiii](#)] *Connick v. Myers*, 461 U.S. 138, 143, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

[[ccccxliv](#)] *Waters v. Churchill*, 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994).

[[ccccxlv](#)] 511 U.S. at 675, 114 S.Ct. 1878.

[[ccccxlvii](#)] 163 F.3d at 12.

[[ccccxlviii](#)] *Meaney v. Dever*, 326 F.3d 283 (1st Cir. 2003).

[[ccccxlviiii](#)] *City of San Diego v. Roe*, 543 U.S. 77, 125 S.Ct. 521 (2004).

[[ccccxlix](#)] *Tripp v. Cole*, 425 F.3d 5, 2005 WL 2358701 (2005).

[[cccccl](#)] *Connick v. Meyers*, 461 U.S. 138, 103 S.Ct. 138, 75 L.Ed.2d 708 (1983).

[[cccccli](#)] *Vickowski v. Hukowicz*, 201 F.Supp.2d 195 (D.Mass. 2002).

[[cccccliii](#)] *See Padilla-Garcia v. Guillermo Rodriguez*, 212 F.3d 69, 78-79 (1st Cir.2000) (noting public comment that mayor failed to comply with regulations

by not publicly announcing new projects and respective budget allotments was “easily distinguishable from self-serving statements that promote a personal interest.”).

[[cccliii](#)] *See also Flynn v. City of Boston*, 140 F.3d 42, 47 (1st Cir.), *cert. denied*, 525 U.S. 961 (1998); *Alinovi v. Worcester Sch. Comm.*, 777 F.2d 776, 787 (1st Cir.1985), *cert. denied*, 479 U.S. 816 (1986).

[[cccliv](#)] *Brayton v. Monson Public Schools*, 950 F.Supp. 33, 37 (D.Mass. 1997). *Compare Rankin v. McPherson*, 483 U.S. 378, 386-87, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (holding that plaintiff’s comment to coworker concerning the attempted assassination of President Reagan dealt with a matter of public concern where comment “was made in the course of a conversation addressing the policies of the President’s administration” and “came on the heels of a news bulletin regarding what [was] certainly a matter of heightened public attention”).

[[ccclv](#)] *O’Connor v. Steeves*, 994 F.2d 905, 915 (1st Cir.1993), *cert. denied sub nom.*, *Town of Nahant v. O’Connor*, 510 U.S. 1024 (1993). *Id.* at 915.

[[ccclvi](#)] *United States v. National Treasury Employees Union*, 513 U.S. 454, 466, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (emphasis in original), *quoting Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

[[ccclvii](#)] *Baron v. Suffolk County Sheriff’s Dept.*, 402 F.3d 225 (1st Cir. 2005). *See* Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U.L.Rev. 17, 63-67 (2000) (describing depth and pervasiveness of problem of codes of silence in law enforcement).

[[ccclviii](#)] *See Jeffes v. Barnes*, 208 F.3d 49, 64 (2d Cir.), *cert. denied sub nom.*, *Town of Schenectady v. Jeffes*, 531 U.S. 813 (2000) (overturning dismissal of § 1983 case brought by corrections officer subject to harassment for statements made to news media and federal investigators concerning other officers’ treatment of inmates).

[[ccclix](#)] *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Mullin v. Town of Fairhaven*, 284 F.3d 31 (1st Cir. 2002).

[[ccclx](#)] *O’Connor v. Steeves*, 994 F.2d 905 (1st Cir. 1993), *cert. denied sub nom.*, *Town of Nahant v. O’Connor*, 510 U.S. 1024 (1993).

[[ccclxi](#)] *Guilloty Perez v. Pierluisi*, 339 F.3d 43 (1st Cir. 2003).

[[ccclxii](#)] *Mihos v. Swift*, 358 F.3d 91 (1st Cir. 2004).

[[ccclxiii](#)] *Guilloty Perez v. Pierluisi*, 339 F.3d 43 (1st Cir. 2003).

[ccclxiv] *Storlazzi v. Bakey*, 894 F.Supp. 494, 502 (D.Mass.), *aff'd*, 68 F.3d 455 (1st Cir.1995) (quoting *Acevedo-Diaz v. Aponte*, 1 F.3d 62, 66 (1st Cir.1993)).

[ccclxv] *Storlazzi v. Bakey*, 894 F.Supp. at 502.

[ccclxvi] *Compare, e.g., Ways v. City of Lincoln*, 909 F.Supp. 1316, 1325 (D.Neb.1995) (five years between prior lawsuit and allegedly retaliatory acts too long to provide causal nexus), *with Parks v. City of Brewer*, 56 F.Supp.2d 89, 96 (D.Me.1999) (inference of causation appropriate where, eight days after plaintiff voiced concerns, he was notified that his performance review would be continued, and, at the continued review a few weeks later, plaintiff was informed that his contract would not be renewed).

[ccclxvii] *Rubinovitz v. Rogato*, 60 F.3d 906 (1st Cir.1995).

[ccclxviii] *Fletcher v. Szostkiewicz*, 190 F.Supp.2d 217, (D. Mass. 2002).

[ccclxix] *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). *Padilla-Garcia v. Guillermo Rodriguez*, 212 F.3d 69, 74 (1st Cir.2000).

[ccclxx] *Wagner v. Devine*, 122 F.3d 53, 56 (1st Cir.1997), *cert. denied*, 522 U.S. 1090 (1998) (citing *Elrod v. Burns*, 427 U.S. 347, 372, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and *Branti v. Finkel*, 445 U.S. 507, 517-18, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980)).

[ccclxxi] *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 242 (1st Cir.1986), *cert. denied*, 481 U.S. 1014 (1987).

[ccclxxii] *Id.* at 242 (citation and internal quotation marks omitted).

[ccclxxiii] *Chavez v. Martinez*, 538 U.S. 760, 766-767 (2003); *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989)

[ccclxxiv] *Veilleux v. Perschau*, 101 F.3d 1, 3 (1st Cir. 1996); *Mahan v. Plymouth County House of Corrections*, 64 F.3d 14, 17 (1st Cir. 1995); *Weaver v. Brenner*, 40 F.3d 527, 535 (2d Cir. 1994); *Wiley v. Doory*, 14 F.3d 993, 996 (4th Cir. 1994); *Gray v. Spillman*, 925 F.2d 90, 94 (4th Cir. 1994).

[ccclxxv] *Chavez v. Martinez*, 538 U.S. 760 (2003).

[ccclxxvi] *Crowe v. County of San Diego*, 359 F.Supp.2d 994 (S.D.CA 2005).

[ccclxxvii] *Haynes v. Washington*, 373 U.S. 503 (1963); *Culombe v. Connecticut*, 367 U.S. 568 (1961).

[ccclxxxviii] *Miranda v. Arizona*, 384 U.S. 436, *reh'g denied*, 385 U.S. 890 (1966).
Chavez v. Martinez, 538 U.S. at 772 (2003).

[ccclxxxix] *Broderick v. Police Commissioner of Boston*, 368 Mass. 33, 38 (1976).

[ccclxxx] *Patch v. Mayor of Revere*, 397 Mass. 454, 455 (1986).

[ccclxxxii] *See Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (use immunity required under federal law); *Carney v. Springfield*, 403 Mass. 604, 610 (1988) (transactional immunity required under Massachusetts law).

[ccclxxxiii] *Riley v. Dorton*, 115 F. 3d 1159 (4th Cir.1997).

[ccclxxxiiii] *Mahan v. Plymouth County House of Correction*, 64 F 3d 14 (1st Cir. 1995).

[ccclxxxv] *Simmons v. O'Brien*, 77 F 3d 1093 (8th Cir. 1996).

[ccclxxxvi] *Anngara v. City of Chicago*, 897 F. Supp. 355 (ND Ill 1965).

[ccclxxxvii] *Cinelli v. Coutillo*, 896 F. 2d 650, (1st Cir. 1990).

[ccclxxxviii] *Commonwealth v. Butler*, 423 Mass. 517, 837 (1996); *Commonwealth v. Ortiz*, 422 Mass. 64, 68-69 (1996); *Commonwealth v. Rosario*, 422 Mass. 48, 76-77 (1996).

[ccclxxxix] *Brady v. Maryland*, 373 U.S. 1194 (1963); *see Strickler v. Greene*, 527 U.S. 263 (1999) (history of *Brady* line of cases in order to distill test for *Brady* violation); See also, M. Avery, Paying for Silence: The Liability of Police Officers Under Section 1983 for Suppressing Exculpatory Evidence, 13 Temple Political & Civil Rights L. Rev. 1 (2003).

[ccclxxxix] *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999).

[cccxcl] *Limone v. Condon*, 372 F.3d 39 (1st Cir. 2004); *Brady v. Dill*, 187 F.3d 104 (1st Cir. 1999); *Reid v. Simmons*, 163 F.Supp.2d 81 (D.N.H. 2001), *aff'd*, 47 Fed.Appx. 5 (1st Cir. 2002), *cert. denied*, 540 U.S. 894 (2003).

[cccxci] *Reid v. Simmons*, 163 F.Supp.2d 81 (D.N.H. 2001), *aff'd*, 47 Fed.Appx. 5 (1st Cir. 2002), *cert. denied*, 540 U.S. 894 (2003).

[cccxcii] *Johnson v. Mahoney*, 42 F.3d 83, 2005 WL 2277647 (1st Cir. 2005).

[cccxci] *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 207 n. 3 (1st Cir. 1999).

[[cccxciv](#)] *Davis v. Rennie*, 264 F.3d 86, (1st Cir. 2001), *cert. denied*, 535 U.S. 1053 (2002).

[[cccxcv](#)] *Byrd v. Brishke*, 466 F.2d 6 (1st Cir. 1972).

[[cccxcvi](#)] *Id.* at 11.

[[cccxcvii](#)] *McHenry v. Chadwick*, 896 F.2d 184 (6th Cir. 1990).

[[cccxcviii](#)] *Durham v. NuMan*, 97 F.3d 862 (6th Cir. 1996).

[[cccxcix](#)] *Davis v. Rennie*, 264 F.3d 86, (1st Cir. 2001).

[[cd](#)] *See also, Gaudreault v. Salem*, 923 F.2d 203 (1st Cir. 1990), *cert. denied*, 500 U.S. 956 (1991).

[[cdi](#)] *U.S. v. Lanier*, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed. 2432 (1997).

[[cdii](#)] *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979).

[[cdiii](#)] *Mitchell v. City of Boston*, 130 F.Supp.2d 201 (D. Mass., 2001).

[[cdiv](#)] *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983).

[[cdv](#)] *See, e.g., Franklin v. Terr*, 201 F.3d 1098, 1101 (9th Cir. 2000).

[[cdvi](#)] *See Malachowski v. City of Keene*, 787 F.2d 704, 712 (1st Cir.), *cert. denied*, 479 U.S. 828, *reh'g denied*, 479 U.S. 1022 (1986); *Guzman-Rivera v. Rivera-Cruz*, 55 F.3d 26, 29 (1st Cir.1995) (stating the immunized nature of an act “does not spread backwards like an inkblot, immunizing everything it touches.”); *Juriss v. McGowan*, 957 F.2d 345, 348 (7th Cir.1992) (holding *Briscoe* does not absolutely immunize police officer for a claim arising out of a false arrest on warrant that was based on the officer’s false grand jury testimony).

[[cdvii](#)] *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

[[cdviii](#)] *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir.), *cert. denied*, 493 U.S. 820 (1989).

[[cdix](#)] *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989).

[[cdx](#)] *Santiago v. Fenton*, 891 F.2d 373 (1st Cir. 1989).

[[cdxi](#)] *Manarite v. City of Springfield*, 957 F.3d 953 (1st Cir.), *cert. denied*, 506 U.S. 837 (1992).

[[cdxii](#)] *Clancy v. McCabe*, 441 Mass. 311 (2004).

[[cdxiii](#)] *Hewitt v. Helms*, 459 U.S. 460 (1983); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

[[cdxiv](#)] *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

[[cdxv](#)] *Mard v. Town of Amherst*, 350 F.3d 184 (1st Cir. 2003).

[[cdxvi](#)] G.L. c. 31, §§ 41-43.

[[cdxvii](#)] *Whalen v. Massachusetts Trial Court*, 397 F.3d 19 (1st Cir. 2005).

[[cdxviii](#)] *Hadfield v. McDonough*, 407 F.3d 11 (1st Cir. 2005).

[[cdxix](#)] *Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981).

[[cdxx](#)] *Mard v. Town of Amherst*, 350 F.3d 184 (1st Cir. 2003); *Wojcik v. Massachusetts State Lottery Commn.*, 300 F.3d 92 (1st Cir. 2002); *O'Neill v. Baker*, 210 F.3d 41 (1st Cir. 2000).

[[cdxxi](#)] *Hadfield v. McDonough*, 407 F.3d 11 (1st Cir. 2005); *Cronin v. Town of Amesbury*, 81 F.3d 257 (1st Cir. 1996) (per curiam).

[[cdxxii](#)] *Herwins v. City of Revere*, 163 F.3d 15 (1st Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999).

[[cdxxiii](#)] *Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981).

[[cdxxiv](#)] *Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Figueroa-Serrano v. Ramos-Alverio*, 221 F.3d 1 (1st Cir. 2000).

[[cdxxv](#)] *Mireless v. Waco*, 502 U.S. 9 (1991); *Stump v. Sparkman*, 435 U.S. 349 (1978).

[[cdxxvi](#)] *Forrester v. White*, 484 U.S. 219 (1988).

[[cdxxvii](#)] *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Burns v. Reed*, 500 U.S. 478 (1991); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

[[cdxxxviii](#)] *Briscoe v. LaHue*, 460 U.S. 325 (1983).

[[cdxxxix](#)] *Kalina v. Fletcher*, 522 U.S. 118 (1997).

[[cdxxx](#)] *Cignetti v. Healy*, 89 F.Supp.2d 106 (D.Mass. 2000).

[[cdxxxxi](#)] *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

[[cdxxxii](#)] *Malley v. Briggs*, 475 U.S. 335 (1986).

[[cdxxxiii](#)] *Hunter v. Bryant*, 502 U.S. 224 (1991); *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

[[cdxxxiv](#)] *Saucier v. Katz*, 533 U.S. at 206, 121 S. Ct. 2151 (qualified immunity operates “to protect officers from the sometimes ‘hazy border between excessive and acceptable force’ “).

[[cdxxxv](#)] *Saucier v. Katz*, 533 U.S. 194 (2001).

[[cdxxxvi](#)] *Wilson v. City of Boston*, 421 F.3d 45 (1st Cir. 2005); *Burke v. Town of Walpole*, 405 F.3d 66 (1st Cir. 2005).

[[cdxxxvii](#)] *Ricci v. Urso*, 974 F.2d 5 (1st Cir. 1992).

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