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Section 1983—Defending the Government

Introduction to § 1983: Defending the Government and its Officers

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Introduction to § 1983: Defending the Government and its Officers

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Background

This paper started as a class I developed to teach in-house in my office, *Introduction to Section 1983: Hey, Let's Sue the District!* It was designed for beginning litigators, law students, and interns, not experienced attorneys. It was written from the defensive perspective, as a pragmatic, hands-on guide to the basic concepts and cases necessary to defend the District of Columbia in Section 1983 cases. I did not learn about 42 U.S.C. § 1983 in law school, so I learned the topic in the worst way possible—as counsel defending the government in federal litigation.

My interest in the history of Section 1983 developed from questions concerning the scope of the District's authority and responsibility as a unique, non-State federal enclave. To understand the purposes and operation of § 1983, it helps to know the context in which it was enacted.

History

Title 42, U.S. Code § 1983 began as Section 1 of the Ku Klux Act/Civil Rights Act of Apr. 20, 1871, 17 Stat. 13. It provides a cause of action for violations of the Constitution. Prevailing parties in § 1983 actions are entitled to reasonable attorney's fees. "In any action or proceeding to enforce a provision of sections . . . 1983 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." 42 U.S.C. § 1988b.

The Thirteenth Amendment to the Constitution was passed by Congress on January 31, 1865, and ratified December 6, 1865. It reads:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress *shall have power to enforce this article by appropriate legislation*.

U.S. Const. amend. XIII.

In 1868, Congress enacted the Fourteenth Amendment. Together, the Thirteenth and Fourteenth Amendments (and Fifteenth) are known as the "Reconstruction Amendments," enacted to protect the rights of "national citizenship." *See, generally, City of Richmond v. J.A. Croson Co.*, 488 U.S. 469,

559–61 (1989) (Marshall, J., dissenting); *Slaughter-House Cases*, 83 U.S. 36, 70–73 (1872). In particular, the Fourteenth Amendment was enacted to explicitly overrule *Dred Scott v. Sandford*, 60 U.S. 393 (1857). *See Sugarman v. Dougall*, 413 U.S. 634, 652 (1973). *Dred Scott* held that people of African descent brought into the United States and held as slaves (or their descendants) were not protected by the Constitution and were not United States citizens. The Fourteenth Amendment reads, in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens* of the United States and of the State wherein they reside. **No State** shall *make or enforce* any law which shall *abridge the privileges or immunities* of citizens of the United States*; nor shall any State deprive* any person of life, liberty, or property, without *due process* of law; nor deny to any person within its jurisdiction the *equal protection* of the laws.
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> * * *
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> Section 5. The Congress *shall have power to enforce, by appropriate legislation,* the provisions of this article.

U.S. Const. amend. XIV.

Congress used the language highlighted above to crack down on the KKK. The legislative history of the Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983, shows that its purpose was to enforce the provisions of the Fourteenth Amendment. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 665 (1978). Congress wanted to extend a remedy not only where a State had passed an unconstitutional statute, but also where officers of the State were deliberately indifferent to the rights of African-American citizens.

In *Monell*, the Supreme Court undertook a "fresh analysis" of the debate accompanying the passage of that legislation, and dug deep into the legislative history. *See id*.[1] That legislative history revealed that, as originally envisioned, the

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[1] *See also Briscoe v. LaHue*, 460 U.S. 325, 337–38 (1983):

> The Ku Klux Act, 17 Stat. 13, was enacted on April 20, 1871, less than a month after President Grant sent a dramatic message to Congress describing the breakdown of law and order in the Southern states. During the debates, supporters of the bill repeatedly described the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern states. Hours of oratory were devoted to the details of Klan outrages—arson, robbery, whippings, shootings, murders, and other forms of violence and intimidation—often committed in disguise and under cover of night. These acts of lawlessness went unpunished, legislators asserted,

Act did not impose liability on cities for the depredations of the KKK, but "made any inhabitant of a municipality liable for damage inflicted by persons 'riotously and tumultuously assembled.'" 436 U.S. at 666 (quoting Cong. Globe, 42d Cong., 1st Sess., 663 (1871) (hereinafter Globe). "Execution of the judgment was not to run against the property of the government unit, however, but against the private property of any inhabitant." *Id*. at n.14. The purpose of that language "was to enlist the aid of persons of property in the enforcement of the civil rights laws by making their property 'responsible' for Ku Klux Klan damage." *Id*. at 667 & n.16 ("Let the people of property in the southern States understand that if they will not make the hue and cry and take the necessary steps to put down lawless violence in those States their property will be holden responsible, and the effect will be most wholesome.") (quoting Globe 761 (remarks of Sen. Sherman)).

The Act's sponsors explained that Section 1 of the Fourteenth Amendment embodied a "right of protection" by the federal government. *See id*. at 670 (quoting Cong. Globe, 42d Cong., 1st Sess., App. 69 (1871) (quoting *Corfield v. Coryell*, 3 F. Cas. 230, 4 Wash. C.C. 371 (CC ED Pa. 1825)). The sponsors also discussed the relevant precedent, in the form of legislation enacted by Congress to enforce the provisions of the Constitution. That, ironically, included legislation to enforce the fugitives from justice and fugitive slave provisions of Article IV of the Constitution. *Id*. at 672 (discussing the Act of Feb. 12, 1793, 1 Stat. 302, upheld in *Prigg v. Pennsylvania*, 16 Pet. 539 (1842)). The Constitution gave slave owners a federal right to unhindered possession of their slaves, wherever they might be found. But because some State laws (and State officials) might be unhelpful or even hostile to the rights of the slave owners, the "right" conferred by the Constitution would be ineffective if left to the States. The Supreme Court in *Prigg* therefore held that the "natural inference" was that Congress had the power to ensure an appropriate remedy for the right conveyed. *See id*.

Thus, building on the logic of *Prigg*, the Civil Rights Act's sponsors "argued that a remedy against municipalities and counties was an appropriate—and hence constitutional—method for ensuring the protection which the Fourteenth Amendment made every citizen's federal right." *Id*. (citing Globe 751). Ultimately,

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> because Klan members and sympathizers controlled or influenced the administration of state criminal justice.
>
> [I]t is clear from the legislative debates that, in the view of the Act's sponsors, the victims of Klan outrages were deprived of "equal protection of the laws" if the perpetrators systematically went unpunished. Proponents of the measure repeatedly argued that, given the ineffectiveness of state law enforcement and the individual's federal right to "equal protection of the laws," an independent federal remedy was necessary and Congress had the power to provide it.

Id. (citation and footnotes omitted).

in passing the Act, Congress "accept[ed] the basic principle that the inhabitants of a community were bound to provide protection against the Ku Klux Klan." *Id*. at n.57.

The Statute

The text of 42 U.S.C. § 1983 currently reads:

> 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.

Section 1983 does not create any substantive rights; a plaintiff cannot go into court and claim a "violation" of § 1983 (although such lawsuits are filed every day). It provides a cause of action for violations of the Constitution or federal law. "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144, n. 3 (1979)).

The seminal *Monell* case determined that municipalities are "persons" per § 1983, and subject to suit. However, there is no vicarious liability or "*respondeat superior"* liability under Section 1983. In other words, a city may not be held liable under § 1983 solely because one of its employees committed a constitutional tort, even in the course of his or her official duties. *Board of the County Commissioners v. Brown*, 520 U.S. 397, 403 (1997) (citing *Monell*, 436 U.S. at 689). *See also City of St. Louis v. Praprotnik*, 485 U.S. 112, 125 n.2 (1988) ("[C]ongress intended to hold municipalities responsible under § 1983 only for the execution of official policies and customs, and not for injuries inflicted solely by employees or agents."). The tortfeasor must have been a policymaker, or acting according to an official policy.

To establish liability under § 1983, a plaintiff must prove two things: (1) a *violation* of the Constitution or federal law; and (2) that a municipal "*policy* or *custom*" *caused* the violation, *i.e.*, was the "moving force" behind the violation. While there are only two elements that a plaintiff must make out to state a claim, he or she must still make fairly detailed allegations that some municipal policy caused a violation of his or her constitutional rights, a basic requirement that still can trip up opposing counsel. Some examples: In *Philogene v. District of Columbia*, 864 F.Supp.2d 127 (D.D.C. 2012), a plaintiff alleged that a police officer "improperly cited, arrested, and prosecuted him for operating a nightclub without a license." The Court granted the District's motion to dismiss:

> Even if his allegations were sufficient to establish a predicate constitutional violation, the plaintiff's claim founders on the second

> step of the inquiry. The [Complaint] does not articulate any specific allegations describing a government policy or custom behind [the officer's] actions. Instead, the plaintiff summarily reiterates the elements of a claim for municipal liability under *Monell*. These formulaic and threadbare recitals of a cause of action are legally insufficient to shield the plaintiff's claim from a motion to dismiss.

Id. at 131 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Similarly, in *Davis v. District of Columbia*, 800 F. Supp. 2d 28 (D.D.C. 2011), the Court found the allegations wanting. There, a woman called police, explaining that her boyfriend had locked himself in the bathroom, was paranoid and suicidal, and she feared for the safety of her children. The police arrived and entered the bathroom, where the boyfriend pointed a gun at them. The police fired, and the boyfriend later died of his wounds. The woman sued, alleging (correctly) that the police had an official policy to use "minimum force" and exhaust every other means before using firearms. Plaintiff's Section 1983 theory was that the police did not follow this policy, and acted in violation of it. The Court granted the District's motion to dismiss, finding that plaintiff's theory meant that the cited policy was *not* the "moving force" behind the civil-rights violations, because the police did *not* follow that policy, consequently, the District could not be liable on that theory.

Causation is key in § 1983 litigation, and there are a number of ways a plaintiff can show such causation: (1) an express municipal policy; (2) action (or omission) by a "policymaker;" (3) a "custom or usage;" or (4) deliberate indifference. *See, e.g.*, *Lightfoot v. District of Columbia*, 273 F.R.D. 314 (D.D.C. 2011); *Brandon v. City of New York*, 705 F.Supp.2d 261, 276–77 (S.D.N.Y. 2010); *World Wide Street Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 (5th Cir. 2009); *Darchak v. Chicago Bd. of Ed.*, 580 F.3d 622, 629 (7th Cir. 2009); *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999); *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003).

Express Policy

An *express municipal policy* is a law, ordinance, regulation, or written policy; some officially adopted position by which the city binds itself. An express municipal policy may violate the Constitution, either facially, or as applied (or both). Two of my cases will illustrate how this might happen. In *Daskalea v. Wash. Humane Soc'y*, 710 F.Supp.2d 32 (D.D.C. 2010), plaintiffs alleged that the District's animal-cruelty law, on its face, failed to provide due process to owners of pets who had been seized. The Court agreed, and the District amended its law, mooting plaintiffs' facial challenge. *Id*. at 41–42. Plaintiffs had also alleged that the law, as applied by Washington Humane Society employees to plaintiffs, violated due process. But because the WHS had independent law-enforcement powers (granted by Congress) and was not being controlled or directed by the District, plaintiffs were not entitled to damages from the District simply from the *existence* of the unconstitutional law. *Id*. at 43.

Barnes v. District of Columbia, 793 F.Supp.2d 260 (D.D.C. 2011), was a class-action by former inmates alleging overdetention and improper strip searches. In 2003, with similar litigation pending, the District enacted a law that prohibited the D.C. Jail from releasing any inmates after 10 p.m. (ostensibly for their own protection, for lack of "services" at that hour). *Id*. at 268. Even though the District's Attorney General at the time advised the Council that the law was unconstitutional, and directed the Department of Corrections to stop enforcing it in March 2009, the District was liable for the overdetentions the law had caused up until that time:

> [W]hatever its intended purpose, the ordinance's effect was to turn delayed releases into automatic, overnight overdetentions in cases where the Records Office was unable to complete the release process by 10 p.m. The District's own Attorney General notified the DC Council's Chairman in February 2009 that inmates were being overdetained "solely by operation of the cutoff provision" and that the provision was "unconstitutional as applied."
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> * * *
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> The District's *legislative behavior is truly irrational* in that the District had just been sued, in this very Court, the year before it enacted a rule that mandates overdetentions when the DOC—as was often the case—had failed to process inmates' releases in a timely fashion. The District's legislative act is therefore not only *shocking* to this Court, but has interfered with the fundamental liberty interests of class members overdetained on account of that ordinance.

Id. at 269, 278 (emphasis added).

Cases from other jurisdictions also illustrate how "express" municipal policies can violate the Constitution. A city ordinance prohibited people from using median strips for any purpose except crossing the street: "No person shall stand, sit, stay, drive or park on a median strip . . . except that pedestrians may use median strips only in the course of crossing from one side of the street to the other." *Cutting v. City of Portland, Maine*, 802 F.3d 79 (1st Cir. 2015). The court found that the ordinance violated the First Amendment; the median was a "traditional public forum, and the overbroad prohibition on all "expressive activities" violated the rights of those persons who had been arrested for panhandling. The city of Key West was found liable for a decision by its Police Chief to enforce a Florida statute against a newspaper publisher. *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005). The statute prohibited the disclosure of nonpublic information obtained by a participant in any internal investigation of a law enforcement officer. The Eleventh Circuit found that the statute violated the First Amendment (because it was content-based and could not meet strict scrutiny). The city was liable because the Chief was the "final policymaking official" regarding law-enforcement matters. And while Key West could not be, obviously, liable for enforcing an unconstitutional state statute which it did not promulgate or adopt, here Key West *expressly* adopted the

Florida law as its own. *See id.* at 1222–23 (citing Key West, Fla., Code of Ordinances § 42–1 ("It shall be unlawful for any person to commit, within the city limits, any act which is or shall be recognized by the laws of the state as an offense.")).

Action by Policymaker

Another way for municipalities to be liable is for the unconstitutional actions or omissions of their policymakers. "Policymakers" are those "persons who have 'final policymaking authority [under] state law,'" *Triplett v. District of Columbia*, 108 F.3d 1450, 1453 (D.C. Cir. 1997) (quoting *Jett v. Dallas Indep. Sch. Dist*., 491 U.S. 701, 737 (1989)). Normally, a single, tortious act is insufficient to impose liability on a municipality; there must be evidence of an unconstitutional "pattern or practice," as we discuss below. However, liability may attach for a *single act* by an official with policymaking authority. *Praprotnik*, 485 U.S. at 123–32. This rule extends liability for the acts of those individuals "whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694. *See also, e.g., Bolton v. City of Dallas*, 541 F.3d 545, 548 (5th Cir. 2008); *Gronowski v. Spencer*, 424 F.3d 285, 296–97 (2d Cir. 2005); *McGreevy v. Stroup*, 413 F.3d 359, 367–68 (3d Cir. 2005); *Love-Lane v. Martin*, 355 F.3d 766, 782–83 (4th Cir. 2004); *Gibson v. County of Washoe*, 290 F.3d 1175, 1185–86 (9th Cir. 2002).

The question of who is a "policymaker" is a matter of state law, and a legal question for the judge to decide. *See, e.g., Walden v. City of Providence*, 596 F.3d 38, 56 (1st Cir. 2010) ("Courts must look to state law, including 'valid local ordinances and regulations,' for descriptions of the duties and obligations of putative policymakers in the relevant area at issue.") *Hill v. Borough of Kutztown*, 455 F.3d 225, 245 (3d Cir. 2006) (to determine if official is policymaker, court must determine "whether, as a matter of state law, the official is responsible for making policy *in the particular area* of municipal business in question[.]") (citing *McMillian v. Monroe County*, 520 U.S. 781, 785 (1997)). Moreover, there is a distinction in the case law between the authority to *establish* policy, and the ability to make a final decision pursuant to that policy—the two are not synonymous. *See, e.g., Kujawski v. Board of Comm'rs of Bartholomew County*, 183 F.3d 734, 739 (7th Cir. 1999) ("There must be a delegation of authority to set policy for hiring and firing, not a delegation of only the final authority to hire and fire.").[2]

Typically, the Mayor and heads of executive agencies are policymakers. Litigators should check to see if there are specific code provisions, regulations, executive orders, etc., granting policymaking authority, or the authority to promulgate regulations. *See, e.g.*, Tit. 6A, D.C. Mun. Regs § 800.16 ("The Chief of Police shall have the authority to plan and prescribe departmental policy within

[2] *Cf. Heinrich v. City of Casper*, 526 Fed.Appx. 862, 863 (10th Cir. 2013) (city's designation of employee as Rule 30(b)(6) deponent for a particular topic does not, alone, show that the deponent is the "final policymaker" for the city on that topic).

the limits of overall policy enunciated by the Mayor and the Council to include the coordination, direction and control of all Metropolitan Police programs, services, and operations."); *Triplett v. District of Columbia*, 108 F.3d 1450, 1453 (D.C. Cir. 1997) (finding that the Director of the Department of Corrections was a final policymaker where the D.C. Code specified that he was responsible for "the general direction and supervision" of the Department); *Cf. Nagle v. Marron*, 663 F.3d 100, 116–17 (2d Cir. 2011) (Superintendent of school district may be policymaker, and liable for decision to recommend denial of tenure for allegedly retaliatory reasons, based on state law) (citing N.Y. Educ. Law § 3012(2) (at end of probationary period, "the superintendent of schools shall make a written report to the board of education" recommending the grant or denial of tenure."); *Lytle*, 326 F.3d at 472 ("The Norfolk City Charter provides that the City Manager, acting as the director of public safety, is in charge of the police department. All orders, rules, and regulations applicable to the entire police department must be approved by the City Manager. The City Manager is therefore clearly the final policymaker for purposes of § 1983 liability."); *Milestone v. City of Monroe, Wis*., 665 F.3d 774, 781 (7th Cir. 2011) (city board was not policymaker, as shown by city ordinance; powers of board included "[t]o oversee professional employees having responsibility for senior citizen programs and activities *subject to policies and procedures adopted by the city for supervision of such employees*.") (quoting Monroe, Wis., Code § 2–12–3(B) (emphasis in original)).[3]

Individual liability may be imposed for the actions of a policymaker, but only if that policymaker was "personally involved" in the alleged constitutional violation. *Parratt v. Taylor*, 451 U.S. 527, 537 n. 3 (1981); *Sutton v. Rasheed*, 323 F.3d 236, 249 (3d Cir. 2003); *Doyle v. Camelot Care Centers, Inc*., 305 F.3d 603, 614–15 (7th Cir. 2002); *Cf. Littlejohn v. City of New York*, 795 F.3d 297, 314 (2d Cir. 2015) (individual liability may be imposed if plaintiff can demonstrate that: (1) the defendant policymaker participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference by failing to act on information indicating that unconstitutional acts were occurring) (quoting *Back v. Hastings On Hudson Union Free Sch. Dist*., 365 F.3d 107, 127 (2d Cir. 2004)); *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010) (plaintiff can establish individual policymaker liability by demonstrating "(1)

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[3] Plaintiffs will occasionally try to skip over this step, or muddy the waters. *See, e.g., Hamilton v. District of Columbia*, 852 F.Supp.2d 139 (D.D.C. 2012). There, employees of a city agency alleged adverse employment actions based on race. Specifically, they alleged that "high level officials within the Agency were complicit in the actions taken against the plaintiffs[.]" *Id*. at 150. The Court held that this allegation was insufficient to state a claim for municipal liability, because neither of the two individual defendants had final policymaking authority under District law.

personal involvement, (2) sufficient causal connection, and (3) culpable state of mind.").

Whether an official is a policymaker often turns on whether his or her decisions are subject to review by someone else. If they are, he or she is *not* a policymaker. *Praprotnik*, 485 U.S. at 127 ("[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies.") (emphasis in original). *See also, e.g.*, *Palka v. City of Chicago*, 662 F.3d 428, 435 (7th Cir. 2011) ("[Supervisor's] recommendations [to fire plaintiff] were reviewed by [the Chicago Police Department's Personnel Division Commander]. Because [the supervisor's] decisions were subject to review and implementation by a higher authority, he cannot be a final policymaker for purposes of municipal § 1983 liability."); *Walden*, 596 F.3d at 57 (city's director of communications was not "final policymaker" with respect to decision to hire company to install system to record all telephone calls into and out of police and fire departments, because his recommendations were subject to review and approval by city procurement board, hence city could not be liable for employees' alleged Fourth Amendment violations); *Beattie v. Madison County Sch. Dist.*, 254 F.3d 595, 603 (5th Cir. 2001) (superintendent was not final policymaker because her decision was subject to review by the school board); *Riddick v. School Bd. of City of Portsmouth*, 238 F.3d 518, 523–24 (4th Cir. 2000) (per state law, final decisions to terminate employees are subject to review by Board, hence decision by superintendent, principal, and athletic director *not* to fire a coach later caught videotaping students with hidden camera was not "official municipal policy" pursuant to Section 1983).

Similarly, the exercise of *discretion* by an official regarding his or her duties or the enforcement of the law is insufficient, alone, to show a policymaker:

> The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

Pembaur v. City of Cincinnati, 475 U.S. 469, 481–83 (1986) (citation and footnote omitted).

"Custom or Usage"

If a plaintiff is not alleging the single act of a policymaker, municipal liability may be imposed only if he or she can show a "pattern or practice," *i.e.*, city practices which are so "'persistent and widespread' as to practically have the force of law." The practices complained of must be "so permanent and well settled as to constitute 'custom or usage.'" *Monell* at 691. A plaintiff must introduce some evidence about *other* incidents, *beyond* the particular incident(s) at issue in the case. This evidence can include, for example, statistical evidence, the testimony of

former or present employees (regarding previous incidents); expert testimony; or investigatory reports detailing similar incidents.

How many incidents will equal "a pattern"? Each case is different, but depends on a wide variety of factors including the time period at issue, the size of the relevant city or city agency, and how specifically the alleged violation is described.[4] *See, e.g.*, *Sorlucco v. New York City Police Dep't*, 971 F.2d 864, 872–73 (2d Cir. 1992) (city had "widespread practice" of disciplining probation officers differently based on their gender; statistical evidence showed that 100% of disciplined female probation officers were terminated, compared to 63% of disciplined male probation officers). *Cf. Pineda v. City of Houston*, 291 F.3d 325, 329 (5th Cir. 2002) ("Eleven incidents [of warrantless searches by gang task force] cannot support a pattern of illegality in one of the Nation's largest cities and police forces."); *Estate of Moreland v. Dieter*, 395 F.3d 747, 760 (7th Cir. 2005) (three separate occasions where guards improperly sprayed inmates with pepper spray did not show a "widespread" pattern); *Carter v. District of Columbia*, 795 F.2d 116, 123 (D.C. Cir. 1986) (evidence showed 21 proven complaints of excessive force, out of 1,315 filed over 18-month period; "This catalog of disquieting events is not sufficient to demonstrate a pervasive pattern of police officer indulgence in the use of excessive force[.]"). *But cf. Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986) ("several" prior incidents of excessive force by police were sufficient to show a pattern).

Note, however, that even where a plaintiff cannot produce sufficient evidence to show a § 1983 "pattern or practice," those incidents *may* be enough to put the municipality "on notice" that a problem of constitutional dimensions exists, and if the city does not respond appropriately, "deliberate indifference" may be found, as discussed in the next section. *See Huthnance v. District of Columbia*, 793 F.Supp.2d 183, 198–200 (D.D.C. 2011) (four complaints, over a two-year period, of the "exact same problem" encountered by plaintiff (*i.e.*, arrest for "contempt of

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[4] *See Roberts v. City of Shreveport*, 397 F.3d 287 (5th Cir. 2005):

> [Plaintiffs'] proffered evidence of pattern requires an excessively high level of generality, as it consists of a handful of tangentially related incidents, some of which do not even involve [the police officer].
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> First, plaintiffs supply claims of past incidents in which [the officer] brandished and pointed his firearm toward unarmed African–Americans while making routine traffic stops. Rivet's alleged propensity for *displaying* his firearm is fundamentally different from a propensity to *use* deadly force in the course of ordinary traffic stops.

Id. at 294 (emphasis in original).

cop"), may not have been enough to show a "custom or usage," but put the District "on notice" of potential constitutional violations, sufficient to show deliberate indifference). Thus, there appears to be (at least in the District of Columbia) a *lower* burden for a plaintiff to demonstrate Section 1983 municipal liability via "deliberate indifference," in comparison to "custom or usage" liability.

Deliberate Indifference

A city may be found liable under Section 1983 where a plaintiff can show "deliberate indifference—where a municipality "knew or should have known of the risk of constitutional violations," *i.e.*, was on notice, but did nothing. There must be some *pattern* of problems, or some other *reason* for city officials to know of such a "risk." A plaintiff must point to past incidence similar enough to the alleged violation such that a reasonable jury could find that the city was "on notice."

A pattern of similar constitutional violations is usually required to prove a *de facto* custom or policy of deliberate indifference on the part of a municipality. *Board of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 409 (1997). The Supreme Court has said that speculation is not enough to make out a deliberate indifference claim; it is not sufficient for a plaintiff to provide evidence of potential "fixes" to the problem; every plaintiff can do that. *See Canton*, 489 U.S. at 392 ("[I]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident."). "But showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability." *Connick v. Thompson*, 563 U.S. 51, 68 (2011).

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.'" *Id*. at 61 (quoting *Bryan County*, 520 U.S. at 410). Plaintiff must provide specific and detailed evidence of a continuing policy or pattern of unconstitutional conduct that was either condoned or deliberately ignored. But plaintiffs can do that when cities fail adequately to address persistent problems:

> Uncontradicted evidence at the trial of this case established the routine sexual abuse of women inmates by prison guards at the District of Columbia Jail. [That evidence included a previous class-action lawsuit, as a result of which the trial court there] issued a detailed order on December 13, 1994, requiring the Department of Corrections to 'take all action necessary to remedy and prevent' sexual harassment of female inmates by its employees. The court specifically directed the Department to issue, distribute, and post a sexual harassment policy within sixty days, and to conduct mandatory training on sexual harassment for both employees and female inmates.

> On May 15, 1995, the Department of Corrections issued a policy in response to [that] order. The policy forbade sexual misconduct and harassment, as well as retaliation for the filing of complaints regarding such behavior, and directed the institution of mandatory training. Although some of the guards who testified at Daskalea's trial remembered receiving the policy, others did not. No inmate testified to receiving the policy, and officers admitted that the policy was never posted. There was no evidence that the training requirements were implemented nor that any significant corrective intervention occurred.

Daskalea v. District of Columbia, 227 F.3d 433, 437 (D.C. Cir. 2000) (citations omitted).

Deliberate indifference can be shown where the city "has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm." *Schneider v. City of Grand Jct.*, 717 F.3d 760, 771 (10th Cir. 2013) (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998) ("In a narrow range of circumstances . . . deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a highly predictable or plainly obvious consequence of a municipality's action or inaction[.]") (citations omitted)).

Thus, "deliberate indifference" may be found when a municipality is "on notice" of a problem via a previous lawsuit or settlement or otherwise, and takes insufficient steps to correct the constitutional problems identified. *See Barnes*, 793 F.Supp.2d at 280 (noting "[t]his Court's alarm at the [agency's] lack of urgency in responding to this disturbing pattern . . . despite the notice provided by the [previous] litigation[.]").

Frequently, deliberate-indifference claims are raised in the context of a "failure to train." *See, e.g., Daskalea*, 227 F.3d at 441 ("[A] city's inaction, including its failure to train or supervise its employees adequately, constitutes a "policy or custom" under *Monell* when it can be said that the failure amounts to "'deliberate indifference' towards the constitutional rights of persons in its domain.") (quoting *City of Canton v. Harris*, 489 U.S. 378, 388–89 & n. 7 (1989)). *See also Canton*, 489 U.S. at 390 n.10 (recognizing municipal liability where officers "so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers"). *See also, e.g., Duvall v. Dallas County*, 631 F.3d 203, 208–209 (5th Cir. 2011) (jury appropriately found municipality liable for deliberate indifference where jail experienced around 200 MRSA infections *per month*; "Dallas County was aware of the high MRSA infection risks in the jail before 2003, and the Sheriff knew that the few measures that the jail did take in an attempt to control the rate of infection had been ineffective."); *Wray v. City of New York*, 490 F.3d 189, 196 (2d Cir. 2007) ("'Deliberate indifference' involves the conscious disregard of the risk that poorly-trained employees will cause deprivations of clearly established constitutional

rights.") (citing *Amnesty Am. v. Town of Hartford*, 361 F.3d 113, 127 n.8 (2d Cir. 2004)); *but cf. Szabla v. City of Brooklyn Park*, 486 F.3d 385, 392 (8th Cir. 2007) ("So far as the record reveals, this was a one-time incident, and there is no evidence of a pattern of constitutional violations making it "obvious" that additional training or safeguards were necessary.").

In *Farmer v. Brennan*, 511 U.S. 825, 847 (1994), the Supreme Court defined deliberate indifference in the Eighth Amendment context to be when a municipality or policymaker "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Thus, "deliberate indifference" does *not* mean that the city has to "solve" the problem, only that it must take "reasonable measures" to *try* to fix the problem. A municipality need not be *proactive*, but must be properly *reactive*. Deliberate indifference "does *not* require the city to take reasonable care to discover and prevent constitutional violations. It simply means that, faced with actual or constructive knowledge that its agents will probably violate constitutional rights, the city may not adopt a policy of inaction." *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004).

"Inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties, do not warrant redress under [42 U.S.C. § 1983]." *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988). *See also Toguchi v. Chung*, 391 F.3d 1051, 1057–58 (9th Cir. 2004) ("Deliberate indifference is a high legal standard. A showing of medical malpractice or negligence is insufficient to establish a constitutional deprivation under the Eighth Amendment."). Deliberate indifference "is obduracy and wantonness, not inadvertence or error in good faith[.]" *Whitley v. Albers*, 475 U.S. 312, 319 (1986). *See also Wormley v. United States*, 601 F.Supp.2d 27, 41 (D.D.C. 2009) ("The more accurate standard for deliberate indifference is that of recklessness."); *Ellis v. District of Columbia*, 84 F.3d 1413, 1424 (D.C. Cir. 1996) ("Even if mistakes were made in some instances, 'it is not reasonable to extrapolate a general policy of lawlessness from such mistakes.'") (quoting *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 123 (D.C. Cir. 1977)).

"State actor/under color of law"

Finally, even *private parties* may be held liable under 42 U.S.C. § 1983, so long as their conduct is "clothed with authority of state law" or those persons *conspired* with state officials or otherwise "willfully engaged in joint activity" with state. *See, e.g., Filarsky v. Delia*, 132 S. Ct. 1657, 1661 (2012) ("Anyone whose conduct is "fairly attributable to the state" can be sued as a state actor under § 1983."). A plaintiff must show a "close nexus" or "coercive power" by the government over a private party or "significant encouragement" by the government, or that the private party exercised powers that are "traditionally the exclusive prerogative of the state." *See, e.g., Brentwood v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 295 (2001) (holding that "state action

may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself."); *Rendell–Baker v. Kohn*, 457 U.S. 830, 838 (1982) ("The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights fairly attributable to the State?").

Case law demonstrates that a contractual relationship between the government entity and the private party is insufficient, alone, to show "state action." The inquiry is highly "fact based" in each case. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) ("The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required[.]").

Courts look at a number of factors to determine the level of a state's involvement, including: (1) the amount of government funding given to the private entity; (2) the extent of the regulation of the entity by the state; and (3) whether the private entity is engaging in a "public function" that is traditionally within the exclusive province of the state. *Id*. For example, the exercise of eminent domain is "traditionally associated with sovereignty." *Id*. at 353. *Cf. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 545 (1987) (USOC is not a state actor because "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function"); *Caviness v. Horizon Community Learning Center, Inc*., 590 F.3d 806, 815 (9th Cir. 2010) (charter school was not a state actor for due process claims by dismissed teacher; "Merely because Horizon is "a private entity perform[ing] a function which serves the public does not make its acts state action.") (quoting *Rendell-Baker*, 457 U.S. at 842); *Wickersham v. City of Columbia*, 481 F.3d 591, 598 (8th Cir. 2007) (non-profit corporation that operated annual air show at municipal airport qualified as state actor, for First Amendment claims brought by persons prevented from distributing anti-war flyers and petitions; "the city not only provided critical assistance in planning and operating the show, but also played an active role in enforcing the particular speech restrictions challenged in this action."); *Crissman v. Dover Downs Entertainment Inc.*, 289 F.3d 231, 235 (3d Cir. 2002) (state's regulation and subsidization of harness racing did not produce "symbiotic relationship" sufficient to make racing facility a state actor for purposes of due process claim by horse trainers of unconstitutional exclusion from working at the track based on "rumors of licensing denials, doping, and financial irresponsibility"). *See also, e.g., PRBA Corp. v. HMS Host Toll Roads, Inc.*, 808 F.3d 221, 224 (3d Cir. 2015) (private contractor that leased service plazas from state agencies was not "state actor" for § 1983 purposes on claims brought by "gentlemen's club" that manager of service plaza had ordered the removal of all of the club's advertising brochures from advertising racks in the plazas); *Jarvis v. Village Gun Shop, Inc.*, 805 F.3d 1, 8 (1st Cir. 2015) (operator of bonded warehouse was not state actor, for claims by gun owners alleging that their due process rights were violated when operator auctioned off guns after owners failed to pay storage fees associated with guns that were confiscated and subsequently transferred to the warehouse by police); *Marie v. American Red Cross*, 771 F.3d 344, 361–64 (6th Cir. 2014) (private relief

organization was not state actor for § 1983 claims by Catholic nuns that the termination of their volunteer status violated their civil rights); *Wittner v. Banner Health*, 720 F.3d 770, 776–80 (10th Cir. 2013) (physician and nurse at private medical center were not state actors subject to liability under § 1983 for patient's death during involuntary mental health hold, even though police officers brought patient to center, center received state funding, and state agencies set standards for center, required center to keep certain records, could give training to staff, and could order retraining, where state had no ability to force center to admit patient or to administer anti-psychotic drug that allegedly caused patient's death).

As noted earlier, the court in *Daskalea v. Wash. Humane Soc'y*, 480 F.Supp.2d 16 (D.D.C. 2007), found that WHS employees were "state actors" for purposes of § 1983 liability, because they were performing a "traditional state function" (*i.e.*, enforcement of animal-cruelty laws). In *Moonblatt v. District of Columbia*, 572 F.Supp.2d 15 (D.D.C. 2008), a former inmate sued the District and the Corrections Corporation of America, with whom the District had contracted, alleging discrimination. The court denied the motions to dismiss, noting that the "state actor" question could not be conclusively resolved at the motion-to-dismiss stage. The court found that while the District was not "heavily" regulating CCA's daily activities, *id*. at 23 (citing *Rendell-Baker*, *supra*, and *Blum v. Yaretsky*, 457 U.S. 991 (1982)), CCA's activities *may* be of the type "traditionally left to the exclusive prerogative of the state[,]" *id*., which may indicate that it is a "state actor."