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Recommended Citation
Karen M. Blum, Municipal Liability: Derivative or Direct? Statutory or Constitutional? Distinguishing the Canton Case from the Collins Case, 48 DePaul L. Rev. 687 (1999)
Available at: https://via.library.depaul.edu/law-review/vol48/iss3/5

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MUNICIPAL LIABILITY: DERIVATIVE OR DIRECT? STATUTORY OR CONSTITUTIONAL? DISTINGUISHING THE CANTON CASE FROM THE COLLINS CASE

Karen M. Blum*

INTRODUCTION

Since the Supreme Court's decision in Monell v. Department of Social Services, holding that local government entities may be sued under § 1983 for official policies or customs that cause constitutional violations, the Supreme Court, as well as lower federal courts, have been engaged in developing a "highly complex body of interpretive law" to effectuate the distinction adopted in Monell between direct and vicarious liability. The line becomes particularly difficult to draw.

* Professor of Law, Suffolk University Law School. I would like to thank Dean John E. Fenton, Jr. for his generous support of my scholarship through the summer writing stipend. My appreciation is also extended to Barbara Wennger for her very capable research assistance.

1. 436 U.S. 658 (1978). The Court overruled Monroe v. Pape, 365 U.S. 167 (1961), to the extent it had held that municipalities were not "persons" subject to suit within the meaning of the term in §1983. Monell, 436 U.S. at 663.

2. Section 1983 provides:

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


3. See Monell, 436 U.S. at 690-94.


5. The Court in Monell rejected the concept of respondeat superior liability against municipalities under § 1983. Monell, 436 U.S. at 691. This author was among those who first criticized the rejection of respondeat superior liability in Monell. See Karen M. Blum, From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts, 51 TEMPLE L.Q. 409 (1978), cited in Pembaur v. City of Cincinnati, 475 U.S. 469, 489 n.4 (1986) (Stevens, J., concurring in part and concurring in judgment). In Brown, Justice Breyer authored a dissenting opinion in which he called for a reexamination of "the legal soundness of [the] basic distinction" drawn in
when liability against the municipality is premised on action or inaction that itself may not be unconstitutional, such as failure to adequately screen, train, supervise, or discipline non-policymaking employees who do commit constitutional violations. Arguments made by litigants and opinions rendered by judges still reflect considerable confusion as to the difference between assertions of municipal liability based on a derivative/statutory notion stemming from the Supreme Court's decision in *City of Canton v. Harris*, 6 and from allegations attempting to establish municipal liability for direct/constitutional violations based on the reasoning of the Court in *Collins v. City of Harker Heights*. 7 This Symposium took place before the Supreme Court rendered its decision in *County of Sacramento v. Lewis*, 8 holding that, in the context of a high speed pursuit, only conduct on the part of the individual officer that is intended to cause harm and that is without any law enforcement justification is sufficient to "shock the conscience" and, thus, is actionable as a substantive due process claim under the Fourteenth Amendment. While *Lewis* is not a case about government liability, this author believes the opinion may provide an answer to the "Where's the beef?" problem raised in cases finding municipal liability for deliberate indifference without an underlying constitutional violation by the individual officer involved. Indeed, although *Lewis* is generally regarded as a disaster by plaintiffs' attorneys engaged in § 1983 litigation, 9 the case contains the seeds for justifying a finding of municipal liability in some substantive due process cases where the officer's conduct does not rise (or sink) to a conscience-shocking level.

**The Concept of Derivative or Statutory Liability Under Section 1983**

In *City of Canton v. Harris*, 10 the Court addressed the question of whether a municipality could ever be liable under § 1983 for constitutional violations resulting from a failure to train municipal employees. 11 The plaintiff in *Canton* had been arrested and brought to the

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*Monell* between direct and vicarious liability. 520 U.S. at 430 (Breyer, J., joined by Stevens and Ginsburg, J.J., dissenting).

9. This is the author's own observation, derived from conversations with many plaintiffs' attorneys throughout the country in a period shortly following the *Lewis* decision.
10. 489 U.S. 378.
11. *Id.* at 380.
police station in a patrol wagon. Upon arrival at the station, she was incoherent when asked about her need for medical assistance. After she fell to the floor twice, she was left on the floor with no medical help. After approximately one hour, she was released to her family and transported to a hospital where she was diagnosed as suffering from a number of emotional ailments. She remained in the hospital for a week and received outpatient treatment throughout the following year.

Mrs. Harris brought suit under § 1983, claiming a deprivation of her substantive due process right to receive necessary medical care while in police custody. She asserted a claim of municipal liability for this deprivation based on a theory of "grossly inadequate training." The plaintiff presented evidence of a municipal regulation, establishing a policy of giving police shift commanders complete discretion to make decisions as to whether prisoners were in need of medical care, accompanied by evidence that such commanders received no training or guidelines to assist in making such judgments. The United States Court of Appeals for the Sixth Circuit upheld the adequacy of the district court's jury instructions on the issue of municipal liability for inadequate training, stating that the plaintiff could succeed on her claim of municipal liability for failure to train its police force, "[where] the plaintiff . . . prove[s] that the municipality acted recklessly, intentionally, or with gross negligence."

In an opinion written by Justice White, the Court unanimously rejected the argument of the City that municipal liability can be imposed only where the challenged policy is unconstitutional and concluded that "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983." Noting the substantial disagreement among the lower courts as to the level of culpability required in failure-to-train cases, the Court went on to hold that "the inadequacy of [the training policy] may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."
The Court was careful to note that the "deliberate indifference" standard it was imposing as a matter of statutory construction under § 1983 has nothing to do with the level of culpability that may be required to make out the underlying constitutional wrong, but rather has to do with what is required to establish the municipal policy as the "moving force" behind the constitutional violation. The Court did not address the question of whether there was an underlying constitutional violation under substantive due process on the part of the city employees in denying medical care to Mrs. Harris. Given the state of the record before the Supreme Court, it was "assume[d] that respondent's constitutional right to receive medical care was denied by city employees—whatever the nature of that right might be." The issue was whether the given violation could be attributed to the City for liability purposes under § 1983.

Justice O'Connor, in her concurring opinion, suggested that a plaintiff could establish deliberate indifference on the part of a municipality where failure to train, in the face of an obvious need for training, was substantially certain to result in constitutional injuries. Where there is "a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face . . . failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue." For example, all of the Justices agreed that a failure of a city to train police officers as to the constitutional limitations on the use of deadly force, would be so certain to result in constitutional violations, that such a failure to train would reflect the "deliberate indifference" to constitutional rights required for the imposition of municipal liability.

Justice O'Connor also recognized that municipal liability on a "failure to train" theory might be established:

22. Id. at 388.
24. Id. at 389.
26. Id. at 388 n.8.
27. Id. at 380.
28. Id. at 396. (O'Connor, J., concurring in part and dissenting in part).
29. Id.
[W]here it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion, . . . [which pattern] could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements.\textsuperscript{32} Thus, \textit{Canton} provides a plaintiff with two different approaches to a failure-to-train case. First, a plaintiff may claim that her constitutional injury was caused by the municipality's failure to train in an area where there was an obvious need for training in order to prevent officers or employees from violating citizens' constitutional rights.\textsuperscript{33} Second, a plaintiff may rely on a pattern of unconstitutional conduct so pervasive as to imply actual or constructive knowledge of the conduct on the part of policymakers, whose deliberate indifference to the unconstitutional practice, evidenced by a failure to correct, would be attributable to the municipality.\textsuperscript{34}

\textsuperscript{32} Id. at 397 (O'Connor, J., concurring in part and dissenting in part).

\textsuperscript{33} See, e.g., Allen v. Muskogee, 119 F.3d 837 (10th Cir. 1997): When read as a whole and viewed in the light most favorable to the plaintiff as the party opposing summary judgment, the record supports an inference that the City trained its officers to leave cover and approach armed suicidal, emotionally disturbed persons and to try to disarm them, a practice contrary to proper police procedures and tactical principles. . . . The evidence is sufficient to support an inference that the need for different training was so obvious and the inadequacy so likely to result in violation of constitutional rights that the policymakers of the City could reasonably be said to have been deliberately indifferent to the need.

\textsuperscript{34} See, e.g., Henry v. County of Shasta, 132 F.3d 512 (9th Cir. 1997), amended on denial of reh'g, 137 F.3d 1372 (9th Cir. 1998): If a municipal defendant's failure to fire or reprimand officers evidences a policy of deliberate indifference to their misconduct, surely its failure even after being sued to correct a blatantly unconstitutional course of treatment—stripping persons who have committed minor traffic infractions, throwing them naked into a 'rubber room' and holding them there for ten hours or more for failing to sign a traffic ticket or asserting their legal right to be brought before a magistrate—is even more persuasive evidence of deliberate indifference or of a policy encouraging such official misconduct.

\textsuperscript{32} Id. at 520; Vann v. City of New York, 72 F.3d 1040, 1049 (2d Cir. 1995) ("An obvious need [for more or better supervision] may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents."); Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994): Where the city equips its police officers with potentially dangerous animals, and evidence is adduced that those animals inflict injury in a significant percentage of the cases in which they are used, a failure to adopt a departmental policy governing their use, or
In a typical Canton "failure to train" case, there are two hurdles a plaintiff must overcome. First, a plaintiff must show an underlying constitutional violation has been committed by someone acting under color of law, generally a nonpolicymaking employee of the local government unit. Second, a plaintiff must demonstrate that the municipality "caused" the underlying constitutional violation within the meaning of § 1983 and, thus, is responsible for the harm incurred by plaintiff. The requisite causal link between the constitutional injury and the municipal policy is established by proving that the city's policy, even if constitutional, was deliberately indifferent to the violation of citizens' constitutional rights by municipal employees. Liability of the government entity under Canton is derivative and dependent upon first establishing a constitutional violation by a nonpolicymaking employee.

In Board of County Commissioners of Bryan County v. Brown, the Supreme Court revisited the issue of municipal liability under § 1983 in the context of a single bad-hiring decision made by a county sheriff who was stipulated to be the final policymaker for the county in matters of law enforcement. The plaintiff was injured when she was forcibly extracted from a vehicle driven by her husband. Mr. Brown was avoiding a police checkpoint and was eventually stopped by a squad car in which Reserve Deputy Burns was riding. Burns removed Mrs. Brown from the vehicle with such force that he caused

_id. at 1445; Cox v. District of Columbia, 821 F. Supp. 1, 13 (D.D.C. 1993) ("[T]he District of Columbia's maintenance of a patently inadequate system of investigation of excessive force complaints constitutes a custom or practice of deliberate indifference to the rights of persons who come in contact with District police officers.").

35. See, e.g., Estate of Phillips v. City of Milwaukee, 128 F.3d 586, 597 (7th Cir. 1997) ("Neither the City nor the police officers' supervisor can be held liable on a failure to train theory or on a municipal policy theory absent a finding that the individual police officers are liable on the underlying substantive claim."); Abbott v. City of Crocker, 30 F.3d 994, 998 (8th Cir. 1994) ("The City cannot be liable in connection with either the excessive force claim or the invalid arrest claim, whether on a failure to train theory or a municipal custom or policy theory, unless Officer Stone is found liable on the underlying substantive claim."); see also Sanchez v. Figueroa, 996 F. Supp. 143, 147 (D.P.R. 1998) (holding that in an action against a supervisory official for failure to train and failure to screen/supervise, the plaintiff must first establish that a non-supervisory officer violated the plaintiffs' decedent's constitutional rights).

36. See, e.g., Wyke v. Polk County Sch. Bd., 129 F.3d 560, 568-69 (11th Cir. 1997) ("[T]o prevail on a § 1983 claim against a local government entity, a plaintiff must prove both that her harm was caused by a constitutional violation and that the government entity is responsible for that violation.").


39. Id.
severe injury to her knees.\textsuperscript{40} The plaintiff sued both Burns and the County under § 1983.\textsuperscript{41} A panel of the Fifth Circuit affirmed the district court's entry of judgment on the jury's verdict against Burns for excessive force, false arrest, and false imprisonment.\textsuperscript{42} The majority of the panel also affirmed the judgment against the county based on the single decision of Sheriff Moore to hire Burns without adequately investigating his background.\textsuperscript{43} The Fifth Circuit concluded that Moore's inadequate screening and hiring of Burns demonstrated "deliberate indifference to the public's welfare."\textsuperscript{44}

The Supreme Court, in a five-to-four opinion written by Justice O'Connor, reversed the court of appeals, distinguishing Brown's case, involving a claim that a single lawful hiring decision ultimately resulted in a constitutional violation, from a case where the plaintiff claims that "a particular municipal action itself violates federal law, or directs an employee to do so."\textsuperscript{45} As the Court noted, its prior cases recognizing municipal liability based on a single act or decision attributed to the government entity involved decisions of local legislative bodies or policymakers that directly effected or ordered someone to effect a constitutional deprivation.\textsuperscript{46}

\begin{flushleft}
\textsuperscript{40} Id. at 1178.
\textsuperscript{41} Id. at 1177.
\textsuperscript{42} Id. at 1185.
\textsuperscript{43} Id.
\textsuperscript{44} Brown, 67 F.3d at 1185. Burns, the son of Sheriff Moore’s nephew, had an extensive “rap sheet,” but the numerous violations and arrests included no felonies. Id. at 1183. State law prohibited the Sheriff's hiring of an individual convicted of a felony, but did not prescribe the hiring of someone like Burns. Id. Although the original district court opinion entered a judgment on the jury's verdict for the plaintiff on both an inadequate hiring claim and an inadequate training claim, the Court of Appeals did not address the inadequate training claim. See id. at 1178. On remand from the Supreme Court, the Fifth Circuit, in turn, remanded the case to the district court “for consideration in conformity with the opinion of the Supreme Court.” Brown v. Bryan County, 117 F.3d 239 (5th Cir. 1997). The district court found “sufficient evidence to support the jury’s verdict imposing Section 1983 liability against Bryan County for its inadequate training of Burns . . . .” Brown v. Bryan County, No. 4:91 CV 229, slip op. at 6, 7 (E.D. Tex. June 22, 1998). As this Article is being written, Brown II is on appeal before the Fifth Circuit.
\textsuperscript{45} Brown v. Board of County Comm'rs, 520 U.S. 397, 404-05 (1997).
\textsuperscript{46} See, e.g., Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (finding that the county prosecutor gave order that resulted in constitutional violation); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (finding the decision of city council to cancel license permitting concert directly violated constitutional rights); Owen v. City of Independence, 445 U.S. 622 (1980) (holding city council discharged employee without due process). In such cases, there are no real problems with respect to the issues of fault or causation. See Bennett v. Pippin, 74 F.3d 578 (5th Cir. 1996), where the county was held liable for the Sheriff's rape of a murder suspect, when the Sheriff was the final policymaker in matters of law enforcement. Id. at 586 n.5.
\end{flushleft}
The majority rejected the plaintiff’s effort to analogize her inadequate screening case to a failure-to-train case. Justice O’Connor noted:

In attempting to import the reasoning of Canton into the hiring context, respondent ignores the fact that predicting the consequence of a single hiring decision, even one based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties. As our decision in Canton makes clear, ‘deliberate indifference’ is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. Unlike the risk from a particular glaring omission in a training regimen, the risk from a single instance of inadequate screening of an applicant’s background is not ‘obvious’ in the abstract; rather, it depends upon the background of the applicant. A lack of scrutiny may increase the likelihood that an unfit officer will be hired, and that the unfit officer will, when placed in a particular position to affect the rights of citizens, act improperly. But that is only a generalized showing of risk. The fact that inadequate scrutiny of an applicant’s background would make a violation of rights more likely cannot alone give rise to an inference that a policymaker’s failure to scrutinize the record of a particular applicant produced a specific constitutional violation.

The majority opinion concluded that:

Only where adequate scrutiny of an applicant’s background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party’s federally protected right can the official’s failure to adequately scrutinize the applicant’s background constitute ‘deliberate indifference.’

Thus, the majority insisted on evidence from which a jury could find that had Sheriff Moore adequately screened Deputy Burns’ background, he “should have concluded that Burns’ use of excessive force would be a plainly obvious consequence of the hiring decision.” In the view of the majority, scrutiny of Burns’ record produced insufficient evidence from which a jury could have found that Sheriff Moore’s hiring decision reflected deliberate indifference to an obvious risk that Burns would use excessive force.

47. Brown, 520 U.S. at 409.
48. Id. at 410-11.
49. Id. at 411.
50. Id. at 412-13.
51. Id. at 413. Justice Souter, joined by Justices Breyer and Stevens, dissented in Brown, characterizing the majority opinion as an expression of “deep skepticism” that “converts a newly-demanding formulation of the standard of fault into a virtually categorical impossibility of show-
In Brown, as in Canton, there was no question about the underlying constitutional violation that had been committed by the non-policy-making employee. In both cases, the Court was engaged in defining the level of culpability that plaintiffs would have to prove to demonstrate municipal liability under § 1983 for having “caused” the violation. While both a failure-to-train case and a failure-to-screen case require a showing of “deliberate indifference,” the plaintiff’s burden in the inadequate screening case is more stringent and is more dependent upon the specific background of the particular employee and the type of constitutional injury incurred.\textsuperscript{52}

THE CONCEPT OF DIRECT MUNICIPAL LIABILITY UNDER THE CONSTITUTION

Unlike Canton and Brown, the issue before the Court in Collins v. City of Harker Heights\textsuperscript{53} was not municipal responsibility for an officer’s unconstitutional conduct. Instead, the issue in the case was

\textsuperscript{52} In Barney v. Pulsipher, 143 F.3d 1299 (10th Cir. 1998), a post-Brown case, the Court of Appeals for the Tenth Circuit explained the exacting nature of the “deliberate indifference” standard when it is applied in a failure-to-screen case:

Culpability requires a strong connection between the background of the particular applicant and the specific constitutional violation alleged. . . . We note that the focus of the inquiry in determining when a single poor hiring decision is sufficient to constitute deliberate indifference appears to be on the actual background of the individual applicant and not on the thoroughness or adequacy of the municipality’s review of the application itself. . . . Whether or not an unsuitable applicant is ultimately hired depends more on his actual history than the actions or inactions of the municipality.

whether a constitutional violation had occurred at all.\(^{54}\) In *Collins*, the wife of a sanitation department worker brought suit against the city of Harker Heights after her husband was asphyxiated while working on a sewer line.\(^{55}\) Mrs. Collins alleged that the city had violated her husband's substantive due process rights through a policy of deliberate indifference to the rights of city employees.\(^{56}\) Specifically, Mrs. Collins alleged that the city had a policy of failing to provide training to its employees regarding the risks of working in sewer lines, failing to provide safety equipment, and failing to provide safety warnings.\(^{57}\) The district court dismissed the plaintiff's complaint for failure to state a claim, finding no constitutional violation was alleged.\(^{58}\) The Court of Appeals for the Fifth Circuit affirmed, but on the ground that the plaintiff had not alleged an abuse of governmental power, a prerequisite for a § 1983 claim.\(^{59}\)

A unanimous Supreme Court rejected the Fifth Circuit's requirement that the plaintiff must offer proof of an abuse of governmental power that is separate from proof of a constitutional violation.\(^{60}\) Instead, the proper standard for finding municipal liability under § 1983 requires the plaintiff to show that her harm was caused by a constitutional violation and that the city is responsible for that violation.\(^{61}\) The Court noted that the plaintiff's reliance on *Canton* was based on the misapprehension that *Canton* was a decision dealing with the constitutional issue. As the Court pointed out, however, *Canton* dealt only with the question of whether the assumed underlying constitutional violation could be attributed to the municipality.\(^{62}\) In *Collins*, the Court assumed, for purposes of the decision, that the plaintiff suf-

\(^{54}\) *Id.* at 122-23.
\(^{55}\) *Id.* at 117.
\(^{56}\) *Id.*
\(^{57}\) *Id.*
\(^{58}\) *Id.*
\(^{59}\) *Collins*, 503 U.S. at 118.
\(^{60}\) *Id.* at 119. The Court noted that the mere fact that a government employee initiated the action, rather than a private citizen, was not a dispositive factor. Justice Stevens, writing for the Court, made it clear that:

> The First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees who serve the government as well as to those who are served by them, and § 1983 provides a cause of action for all citizens injured by an abridgement of those protections.

*Id.* at 119-20.
\(^{61}\) *Id.* at 120.
\(^{62}\) *Id.* at 122-23. As the Court explained:

> Although the term 'deliberate indifference' has been used in other contexts to define the threshold for finding a violation of the Eighth Amendment, ... as we have explained, that term was used in the *Canton* case for the quite different purpose of identi-
ficiently alleged that the city was responsible for the harm to Collins based on a theory other than respondeat superior liability.\textsuperscript{63}

Turning to the issue of whether unconstitutional conduct occurred, the Supreme Court proceeded cautiously in determining the specific substantive due process right that Mrs. Collins alleged the city violated.\textsuperscript{64} The Court interpreted the complaint as advancing two theories of municipal liability: (1) The government had a constitutional duty to provide workers with a minimally safe work environment, or (2) the City's deliberate indifference to the safety of its workers was arbitrary government conduct that was conscience-shocking.\textsuperscript{65} The Court considered the first theory of liability "unprecedented," distinguishing the case from instances where the government deprives persons of their liberty to act for themselves, and thus owes a duty to provide for the safety and welfare of those who are involuntarily in custody.\textsuperscript{66} Because the city had not deprived Mr. Collins of his liberty, the Court concluded that the city owed no constitutional duty to provide safe working conditions to Mr. Collins.\textsuperscript{67}

\begin{itemize}
\item \textsuperscript{63}Id. at 124.
\item \textsuperscript{64}Id.
\item \textsuperscript{65}Id. at 125 (recognizing the Court's hesitation in expanding substantive due process rights).
\item \textsuperscript{66}Collins, 503 U.S. at 126.
\item \textsuperscript{67}Id. at 127-28 (recognizing the State has a duty to provide for persons in custody).
\end{itemize}

\begin{itemize}
\item \textsuperscript{68}Id. at 129-30; see Wallace v. Adkins, 115 F.3d 427 (7th Cir. 1997):

\begin{quote}
[Un]like a prisoner, a person involuntarily committed to a mental institution, or a child placed by state authorities in a foster home, Wallace was free to walk out the door any time he wanted. . . . We therefore hold that prison guards ordered to stay at their posts are not in the kind of custodial setting required to create a special relationship for 14th Amendment substantive due process purposes.
\end{quote}

\item \textsuperscript{69}Id. at 430; Liebson v. New Mexico Corrections Dep't, 73 F.3d 274, 276 (10th Cir. 1996) (holding that where a librarian was assigned to provide library services to inmates housed in maximum security unit of the New Mexico State Penitentiary she was not in state's custody or held against her will; employment relationship was "completely voluntary"); Skinner v. City of Miami, 62 F.3d 344 (11th Cir. 1995). Deciding a case involving hazing incident by firefighters, the court determined:

\begin{quote}
[The] record does not support the dissent's implication that the City committed any deliberate acts to injure [plaintiff]. At most, the evidence suggests that certain fire department officials knew that hazing incidents had occurred at some points in the past. This, however, falls short of demonstrating that the City violated a substantive constitutional right.
\end{quote}

\item \textsuperscript{70}Id. at 347 n.2; Lewellen v. Metropolitan Gov't, 34 F.3d 345 (6th Cir. 1994) (holding a workman accidentally injured on school construction project has no substantive due process claim); Figue- roa v. United States, 7 F.3d 1405 (9th Cir. 1993):

\begin{quote}
[While] we acknowledge that a broader understanding of deprivation of liberty may have emerged later . . . in 1987 there was no clearly established constitutional right not to be placed in a position of danger by a government employer absent some sort of
\end{quote}
In addition, the Supreme Court held that the city's failure to train or warn its employees about known risks of harm did not rise to the level of arbitrary or conscious-shocking behavior. In making this determination, the Supreme Court reinforced the position it had previously articulated, that it would not read traditional duties imposed by state tort law into the Due Process Clause. Although the Court assumed that the city had a duty under Texas law to warn employees of dangers and to provide education and training, the city's failure to do so was not arbitrary in a constitutional sense. Consequently, the Court affirmed the judgment of the court of appeals.

**City of Los Angeles v. Heller**

In *City of Los Angeles v. Heller*, the Supreme Court considered whether a municipality could be held liable for the conduct of one of its officers in an excessive force case in which the officer was exonerated by the jury. Heller brought suit against the City of Los Angeles and individual police officers, alleging that the police officers violated his constitutional rights by arresting him without probable cause and by using excessive force in the course of the arrest. During the governmental restriction on an individual's physical freedom to act to avert potential harm.

*Id.* at 1413; *Walls v. City of Detroit*, 993 F.2d 1548, 1993 WL 158498 (6th Cir. 1993) (Table, Text in Westlaw):

[P]laintiff's artful attempt to recast his complaint in terms distinguishable from *City of Harker Heights* is unavailing, because it misunderstands one of the central tenets of the Supreme Court's holding in that case: the Constitution does not guarantee police officers and other municipal employees a workplace free of unreasonable risks of harm. *Id.* at *5. But see *Jensen v. City of Oxnard*, 145 F.3d 1078 (9th Cir. 1998):

Employing *Collins*, Oxnard argues that Officer Jensen could not have had any of his rights violated because he was injured while performing his duties as a police officer. We reject this argument and Oxnard's attempt to turn this into a safe workplace case. Although this case is similar to the safe workplace cases in that they both concern individuals who 'voluntarily accepted ... an offer of employment;' ... this case is different in one significant way—the nature of the injury alleged. ... While the safe workplace cases concern the failure of the state adequately to train, prepare, or protect government employees from non-state actors, this case involves the allegedly intentional or reckless acts of a government employee directed against another government employee.

*Id.* at 1083-84.

68. *Collins*, 503 U.S. at 128. The Court noted that the plaintiff had not alleged wilfulness or deliberate harm or that the supervisor knew or should have known of the significant risk. *Id.* at 125.

69. *Id.*

70. *Id.* at 129.

71. *Id.* at 130.


73. *Id.* at 799.

74. *Id.* at 797.
arrest, one of the officers employed a chokehold to restrain Heller and a struggle ensued, which resulted in Heller falling through a plate glass window.\(^{75}\) The City of Los Angeles Police Department’s alleged custom of condoning the use of excessive force served as the basis for Heller’s claim against the city.\(^{76}\)

The district court judge bifurcated the trial, so that the first phase proceeded against Officer Bushey on the excessive force claim.\(^{77}\) The jury, which received no instruction on any affirmative defense of qualified immunity\(^{78}\) or good faith, rendered a general verdict in favor of the officer.\(^{79}\) Consequently, the District Court dismissed the remaining claims against the city, reasoning that without an underlying constitutional violation by the individual officer, there could be no municipal liability.\(^{80}\)

The Court of Appeals for the Ninth Circuit reversed the dismissal of the claims against the city on the basis that the jury might have concluded that Officer Bushey was entitled to a good faith defense where his actions were in conformance with department policy.\(^{81}\) Exoneration of the officer on these grounds would not be inconsistent with a finding of constitutional injury.\(^{82}\) Consequently, the Ninth Circuit held that Heller could proceed with his claim against the city.\(^{83}\)

The United States Supreme Court reversed the Ninth Circuit’s decision in a per curiam opinion.\(^{84}\) The Supreme Court’s decision noted that without a jury instruction specifically mentioning the affirmative defenses, the Court could not presume that the jury directed a verdict for the officer based on a good faith defense.\(^{85}\) Since the officer inflicted no constitutional injury upon Heller, the Supreme Court rea-

\(^{75}\) Id.

\(^{76}\) Id. at 801 (Stevens, J., joined by Marshall, J., dissenting) Apparently, the Los Angeles Police Department had an “escalating force” policy, which included the use of chokeholds. Id. at 802. At trial, the testimony of both the officer who used the chokehold and a Los Angeles Police Sergeant showed that the officer’s actions complied with established Department policy. Id. at 802-03.

\(^{77}\) Id. at 797.

\(^{78}\) At the time Heller was decided, it was common practice in the Ninth Circuit to instruct the jury on the affirmative defense of qualified immunity. City of Los Angeles v. Heller, 475 U.S. 796, 798 (1988). Since then, the Supreme Court has admonished that “[i]mmunity ordinarily should be decided by the court long before trial.” Hunter v. Bryant, 502 U.S. 224, 228 (1991) (per curiam).

\(^{79}\) Heller, 475 U.S. at 798.

\(^{80}\) Id.

\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) Id.


\(^{85}\) Heller, 475 U.S. at 798.
asoned that there was no basis for holding the city liable, even if the city's policy authorized the use of unconstitutional force. The per curiam opinion concluded that "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." Heller is confusing precedent. Accepting the Court's determination that the jury was not free to make a good faith or qualified immunity determination without the appropriate instruction, the Court's conclusion could be read as a "standing" decision. Thus, even if the jury might have believed that department policy authorized the use of excessive force, the verdict in favor of Officer Bushey, absent consideration of any affirmative defenses, meant that Bushey did not use excessive force. A plaintiff who cannot show injury caused by the city's policy has no standing to challenge that policy. The plaintiff in Heller had a problem under both a Canton derivative liability theory, as well as under a Collins direct constitutional violation theory. Derivative liability will not lie where there is no underlying constitutional violation by the officer. Nor could the plaintiff challenge or seek redress for injuries due to an unconstitutional policy, where the plaintiff could show no causal connection between the asserted unconstitutional policy and the plaintiff's injuries.

**THE CONFUSION: STATUTORY VERSUS CONSTITUTIONAL LIABILITY, CANTON DELIBERATE INDIFFERENCE VERSUS FARMER DELIBERATE INDIFFERENCE**

Litigants and courts must be careful to satisfy the Collins requirement that there be an underlying constitutional violation established before proceeding to attribute liability to the municipality under § 1983 by demonstrating deliberate indifference within the meaning of Canton. It is this distinction between Canton and Collins, the former a

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86. Id. at 799. But see id. at 803 (Stevens, J., dissenting) (opining that because jury did not decide constitutionality of city's escalating force policy, there would be no inconsistency between a verdict in favor of officer and imposition of liability on city).

87. Id. at 799.

88. The per curiam nature of the opinion was criticized by the dissenters in the case. See id. at 800 (Stevens, J., joined by Marshall, J., dissenting) ("Whenever the Court decides a case without the benefit of briefs or argument on the merits, there is a danger that it will issue an opinion without the careful deliberation and explication that the issues require. Today's per curiam opinion is a fair illustration of the problem.").

89. Another possibility is that, since the jury was not free to consider qualified immunity, its decision in favor of Officer Bushey was based on a finding that he followed a Department policy that was constitutional and that did not authorize or result in the use of excessive force.
case about statutory interpretation, the latter a case about constitutional violation, that has led to confusion in the case law.

Part of the confusion must be sorted out by distinguishing the standard of "deliberate indifference" under Canton, which the Court has set as the required level of culpability needed to establish municipal responsibility for an underlying constitutional violation, from the various standards of culpability, including "deliberate indifference" under Farmer v. Brennan,\textsuperscript{90} that the Court has designated as necessary to establish the different underlying constitutional violations.

For example, in Farmer, the Supreme Court distinguished the objective test for deliberate indifference established in Canton from the subjective deliberate indifference test required for culpability under the Eighth Amendment in prison conditions cases:

It would be hard to describe the Canton understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective. Canton's objective standard, however, is not an appropriate test for determining the liability of prison officials under the Eighth Amendment as interpreted in our cases.\textsuperscript{91}

As Farmer illustrates, establishing Canton objective deliberate indifference is not sufficient to make out an underlying Eighth Amendment claim. A plaintiff seeking to hold a municipality liable for an Eighth Amendment violation would have to prove subjective deliberate indifference on the part of the municipal employee(s) before moving to the second step of showing a municipal policy that was objectively deliberately indifferent to the likelihood of inmates constitutional rights being violated (i.e., a policy that policymakers knew or should have known would result in constitutional violations).

\textsuperscript{90} 511 U.S. 825 (1994).

\textsuperscript{91} Id. The Court in Farmer held that a prison official could be held liable under the Eighth Amendment for denying humane conditions of confinement only if he had actual knowledge of a substantial risk of serious harm faced by inmates and disregarded that risk by failing to take reasonable measures to abate it. Id. at 835-36; see Earrey v. Chickasaw County, 965 F. Supp. 870 (N.D. Miss. 1997):

The actions of governmental officials, who are fully capable of subjective deliberate indifference, serve as the basis of governmental liability for Eighth Amendment violations. While the governmental entity may only need be shown to be objectively deliberately indifferent to the known or obvious consequences of a custom or policy which does not itself violate federal law, it cannot be held liable unless the plaintiff shows that a constitutional violation has in fact occurred. In the Eighth Amendment context, in order for a violation to occur, a prison official must know "that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it."

Id. at 877.
In Fourteenth Amendment substantive due process cases, where the level of culpability on the underlying claim has not been definitively established by the Supreme Court, there has been an added layer of confusion due to uncertainty and disagreement as to what standard would suffice to make out the substantive due process claim and whether that standard would remain consistent in different contexts. A majority of courts have applied the subjective "deliberate indifference" standard to cases involving medical needs, protection, and treatment of pretrial detainees under the Due Process Clause of the Fourteenth Amendment, and the Court in Lewis has seemingly approved the subjective deliberate indifference standard in that context.

**HIGH SPEED PURSUITS, SUBSTANTIVE DUE PROCESS, AND MUNICIPAL LIABILITY**

While there are isolated opinions in other circuits which may reflect confusion, the Third Circuit Court of Appeals has most consistently embraced an approach to municipal liability that ignores the important distinction between the Supreme Court's statutory interpretation.

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92. Prior to its decision in Lewis, the Court had only stated that something more than "mere negligence" must be shown to make out a substantive due process claim. Davidson v. Cannon, 474 U.S. 344, 347 (1986); Daniels v. Williams, 474 U.S. 327, 333 (1986).

93. See, e.g., Kneipp v. Tedder, 95 F.3d 1199, 1207 (3d Cir. 1996) (limiting "shocks the conscience" standard to substantive due process claims asserted in context of police pursuit cases).

94. See, e.g., Hare v. City of Corinth, 74 F.3d 633, 643 (5th Cir. 1996) (en banc) (concluding that "a state jail official's constitutional liability to pretrial detainees for episodic acts or omissions should be measured by a standard of subjective deliberate indifference as enunciated by the Supreme Court in Farmer").

95. County of Sacramento v. Lewis, 118 S. Ct. 1708, 1711 (1998). "The Court has recognized that deliberate indifference is egregious enough to state a substantive due process claim in one context, that of deliberate indifference to the medical needs of pretrial detainees." Id. (citing City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983)).

In Youngberg v. Romeo, 457 U.S. 307 (1982), a case involving the treatment of involuntarily committed mentally retarded patients, the Supreme Court held that liability could be imposed "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such judgment." Id. at 323. A number of courts have applied the professional judgment standard to substantive due process claims raised by involuntarily placed foster children. See, e.g., Yvonne L. v. New Mexico Dep't of Human Servs., 959 F.2d 883, 893-94 (10th Cir. 1992) (adopting professional judgment standard, rather than deliberate indifference, in foster care setting).

96. See, e.g., Parrish v. Luckie, 963 F.2d 201, 207 (8th Cir. 1992) ("A public entity or supervisory official may be liable under § 1983, even though no government individuals were personally liable."); Rivas v. Freeman, 940 F.2d 1491, 1495-96 (11th Cir. 1991) (finding a Sheriff liable in his official capacity for failure to train officers regarding identification techniques and failure to properly account for incarcerated suspects, while deputies' actions which flowed from lack of procedures were deemed mere negligence).
of § 1983 in Canton and its constitutional analysis of substantive due process in Collins.77 The context of high speed pursuit cases best illustrates the Canton/Collins confusion. This Article will compare the Third Circuit’s approach in Fagan v. City of Vineland98 with that of the Tenth Circuit in Williams v. City and County of Denver.99 Both decisions were rendered prior to County of Sacramento v. Lewis. While the Tenth Circuit had granted a rehearing en banc in Williams, it has since remanded the case to the district court so that the Supreme Court’s decision in Lewis may be taken into account by the trial court. By examining Fagan and the now vacated Tenth Circuit opinion in Williams, and by taking into consideration the impact of the Supreme Court’s decision in Lewis, I hope to illustrate that while the analysis in Fagan is faulty and does confuse the principles of Canton and Collins, the result, a finding of municipal liability without an underlying substantive due process violation by the officer, may now be justified. On the other hand, whereas the analysis in Williams is correct and the court avoids the Canton/Collins confusion, the result intimated by the court with respect to municipal liability may not be the right one given the Supreme Court’s recent pronouncements concerning the contextual standard(s) of culpability for substantive due process claims.

THE FAGAN CASE

In Fagan v. City of Vineland,100 the Court of Appeals for the Third Circuit, sitting en banc, addressed the issue of the level of culpability required to state a substantive due process claim in the context of a high-speed police pursuit that resulted in the deaths of three innocent bystanders.101 The accident survivors, along with the estates and relatives of those killed, brought actions under § 1983 against the officers and the city.102 They alleged that their substantive due process rights were violated by the officers’ recklessness and by the city’s failure to

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97. See, e.g., Kneipp v. Tedder, 95 F.3d 1199, 1213 (3d Cir. 1996) (“The precedent in our circuit requires the district court to review the plaintiffs’ municipal liability claims independently of the § 1983 claims against the individual police officers, as the City’s liability for a substantive due process violation does not depend upon the liability of any police officer.”).

98. 22 F.3d 1296, 1303 (3d Cir. 1994) (Fagan II) (en banc).

99. Williams v. City & County of Denver, 99 F.3d 1009 (10th Cir. 1996), vacated and remanded for further proceedings in light of County of Sacramento v. Lewis and Board of County Comm’rs v. Brown, Williams v. City & County of Denver, 153 F.3d 730 (10th Cir. 1998) (per curiam) (en banc).


101. Fagan, 22 F.3d at 1299.

102. Id. at 1301.
train the officers properly regarding high-speed pursuits.\textsuperscript{103} The dis-


trect court granted summary judgment in favor of all defendants on the constitutional claims, holding that the alleged conduct of the of-


cicers could not be found to satisfy the applicable standard in this con-


text.\textsuperscript{104} The district court reasoned that a jury could not find that the ac-


tions of the officers constituted "[b]ehavior that shocks the con-


sience, . . . outrageous behavior, or behavior that offends a sense of justice."\textsuperscript{105}


A divided panel reversed the part of the district court's decision that held that a shocks-the-conscience standard was applicable to the due process claim, the majority holding that "reckless indifference to public safety" was the standard to be applied in police pursuit cases.\textsuperscript{106} A petition for rehearing en banc was granted, limited to the issue of "the appropriate standard to be applied in police pursuit cases alleging a violation of substantive due process."\textsuperscript{107} The majority of the en banc court concluded that the Supreme Court's decision in \textit{Collins} dictated the shocks-the-conscience standard for substantive due process claims.\textsuperscript{108}


Having found no underlying constitutional violation, the district court concluded that there could be no liability on the part of the city for failure to train.\textsuperscript{109} The Third Circuit panel was in agreement, however, that the city could be found independently liable for the violation of plaintiffs' constitutional rights even if the individual officers were found not liable because they lacked the requisite mental state to be constitutionally accountable.\textsuperscript{110} This aspect of the panel opinion was not considered in the en banc rehearing and has been criticized, rightly so in my opinion, by another panel of the Third Circuit, as well as by other circuits.\textsuperscript{111} The conclusion in \textit{Fagan} rests on the premise that a plaintiff who can show injury and \textit{Canton}-type deliberate indif-

\begin{itemize}
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Id. at 1302.
\item \textsuperscript{105} \textit{Fagan}, 804 F. Supp. at 603.
\item \textsuperscript{106} \textit{Fagan II}, 22 F.3d at 1289-90.
\item \textsuperscript{107} Id. at 1302.
\item \textsuperscript{108} Id. at 1308.
\item \textsuperscript{109} \textit{Fagan}, 804 F. Supp at 606 (citing City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986)).
\item \textsuperscript{110} \textit{Fagan II}, 22 F.3d at 1292.
\item \textsuperscript{111} In \textit{Mark v. Borough of Hatboro}, 51 F.3d 1137 (3d Cir. 1995), the court made the follow-

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

\end{itemize}
ference on the part of the city may hold the city liable under § 1983 for that injury.

The Fagan analysis leaves one asking "Where's the beef?" With no constitutional violation committed by the non-policymaking employee(s) and with a showing of only Canton-type deliberate indifference, there is simply no constitutional violation made out and there is no basis for § 1983 liability on anyone's part. The Third Circuit's mistake in Fagan is in treating proof of statutory responsibility under Canton's deliberate indifference standard as proof of constitutional liability under Collins.112

Williams v. City & County of Denver

In Williams, the plaintiff's son was killed when a police vehicle ran a red light and broadsided the decedent's vehicle.113 At the time of the collision, the officer operating the police vehicle was responding to a non-emergency request for assistance by another officer.114 The plaintiff sued both Officer Farr and the city.115

Because the district court had determined that the officer's conduct did not amount to a constitutional violation, it had granted summary

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112. Id. at 1153 n.13; see Evans v. Avery, 100 F.3d 1033, 1039 (1st Cir. 1996) (declining invitation to adopt Fagan analysis "because we believe that the Fagan panel improperly applied the Supreme Court's teachings").

113. A recent district court opinion recognizes the problem created by the Fagan analysis and rejects the imposition of municipal liability in absence of "the beef." In Burke v. Mahanoy City, No. 97-CV-7277, 1999 WL 116291 (E.D. Pa. Mar. 3, 1999) the court noted:

This court finds that we are required to follow Third Circuit law and examine the possibility of municipal liability under § 1983, although the individual officers have not been held liable in this situation. The present case is close in identity to Fagan because Plaintiff has alleged substantive due process claims . . . Moreover, Plaintiff has also independently alleged constitutional claims against the City, Police Department and Chief of Police. . . . Under either scenario for municipal liability, the deliberate indifference or policy and custom of the municipality must inflict constitutional injury. . . . Thus, the mere existence of a policy of inaction or inadequate training of officers with respect to drinking and disorderly conduct is not actionable under § 1983 if such conduct does not inflict constitutional injury. . . . Even if we accept that the existence of a municipal policy or custom resulted in the failure of individual officers to address the city's problems of underage drinking, loitering and fighting, such municipal inaction cannot be said to inflict constitutional injury. Thus, we need not reach the issue of whether Defendants are subject to Monell liability where, as here, we have concluded that no constitutional right was violated.

Id. at *12-13.

114. Id.

115. Id. at 1013.
judgment for the city on the *Canton* claims. The district court also rejected the notion that the city could be held liable under § 1983 independent of the officer’s liability. In reversing the holding of the district court on the existence of the underlying constitutional violation, the court of appeals concluded that “Officer Farr’s alleged conduct, particularly his decision to speed against a red light through an intersection on a major boulevard in Denver without slowing down or activating his siren in non-emergency circumstances, all in violation of state law and police regulations, could be viewed as reckless and conscience-shocking[.]” and, therefore, egregious enough to constitute an underlying substantive due process violation. The court affirmed summary judgment for the officer, however, based on qualified immunity because the court concluded that the law was not clearly established at the time of the accident. Given sufficient evidence to make out an underlying constitutional violation by Officer Farr, the court of appeals also reversed the summary judgment for the city and remanded for further proceedings. The court of appeals subsequently granted a rehearing en banc, but, given the Supreme Court’s intervening decisions in *Brown* and *Lewis*, has now vacated its panel opinion and remanded to the district court for reconsideration in light of these two Supreme Court opinions. If the forthcoming opinion of the district court results in a determination that an underlying substantive due process violation was committed by the officer, then the plaintiff could proceed with her municipal liability claim based on the deliberate indifference of the city in the hiring, training, and supervising of Officer Farr. This would be a *Canton*-type claim dependent upon an underlying constitutional wrong having been committed by Officer Farr.

Unlike the district court’s original opinion, the now vacated panel opinion of the court of appeals acknowledged that a claim could be asserted directly against the city on a *Collins* theory, but affirmed summary judgment for the city on this basis since there was not enough evidence from which a jury could find that the city’s conduct was “so egregious, outrageous and fraught with unreasonable risk as to shock the conscience.” Thus, the Tenth Circuit panel opinion recognized that in cases where the plaintiff’s underlying constitutional

116. *Id.*
117. *Id.*
118. *Id.* at 1017.
120. *Id.*
122. *Williams*, 99 F.3d at 1020.
claim depends upon establishing a particular state of mind on the part of the non-policymaking employee, there may be situations in which an officer inflicts the injury, but lacks the requisite state of mind. In these cases, the plaintiff should be able to proceed directly against the government entity on a Collins theory if the plaintiff can demonstrate: (1) that the policymaker(s) possessed the requisite state of mind required to make out a constitutional violation, and (2) that the policymaker's acts or omissions were the "moving force" behind the plaintiff's injury.

**County of Sacramento v. Lewis**

In Lewis, the Court granted certiorari "to resolve a conflict among the circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." The decedent in Lewis was a sixteen-year-old passenger on a motorcycle driven by a friend. A pursuit took place when the driver of the motorcycle ignored an officer's attempt to stop him for speeding. The chase reached speeds of up to 100 miles per hour and ended when the motorcycle failed to maneuver a turn, resulting in both the driver and passenger falling off the cycle. The police officer in pursuit skidded into Lewis, propelling him seventy feet down the road. Lewis died as a result of his injuries.

Because Supreme Court precedent precluded application of the Fourth Amendment to the facts of the case, the Court first had to resolve whether the plaintiff could state a Fourteenth Amendment substantive due process claim in the pursuit context, and, if so, whether the allegations set out by the plaintiff were sufficient to establish such a claim.

Justice Souter, writing the majority opinion, noted that the Court had recently expressed its view on the first question and pointed to the following language in United States v. Lanier:

123. Id. at 1015-16.
125. Id. at 1712.
126. Id.
127. Id.
128. Id.
129. Id.
130. See California v. Hodari D., 499 U.S. 621, 626 (1991). Hodari D. held that police pursuit does not amount to "seizure" within meaning of Fourth Amendment. Id. Fourth Amendment "seizure occurs only when there is a governmental termination of freedom of movement through means intentionally applied." Brower v. County of Inyo, 489 U.S. 593, 596-97 (1989).
Graham v. Connor . . . does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, Graham simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.133

Thus, given the facts of Lewis and the inapplicability of a more specific constitutional provision, the plaintiff could assert a claim under the Fourteenth Amendment for a violation of substantive due process.134 The Court expressly rejected as "unsound,"135 the contrary position taken by the Seventh Circuit in Mays v. City of East St. Louis.136

The more difficult question was the standard of culpability the plaintiff would have to demonstrate to make out a substantive due process claim in the pursuit context. In Lewis, the Ninth Circuit had held that "deliberate indifference or reckless disregard" was the ap-

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133. Id. at 272 n.7.
134. See Petta v. Rivera, 143 F.3d 895, 901 (5th Cir. 1998), concluding that:
   As have all of the courts of appeals that have addressed the issue, that a plaintiff whose
   claim is not susceptible to proper analysis with reference to a specific constitutional
   right may still state a claim under § 1983 for a violation of his or her Fourteenth
   Amendment substantive due process right, and have the claim judged by the constitu-
   tional standard which governs that right.
Id.; Hemphill v. Schott, 141 F.3d 412 (2d Cir. 1998):
   This court has held that outside the context of an arrest, a plaintiff may make claims of
   excessive force under § 1983 under the Due Process Clause of the Fourteenth Amend-
   ment. . . . One embodiment of this still extant claim for relief from excessive force
   based in Due Process is the situation in which a state actor aids and abets a private
   party in subjecting a citizen to unwarranted physical harm. . . . Graham's holding that
   excessive force claims in the context of an arrest are to be analyzed under the Fourth
   Amendment's objective standards does not extend to this unusual situation in which
   the police officers allegedly engaged in a deprivation of rights coincident with, but dis-
   tinct from, their arrest of the suspect.
Id. at 418-19; Sanchez v. Figueroa, 996 F. Supp. 143, 147-48 (D.P.R. 1998):
   While substantive due process analysis has been rendered inapposite to situations to
   which specific constitutional amendments apply, . . . the factors set forth by Judge
   Friendly in Glick remain useful in analyzing claims of excessive force by innocent by-
   standers who have no Fourth or Eighth Amendment claims.
Id.

135. Lewis, 118 S. Ct. at 1715.
136. 123 F.3d 999 (7th Cir. 1997). The court held that where passengers in suspect's car sued
   for injuries sustained in context of high-speed pursuit,
   [c]aution in the creation of new rights leads us to conclude that the sort of claim plain-
   tiffs make is not a proper invocation of substantive due process. . . . [O]nce the substan-
   tive criteria of the fourth amendment have been applied, there is neither need nor
   justification for another substantive inquiry—one based not on constitutional text but
   on an inference from structure.
Id. at 1002.
propriate standard for a substantive due process claim arising from a high-speed pursuit.\textsuperscript{137} The Ninth Circuit's holding was in direct conflict with decisions of other circuits requiring conduct that "shocks the conscience" in high-speed pursuit cases.\textsuperscript{138}

The Court first observed that "the core of the concept" of due process has always been the notion of "protection against arbitrary action."\textsuperscript{139} What will be considered "fatally arbitrary," however, will "differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."\textsuperscript{140} To establish an executive abuse of power that is "fatally arbitrary," the plaintiff will have to demonstrate conduct that "shocks the conscience."\textsuperscript{141} The Court acknowledged that "the measure of what is conscience-shocking is no calibrated yard stick," and "that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault."\textsuperscript{142} Most likely to reach the conscience-shocking level would be "conduct intended to injure in some way unjustifiable by any government interest."\textsuperscript{143}

Approving of the deliberate indifference standard applied to substantive due process claims of pretrial detainees complaining of inadequate attention to health and safety needs, the Court distinguished high-speed pursuits by law enforcement officers as presenting "markedly different circumstances."\textsuperscript{144} The Court noted substantial authority for different standards of culpability being applied to the same constitutional provision.\textsuperscript{145} Thus, in the Eighth Amendment prison context, while deliberate indifference to medical needs may establish

\textsuperscript{137} Lewis v. Sacramento County, 98 F.3d 434, 441 (9th Cir. 1996), rev'd, 118 S. Ct. 1708 (1998).

\textsuperscript{138} See, e.g., Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996). "[P]olice officers' deliberate indifference to a victim's rights, standing alone, is not a sufficient predicate for a substantive due process claim in a police pursuit case. Rather, in such a case, the plaintiff must also show that the officers' conduct shocks the conscience." Id. at 1038; Williams v. City & County of Denver, 99 F.3d 1009, 1017 (10th Cir. 1996) (concluding that officer's "decision to speed against a red light through an intersection on a major boulevard in Denver without slowing down or activating his siren in non-emergency circumstances . . . could be viewed as reckless and conscience-shocking"), vacated and remanded for further proceedings in light of County of Sacramento v. Lewis and Board of County Comm'rs v. Brown, Williams v. City & County of Denver, 153 F.3d 730 (10th Cir. 1998) (per curiam) (en banc); Fagan v. City of Vineland, 22 F.3d 1296, 1303 (3d Cir. 1994) (en banc) (holding that "the appropriate standard by which to judge the police conduct [in a high speed pursuit case] is the 'shocks the conscience' standard").

\textsuperscript{139} Lewis, 118 S. Ct. at 1716.

\textsuperscript{140} Id.

\textsuperscript{141} Id. at 1717.

\textsuperscript{142} Id.

\textsuperscript{143} Id. at 1718.

\textsuperscript{144} Id. at 1719.

\textsuperscript{145} Lewis, 118 S. Ct. at 1719-20.
constitutional liability, the Court has required prisoners asserting excessive force claims in the context of a prison riot to show that the force was used "maliciously and sadistically for the very purpose of causing harm." The Court analogized police officers engaged in sudden police chases to prison officials facing a riot and concluded:

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

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

Lewis, like Collins, is a decision dealing with the requirements of the underlying constitutional violation. The case sets out the level of culpability that the plaintiff must prove to hold the individual officer liable for a substantive due process violation in the context of a high speed pursuit. It is not a case about municipal responsibility under § 1983, and it is not a case about substantive due process claims in other contexts. The Court does, however, clarify that not all substantive due process claims will be subject to the same level of culpability. To read the case as a source of municipal liability under § 1983, one must discern from the opinion what standard the Court might ap-

147. Whitley v. Albers, 475 U.S. 312, 320-21 (1986). See Hudson v. McMillian, 503 U.S. 1, 6 (1992), where the "malicious and sadistic" standard was applied to a prisoner's excessive force claim that arose in a non-riot, non-emergency context.
148. Lewis, 118 S. Ct. at 1720.
149. Id. at 1720-21.
150. Id. at 1721. While six of the Justices concurred in the judgment and opinion of the Court, Justices Stevens, Scalia, and Thomas concurred only in the judgment. Id. at 1723. Justice Stevens would have reinstated the judgment of the district court which had disposed of the case on qualified immunity grounds on the basis that the law was not clearly established at the time. Id. He would have left resolution of the difficult constitutional question for a case against a municipality. Id. (Stevens, J., concurring).
Justice Scalia, joined by Justice Thomas, suggested that the appropriate test for a substantive due process claim was "whether our Nation has traditionally protected the right respondents assert" rather than "whether the police conduct here at issue shocks my unelected conscience." Id. at 1724. (Scalia, J., joined by Thomas, J., concurring in the judgment). Justice Scalia "would reverse the judgment of the Ninth Circuit, not on the ground that petitioners have failed to shock my still, soft voice within, but on the ground that respondents offer no textual or historical support for their alleged due process right." Id. at 1726.
151. Id. at 1716.
ply to hold the municipality itself, through it policymakers, liable for a substantive due process violation.

While Williams is a work in progress that may well be completed before these Symposium articles are published, the case serves as an excellent vehicle for examining the impact that Lewis may have on the Canton/Collins confusion in the context of substantive due process claims. As Williams winds its way through the trial court and, most likely, through the court of appeals again, three major issues will need to be reexamined in light of Brown and Lewis. First, is there sufficient evidence to support a determination that Officer Farr violated the plaintiff's decedent's substantive due process rights? Second, if so, can the plaintiff make out the requisite level of deliberate indifference demanded by Brown to attribute the underlying constitutional violation to the city on a Canton-type theory? Third, if there is no underlying constitutional violation by Officer Farr, can the plaintiff assert a claim directly against the city based on its own violation of the plaintiff's substantive due process rights?

Given the facts of Williams, the plaintiff should not have to satisfy the Lewis "intent to harm" standard to prove a violation of the decedent's substantive due process rights. Officer Farr was not engaged in a high-speed pursuit, but was responding to a non-emergency call from another officer. While he may have been pursuing police business, he was not pursuing "bad guys." The Court in Lewis evidences concern with the need for officers to be able to respond to emergency situations without fear of civil liability. The analogy to the "prison riot" underscores the focus of the decision on officers who confront "an occasion calling for fast action," officers who do not have the "luxury" of deliberating or reflecting about the course of conduct to pursue in the given circumstances.

In a post-Lewis case, the Tenth Circuit has interpreted the Supreme Court decision to draw this distinction between contexts where officers are confronted with sudden, tense, rapidly developing or emergency-type situations and contexts in which there is time to deliberate. In Radecki v. Barela, the court states:

[I]n assessing the constitutionality of law enforcement actions, we now distinguish between emergency action and actions taken after

152. Id. at 1719-20.
153. Id. at 1720.
154. 146 F.3d 1227 (10th Cir. 1998), cert. denied, 119 S. Ct. 869 (1999). Radecki was not a high-speed pursuit case. It involved an officer who was engaged in a struggle with a suspect and ordered an innocent bystander to assist. Id. at 1228. In his attempt to help the officer, the innocent bystander was shot and killed by the suspect. Id. It is apparent that Lewis' "intent to harm" standard for substantive due process claims will not be confined to the high-speed pursuit
opportunity for reflection. Appropriately, we are required to give great deference to the decisions that necessarily occur in emergency situations. . . . Henceforth, we look to the nature of the official conduct on the spectrum of culpability that has tort liability at one end. On the opposite, far side of that spectrum is conduct in which the government official intended to cause harm and in which the state lacks any justifiable interest. In emergency situations, only conduct that reaches that far point will shock the conscience and result in constitutional liability. Where the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience.155

Given the “contextual” nature of the level of culpability for substantive due process claims, the facts of Williams arguably present a context in which the Lewis “intent to harm” standard should not apply. Instead, it should suffice to “shock the conscience” if Officer Farr’s conduct is deemed reckless and deliberately indifferent to the obvious and serious risk he created to the safety of those around him. In the words of the Tenth Circuit, calculated indifference should be enough.156

If Officer Farr is found to have committed the underlying substantive due process violation, then the plaintiff could proceed against the City on a Canton/Brown theory of liability. The officer was proceeding down a major Denver boulevard at sixty miles per hour in a thirty-five context. See, e.g., Moreland v. Las Vegas Metropolitan Police Department, 159 F.3d 365, 372-73 (9th Cir. 1998):

The question we face today is whether [the Lewis] newly minted explanation of the “shocks the conscience” standard also controls in cases where it is alleged that an officer inadvertently harmed a bystander while responding to a situation in which the officer was required to act quickly to prevent an individual from threatening the lives of others. We conclude that it does. . . . Expressly declining to draw a bright line rule, the Court described the critical consideration as whether the circumstances are such that “actual deliberation is practical.”. . . . [E]ach of the circuits that has interpreted and applied this aspect of the Lewis decision has recognized that the critical question in determining the appropriate standard of culpability is whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct.

Id.; Schaefer v. Goch, 153 F.3d 793, 798 (7th Cir. 1998) (concluding that where officers shot innocent party instead of suspect, “[t]he situation was fluid, uncertain, and above all dangerous, and the officers’ decision to shoot, regrettable though its results turned out to be, does not shock the conscience”); Medeiros v. O’Connell, 150 F.3d 164, 170 (2d Cir. 1998) (discussing how the Lewis “shocks the conscience” standard was not satisfied where the bullet intended for the suspect deflected and hit hostage).

155. Radecki, 146 F.3d at 1231-32.

156. Id. at 1232. Another possibility is that since proof of “intent to harm” will rarely be made through direct evidence, the lack of a legitimate law enforcement purpose for the officer’s conduct may be considered as evidence of the impermissible purpose required to make out the constitutional violation.
mile-per-hour zone with his overhead lights on, but no siren.\textsuperscript{157} The officer involved had his license revoked on three separate occasions and had a number of traffic violations.\textsuperscript{158} Additionally, the executive director of the Denver Civil Service Commission cautioned the city against hiring the officer and attached a note to his file stating, “Do not waste time on this one. Three suspensions. Flunks because of driving record.”\textsuperscript{159} A psychologist recommended that the city conduct further investigations before hiring the officer.\textsuperscript{160} The city, however, failed to conduct any additional investigations.\textsuperscript{161} Moreover, the city did not provide the officer with any special driving training and he had nine incidents of poor driving during the training the city did give him.\textsuperscript{162} The facts of \textit{Williams} present an egregious case of a single, bad hire that would satisfy even the more rigorous “plainly obvious consequence” rule of \textit{Brown}.\textsuperscript{163} Given the facts with respect to the background of Officer Farr, it is difficult to imagine that the evidence would be insufficient as a matter of law for a jury to conclude that a policymaker screening Farr’s record would not have understood that a “plainly obvious consequence” of hiring Farr would be the violation of someone’s constitutional rights through the operation of a motor vehicle.

If, despite the fact that Officer Farr was not engaged in a high-speed pursuit and was not involved in an “emergency” situation, the court applies the \textit{Lewis} “intent to harm” standard and concludes that the application of this standard precludes a finding of a substantive due process violation by Farr, then the \textit{Canton/Brown} claim against the city dissolves. This liability is founded on derivative, statutory responsibility for the underlying constitutional violation. Without a substantive due process violation by Farr, there can be no derivative liability on the part of the city under § 1983. But does \textit{Lewis} provide the “beef” for a substantive due process claim directly against the city?

This author would argue that even if the plaintiff cannot make out the requisite level of culpability to establish a substantive due process claim against Officer Farr, that should not preclude a successful substantive due process claim against the city based on a different level of culpability applicable to the policymakers who hired, trained and supervised Farr. This would not be a \textit{Canton/Brown} derivative sort of

\begin{footnotes}
\footnotetext[157]{Williams v. City & County of Denver, 99 F.3d 1009, 1012 (10th Cir. 1996).}
\footnotetext[158]{\textit{Id.}}
\footnotetext[159]{\textit{Id.}}
\footnotetext[160]{\textit{Id.}}
\footnotetext[161]{\textit{Id.}}
\footnotetext[162]{\textit{Id.}}
\footnotetext[163]{Board of County Comm’rs v. Brown, 520 U.S. 397, 398 (1997).}
\end{footnotes}
liability. This claim would be based on the City’s own violation of the plaintiff’s constitutional rights. While the Tenth Circuit panel opinion in Williams recognized the possibility of the plaintiff asserting a claim directly against the city based on its own substantive due process violation, the court applied the same standard of culpability that it applied to the individual officer who inflicted the injury. That standard embodied the pre-Lewis notion of “shocks the conscience” as outrageous, egregious behavior that required a showing of more than deliberate or reckless indifference.164

The Court in Lewis clearly acknowledged that less than “intent to harm” would suffice for a substantive due process violation in some Fourteenth Amendment contexts.165 The subjective deliberate indifference standard borrowed from the Eighth Amendment context has been approved by the Supreme Court as applicable in the Fourteenth Amendment pretrial detainee cases.166 The Court could have drawn a clear line in Lewis between contexts involving those in “custody,” where deliberate indifference would suffice to shock the conscience, and contexts involving “free citizens,” where the level of culpability would rise to “intent to harm.” Instead, the Court has made the level of culpability in substantive due process claims, like the standard in Eighth Amendment cases, a variable that depends not on the status of the victim, but rather on the situation confronting the state actor. Great deference is given to the officer who must act quickly in an emergency situation, with no time for weighing, deliberating, or calculating the foreseeable consequences of his conduct. Great deference gives way to greater scrutiny, however, when the state actor is in a situation that allows for, perhaps even requires, deliberation, reflection, and consideration of obvious or foreseeable consequences flowing from the actor’s conduct or decisions.167

164. See Williams, 99 F.3d at 1020.
166. Id.
167. A recent district court opinion provides an unusual application of this approach (deference giving way to greater scrutiny, depending on the opportunity to deliberate). The court subjects an officer’s conduct in the context of high speed pursuit to different scrutiny and varying standards as the pursuit is prolonged and escalates in its level of recklessness and risk to public safety. The Court’s observation in Feist v. Simonson, No. CIV. 97-1882 ADM/AJB, 1999 WL 61888 (D. Minn. Feb. 8, 1999) are worth noting in some detail:

In cases involving split-second judgments, difficult law enforcement choices, and sudden instincts, police officers must be given broad discretion to act. However, undisputed facts of this case present a far different factual predicate which takes the decision making process outside the realm of “split second judgment.” In his pursuit of Shannon, Simonson was initially engaging in the same sort of instantaneous judgments and reactions as those required of the officer in Lewis or the prison guards in the riot cases. The initial decision to activate his lights and siren and commence pursuit was one made
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As the Court of Appeals for the Eighth Circuit has observed, the Supreme Court "has not directly addressed the question of how *Mo-nell*'s standard for municipal liability meshes with *Farmer*'s requirement of subjective knowledge."\footnote{168} Proof that a policymaker had actual knowledge of the substantial risk of constitutional injury created by his act or omission and failed to take reasonable steps to eliminate or reduce that risk should suffice to establish the requisite subjective deliberate indifference on the part of the city itself.\footnote{169} Judge Becker, now Chief Judge, writing for the Court of Appeals for the Third Circuit essentially adopted this view in a case decided before *Fagan* and before the Supreme Court's decision in *Collins*.

in haste and can easily be justified under the circumstances. However, the situation then escalated step-by-step into one of greater and greater potential for harm to the general public. What began as a chase down residential roads soon escalated to a high-speed run through stop lights and down the wrong way of busy one-way streets. What then became a dangerous pursuit entering a busy interstate eventually became a deadly pursuit back onto the same interstate, this time heading at break-neck speeds the wrong direction against heavy traffic. The entire chase lasted over six minutes and measured over six miles. The wrong-way portion of the chase down the busy interstate covered over 1.2 miles on its own, heading through one tunnel and toward a second—crashing to a tragic halt causing Feist's death. While Officer Simonson should be afforded deference for his initial decision, the contention that he did not have the time or ability to clearly assess the rising levels of potential danger in the situation should be subject to further analysis. At many points during the chase, Simonson had the opportunity to balance the law enforcement goal of apprehending Shannon for use of a stolen vehicle (a low-level penalty likely carrying no prison time) against the threat to the general public. Each new turn onto one-way streets and especially the accessing the freeway to drive on the wrong side of the median, presented a juncture for reassessment and evaluation of the escalating consequences of the chase. Rather than aborting the chase as the danger increased, the speed and number of pursuing vehicles also increased. While catching a car thief is a law enforcement goal, there is no indication that, had Simonson suspended the chase, the MPD would not have been able to eventually apprehend Shannon. Simonson had secured a physical description and license number of the vehicle; he likely could make an eyewitness identification of the driver; and numerous MPD officers had been notified of the chase and called to the area in the event of a "bail" or exit off the freeway. A review of Simonson's conduct, in light of *Lewis* and other established precedent, reveals that genuine issues of fact exist as to whether his actions "shocked the conscience" for the purpose of a substantive due process claim.

\footnote{Id. at *9-10, *15 n.4.}


169. In *Doe*, the Eighth Circuit affirmed a verdict against the County for violating the plaintiff's substantive due process right to protection from harm inflicted by other juvenile detainees, concluding that "[w]hatever the standard may be, the evidence nonetheless adequately establishe[d] subjective knowledge on the part of Sheriff McKee, who, in his own testimony, acknowledged the dangers of housing five juveniles together in a 200-square-foot, short-term holding cell for months at a time." \footnote{Id.}
In *Simmons v. City of Philadelphia*, the plaintiff, the mother and administratrix of the estate of the decedent, brought suit under § 1983 against the city and the individual officer who was the "turnkey" on duty when her son hanged himself after being taken into custody for public intoxication. Municipal liability was predicated upon two theories: First, "that the City violated Simmons's constitutional right to due process through a policy or custom of inattention amounting to deliberate indifference to the serious medical needs of intoxicated and potentially suicidal detainees," and second, "that the City violated Simmons's due process rights through a deliberately indifferent failure to train its officers to detect and to meet those serious needs." The jury in *Simmons* found that the individual officer, although negligent, did not violate Simmons's constitutional rights, but that the city was liable under § 1983. One of the many issues raised on appeal was whether, in light of *Heller*, the city could be held liable under § 1983 where the individual, low-level official was found not to have violated decedent's constitutional rights. In affirming the verdict against the city, Judge Becker engaged in a lengthy analysis of municipal liability based on a custom, policy, or failure to train, concluding that to establish municipal liability, principles set forth by the Supreme Court in its "Pembaur trio" must be satisfied. The plaintiff must both identify a particular official with policymaking authority in the area and adduce "scienter-like" evidence with respect to that policymaker. Judge Becker drew support for the imposition of a "scienter-like" evidence requirement not only from the *Pembaur* trio, but also from *Wilson v. Seiter*, in which the Supreme Court held that a prisoner challenging conditions of confinement under the Eighth Amendment must establish "a culpable state of mind" on the part of particular prison officials. Finding the level of care owed to pretrial detainees to be at least the same as that owed to convicted prisoners under the Eighth Amendment, Judge Becker determined that *Wilson* supported his conclusion that the plaintiff was required to adduce "scienter-like" evidence.

170. 947 F.2d 1042 (3d Cir. 1991).
171. Id. at 1050.
172. Id.
173. Id. at 1054.
174. Id. at 1059.
176. *Simmons*, 947 F.2d at 1064.
177. Id. at 1063.
179. See *Simmons*, 947 F.2d at 1062-63.
evidence of deliberate indifference of identified policymakers. Judge Becker noted that the plaintiff need not name the specific policymaker as a defendant, nor obtain a verdict against him to prevail against the municipality. The plaintiff must only present evidence of the policymaker's "knowledge and his decisionmaking or acquiescence." 

In a concurring opinion, then Chief Judge Sloviter objected to the "scienter-like" requirement imposed by Judge Becker. Judge Sloviter's concern was that insisting upon a showing of "scienter" would limit § 1983 cases "to those where plaintiffs can show defendants knew of the constitutional deprivation and exclud[e] those cases where plaintiffs argue that defendants should have known of it." Interpreting "scienter" to require actual knowledge and intentional conduct, Judge Sloviter concluded the requirement was inconsistent with the Supreme Court's decision in Canton.

Examining Simmons through the lens of subsequent Supreme Court decisions, this author would conclude that Judge Sloviter was right that Judge Becker's "scienter-like" requirement is not consistent with the objective deliberate indifference standard of Canton, which would hold a municipality liable for constitutional violations committed by nonpolicymaking employees where policymakers knew or should have known that their acts or omissions would cause such constitutional injuries to be inflicted upon citizens with whom their employees came into contact. Deliberate indifference under Canton does not require actual knowledge or intentional conduct. If Canton deliberate indifference were the appropriate standard, then Judge Becker could be

180. Id. at 1064 n.20.
181. Id. at 1261.
182. Id. at 1065 n.21. See Brown v. City of Margate, 842 F. Supp. 515 (S.D. Fla. 1993), where the court makes the following observation:
Defendant argues that because a municipality can only act through natural persons, the City of Margate could not be found liable unless one or more of the individual named Defendants had also been found liable. Defendants do not cite any authority for this argument, and it merits no more than brief consideration here. . . . The jury may not have been able to decide conclusively which official was ultimately responsible for the City's policies, and therefore declined to find any particular individual liable. This is not necessarily inconsistent with a finding that someone or some combination of policymakers had implicitly or explicitly condoned a policy of tolerance toward the excessive use of force.

Id. at 519.
183. Simmons, 947 F.2d at 1089.
184. Id. at 1090 (Sloviter, C.J., concurring).
185. Id. at 1091.
accused of having "given undue weight to the 'deliberate,' or 'scienter,' element of these uneasily yoked terms."\textsuperscript{186}

On the other hand, Judge Becker was right to insist upon a higher level of culpability, a "scienter-like" requirement on the part of identified policymakers, since Simmons was not about Canton-type derivative, statutory liability but, rather, was about the underlying constitutional violation committed by the city. In this sense, Judge Sloviter's opinion could be criticized for having "emphasize[d] 'indifference' to the exclusion of the word 'deliberate' to which it is yoked."\textsuperscript{187}

In two recent opinions, the Seventh Circuit has first commented upon, and then, oddly enough, displayed the sort of Canton/Collins confusion discussed in this Article. In Contreras v. City of Chicago,\textsuperscript{188} the court leveled the following criticism at the plaintiffs:

We would first note that much of the plaintiffs' argument reflects a confusion between what constitutes a constitutional violation and what makes a municipality liable for constitutional violations. Both in the District Court and here on appeal, the plaintiffs invoked 'failure to train' and 'deliberate indifference' theories as the basis for the substantive due process claim. . . . Notions of 'deliberate indifference' and 'failure to train,' however, are derived from municipal liability cases such as [Monell, Canton] and most recently [Brown]. Those cases presume that a constitutional violation has occurred (typically by a municipal employee) and then ask whether the municipality itself may be liable for the violations. . . . The liability of the City of Chicago for any deliberate indifference or for failing to train DCS inspectors is therefore secondary to the basic issue of whether a constitutional guarantee has been violated.\textsuperscript{189}

In Armstrong v. Squadrito,\textsuperscript{190} however, a post-Lewis decision raising the issue of municipal liability for a substantive due process claim arising from an extended detention after arrest on a writ of body attachment, the Seventh Circuit Court of Appeals suggests that the objective Canton/Brown deliberate indifference standard is the level of culpability sufficient to find county liability on a constitutional basis. A "body attachment warrant" was issued for the arrest of the plaintiff when he allegedly failed to appear for a contempt hearing on child support payments.\textsuperscript{191} The plaintiff voluntarily surrendered and was informed there would be a brief detention until he was escorted to

\textsuperscript{186} Id. at 1060 n.13.

\textsuperscript{187} Id.

\textsuperscript{188} 119 F.3d 1286 (7th Cir. 1997).

\textsuperscript{189} Id. at 1294.

\textsuperscript{190} 152 F.3d 564 (7th Cir. 1998).

\textsuperscript{191} Id. at 567.
court or received a court date.\textsuperscript{192} He was told he could expect to be released the same day.\textsuperscript{193} Due to a “will call” system adopted by the county jail, which system was geared to numbers rather than names, and a transcription error with respect to the plaintiff's file number, the plaintiff remained incarcerated for fifty-seven days with no court appearance, despite his increasingly vociferous complaints.\textsuperscript{194} The plaintiff sued the sheriff and jail commander in their official capacities and the confinement officers in their individual capacities.\textsuperscript{195} The district court granted summary judgment for all defendants.\textsuperscript{196} The Seventh Circuit reversed and remanded.\textsuperscript{197}

After concluding that the circumstances of the plaintiff's confinement gave rise to a liberty interest that was protected by substantive due process,\textsuperscript{198} the court proceeded to the next step of its analysis,\textsuperscript{199} which asked whether “the defendants' conduct offend[ed] the standards of substantive due process.”\textsuperscript{200} Noting that the Supreme Court had endorsed the deliberate indifference standard in contexts like the prison setting, where there was time for reflection and forethought, the court of appeals then addressed what constituted deliberate indifference.\textsuperscript{201} The court acknowledged that deliberate indifference in the

\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id. at 567-68.
\textsuperscript{195} Id. at 569. Thus, the suit was considered to be against the municipality or County itself. \textit{Id.} at 577 (citing Yeksigian v. Nappi, 900 F.2d 101, 103 (7th Cir. 1990) (citing Kentucky v. Graham, 473 U.S. 159, 166-67 & n.14 (1985))).
\textsuperscript{196} Armstrong, 152 F.3d at 569.
\textsuperscript{197} Id. at 567.
\textsuperscript{198} Id. at 571-76.
\textsuperscript{199} The court adopted the following approach in analyzing plaintiff's claims:

First, we examine whether the Due Process Clause protects against an extended detention, without an appearance before a magistrate, following an arrest pursuant to valid bodily attachment. Second, we will explore whether the defendants' conduct offended the standards of substantive due process. And third, we will consider whether the totality of the circumstances shocked the conscience.

\textit{Id.} at 570. Although the whole 3-step analysis addresses a question of law, whether the defendants' conduct violated substantive due process, the Court of Appeals thought the issue of deliberate indifference under the second step should be decided by the jury, while the ultimate “totality of the circumstances/shocks the conscience” question must be determined by the court. \textit{Id.} at 577. The Supreme Court in \textit{Lewis} did not state whether the conscience-shocking determination was to be made by the judge or jury. There is some difference of opinion on this among the lower federal courts. Compare Bovari v. Town of Saugus, 113 F.3d 4, 6 (1st Cir. 1997) (holding conscience-shocking determination is question for jury) and Mellott v. Heemer, No. CV-94-2071, 1997 WL 447844, at *15 (M.D. Pa. July 23, 1997) (“The question of whether conduct is 'truly conscience shocking' is one for the jury.”), rev'd on other grounds, 161 F.3d 117 (3d Cir. 1998) with Mason v. Stock, 955 F. Supp. 1293, 1308 (D. Kan. 1997) (finding shock-the-conscience determination is not a jury question).

\textsuperscript{200} Armstrong, 152 F.3d at 576.
\textsuperscript{201} Id.
Eighth Amendment context required the plaintiffs to prove that the defendants had actual knowledge of the serious risk of harm to which the plaintiffs were exposed and failed to take reasonable steps to prevent the harm from occurring.202 Nevertheless, the court determined that in the Fourteenth Amendment context and in contexts involving municipal liability for substantive due process violations, "the standard for deliberate indifference appears closer to tort recklessness," requiring a showing of a "conscious disregard of known or obvious dangers."203 In reaching this conclusion as to what the deliberate indifference standard entails for Fourteenth Amendment substantive due process claims asserting municipal liability, the court of appeals relied on Seventh Circuit and Supreme Court precedent that dealt with Canton/Brown municipal statutory liability under § 1983 for underlying constitutional violations committed by non-policymaking employees.204

The court concluded that the "will call" system evidenced a policy of deliberate indifference, but was saved from that characterization by a provision allowing for the filing of "complaint forms," through which detainees could inquire into court dates or release dates.205 The reality was, however, that there was also a policy or custom of refusing to accept such complaint forms from detainees inquiring about court dates.206 Analogizing a refusal to accept the complaint form to a refusal to respond to a reasonable request for medical assistance, the court concluded that "the refusal to accept complaints vitiate[d] the salutary effect of the complaint form and return[ed] us to the serious problems evident in the will call system."207 Thus, the plaintiff survived summary judgment on this claim against the county.

The court treated the claims against the confinement officers in their individual capacities as separate and independent of the claims against the county, and the plaintiff also survived summary judgment

202. Id. at 577.
203. Id. at 576-77.
204. Id. at 577. The court cited West v. Waymire, 114 F.3d 646 (7th Cir. 1997), in which the Seventh Circuit had relied on Brown in rejecting municipal liability on a failure to train or supervise theory, where a police officer, acting under color of law, had sexual relations with a thirteen-year-old girl. Id. at 651. In West, there was clearly an underlying substantive due process violation committed by the officer. Id. at 647. The only question was whether the Town could be held liable for that violation on a Harris/Brown theory. Id. The Court of Appeals in West concluded that sexual molestation of young girls by officers was not so foreseeable or so likely that the Town was obligated to train against it or adopt measures to prevent such conduct. Id. at 650.
205. Armstrong, 152 F.3d at 579.
206. Id.
207. Id. at 579-80.
as to those claims.\textsuperscript{208} The refusal to convey the plaintiff's complaints to superiors as well as the refusal to pay any heed to the plaintiff's repeated protests would suffice to prove the deliberate indifference of the individual defendants as required by \textit{Lewis}\.\textsuperscript{209} What is confusing about the opinion in Armstrong is that it was a \textit{Canton/Brown} kind of case with respect to the issue of municipal liability, yet the court does a \textit{Collins/Lewis} analysis of the claim. If the jury finds an underlying substantive due process violation by the confinement officers, the claim against the county should be a derivative one based on the custom or policy of refusing to accept complaint forms when the plainly obvious consequence of that policy would be unconstitutional detentions. The implication of the Seventh Circuit's decision is that even if the jury does not find deliberate indifference on the part of the confinement officers, the claim against the county could proceed based on its own deliberately indifferent policy or custom. Having absolved the named policymakers of any actual knowledge or personal involvement in the conduct giving rise to Armstrong's claim,\textsuperscript{210} the court is clearly holding that a finding of objective deliberate indifference by the jury would be sufficient for the court to find the County's conduct conscience-shocking. In this light, the Seventh Circuit opinion in Armstrong is very much like the Third Circuit's opinion in Fagan, in that the Seventh Circuit would seemingly allow municipal liability based on Canton-type deliberate indifference, with no showing of an underlying constitutional violation.

\section*{Conclusion}

It may be that the Supreme Court will ultimately settle on \textit{Canton/Brown} objective deliberate indifference as the appropriate standard for holding a municipality liable for its own constitutional violations in contexts where there is time and opportunity for deliberation by policymakers whose acts or omissions affect interests protected by substantive due process. However, until or unless the Supreme Court signals that the \textit{Canton/Brown} standard of deliberate indifference will

\begin{footnotes}
\footnotetext{208}{Id. at 580.}
\footnotetext{209}{Id. As the court observed: Armstrong's repeated and increasingly strenuous complaints should have provided the guards with sufficient knowledge to suspect improper confinement and take additional action. Armstrong claims that, given this knowledge, their failure to transmit his complaints to the jail authorities constitutes deliberate indifference. This argument dovetails smoothly with the Supreme Court's emphasis on "unhurried judgments, upon the chance for repeated reflection."}
\footnotetext{210}{Id. at 581.}}

\end{footnotes}
suffice to hold a municipality liable on a constitutional level, courts
should follow the analysis done by the Tenth Circuit in *Williams*, but
use the standard of subjective deliberate indifference (akin to the "sci-
enter-like" requirement in *Simmons*), rather than the "intent to
harm" standard, for the underlying constitutional claim against the
city. Proving subjective deliberate indifference on the part of a poli-
cymaker should make the municipality itself liable for a substantive
due process violation where that deliberate indifference causes consti-
tutional injury. In each case, the court should ask the "Where's the
beef?" question, forcing both advocates and the court to focus on the
case as either a *Canton/Brown* form of municipal liability for a non-
policymaker's constitutional violation or a *Collins/Lewis* form of di-
rect constitutional liability based on the subjective deliberate indiffer-
ence of a policymaker as the source of the constitutional injury. In
defining "the beef," litigants and lower courts must be cautious in the
framing of their arguments and opinions, respecting the distinction be-
tween the statutory standard and the constitutional standard of culpa-
ility in § 1983 cases.