OPENING THE DOOR TO LIABILITY WITH POLICY

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SELECTED LAW RELATED PUBLICATIONS AND ACADEMIC APPOINTMENTS

- Author/Speaker: *I Know You Are, But What am I? Ethical Issues in Removal and Quo Warranto Litigation*, Texas District and County Attorneys Association Civil Law Seminar, 2011
- Author/Speaker: *It Came from Article 5 of the Texas Constitution: Practical and Ethical Issues in Representing and Advising the Commissioners Court*, Texas District and County Attorneys Association Civil Law Seminar, 2007
- Author/Speaker: *Some Do Fight City Hall: Governmental Liability Under Section 1983*, State Bar of Texas 17th Annual Suing and Defending Governmental Entities Course, 2005
- Author/Speaker: *It's Good to Be the King: Suing & Defending Governmental Entities*, Amarillo Area Bar Association Spring Institute, 2005
- Author/Speaker: *Lifestyles of the Ethically Challenged: Ethics Scenarios and Trepid Answers*, Texas District and County Attorneys Association Civil Law Seminar, 2005
- Author/Speaker: *Lights! Camera! Grievance! Ethical Issues in High-Profile, High-Dollar Cases and Media Relations*, Texas District and County Attorneys Association Annual Criminal and Civil Law Update, 2004
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TABLE OF CONTENTS

I. INTRODUCTION 1

II. SCOPE OF SECTION 1983 1

III. FEDERAL AND STATE SOVEREIGN IMMUNITY 2
- A. To Immunize or Not to Immunize; That is the Question 3
- B. How to Correct Official Un-Officialness: *Ex Parte Young* 4
- C. Freely-Given, Coerced Consent: Waiver of Immunity 5

IV. FEDERAL AND STATE JURISDICTION OVER SECTION 1983 CLAIMS 5

V. LIABILITY OF THOSE ENTITIES SUBJECT TO SECTION 1983 CLAIMS 6
- A. Whodunit?: Identifying the Policymaker 6
- B. The Smoking Gun: Policy or Custom 8
  - 1. "Policy" or "Custom" Defined 8
  - 2. Facial Innocuousness Requires Widespread Pattern of Misconduct 9
  - 3. "Single Incident" Exception and Its *Connick* Problem 11
  - 4. Deviation from Policy and Failure to Discipline 13
- C. "My Bad": Deliberate Indifference 14
- D. Taking the "Moving Force" on Up: Causation 17

VI. IMPORTANCE OF CAPACITY 18

VII. REQUISITES OF PLEADING 19

VIII. DAMAGES CONSIDERATIONS 20

OPENING THE DOOR TO LIABILITY WITH POLICY (PowerPoint Presentation) 23

OPENING THE DOOR TO LIABILITY WITH POLICY[1]

I. INTRODUCTION

Whether driven by an idealistic crusade, the age-old search for deep pockets or something in between, there seems to be a certain adventuresome attraction to suing governmental entities under 42 U.S.C. § 1983 (hereinafter "section 1983"). Swashbuckler and bean counter alike can appreciate a liability theory that is unfettered by damages caps or individual-capacity defenses like qualified immunity. Anyone who has experience in section 1983 litigation, however, will confirm that blithely filing a lawsuit with the requisite buzzwords is not the figurative equivalent of plucking the key to Fort Knox from under the doormat. The requisite elements of successful section 1983 claims present potential traps for those who are unfamiliar with this area of the law. Consequently, this article attempts to address the important, overarching considerations in governmental section 1983 liability cases, with a focus on the bedrock concept of policy or custom. The substantive details of particular section 1983 claims are left to the expertise and eloquence of this seminar's other presenters. Instead, common or significant policy issues encountered in section 1983 litigation against governmental entities are considered without intended emphasis on the plaintiff's or defendant's perspective. In order to understand the role and mechanics of policy as an essential component of section 1983 liability, a review of the general principles applicable to entity liability may be instructive. To that end, the statute itself would appear to be the best starting point.

II. SCOPE OF SECTION 1983

It has long been established that section 1983 is not a source of substantive rights. *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979)). Instead, it simply provides a remedy for rights established under the Constitution or federal laws. *Id*.; *see also Hernandez ex rel. Hernandez v. Texas Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 879 (5th Cir. 2004). The statute itself provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... 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[.]

42 U.S.C. § 1983. Thus, an underlying constitutional or statutory violation is a predicate to liability under section 1983. *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir.), *cert. denied*, 522 U.S. 1016 (1997) . Because of the statute's conditional language focusing upon deprivations of rights, though, it does not provide an avenue for relief every time a state actor violates a federal law. *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 119 (2005). Similarly, section 1983 permits only the enforcement of rights, not the broader category of "benefits" or "interests." *Id*. (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)). In light of these considerations, stating a claim under section 1983 fundamentally requires a plaintiff to: (1) allege a violation of rights secured by the Constitution of the United States or the laws of the United States; and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *James v. Texas Collin County*, 535 F.3d 365, 373 (5th Cir. 2008). Phrased slightly differently, these requisites also have been seen to impose a three part test, demanding: (1) a deprivation of a right secured by federal law (2) that occurred under color of state law, and (3) that was caused by a state actor. *Victoria W. v. Larpenter*, 369 F.3d 475, 482 (5th Cir. 2004).

Considering these basic elements highlights the importance of state action, which in entity-targeted lawsuits generally finds form in one of the recognized species of policy or their analogues. As touched upon above, state action is a prerequisite to bringing a lawsuit under section 1983. *Rundus v. City of Dallas, Tex.*, 634 F.3d 309, 312 (5th Cir. 2011), *petition for cert. filed*, No. 10-1434 (U.S. May 23, 2011), http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1434.htm. Showing state action, in turn, requires that either: 1) the act or omission in question represents an official governmental policy or custom or 2) the conduct at issue is "fairly attributable" to a governmental entity, even if that conduct was undertaken by a non-governmental actor. *Id*. Whether private conduct is attributable to a governmental entity for state action purposes is to be addressed on a pragmatic, case-by-case basis. *See id.* at 313. The context of the *Rundus* case, for example, centered upon a speech restriction imposed by the State Fair of Texas, which operates on property owned by the City of Dallas. After reviewing cases from other circuits and the fact permutations they considered, the Fifth Circuit ultimately determined within this context that the State

[1] The author wishes to gratefully acknowledge the research assistance of Kimberly Beza, Assistant County Attorney, Potter County, Texas, in the preparation of this article.

Fair was not a state actor. *Rundus v. City of Dallas, Tex.*, 634 F.3d 309, 315 (5th Cir. 2011), *petition for cert. filed*, No. 10-1434 (U.S. May 23, 2011), http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1434.htm. Though far from being exclusive or conclusive, factors seen as significant by the court in reaching its conclusion included: the extent of governmental aid in enforcement of the private entity's regulations; whether the private entity has a simple permit to use governmental property (presumably requiring greater reliance upon the government for logistics) or is a tenant (presumably enjoying greater plenary control over use of the property); and the extent of the government's role in planning, advertising or managing the event in question. *See id*. at 314-15.

Where state action is involved, alleged constitutional violations seem to form the most common foundations for section 1983 claims. *See, e.g.*, *Piotrowski v. City of Houston*, 237 F.3d 567, 579-80 (5th Cir.) (requiring that each municipal policy at issue be identified and subjected to determination of whether it is facially constitutional or unconstitutional), *cert. denied*, 524 U.S. 820 (2001). Conversely, bringing a section 1983 action on the basis of a federal statutory violation implicates an additional analytical consideration. Under such circumstances, a plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs. *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 119 (2005). Assuming the requisites of governmental action and violation of federal rights, however, not every "state actor" is the proper defendant in a section 1983 lawsuit.

III. FEDERAL AND STATE SOVEREIGN IMMUNITY

At the outset, it should be noted that section 1983 expressly confines its remedial reach to deprivations of rights under color of state law. As a result, federal officials acting under color of federal law are not subject to suit under section 1983. *Broadway v. Block*, 694 F.2d 979, 981 (5th Cir. 1982).[2] Moreover, sustaining a claim that the federal government is liable for an award of monetary damages requires a waiver of sovereign immunity that extends unambiguously to such a monetary claim. *Lane v. Pena*, 518 U.S. 187, 192 (1996). The federal government has not waived its sovereign immunity for section 1983 claims. *Boyd v. United States*, 861 F.2d 106, 107 (5th Cir. 1988).

States enjoy similar protection. Ratification of the Constitution signaled that states entered the union with their sovereignty intact. *Sossamon v. Texas*, ___ U.S. ___, ___, 131 S.Ct. 1651, 1657 (2011). Immunity from suit historically has been considered central to state sovereignty, and that centrality prompted adoption of the Eleventh Amendment. *See id*. (citing *Hans v. Louisiana*, 134 U.S. 1, 11 (1890)). The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const., amend. XI. When coupled with aspects of section 1983 itself, the Eleventh Amendment operates to retain the sovereign immunity of the states from section 1983 damages claims. Initially, neither a state nor its officials acting in their official capacities are considered to be "persons" under section 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). And while the express language of the Eleventh Amendment applies to suits by citizens of a state or political entity other than the defendant state, it is recognized that a state's sovereign immunity is not limited to the literal terms of the amendment. *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 446 (2004). Under the Eleventh Amendment, a state also is immune from suits by its own citizens. *Id*.

By virtue of the Eleventh Amendment, then, federal courts have no jurisdiction over federal or state law claims against a state or state agency unless that immunity has been expressly waived by the state or abrogated by Congress pursuant to proper constitutional authority. *Virginia Off. For Protection & Advocacy v. Stewart*, ___ U.S. ___, ___, 131 S.Ct. 1632, 1638 (2011); *Hoff v. Nueces County*, 153 S.W.3d 45, 48 (Tex. 2004); *accord Univ. of Tex. at El Paso v. Herrera*, 322 S.W.3d 192, 195 & n. 11 (Tex. 2010) (citing, *inter alia*, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003)). Furthermore, sovereign immunity retained under the Eleventh Amendment protects nonconsenting states from being sued in their own courts for federal law claims. *Hoff*, 153 S.W.3d at 48.

While section 1983 provides a federal forum to remedy many deprivations of civil liberties, "it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity." *Will*, 491 U.S. at 66. Identical protection is afforded a state official sued in her official capacity. An official

[2] *But see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (recognizing implied federal cause of action for damages against federal agents who violated Fourth Amendment).

capacity suit generally represents "only another way of pleading an action against an entity of which the officer is an agent, so it is treated as a suit against the entity if the entity receives notice and an opportunity to respond. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Thus, individual capacity defenses are unavailable in official capacity suits; rather, the forms of sovereign immunity available to the employing entity under the Eleventh Amendment may be claimed. *Kentucky v. Graham*, 473 U.S. 159, 167 (1985). Complications in applying the Eleventh Amendment generally arise not when the state itself or one of its officers in his or her official capacity is named as a party, but in three other circumstances: (1) when the target defendant is an agency or subdivision; (2) when equitable relief is sought; and (3) when trying to determine whether the immunity has been waived. Each issue is examined below in turn.

A. To Immunize or Not to Immunize; That is the Question

The sovereign immunity protected by the Eleventh Amendment extends not only to the states themselves, but also to governmental entities that are considered "arms of the state". *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989); *Hoff v. Nueces County*, 153 S.W.3d 45, 49 (Tex. 2004). This line of reasoning has developed "to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." *Hoff*, 153 S.W.3d at 49 (quoting *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400-01 (1979)). For example, the Texas Department of Criminal Justice — a frequent defendant in suits brought by its disgruntled guests — is protected by Eleventh Amendment immunity from section 1983 actions seeking money damages. *Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002). By contrast, "municipalities" and similar political subdivisions have no such immunity from suit. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993) (citing *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658, 701 (1978)).[3] Counties fall within this exclusion from immunity, even where they exercise a "slice of state power." *Northern Ins. Co. of N.Y. v. Chatham County, Ga.*, 547 U.S. 189, 193-94 (2006). Whether an entity is an arm of the state, or an independent political subdivision such as a county, is a question of federal law. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n. 5 (1997). But that federal question can only be answered after considering the provisions of state law that define the agency's character. *Id*.

To accommodate this blended scrutiny, the Fifth Circuit employs a six factor test to determine whether an agency or entity is an "alter ego" or "arm of the state." It was developed to determine "if the state is the real, substantial party in interest because the suit seeks to impose a liability which must be paid from public funds in the state treasury." *United States ex rel. Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438, 440 (5th Cir. 2004), *cert. denied sub nom. Nat'l Heritage Ins. Co. v United States ex rel. Barron*, 545 U.S. 1114 (2005). The test inquires about:

(1) whether the state statutes and case law view the agency as an arm of the state;
(2) the source of the entity's funding;
(3) the entity's degree of local autonomy;
(4) whether the entity is concerned primarily with local, as opposed to statewide, problems;
(5) whether the entity has the authority to sue and be sued in its own name; and
(6) whether the entity has the right to hold and use property.

Id.; *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 360 n. 11 (5th Cir. 2003), *cert. denied sub nom. State Concern Turkmenneft v. Bridas S.A.P.I.C.*, 541 U.S. 937 (2003). Of the six factors, the source of the entity's funding is the weightiest. *Deloitte & Touche*, 381 F.3d at 440; *accord Regents of the Univ. of Cal.*, 519 U.S. at 430 ("the question of whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued."). To contextualize these principles in operation, a useful example of the test's application may be seen in *Flores v. Cameron County, Tex.*, 92 F.3d 258 (5th Cir. 1996).

In *Flores*, a county juvenile board asserted that it was an arm of the state and, thus, immune from a

[3] Throughout what has been dubbed "*Monell*" jurisprudence concerning the liability of local governmental units under section 1983, the terms "municipality" and "municipal" are generically used to denote those local governments. *See Monell*, 436 U.S. at 690 (noting congressional intent that "municipalities and other local government units" be included among those persons to whom section 1983 applies). Use of the term has developed as an apparent shorthand reference for convenience's sake, without any demonstrated intent to limit the jurisprudential scope to cities. *See, e.g., City of Canton, Ohio v. Harris*, 489 U.S. 378, 381-83 (using "municipality" to refer to city); *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 403 (1997) (using "municipality" to refer to county); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 733 (1989) (using "municipality" to refer to local school district).

section 1983 claim concerning the death of a juvenile in its custody. The Fifth Circuit rejected this contention, noting that the Texas Human Resources Code and applicable attorney general opinions viewed a juvenile board as a county, rather than a state, authority. 95 F.3d at 265-66. Applying the second factor, the court observed that two-thirds of the juvenile board's funding came from the county, and that all funding received for the benefit of the juvenile board was disbursed by the county in the course of the normal county budgeting process. *Flores v. Cameron County, Tex*., 92 F.3d 258, 266 (5th Cir. 1996). As to the third factor, the court found significance in the fact that the proportion of the board's funding from state sources was small enough that it could function without it if forfeiture for violation of state standards occurred.. Further, the court pointed out that the juvenile board was empowered to set more stringent standards for juvenile detention than the minima prescribed by the Texas Juvenile Probation Commission. *Id*. at 266-67. Because the juvenile board's function was to provide juvenile probation services to the county, rather than to address broader geographical concerns, the fourth factor also weighed against immunity. *Id*. at 267. While the court could not definitively determine whether the juvenile board had authority to sue and be sued or to hold and use property, it averted to "miscellaneous facts," such as the county's construction and maintenance of the detention center at issue, its contracts with other counties to house juvenile offenders and the perception that juvenile detention center employees were county employees as indicative of the juvenile board's status as a county, not a state, agency. *Id.* at 267. This conclusion is bolstered by the Texas Supreme Court's subsequent, direct holding that Texas counties themselves "possess sufficient indicia of independence" that they are not arms of the state for purposes of the Eleventh Amendment. *Hoff v. Nueces County*, 153 S.W.3d 45, 50 (Tex. 2004).

B. How to Correct Official Un-Officialness: *Ex Parte Young*

At first blush, it would appear that Eleventh Amendment law would foreclose the ability to require states to comply with federal law, at least within the context of section 1983. To resolve this anomaly, federal courts have fashioned a remedy often referred to as the doctrine of *Ex parte Young*.[4] The doctrine holds that the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004). It rests on the "fiction" that when a federal court commands a state official to do nothing more than refrain from violating federal law, the official is not the state for sovereign immunity purposes. *Virginia Off. for Protection & Advocacy v. Stewart*, ___ U.S.___, ___, 131 S.Ct. 1632, 1638 (2011). Consequently, a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law. *Quern v. Jordan*, 440 U.S. 332, 337 (1979).

In accordance with this doctrine, federal courts may order prospective relief as well as measures ancillary to appropriate prospective relief. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004). They may not, however, award retrospective relief such as money damages or their equivalent if the state invokes its immunity. *Id*. An example of a permissible exercise of *Ex parte Young* authority is enforcement of a consent decree implementing a federal statute in a particularized way. *Id*. at 439. Enforcing such a decree is permissible because it "vindicates an agreement that the state officials reached to comply with federal law." *Id*. To validly invoke the *Ex parte Young* doctrine, a plaintiff's suit alleging a violation of federal law must be brought against individual persons in their official capacities as agents of the state, and the relief sought must be declaratory or injunctive in nature and prospective in effect. *Aguilar v. Tex. Dep't of Crim. Justice*, 160 F.3d 1052, 1054 (5th Cir. 1998), *cert. denied*, 528 U.S. 851 (1999). Care must be taken here to expressly bring an official capacity claim against a state officer, rather than a straightforward claim against the state or agency itself, since the Eleventh Amendment bars suit against a state or state entity, as opposed to a state official, regardless of whether money damages or injunctive relief is sought, and section 1983 does not override the Eleventh Amendment under those circumstances. *Briggs v. Mississippi*, 331 F.3d 499, 503 (5th Cir. 2003), *cert. denied*, 540 U.S. 1108 (2004).

Procedural requirements for suing under the *Ex parte Young* doctrine result in something of an inconsistency within the concept of official capacity suits. This is a peculiarity of Eleventh Amendment law. In other words, it is "[o]nly for purposes of the Eleventh Amendment" that "official-capacity actions for prospective relief [are] not treated as actions against the State." *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 414 (5th Cir. 2004) (internal quotations and punctuation omitted). Texas law now shares a similar peculiarity, recognizing the viability of "ultra vires" suits to force a governmental official in her official capacity to comply with state law, despite sovereign or governmental immunity. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372-73 (Tex. 2009).

[4] *See Ex parte Young*, 209 U.S. 123 (1908).

C. Freely-Given, Coerced Consent: Waiver of Immunity

In operation, the Eleventh Amendment will bar a suit against a state unless the state has waived its immunity or unless Congress has exercised its power under section 5 of the Fourteenth Amendment to override that immunity. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989). Since section 1983 does not represent congressional abrogation of state sovereign immunity protected by the Eleventh Amendment,[5] the latter proposition is inapposite here. The key issue, then, is waiver.

Much like its state law counterpart,[6] Eleventh Amendment-retained sovereign immunity is seen to consist of two separate and different kinds of immunity: immunity from suit and immunity from liability. *Meyers ex rel. Benning v. State of Texas*, 410 F.3d 236, 252-53 (5th Cir. 2005), *cert. denied*, 550 U.S. 917 (2007). A state is free to relinquish its immunity from suit while retaining its immunity from liability, or vice versa, but is not constitutionally required to do so. *Id* at 253; *accord Sossamon v. Texas*, ___ U.S. ___, ___, 131 S.Ct. 1651, 1658 (2011) ("A State, however, may choose to waive its immunity in federal court at its pleasure."). In order to waive immunity, a state's consent to suit must be knowing and voluntary. *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 277 (5th Cir. 2005) (en banc). Waiver under these circumstances is effective when it is the intentional relinquishment or abandonment of a known right or privilege. *Id*. This may be accomplished statutorily or procedurally.

A statutory waiver of immunity — again, much like the standards of Texas law[7] — must be "unequivocally expressed" in the text of the relevant statute or result from overwhelming implication leaving "no room for any other reasonable construction". *See Sossamon*, ___ U.S. at ___, 131 S.Ct. at 1658; *Martinez v. Tex. Dep't of Crim. Justice*, 300 F.3d 567, 575-76 (5th Cir. 2002) (holding that Texas Whistleblower Act waives immunity in state courts, but not for purposes of Eleventh Amendment). This brand of waiver generally is not implemented for selfless reasons. Instead, it primarily occurs as a congressionally-imposed condition of participating in a federal funding program.[8] If waiver results from participation in a Spending Clause[9] program, the program must be a valid exercise of Congress's spending power; the waiver condition must be clearly stated and the program must be non-coercive. *Pace*, 403 F.3d at 279.

Waiver also may occur procedurally. For instance, a state's removal of a case to federal court waives its Eleventh Amendment immunity. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 624 (2002). Procedural default also has been utilized occasionally to find waiver. Thus, where a community college district inadequately briefed its Eleventh Amendment arguments, it was found to have abandoned those defensive contentions. *Martin v. Alamo Community College Dist.*, 353 F.3d 409, 413 (5th Cir. 2003).

IV. FEDERAL AND STATE JURISDICTION OVER SECTION 1983 CLAIMS

Once the issue of immunity has been resolved, attention may turn to procedures and standards applicable to a section 1983 action against a governmental entity that is subject to suit. An initial procedural question prompted by the language of section 1983 is the issue of the proper forum. The statute itself does not address whether section 1983 claims are properly asserted in state court, or whether the remedy is envisioned as wholly federal. Nonetheless, it is now established that state courts exercise concurrent jurisdiction with federal courts over section 1983 claims. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987); *Flores v. Edinburgh Consol. Indep. Sch. Dist.*, 741 F.2d 773, 777 n. 5 (5th Cir. 1984); *see also County of Dallas v. Sempe*, 151 S.W.3d 291, 299 (Tex. App.—Dallas 2004, pet. filed) ("State and federal courts have jurisdiction over section 1983 suits."). Indeed, this concurrence of jurisdiction is as much an obligation as an empowerment. As the Supreme Court has recognized:

> Although § 1983, a Reconstruction-era statute, was passed to interpose the federal courts between the States and the people, as guardians of the people's federal rights, state

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[5] *See Briggs v. Mississippi*, 331 F.3d 499, 503 (5th Cir. 2003), *cert. denied*, 540 U.S. 1108 (2004) ("section 1983 does not override the Eleventh Amendment.").

[6] *See Tex. Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004).

[7] *Cf.* Tex. Gov't Code Ann. § 311.034 (Vernon Supp. 2010) (requiring statutory waiver of sovereign immunity to be expressed in "clear and unambiguous" language).

[8] Congressional power to exact a waiver of immunity under its spending power is restricted. Imposition of a condition under the spending power must: (1) be in pursuit of the public welfare; (2) be accomplished unambiguously; (3) be related to the federal interest in particular projects or programs; and (4) not violate any separate constitutional prohibitions. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

[9] *See* U.S. Const. art. I, § 8, cl. 1.

> courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law.

Haywood v. Drown, ___ U.S. ___, ___, 129 S.Ct. 2108, 2114 (2009) (internal citation and punctuation omitted). There is a limited escape valve available, but it is skeptically viewed. A state may refuse jurisdiction over federal claims on the basis of a neutral state rule regarding the administration of the courts, but it may not "dissociate itself from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Id*. (citing *Howlett v. Rose*, 496 U.S. 356, 372 (1990)).

V. LIABILITY OF THOSE ENTITIES SUBJECT TO SECTION 1983 CLAIMS

Unlike federal or state entities, local governments are not immune from suit and may be sued under section 1983. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993). Amenability to suit, however, does not mean automatic liability. It is hornbook civil rights law that a plaintiff cannot hold a governmental entity liable under section 1983 unless the government has a policy or custom that violated the plaintiff's civil rights. *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). In other words, a governmental body may be held liable under section 1983 only for its own violations of federal law, which occurs when unconstitutional conduct implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by the body's officers, as well as governmental "custom." *Los Angeles County, Cal. v. Humphries*, ___ U.S.___, ___, 131 S.Ct. 447, 452 (2010). Following from this precept is one of the most important rules to consider in evaluating a civil rights claim against a governmental body: local governmental entities cannot be held vicariously liable under section 1983 solely for the actions of their employees. *Connick v. Thompson*, ___ U.S. ___, ___, 131 S.Ct. 1350, 1359 (2011); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989); *see also, e.g., Sanders-Burns v. City of Plano*, 594 F.3d 366, 380 (5th Cir. 2010) ("Liability under the doctrine of *respondeat superior* is not cognizable in § 1983 actions."); *Adames v. Perez*, 331 F.3d 508, 513 n. 3 (5th Cir. 2003) ("We have made clear that vicarious liability is an untenable theory of recovery in a § 1983 action."); *Evett v. DETNTFF*, 330 F.3d 681, 689 (5th Cir. 2003) ("Section 1983 does not create vicarious or *respondeat superior* liability."); *Thompson v. Upshur County, TX*, 245 F.3d 447, 459 (5th Cir. 2001) (no liability for acts of subordinates under section 1983 on any theory of vicarious liability); *accord Ashcroft v. Iqbal*, ___ U.S. ___, ___, 129 S.Ct. 1937, 1948 (2009) (noting correctness of concession that "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*."). As the Fifth Circuit has summed it up, "[a] municipality is almost never liable for an isolated unconstitutional act on the part of an employee; it is liable only for acts directly attributable to it through some official action or imprimatur." *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 847 (5th Cir. 2009), *cert. denied*, ___ U.S. ___, 131 S.Ct. 66 (2010).

Hence, it is not enough for a section 1983 plaintiff merely to identify conduct properly attributable to the local government. *Bd. of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 404 (1997). Instead, a governmental entity is liable if, through its deliberate conduct, the entity was the "moving force" behind the injury alleged. *Id*. To meet these standards and impose liability upon a municipality, then, a plaintiff's claim must encompass proof of (1) a policymaker; (2) an official policy; and (3) a violation of constitutional rights whose "moving force" is the policy or custom. *Valle v. City of Houston*, 613 F.3d 536, 541-42 (5th Cir. 2010), *cert. denied*, No. 10-801 (U.S. Apr. 18, 2011), http://www.supremecourt.gov/orders/courtorders/041811zor.pdf; *Davis v. Tarrant County, Tex.*, 565 F.3d 214, 227 (5th Cir.), *cert. denied*, ___ U.S. ___, 130 S.Ct. 624 (2009). *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003). In a municipal liability case, the first inquiry always is whether there is a direct causal link between a municipal policy and the alleged constitutional deprivation. *Victoria W. v. Larpenter*, 369 F.3d 475, 482 (5th Cir. 2004); *see also Goodman v. Harris County*, 571 F.3d 388, 396 (5th Cir. 2009) (plaintiff seeking to impose liability upon municipality under § 1983 must identify municipal policy or custom that caused plaintiff's injury), *cert. denied*, ___ U.S. ___, 130 S.Ct. 1146 (2010).

A. Whodunit?: Identifying the Policymaker

With respect to identifying a policymaker, federal law instructs the reviewing court to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue. *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 785 (1997). A policymaker, for section 1983 purposes, must have final policymaking authority. *Rivera*, 349 F.3d at 247. Identifying that person or body entails finding those "who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Bolton v. City of Dallas, Tex.*, 541 F.3d 545, 548 (5th Cir. 2008), *cert. denied*, ___ U.S. ___, 129 S.Ct. 1669

(2009). The inquiry is specific to the particular action at issue and depends on an analysis of relevant state and local law. *Id*.

Identifying this authority may not be as simple as it would seem. There is a significant legal distinction to be drawn here between a policymaker and a decisionmaker. *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 167 (5th Cir. 2010), *petition for cert. filed*, No. 10-1036 (U.S. Feb. 14, 2011), http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1036.htm. More particularly, the fact that an official's decisions are final is insufficient on its own to demonstrate policymaker status. *Id*.; *see also Bolton*, 541 F.3d at 548-49. Likewise, simply going along with discretionary decisions made by one's subordinates is not a delegation to them of the authority to make policy. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988) (plurality op.). Nor is a mere failure to investigate the basis of a subordinate's discretionary decisions a delegation of policymaking authority, especially where the wrongfulness of the subordinate's decision arises from a retaliatory motive or other unstated rationale. *Id*. If delegation of policymaking authority is to be legally recognized, it may occur by way of the municipality's governing body either: (1) doing so through express statement or formal action; or (2) by its conduct or practice, encouraging or acknowledging the agent in a policymaking role. *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 167 (5th Cir. 2010), *petition for cert. filed*, No. 10-1036 (U.S. Feb. 14, 2011), http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1036.htm.

Absent express or implied delegation of the relevant authority, mere discretion to exercise a particular function does not necessarily entail final policymaking authority over that function. *Valle v. City of Houston*, 613 F.3d 536, 543 (5th Cir. 2010), *cert. denied*, No. 10-801 (U.S. Apr. 18, 2011), http://www.supremecourt.gov/orders/courtorders/041811zor.pdf. Meanwhile, though final decisionmaking authority is not alone sufficient to render a person or entity a policymaker, it is part of the minimum requirement to be one. If an official's decision is subject to "meaningful review" by a higher authority, the official is not a policymaker. *See Tharling v. City of Port Lavaca*, 329 F.3d 422, 427 (5th Cir. 2003) (finding that city manager, whose decision to remove police chief could not become final until approved by city council, was not policymaker for purposes of First Amendment wrongful termination claim). That scope of oversight or review, however, must be over the precise area of authority at issue to presumptively vitiate policymaking status. *Zarnow*, 614 F.3d at 168.

Whether a particular official has final policymaking authority is a question of state law. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). That is not to say that state law can answer the question by simply labeling as a state official someone who clearly makes local policy. *McMillian*, 520 U.S. at 786. Rather, the substantial impact of state law will be upon defining the official's functions. *Id.* Resolving this inquiry requires the court to consult state and local positive law, as well as "custom or usage" having the force of law. *Jett*, 491 U.S. at 737. Identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the court. *Id*.; *Gros v. City of Grand Prairie, Tex.*, 181 F.3d 613, 617 (5th Cir. 1999). Generally, local governmental policymakers in Texas:

> not only govern conduct; they decide the goals for a particular [governmental] function and devise the means for achieving those goals. Policymakers act in the place of the governmental body in the area of their responsibility; they are not supervised except as to the totality of their performance.

City of Gladewater v. Pike, 727 S.W.2d 514, 523 (Tex. 1987) (quoting *Bennett v. City of Slidell*, 728 F.2d 762, 769 (5th Cir. 1984)). In the end, the analysis is necessarily function-oriented, given that courts resist the existence of any "default final policymaker" because state law state law will always direct a court to some official or body that has responsibility for making law or setting policy in any particular area of a local government's business. *Gros*, 181 F.3d at 616. In short, there is no "de facto" final policymaking authority. *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 847 (5th Cir. 2009), *cert. denied*, ___ U.S. ___, 131 S.Ct. 66 (2010). While no bright-line rule has been offered for easy targeting of a policymaker, some suggestions may be gleaned from recent cases. Analyzing whether a city manager was a policymaker, the Fifth Circuit found relevance in provisions of the Texas Local Government Code that repeatedly described a city manager's responsibilities for "administration." Recalling that a policymaker is one who has "responsibility for making law or setting policy in any given area of a local government's business," the court noted that the city manager's duties as described by state law made the position executive, while strongly suggesting that a policymaker would occupy a legislative role. *Bolton v. City of Dallas, Tex.*, 541 F.3d 545, 551 (5th Cir. 2008), *cert. denied*, ___ U.S. ___, 129 S.Ct. 1669 (2009). By way of contrast, where a police chief issued a number of "General Orders" beginning with "It is the policy of this department …" and setting forth regulations addressing specific behaviors which were binding on

all officers unless altered or changed by the city manager or city council, the Fifth Circuit found that the city had impliedly delegated policymaking authority to the chief. *Zarnow*, 614 F.3d at 167-68.

At the same time, it cannot blithely be presumed that a policymaker exists in a particular case. Where there is no showing of a relevant policy, logically there can be no policymaker to whom responsibility for that policy can be assigned. *See Hutchison v. Brookshire Bros., Inc.*, 225 F.Supp.2d 719, 728 (E.D. Tex. 2002) (where city had no relevant policy, there could be no policymaker to whom allegedly unconstitutional acts were attributable); *cf. Avalos v. City of Glenwood*, 382 F.3d 792, 802 (8th Cir. 2004) (where relevant policies did not apply to actor who caused injury, municipality defendants could not be liable).

Another wrinkle develops when an official creates or implements policy for more than one entity. Where an officer wears "more than one hat," there must be a determination of the particular entity whose policy is being set by the officer within a specific official function in order to figure out which, if any, governmental entity bears section 1983 liability. Most commonly, this functional dichotomy arises in claims focused upon the acts of a judge or prosecutor. To illustrate, a judge acting in his judicial capacity to enforce state law is acting as a state officer, and his judicial acts are not those of a local governmental lawmaker or policymaker. *See Davis v. Tarrant County, Tex.*, 565 F.3d 214, 227 (5th Cir.), *cert. denied*, ___ U.S. ___, 130 S.Ct. 624 (2009); *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992); *accord Eggar v. City of Livingston*, 40 F.3d 312, 316 (9th Cir. 1994), *cert. denied*, 515 U.S. 1136 (1995). On the other hand, a judge could be a local governmental policymaker with respect to her administrative role over matters such as employment issues within her office. *See Johnson*, 958 F.2d at 94; *cf. Forrester v. White*, 484 U.S. 219, 230 (1988) (judge was not entitled to absolute judicial immunity for "administrative" act of firing employee). Likewise, a Texas prosecutor such as district attorney is an agent of the state, rather than the county, when acting in the prosecutorial capacity to enforce state penal law. *Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir.), *cert. denied*, 522 U.S. 828 (1997). But, again in contrast, a district attorney with the final word on hiring or firing within the district attorney's office has been seen to set county policy regarding those decisions. *Brown v. Lyford*, 243 F.3d 185, 192 (5th Cir.), *cert. denied*, 534 U.S. 817 (2001).

B. The Smoking Gun: Policy or Custom

Imposition of liability upon a local governmental entity fundamentally requires identification of a "policy" or "custom" of the government that caused the plaintiff's injury. *Bd. of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 403 (1997). A municipal "policy" must be a deliberate and conscious choice by a governmental entity's policymaker, rather than an unintentionally negligent oversight. *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992). And the decision generally must be a top-down matter. In other words, the requisite official policy is "official" only when it "results from the decision or acquiescence of the municipal officer or body with final policymaking authority over the subject matter of the offending policy." *James v. Harris County*, 577 F.3d 612, 617 (5th Cir. 2009), *cert. denied*, ___ U.S. ___, 130 S.Ct. 1076 (2010). Hence, the unconstitutional conduct must be directly attributable to the local government through some sort of official action or imprimatur; isolated unconstitutional actions by governmental employees "will almost never trigger liability." *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003) (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)). Driving home the essential nature of identifying a relevant custom or policy in a section 1983 suit, that requisite cannot be escaped by simply recasting the suit as one for injunctive or declaratory relief. The "policy or custom" requirement for imposing local governmental liability applies in section 1983 cases irrespective of whether the relief sought is monetary or prospective. *Los Angeles County, Cal. v. Humphries*, ___ U.S. ___, ___, 131 S.Ct. 447, 453-54 (2010).

1. "Policy" or "Custom" Defined

Harkening to the *Monell*, the Supreme Court has advised that local governmental bodies are subject to direct section 1983 liability where the allegedly unconstitutional action at issue implements or executes a policy statement, regulation or decision officially adopted and promulgated by the body's officers, as well as for deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. *Los Angeles County, Cal. v. Humphries*, ___ U.S. ___, ___, 131 S.Ct. 447, 452 (2010).[10] Under the Fifth Circuit's now well-established definition, a governmental policy for purposes of section 1983 liability may consist of:

> (1) A policy statement, ordinance, regulation, or decision that is officially adopted and maintained by [the local government]'s lawmaking officers or by an official to whom the lawmakers have delegated policymaking authority; or

[10] The terms "usage" and "practice" also may be used to describe customs for which liability is appropriate. *Id.*

> (2) A persistent, widespread practice of [the local government's] officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents [the local government's] policy. Actual or constructive knowledge of such custom must be attributable to the governing body of [the local government] or to an official to whom that body had delegated policy-making authority.

Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force, 379 F.3d 293, 309 (5th Cir. 2004) (citing *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992)). Alternatively, a final policymaker's adoption of a course of action tailored to a particular situation and not intended to control decisions in later situations may, in some circumstances, give rise to governmental liability under section 1983. *See Valle v. City of Houston*, 613 F.3d 536, 543 (5th Cir. 2010), *cert. denied*, No. 10-801 (U.S. Apr. 18, 2011), http://www.supremecourt.gov/orders/courtorders/041811zor.pdf. ; *Waltman v. Payne*, 535 F.3d 342, 350 (5th Cir. 2008); *In re Foust*, 310 F.3d 849, 862 (5th Cir. 2002). A section 1983 claim alleging a constitutional violation by force of a custom also may, in an appropriate case, encompass allegations that a policymaker failed to act affirmatively, such as in a failure adequately to train a subordinate. *Burge v. St. Tammany Parish*, 336 F.3d 363, 369 (5th Cir. 2003), *cert. denied sub nom. Burge v. Strain*, 540 U.S. 1108 (2004). Summarized and simplified, official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials and practices so persistent and widespread as to practically have the force of law. *Connick v. Thompson*, ___ U.S. ___, ___, 131 S.Ct. 1350, 1359 (2011).

For a governmental entity to be liable based on its policy, the plaintiff must show, among other things, either (1) that the policy itself violated federal law and authorized or directed the deprivation of federal rights or (2) that the policy was adopted or maintained by the governmental entity's policymakers with deliberate indifference as to its known or obvious consequences. *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 309 (5th Cir. 2004). Here, a "showing of simple or even heightened negligence will not suffice." *Id.*

2. Facial Innocuousness Requires Widespread Pattern of Misconduct

Officially-promulgated policies or customs that are facially unconstitutional present no real analytical difficulties. Quite directly, it is established that even the single unconstitutional action of a final policymaker will establish the requisite "custom or policy." *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 169 (5th Cir. 2010), *petition for cert. filed*, No. 10-1036 (U.S. Feb. 14, 2011), http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1036.htm. Where an official policy or practice is unconstitutional on its face, it necessarily follows that a policymaker was not only aware of the specific policy, but was also aware that a constitutional violation will most likely occur. *Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003), *cert. denied sub nom. Burge v. Strain*, 540 U.S. 1108 (2004). In such circumstances, no substantial question of fault or causation arises. See *Bd. of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 405-06 (1997) (discussing cases involving direct decisions by policymakers). Where an otherwise innocuous policy is at issue, however, liability will not lie unless the policy was promulgated with deliberate indifference and there is a direct link between the policy and the alleged constitutional injury. *Victoria W. v. Larpenter*, 369 F.3d 475, 489 (5th Cir. 2004); *accord Brown*, 520 U.S. at 405 ("Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employees.").

When a claim of section 1983 liability is based on alleged existence of an offending custom, consideration should be given to whether previous, similar incidents have occurred at the hands of the governmental entity's non-policymaking employees.[11] This is so because existence of a custom or practice requires more than a showing of isolated acts. *Burge*, 336 F.3d at 370; *Fraire v. City of Arlington*, 957 F.2d 1268, 1278 (5th Cir.), *cert. denied*, 506 U.S. 973 (1992). At base, "one act is not itself a custom. There must be a persistent and widespread practice." *Pineda v. City of Houston*, 291 F.3d 325, 329 (5th Cir. 2002), cert. denied, 537 U.S. 1110 (2003); *see also World Wide Street Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 753-54 (5th Cir. 2009); *accord Prince v. Curry*, No. 10-10294, 2011 WL 1659493, at *4 (5th Cir. Apr. 28, 2011) (slip op.) (existence of one or, at most, two other similarly situated defendants did not plausibly suggest Texas county had policy or custom of unconstitutionally subjecting sex offenders to enhanced sentences that was so persistent and widespread as to practically have force of law). The Fifth Circuit's rule in this regard is

[11] *See Zarnow*, 614 F.3d at 169 ("A pattern of conduct is necessary only where the municipal actors are *not* policymakers.") (emphasis by the court).

consistent with that of other federal courts. *See, e.g.*, *Gable v. City of Chicago*, 296 F.3d 531, 538-39 (7th Cir. 2002) (two incidents seen as too few to constitute permanent and well-settled custom); *Andrews v. Fowler*, 98 F.3d 1069, 1076 (8th Cir. 1996) (two instances of misconduct indicated only police chief was aware problem existed, but did not indicate "persistent and widespread" patter of misconduct amounting to city custom or policy of overlooking police misconduct); *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) ("Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy."), *cert. denied*, 520 U.S. 1117 (1997); *Davis v. City of New York*, 228 F.Supp.2d 327, 346 (S.D.N.Y. 2002) (two incidents of unconstitutional conduct by low-level employees in large city agency can never provide reasonable basis for finding widespread or well-settled custom); *Doe v. New Philadelphia Pub. Schs. Bd. of Educ.*, 996 F.Supp. 741, 747 (N.D. Ohio 1998) (two incidents of neglectful conduct by school officials found "troubling," but did not rise to level of custom within district or implicate school board in any way). Since isolated violations are not seen to be the persistent, often-repeated and constant violations that constitute custom or policy as required for municipal liability under section 1983, a customary municipal policy cannot ordinarily be inferred from single constitutional violations. *Piotrowski v. City of Houston*, 237 F.3d 567, 581 (5th Cir.), *cert. denied*, 534 U.S. 820 (2001). Therefore, to demonstrate a governmental policy or custom under section 1983, a plaintiff must at least allege:

> A pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.

Fraire v. City of Arlington, 957 F.2d 1268, 1278 (5th Cir.), *cert. denied*, 506 U.S. 973 (1992) (quoting *Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984)). Where prior incidents are used to prove a pattern, they must have occurred for so long or so frequently that the course of conduct warrants attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of the governmental entity's employees. *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 850 (5th Cir. 2009), *cert. denied*, ___ U.S. ___, 131 S.Ct. 66 (2010) (quoting *Webster v. City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984) (en banc)).

Often, "custom" or "policy" claims are accompanied or supplanted by what may be termed "omission" claims. These types of claims most frequently coalesce into allegations of failure to train or failure to supervise. Those claims frequently arise in excessive force cases. In such a case, a plaintiff seeking to impose municipal liability under a failure to train or supervise rationale must prove that the relevant policymaker (*e.g.*, the police chief or sheriff)[12] failed to control an officer's "known propensity for the improper use of force." *Roberts v. City of Shreveport*, 397 F.3d 287, 292 (5th Cir. 2005). In so doing, the plaintiff must plead and prove (1) that the defendant failed to train or supervise the officers involved; (2) there is a causal link between the alleged failure to supervise or train and the alleged violation of the plaintiff's rights and (3) the failure to train or supervise constituted deliberate indifference to the plaintiff's constitutional rights. *Goodman v. Harris County*, 571 F.3d 388, 395 (5th Cir. 2009), *cert. denied*, ___ U.S. ___, 130 S.Ct. 1146 (2010); *Cousin v. Small*, 325 F.3d 627, 637 (5th Cir.), *cert. denied sub nom. Cousin v. Berry*, 540 U.S. 826 (2003). Here, conclusory allegations of "grossly inadequate training" do not make out a case of deliberately indifferent policy. *Benavides v. County of Wilson*, 955 F.2d 968, 973 (5th Cir.), *cert. denied sub nom. Bassler v. County of Wilson*, 506 U.S. 824 (1992). Nor does reliance upon a single instance, rather than a pattern of similar violations, normally sustain a plaintiff's claim that lack of training or supervision caused a violation of the plaintiff's constitutional rights. *Cozzo v. Tangipahoa Parish Council—President Gov't*, 279 F.3d 273, 286-87 (5th Cir. 2002). This theory instead requires a plaintiff to show a pattern of violations and that the inadequacy of training or supervision is "obvious and obviously likely to result in a constitutional violation." *Cousin*, 325 F.3d at 637. Establishing the requisite deliberate indifference further requires a showing that "in light of the duties assigned to specific officers or employees, the need for more or different training is

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[12] Police chiefs often are identified as municipal policymakers with respect to law enforcement. *See, e.g.*, *Pineda v. City of Houston*, 291 F.3d 325, 330 (5th Cir. 2002), cert. denied, 537 U.S. 1110 (2003); *Grandstaff v. City of Borger, Tex.*, 767 F.2d 161, 169 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987); *but see Morgan v. City of DeSoto, Tex.*, 900 F.2d 811, 815 (5th Cir.) (finding fact issue precluding summary judgment on whether city council or police chief was policymaker responsible for illegal arrests), *cert. denied*, 498 U.S. 940 (1990). Texas sheriffs are seen more conclusively to be final policymakers for their counties regarding law enforcement. *Williams v. Kaufman County*, 352 F.3d 994, 1013 (5th Cir. 2003).

obvious, and the inadequacy so likely to result in violations of constitutional rights, that the policymakers of the [governmental body] can reasonably be said to have been deliberately indifferent to the need." *Conner v. Travis County*, 209 F.3d 794, 796-97 (5th Cir. 2000). In addition, for liability to attach based on an "inadequate training" claim, a plaintiff must allege with specificity how a particular training program is defective. *Goodman*, 571 F.3d at 395; *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005). And, in order for liability to attach, the identified deficiency in the governmental training program must be closely related to the ultimate injury. *Hinojosa v. Butler*, 547 F.3d 286, 296 (5th Cir. 2008). Thus, the plaintiff must prove an affirmative answer to the question "would the injury have been avoided had the employee been trained under a program that was not deficient in the *identified respect*?" *Hinojosa v. Butler*, 547 F.3d 286, 296 (5th Cir. 2008) (emphasis by the court).

Adding to the difficulty of this liability theory is the impact of compliance with state-mandated training and licensure programs. With respect to law enforcement training (the most frequently litigated training area), a showing that officers are certified and trained as required by Texas law generally will overcome a claim of constitutionally inadequate training. *See Sanders-Burns v. City of Plano*, 594 F.3d 366, 381-82 (5th Cir. 2010) (when officer have received training required by Texas law, plaintiff must show that legal minimum of training was inadequate); *Benavides v. County of Wilson*, 955 F.2d 968, 973 (5th Cir.) (plaintiff failed to show state minimum training requirements were inadequate), *cert. denied sub nom. Bassler v. County of Wilson*, 506 U.S. 824 (1992). So, if the training of police officers meets state standards, "there can be no cause of action for failure to train absent a showing that the legal minimum of training was inadequate to enable the officers to deal with the usual and recurring situations faced by jailers and peace officers." *O'Neal v. City of San Antonio*, 344 Fed. Appx. 885, 888 (5th Cir. 2009). Federal district courts have been more direct, squarely holding that if a law enforcement department meets the state standards for training of its law enforcement officers, a plaintiff cannot sustain a failure to train cause of action under section 1983. *Gonzales v. Westbrook*, 118 F.Supp.2d 728, 737 (W.D. Tex. 2000); *accord Huong v. City of Port Arthur*, 961 F.Supp. 1003, 1007 (E.D. Tex. 1997) ("All that is required for the municipality to prevail in a claim based on inadequate training is compliance with state-mandated training standards for its officers."); *see also Lopez Hernandez v. Fincher*, No. CIV.A.3:04-CV-1084-G, 2005 WL 265214, at *5 (N.D. Tex. Feb. 2, 2005) (noting plaintiffs' concession that dismissal of failure to train claims is appropriate if record shows relevant officers met TCLEOSE[13] training standards).

3. "Single Incident" Exception and Its *Connick* Problem

There is an exception to the requisite of proving a widespread pattern of misconduct that is generally referred to as the "single-incident" exception, but it is a narrow one. In *Brown v. Bryan County, Okla.*, on remand from the Supreme Court, the Fifth Circuit opined that, under certain circumstances, municipal liability under section 1983 could attach for a single decision without a pattern of prior violations. 219 F.3d 450, 459 (5th Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001). The court later explained that, in a limited set of cases, a plaintiff who is unable to show a pattern of constitutional violations may establish deliberate indifference by showing a single incident with proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights. *Burge v. St. Tammany Parish*, 336 F.3d 363, 373 (5th Cir. 2003), *cert. denied sub nom. Burge v. Strain*, 540 U.S. 1108 (2004). Repeatedly, the Fifth Circuit has emphasized the narrowness of the exception and its reluctance to expand it. *See id.* Invocation of the exception is only proper where the facts giving rise to the violation are such that it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy or failure to train. *Id.* As described in a subsequent opinion, moreover, the single incident in the *Brown* case involved an "utter failure to train and supervise." *Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 386 (5th Cir. 2005). Thus, the Fifth Circuit explained, there is a relevant difference between a complete failure to train and a failure to train in one limited area. *Id.* At the same time, application of the "single-incident" exception is appropriate only if there is evidence of a "reputation for recklessness, or that the on-the-job training … employees received was inadequate." *Burge*, 336 F.3d at 373 (5th Cir. 2003).

Although repeatedly described by the Fifth Circuit as "narrow," the "single-incident" exception is invoked fairly frequently. While the theory has proven popular in section 1983 litigation, however, it is not often successful. And those prospects did not improve significantly after the Supreme Court issued its opinion in *Connick v. Thompson* earlier this year. *Connick* involved a claim against a district attorney's office brought by a defendant who had spent several years on death row and had come within a month of execution before being exonerated. The plaintiff claimed that his

[13] "TCLEOSE" is the acronym for Texas Commission on Law Enforcement Officer Standards and Education.

wrongful imprisonment was caused by the district attorney's office's violation of its obligations under *Brady v. Maryland*[14] — which the district attorney's office conceded — and that the *Brady* violation resulted from the office's deliberate indifference to an obvious need to train its prosecutors on *Brady* compliance. *Connick v. Thompson*, ___ U.S. ___, ___, 131 S.Ct. 1350, 1356-57 (2011). At trial, the jury rejected the claim that an unconstitutional policy caused the Brady violation, but found the district attorney's office liable for failure to train its prosecutors. A $14 million verdict resulted, along with an award of more than $1 million in attorney's fees and costs. 131 S.Ct. at 1357. A panel of the Fifth Circuit affirmed and the court split evenly on rehearing en banc, resulting in affirmance of the trial court judgment. *Id*. at 1358.

The Supreme Court initially noted that, under his failure to train theory, the plaintiff bore the burden of proving both (1) that the district attorney, as policymaker for the district attorney's office, was deliberately indifferent to the need to train the prosecutors about their Brady disclosure obligation with respect to evidence of the type involved in the case and (2) that the lack of training actually caused the Brady violation at issue. *Connick*, 131 S.Ct. at 1358. As context, the court recounted that local governments are responsible only for "their own illegal acts"[15] and are not vicariously liable under section 1983 for their employees' actions. Thus, said the court, plaintiffs who seek to impose section 1983 liability on local governments must prove action pursuant to official municipal policy, which may "[i]n limited circumstances" include a decision not to train certain employees about their legal duty to avoid violating citizens' rights. But the court sounded a cautionary note: "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." Establishing liability in those circumstances requires that the municipality's failure to train its employees in a relevant respect amounts to deliberate indifference to the rights of persons with whom the untrained employees come into contact. *Id.* at 1359.

Since policymakers' continued adherence to an approach they know or should know has failed to prevent tortious conduct by employees can establish the conscious disregard for the consequences of their action—the necessary "deliberate indifference"—a pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train. *Id*. at 1360. As the court observed, "[w]ithout notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Id*.

There was no pattern of similar *Brady* violations by the district attorney's office,[16] so the plaintiff in *Connick* relied primarily upon a "single-incident" exception based on a liability theory left open in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989). The theory was encapsulated in a hypothetical of a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force. *See* 489 U.S. at 390 n. 10. Since it is well known that police often attempt to arrest fleeing felons, and it is predictable that an officer lacking specific tools to handle that situation will violate citizens rights, the court suggested that a city's decision not to train officers about constitutional limits on deadly force could reflect the city's deliberate indifference to the "highly predictable consequence," namely, violations of constitutional rights. The hypothetical-based theory sought to avoid foreclosing the possibility, "however rare," that unconstitutional consequences of failing to train could be "so patently obvious that a city could be liable under section 1983 without proof of a pre-existing pattern of violations." *Connick*, 131 S.Ct. at 1361.

Failing to train prosecutors about *Brady* obligations did not fall within the "narrow range of [the court's] hypothesized single-incident liability." *Id*. This conclusion flowed from a comparison that is enlightening for those considering prospective "single-incident" claims. Police officers are armed and must sometimes make split-second decisions with life-or-death consequences. Concurrently, it cannot safely be assumed that police academy applicants are already familiar with constitutional limitations on the use of deadly force. Nor are they likely to obtain that necessary knowledge without training. By contrast, lawyers necessarily have significant legal training that includes instruction on how to find, understand and apply legal rules. Moreover, most are subject to continuing legal education requirements, and lawyers who practice with other attorneys generally train on the

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[14] 373 U.S. 83 (1963).

[15] Quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986).

[16] There had been four previous reversals of convictions because of *Brady* violations by the office's prosecutors, but none involved the *Brady* issues presented in the plaintiff's case. Thus, the court found them inadequate to put the district attorney's office on notice that specific training was necessary to avoid the relevant constitutional violation. 131 S.Ct. at 1360.

job with more experienced attorneys. *Connick v. Thompson*, ___ U.S. ___, ___, 131 S.Ct. 1350, 1361-62 (2011). Ultimately, prosecutors are not only equipped but also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain.

Perhaps more pointedly, though, the court noted that the significance of the hypothesis underlying the "single-incident" exception was that untrained police officers would have an "utter lack of ability to cope with constitutional situations," where a prosecutor not trained about particular *Brady* scenarios shows only a nuanced training deficiency that cannot support deliberate indifference. *Id*. at 1363. Under those circumstances, "single-incident" liability was unavailable and the failure to prove a pattern of similar violations — which would establish a policy of inaction as the functional equivalent of a decision by the government itself to violate the Constitution — undercut the failure-to-train claim as a matter of law. *Id*. at 1366. Juxtaposed with Fifth Circuit authority on "single-incident" liability, *Connick* appears to corroborate the need to show more than a training deficiency in a particular area, or a widespread pattern of similar constitutional violations, particularly if some training has been provided either by the employing entity or through the employee's education and experience. *Cf. Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 386 (5th Cir. 2005); *cf. Okon v. Harris County Hosp. Dist.*, No. 10-20603, 2011 WL 1990836, at *5 (5th Cir. May 23, 2011) (slip op.) (noting *Connick* essentially foreclosed argument that hospital district could be liable under failure to train theory based on one-time deviation from neutral reduction-in-force procedures or training thereupon). To cut to the chase, a successful failure to train claim lacking a pattern of prior, similar constitutional violations will be rare indeed.

4. Deviation from Policy and Failure to Discipline

Some things look much worse than they actually are. Nothing bears out that truism better than attempting a claim based on an employee who violates the local government's policy or one who isn't disciplined for the occurrence at issue. At a basic level, a claim addressing the violation of a state statute is not cognizable under section 1983, absent implication of a federally protected right. *C.H., II ex rel. L.H. v. Rankin County Sch. Dist.*, Nos. 10-60380, 10-60697, 2011 WL 788908, at *3 (5th Cir. Mar. 4, 2011) (slip op.); *accord Jones v. Diamond*, 594 F.2d 997, 1011 (5th Cir. 1979), *cert. dism'd sub nom. Ledbetter v. Jones*, 453 U.S. 951 (1981). Similarly, the failure to follow procedural guidelines, standing alone, does not implicate constitutional liability. *Evans v. City of Marlin, Tex.*, 986 F.2d 104, 108 n. 6 (5th Cir. 1993). So it is that, where an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the official's departures from them, are the acts of the municipality for section 1983 purposes. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality op.); *McConney v. City of Houston*, 863 F.2d 1180, 1184 (5th Cir. 1989). For this reason, when a non-policymaking local governmental employee acts in a manner inconsistent with established governmental policy, the governmental employer cannot be held liable for the employee's policy violations under section 1983. *Hick v. Bexar County*, 973 F.Supp. 653, 678 (W.D. Tex. 1997), *aff'd*, 137 F.3d 1352 (5th Cir. 1998).

Another approach periodically seen in section 1983 cases is an allegation that the governmental entity's failure to discipline the officer in question represented approval or ratification, and consequent establishment of a custom, of the offending conduct. This is a difficult dance to master. On the one hand, it is true that if a policymaker approves of a subordinate's unconstitutional decision with knowledge of the basis for the decision, the ratification is chargeable to the municipality because the policymaker's decision is final. *See Milam v. City of San Antonio*, 133 Fed. Appx. 622, 626 (5th Cir. 2004) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality op.)). The critical element of this theory is knowledge of the basis for the decision, since simply going along with discretionary decisions made by one's subordinates is not a delegation to them of the authority to make policy. *Praprotnik*, 485 U.S. at 130. Here, it significant to note that a policymaker's defense of his employees, based on acceptance of employee's version of what happened, does not in itself indicate that official policy caused unconstitutional conduct. *See Coon v. Ledbetter*, 780 F.2d 1158, 1162 (5th Cir. 1986). Nor is the mere failure to investigate the basis of a subordinate's decisions a delegation of policymaking authority, especially when the subordinate's motivations for making the decision are not readily apparent. *See id*. And so it is the rule that a municipality's custom or policy authorizing or encouraging official misconduct cannot be inferred from a municipality's isolated decision not to discipline a single officer for a single incident of illegality. *Fraire v. City of Arlington*, 957 F.2d 1268, 1278-79 (5th Cir.), *cert. denied*, 506 U.S. 973 (1992). To satisfy this balancing act, a cautious practitioner should allege and be prepared to prove either (1) knowledge on the part of the relevant policymaker of the alleged violation and the driving factors underlying it, or (2) the policymaker's pattern of acquiescing to similar violations. *Accord Deville v. Marcantel*, 567 F.3d 156, 171 (5th Cir. 2009) (absent evidence of

formal complaints about the officer before the incident in question or knowledge of the officer's propensities by policymakers, there was no showing that failure to discipline officers was undertaken with deliberate indifference to known or obvious consequences that constitutional violations would result), *cert. denied*, ___ U.S. ___, 130 S.Ct. 2343 (2010).

C. "My Bad": Deliberate Indifference

If a facially innocuous policy together with a consistent pattern of unconstitutional conduct can be shown, the requisite culpable mental state becomes the next order of business. A plaintiff must show that the relevant policy or custom was adopted or maintained with deliberate indifference to the known or obvious fact that such constitutional violations would result. *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 309 (5th Cir. 2004); *see also Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003) (facially innocuous policy or custom requires additional showing of deliberate indifference to known or obvious consequences that constitutional violations would result), *cert. denied sub nom. Burge v. Strain*, 540 U.S. 1108 (2004).[17] The requirement of deliberate indifference implements the Supreme Court's directive that section 1983 governmental liability hinges upon a showing that, "through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged." *See Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 404 (1997) (emphasis by the court). This must be so because the culpability and causation requirements established by the Supreme Court in *Brown* [18] demand that the failure at issue rises to the level of a deliberate or conscious governmental choice among alternatives. *In re Foust*, 310 F.3d 849, 862 (5th Cir. 2002). It is a stringent standard, requiring proof that a governmental actor disregarded a known or obvious consequence of his action, and it requires a showing of more than negligence or even gross negligence. *Valle v. City of Houston*, 613 F.3d 536, 547 (5th Cir. 2010), *cert. denied*, No. 10-801 (U.S. Apr. 18, 2011), http://www.supremecourt.gov/orders/courtorders/041811zor.pdf.

As a conceptual matter, deliberate indifference is viewed as encompassing actual or constructive knowledge of the policy or custom and its likely results. *See Democracy Coalition v. City of Austin*, 141 S.W.3d 282, 291-92 (Tex. App.—Austin 2004, no pet.) (noting, in reviewing deliberate indifference issue, that no evidence was presented to show city or its policymakers had actual or constructive knowledge that policy had been used to squelch free speech rights); *accord Valle*, 613 F.3d at 542 (requiring "actual or constructive knowledge of a custom attributable to the governing body of the governmental entity or to official to whom that body has delegated policymaking authority). This flows from the fact that knowledge on the part of a policymaker that a constitutional violation will most likely result from a given policy or custom "is a *sine qua non* of municipal liability under section 1983." *Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003), *cert. denied sub nom. Burge v. Strain*, 540 U.S. 1108 (2004). Thus, for municipal liability to attach under section 1983, a plaintiff must demonstrate "actual or constructive knowledge of such custom ... attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority." *Id*. (quoting *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984).

In the sphere of governmental entity liability, deliberate indifference is an objective standard. *Victoria W. v. Larpenter*, 369 F.3d 475, 489 (5th Cir. 2004). It considers not only what the policymaker actually knew, but what he should have known given the facts and circumstances surrounding the official policy and its impact on the plaintiff's rights. *Lawson v. Dallas County*, 286 F.3d 257, 264 (5th Cir. 2002). Satisfying the deliberate indifference requirement entails showing more than a single instance of wrongdoing causing a violation of constitutional rights. *Burge*, 336 F.3d at 370; *accord Roberts v. City of Shreveport*, 397 F.3d 287, 292 (5th Cir. 2005) (in failure to train case, stating that, "to prove deliberate indifference, a plaintiff must demonstrate at least a pattern of similar violations arising from training that is so clearly inadequate as to be obviously likely to result in a constitutional violation."). Indeed, courts within the Fifth Circuit will dimly view the absence of an identifiable pattern of conduct to support an assertion of deliberate indifference. As the Fifth Circuit has sharply observed in a failure to train case:

> We can reasonably expect — if the need for training in this area was "so obvious" and the failure to train was "so likely to result in the violation of constitutional rights" — that the

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[17] The status of the plaintiff as related to the governmental entity may become relevant at this point. For there to be a duty on governmental officials not to be deliberately indifferent to violations of a person's due process rights, the government must have a "special relationship" with that person. A "special relationship" arises only when the person is involuntarily taken into governmental custody and held against his will through the affirmative power of the government. *Broussard v. Basaldua*, 410 Fed. Appx. 838, 839 (5th Cir. 2011) (quoting *Walton v. Alexander*, 44 F.3d 1297, 1300-01, 1304 (5th Cir. 1995) (en banc)).

[18] *See Board. of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 403-05 (1997).

> Connors [sic] would be able to identify other instances of harm arising from the failure to train. The fact that they did not do so undercuts their deliberate indifference claim.

Conner v. Travis County, 209 F.3d 794, 797 (5th Cir. 2000). A pattern alone may not be sufficient, though. Deliberate indifference is a "stringent standard of fault," requiring a showing that the relevant governmental actor disregarded a known or obvious consequence of his action. *In re Foust*, 310 F.3d 849, 862 (5th Cir. 2002). For example, in an inadequate governmental employment screening claim, deliberate indifference exists where adequate scrutiny of an applicant's background would lead a reasonable supervisor to conclude that the plainly obvious consequences of the decision to hire would be the deprivation of third party's constitutional rights. *Gros v. City of Grand Prairie*, 209 F.3d 431, 433-34 (5th Cir. 2000). Broad-ranging generalizations about bad character and vague propensities to commit harm will not be enough. "There must be a strong connection between the background of the particular applicant and the specific violation alleged." *Id*. at 434. Caution also must be exercised not to confuse negligence with deliberate indifference.[19] By way of example again, where a governmental entity enacts policies to protect a class of people to which the plaintiff belongs (such as inmates), the discrete failure of an employee to carry out those policies and resultant harm to the plaintiff cannot support a finding that the governmental entity adopted policies creating an obvious risk that the constitutional rights of those class members would be violated. *See Evans v. City of Marlin, Tex*, 986 F.2d 104, 108 (5th Cir. 1993) (in light of policies for safe incarceration of inmates, possible negligent failure to follow policies would not permit reasonable juror to find municipality adopted policies with requisite degree of culpability).

Deliberate indifference analysis also requires that some scrutiny be focused on the nature of the claim itself, inasmuch as more than one "layer" of deliberate indifference may need to be shown. Such a stratified approach may be seen most readily in claims raised by inmates.

Where an inmate complains of the number of bunks in a cell or his television or mail privileges, the wrong of which the inmate complains is a general condition of confinement. *Scott v. Moore*, 114 F.3d 51, 53 (5th Cir. 1997) (en banc). Other conditions of confinement include revocation of telephone, television and cigarette privileges, disciplinary segregation, length of pre-trial detention, overcrowding and a policy of refusing inmates access to drugs for rehabilitation. *Id*. at 53 n.2 (collecting cases). More recently, a pair of cases from Dallas County illustrated that prolonged and pervasive institutional failures to prevent serious, chronic infections among the pretrial detainee population or to provide basic necessary care for those detainees with serious ongoing medical conditions established the conditions necessary to impose liability for violation of the due process clause. *See Duvall v. Dallas County, Tex.*, 631 F.3d 203, 209-210 (5th Cir. 2011); *Shepherd v. Dallas County*, 591 F.3d 445, 456-58 (5th Cir. 2009). In conditions of confinement cases, the reasonable relationship test of *Bell v. Wolfish*[20] is applied. *Duvall*, 631 F.3d at 207. To prevail on a conditions of confinement claim, then, a plaintiff must prove (1) a rule or restriction or the existence of an identifiable intended condition or practice or that the jail official's acts or omissions were sufficiently extended or pervasive; (2) which was not reasonably related to a legitimate governmental objective; and (3) which caused the violation of the plaintiff's constitutional rights. *Duvall*, 631 F.3d at 207. Where that test is apposite, the court may safely infer that the municipality's very promulgation and maintenance of the complained-of condition is intended to cause the alleged constitutional deprivation by the decision to expose a detainee to the condition. *Shepherd*, 591 F.3d at 452; *see also Scott*, 114 F.3d at 53. Phrased differently, in a conditions of confinement claim, "an avowed or presumed intent by the State or its jail officials exists in the form of the challenged condition, practice, rule, or restriction." *Duvall*, 631 F.3d at 207 (citation omitted). Liability under that construct, however, exists only if the court finds that the condition of confinement is not reasonably related to a legitimate, non-punitive governmental objective. *Scott*, 114 F.3d at 53; *accord Duvall*, 631 F.3d at 207 (plaintiff need only show that such condition, alleged to be cause of constitutional violation, has no reasonable relationship to legitimate governmental interest). Liability lies in a conditions of confinement claim based on the condition itself because, "even where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, its intent to do so is nevertheless presumed when it incarcerates the detainee in the face of such known conditions and practices." *Duvall*, 631 F.3d at 207 (citation omitted). Where those circumstances exist, the condition may itself reflect the requisite unstated *de facto* policy to prove an intended condition or practice. *Duvall v. Dallas County, Tex.*, 631 F.3d 203, 207 (5th Cir. 2011). Consequently, the standard is

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[19] *See Johnson*, 379 F.3d at 309 (negligence or even heightened negligence "will not suffice").

[20] 441 U.S. 520, 539 (1979).

"functionally equivalent to a deliberate indifference inquiry," because in a true jail conditions case, the plaintiff has shown either an official policy, intentionally adopted, or a series of acts or omissions sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct by other officials, to prove an intended condition. *Shepherd v. Dallas County*, 591 F.3d 445, 454-55 (5th Cir. 2009). Importantly, it is only when the plaintiff has made such a showing that the jury may reasonably presume that the government acted with the requisite intent to punish in violation of the due process clause's prohibition against punishing pretrial detainees. *Id*. at 455. Isolated examples of illness, injury, or even death, standing alone, cannot prove that conditions of confinement are constitutionally inadequate, nor can the incidence of disease or infections, standing alone, imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks. *Id*. at 454. Allegations of insufficient funding are similarly unavailing. "Rather, a detainee challenging jail conditions must demonstrate a pervasive pattern of serious deficiencies in providing for his basic human needs; any lesser showing cannot prove punishment in violation of the detainee's Due Process rights." *Id*.

Conversely, if an inmate alleges harm arising from a particular act or omission of one or more officials, her claim is properly characterized as one concerning an "episodic act or omission." *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 639 (5th Cir. 1996) (en banc). One of the classic examples of an episodic act or omission case is one involving a pretrial detainee's commission of suicide, notwithstanding attempts to plead it as a condition of confinement claim based on training and staffing policies. *See Flores v. County of Hardeman, Tex*., 124 F.3d 736, 738 (5th Cir. 1997); *see also Anderson v. Dallas County, Tex.*, 286 Fed. Appx. 850, 859 (5th Cir. 2008) (finding that pretrial detainee suicide claim ultimately took issue with jail officials' failure to follow suicide prevention policies, making case "a classic episodic-act-or-omission case."). In an episodic act or omission case, an actor usually is interposed between the plaintiff and the governmental entity, such that the plaintiff complains first of a particular act or omission of the actor and then points derivatively to a policy, custom or rule (or lack thereof) of the governmental entity that permitted or caused the act or omission. *Scott v. Moore*, 114 F.3d 51, 53 (5th Cir. 1997) (en banc). Such a claim requires an initial showing that an official acted with deliberate indifference to the plaintiff's needs. *Hare*, 74 F.3d at 647-48. Deliberate indifference in this regard is of the subjective variety. *Id*. at 649 n. 4. Thus, an official demonstrates actionable deliberate indifference if he or she has subjective knowledge of a substantial risk of harm to the plaintiff, but responds with deliberate indifference. *Id*. at 649. Here, deliberate indifference itself means that: (1) the official was aware of facts from which an inference of substantial risk of serious harm could be drawn; (2) the official actually drew that inference; and (3) the official's response indicates the official subjectively intended that harm occur. *Thompson v. Upshur County, TX*, 245 F.3d 447, 458-59 (5th Cir. 2001). Importantly, "[d]eliberate indifference, *i.e*., the subjective intent to cause harm, cannot be inferred from [an officer's] failure to act reasonably." *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 649 (5th Cir. 1996) (en banc).

In turn, to hold the employing governmental entity liable for an alleged violation of constitutional rights, the plaintiff must show (1) that the governmental entity's employee violated the plaintiff's clearly established constitutional rights with subjective deliberate indifference; and (2) that this violation resulted from the governmental entity's policy or custom adopted and maintained with objective deliberate indifference. *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 528-29 (5th Cir. 1999). The existence of an inadequate custom or policy that caused the constitutional violation is key. *Forgan v. Howard County, Tex.*, 494 F.3d 518, 522 (5th Cir. 2007). In this context, moreover, it should be recalled that the requisite showing of deliberate indifference imposes a "stringent standard," requiring proof that the governmental entity disregarded a known or obvious consequence of its action. *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 410 (1997). To succeed on such a claim, the plaintiff must specifically identify each and any policy which allegedly caused constitutional violations, and it must be determined whether each one is facially constitutional or unconstitutional. *Piotrowski v. City of Houston*, 237 F.3d 567, 581 (5th Cir.), *cert. denied*, 534 U.S. 820 (2001).[21] But without a predicate showing of a constitutional violation by the government's officer, the governmental entity cannot be held liable. *See City of Los Angeles v. Heller*, 475 U.S. at 796, 799 (1986); *Bustos v. Martini Club Inc*., 599 F.3d 458, 467 (5th Cir. 2010); *accord Sibley v. Lemaire*, 184 F.3d 481, 488 (5th Cir. 1999) (court must first find employee acted with deliberate indifference before proceeding to question of whether act or omission was caused by policy or

[21] *Accord Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir. 2003) ("we must insist on clarity in the identity of the constitutional violations asserted."), *cert. denied*, ___ U.S. ___, 125 S.Ct. 31 (2004).

custom adopted or maintained with deliberate indifference), *cert. denied*, 529 U.S. 1019 (2000).[22]

D. Taking the "Moving Force" on Up: Causation

Understanding of the appropriate causation measure is aided by recounting one of the basic principles of section 1983 governmental liability jurisprudence. A governmental entity is not vicariously liable under section 1983 for the torts of its agents; it is only liable when it can be fairly said that the governmental entity itself is the wrongdoer. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 122 (1992). Since *respondeat superior* is unavailable to impose section 1983 liability upon a governmental entity, a plaintiff must demonstrate that the relevant policy or custom was the "moving force" behind the constitutional violation. *In re Foust*, 310 F.3d 849, 861 (5th Cir. 2002). Thus, as noted earlier, an issue of prime importance in section 1983 municipal liability cases is whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation. *James v. Harris County*, 577 F.3d 612, 617 (5th Cir. 2009), *cert. denied*, ___ U.S. ___, 130 S.Ct. 1078 (2010); *Victoria W. v. Larpenter*, 369 F.3d 475, 482 (5th Cir. 2004). The rigors of this standard require that:

> A *direct* causal connection must exist between the policy and the alleged constitutional deprivation. This connection *must be more than a mere "but for" coupling* between cause and effect. To form the basis of liability under § 1983, a municipal policy must be affirmatively linked to the constitutional violation and be the *moving force* behind it.

Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force, 379 F.3d 293, 310 (5th Cir. 2004) (internal punctuation omitted; emphasis by the court).

As a starting point, the official policy of custom must be a cause in fact of the deprivation of rights inflicted. *Spiller v. City of Texas City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997). The plaintiff must also prove that the policy or custom was the proximate cause of the injuries sustained. *Paz v. Weir*, 137 F.Supp.2d 782, 799 (S.D. Tex. 2001). But, as previously discussed, simply pointing to a policy or custom as a "but for" cause is not enough to establish causation. *Id*; *accord Johnson*, 379 F.3d at 310.

Putting the standard into practice is a necessarily fact-intensive concern. A governmental policy that vested discretion in its officer regarding how to perform certain tasks was not seen to be the moving force behind a violation stemming from an officer's exercise of that discretion. *See Holland v. City of Houston*, 41 F.Supp.2d 678, 709 (S.D. Tex. 1999), *appeal dism'd*, 237 F.3d 632 (5th Cir. 2000). In another context, a failure to establish "even a remote link" between the failure to implement a stress management and an officer's violation of a plaintiff's rights on the putative basis of stress fell short of meeting the causation requisite. *Snyder v. Trepagnier*, 142 F.3d 791, 799 (5th Cir. 1998), *cert. dism'd*, 526 U.S. 1083 (1999). Conversely, where a policymaker's decision solely and directly causes the injury, it is "undoubtedly" the moving force. *See Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 345 (2002). Extending causation further, where a county was "abetted by its policy of failing to supervise untrained deputies," allowed an officer to pursue and arrest a plaintiff, causing her injury, and the officer lacked training regarding safety precautions and arrest situations, the officer's county-sanctioned lack of training could be seen as the moving force behind the plaintiff's injuries. *Brown v. Bryan county, Okla.*, 219 F.3d 450, 464 (5th Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001).

In reviewing causation, it is prudent not to put the cart before the horse. A predicate constitutional violation by an agent of the governmental defendant must be identifiable before any culpability or causation analysis becomes pertinent. *See Olabisiomotosho v. City of Houston*, 185 F.3d 521, 529 (5th Cir. 1999) (where plaintiffs could not make out claim of constitutional violation by officers, claim against city failed as well). That is, logically, if there is no constitutional violation, there can be nothing behind which the relevant policy, custom or policymaker's decision was the moving force. *See Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003) ("Municipal liability under [section] 1983 requires proof of 1) a policymaker; 2) an official policy; 3) and *a violation of constitutional rights* whose 'moving force' is the policy or custom.") (emphasis added); *accord Bustos v. Martini Club Inc.*, 599 F.3d 458, 467 (5th Cir. 2010) (municipality cannot be liable if a person has suffered no constitutional injury at the hands of the individual police officer; where officers did not violate plaintiff's constitutional rights, neither did city). As the Supreme Court has summarized the principle, if a person has suffered no constitutional injury at the hands of an officer of the defendant governmental entity, the fact that the entity's regulations might have authorized unconstitutional

[22] *Sibley* involved a claim against supervisors as well as the particular officers involved. Nonetheless, the liability standard for supervisors generally "is based on that for municipal liability." *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005).

action "is quite beside the point." *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam).

VI. IMPORTANCE OF CAPACITY

Specificity can be a blessing and a curse. Take, for example, the issue of targeting a specific governmental defendant in a section 1983 lawsuit. It may seem appropriate and even salutary to name the particular department involved in a section 1983 claim as the ultimate responsible defendant. As a general matter, though, that approach may not be fruitful.

Under federal law, the capacity of an entity to sue or be sued "shall be determined by the law of the state in which the district court is held." FED. R. CIV. P. 17(b); *Darby v. Pasadena Police Dep't*, 939 F.2d 311, 313 (5th Cir. 1991). Putting this rule into practice, a plaintiff suing a governmental department must show that the department enjoys "a separate legal existence." *Darby*, 939 F.2d at 313. With respect to governmental agencies or departments, the "touchstone" under Texas law focuses upon whether the sued servient entity has been granted the capacity "to sue and to be sued." *Darby*, 939 F.2d at 313 n.1; *Alexander v. City of Rockwall*, No. CIV. A. 3:95-CV-0489, 1998 WL 684255, at *3 (N.D. Tex. Sept. 29, 1998); *Dillon v. Jefferson County Sheriff's Dep't*, 973 F.Supp. 626, 627 (E.D. Tex. 1997). Cities and counties generally are recognized to possess such capacity. *See Darby*, 939 F.2d at 313 (noting home rule municipality reserved to itself within its charter power to sue and be sued; observing similarities between city and corporation regarding litigation capacity); TEX. R. CIV. P. 33 (suit by or against county or incorporated city, town or village shall be in its corporate name).

Unless the true political entity has taken explicit steps to grant the servient agency with jural authority, the agency cannot engage in any litigation except in concert with the government itself. *Darby*, 939 F.2d at 313; *Alexander*, 1998 WL 684255, at *3. Proving that the true political entity intended to create a separate legal entity having the capacity to engage in separate litigation is the plaintiff's burden. *Alexander*, 1998 WL 684255, at *4; *Dillon*, 973 F.Supp. at 628. In the absence of such proof, governmental divisions such as sheriff's departments, jails and police departments generally are considered to be non-jural entities that cannot be sued for civil rights violations under section 1983. *See, e.g.*, *Darby*, 939 F.2d at 314 (city police department lacked jural existence, rendering claim against it subject to dismissal); *Plemons v. Amos*, No. 2:03-CV-421-J, 2006 WL 1710415, at *6-7 (N.D. Tex. June 22, 2006 (intergovernmental law enforcement task force lacked capacity to be sued as entity), *aff'd in part and reversed in part on other grounds*, 306 Fed. Appx. 160 (5th Cir. 2009); *Wilson v. Vickery*, 267 F.Supp.2d 587, 594-95 (E.D. Tex. 2002) (sheriff's department lacked jural existence); *Jeffery v. Dallas County Med. Exam'r*, 37 F.Supp.2d 525, 528-29 (N.D. Tex. 1999) (county medical examiner lacked separate jural existence); *Dillon*, 973 F.Supp. at 628 (interjurisdictional drug task force lacked separate jural existence). This rationale counsels that, before suing a particular department of a governmental entity, careful review of the law authorizing existence of the department should be undertaken to ensure that the department has the independent capacity to engage in litigation. Without such capacity, dismissal of the claim against the servient department is likely.

Texas law accords with this reasoning. For instance, a Texas sheriff, sued in his official capacity, is not an entity distinct from the county. *Nueces County v. Ferguson*, 97 S.W.2d 205, 216 (Tex. App.—Corpus Christi 2002, no pet.); *Battin v. Samaniego*, 23 S.W.3d 183, 186 (Tex. App.—El Paso 2000, pet. denied). Likewise, a county elections administrator is an employee not of a separate and distinct governmental entity, but of the county itself for litigation purposes. *See Shull v. Bexar County*, No. 04-99-00286-CV, 2000 WL 5251, at *2 (Tex. App.—San Antonio June 29, 2000, pet. denied) (not designated for publication), *cert. denied*, 532 U.S. 975 (2001). So, too, is a city's park police department viewed legally as "merely a department of the [city] and not an entity separate[.]" *Cronen v. Houston Park Police*, No. B14-91-0407-CV, 1992 WL 99533, at *1 (Tex. App.—Houston [14th Dist.] Sept. 16, 1992, writ denied) (not designated for publication). On the other hand, myriad Texas statutes vest specific governmental entities with capacity to "sue and be sued." *See, e.g.*, Tex. Agric. Code Ann. § 201.101(a)(1) (Vernon 2004) (soil and water conservation districts); Tex. Health & Safety Code Ann. § 262.021(b)(2) (Vernon 2010) (municipal hospital authorities); Tex. Health & Safety Code Ann. § 264.021(b)(2) (Vernon 2010) (county hospital authorities); Tex. Loc. Gov't Code Ann. § 306.041(a) (Vernon 2005) (park boards); Tex. Loc. Gov't Code Ann. § 335.005 (Vernon 2005) (sports and community venue districts); Tex. Loc. Gov't Code Ann. § 344.161 (Vernon 2005) (fire control, prevention and emergency services districts); Tex. Loc. Gov't Code Ann. § 351.134(b) (Vernon 2005) (jail districts); Tex. Nat. Res. Code Ann. § 62.054 (Vernon 2011) (beach park boards); Tex. Transp. Code Ann. § 257.001(a) (Vernon 1999) (road districts); Tex. Transp. Code Ann. § 451.054(c) (Vernon 2007) (metropolitan rapid transit authorities); Tex. Water Code Ann. § 49.066(a) (Vernon 2008) (water districts); Tex. Water Code Ann. § 61.082(a) (Vernon 2003) (navigation districts); *see also, generally*, Tex. Spec. Dist. Local Laws Ann. (Vernon 2005) (creating various special districts and vesting such districts with power to "sue and be sued"). Thus, contemplation of suit against such an entity

should begin with review of its relevant organic statute to determine whether it has been granted independent litigation capacity.

VII. REQUISITES OF PLEADING

Once the disparate elements and requirements of a section 1983 governmental liability claim are corralled, the focus should turn to standards applied to pleadings in such cases. Under the liberal system of "notice pleading" under the Federal Rules of Civil Procedure,[23] there no longer is any "heightened pleading" standard — a more demanding rule for pleading a section 1983 claim than for pleading other kinds of claims for relief — applicable to section 1983 claims against local governmental entities. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). But the waters remain muddy. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the … claim is and the grounds upon which it rests. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Id.* Put another way, while the Rule 8 pleading standard does not require detailed factual allegations, it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009). So, to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 555 U.S. at 557).

In applying this construct, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. *Id.*; *accord Twombly*, 555 U.S. at 555 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). As *Iqbal* observes, "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." 129 S.Ct. at 1950. Hence, allegations that defendants "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest", that a defendant was the "principal architect" of such an invidious policy and that another defendant was "instrumental" in adopting and executing it were seen as bare assertions, amounting to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim. *Id.* As such, they were conclusory and are not entitled to be assumed true. *Id.*

Concurrently, Fifth Circuit law holds that assertion of a claim based upon existence of an official policy or custom requires a plaintiff to plead facts which show that: (1) a policy or custom existed; (2) the governmental policymakers actually or constructively knew of its existence; (3) a constitutional violation occurred; and (4) the custom or policy served as the moving force behind the violation. *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 532-33 (5th Cir. 1996). Moreover, "[t]he description of a policy or custom and its relationship to the underlying constitutional violation ... cannot be conclusory; it must contain specific facts." *Spiller v. City of Texas City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997). This being so, pleading of a governmental entity claim should include other instances of similar violations in order to demonstrate a custom and/or deliberate indifference. *See, e.g., Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 309 (5th Cir. 2004) (noting general requirement that plaintiff alleging municipal deliberate indifference "demonstrate at least a pattern of similar violations"); *Yates v. Unidentified Parties*, No. 02-31224, 2003 WL 21744384, at *1 (5th Cir. July 28, 2003) (unpublished op.) (affirming dismissal of claim that parish maintained pattern or practice of abuse by deputies in absence of specific factual allegations regarding other instances of abuse).

For two reasons, the unwary advocate should not be lulled into the impression that these strictures are inapposite if the claim is asserted in a Texas state court. First, it is common practice for a defendant in a section 1983 claim to remove the action to federal court. *See* 28 U.S.C. § 1441(b) (permitting removal of any claim over which federal district courts have original jurisdiction arising from federal law regardless of citizenship of parties); *see also* 28 U.S.C. § 1331 (conferring original jurisdiction upon federal district courts over claims arising from federal law), 42 U.S.C. § 1988(a) (confirming jurisdiction of federal district courts over federal civil rights claims). Second, and perhaps more significantly, Texas courts hold that a

[23] *See* FED. R. CIV. P. 8(a) (requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief.").

plaintiff in a section 1983 claim must set forth specific facts, not merely conclusory allegations, in order to state a claim. *City of Dallas v. Cox*, 793 S.W.2d 701, 726 (Tex. App.—Dallas 1990, no writ); *cf. Geiger v. Landes*, No. 12-01-00152-CV, 2002 WL 169284, at *3 (Tex. App.—Tyler Aug. 1, 2002, pet. denied) (not designated for publication) (to successfully allege section 1983 cause of action, litigant must state specific facts, not merely conclusory allegations).

With these principles in mind, the prudent course presents itself. In preparing a plaintiff's governmental liability case under section 1983, it is clear that a painstakingly detailed exposition of the facts in the complaint or petition is not required. But some factual basis for the required conclusions of the existence of an offending custom or policy and its causal connection to the alleged constitutional injury should be included in order to avert a successful attack by motion to dismiss, motion for more definite statement, special exceptions or, possibly, plea to the jurisdiction.[24]

VIII. DAMAGES CONSIDERATIONS

The level of damages in a section 1983 action ordinarily is determined according to principles derived from the common law of torts. *Memphis Community Sch. Bd. v. Stachura*, 477 U.S. 299, 306 (1986). Thus, they may include out-of-pocket losses and other monetary harms, as well as injuries such as impairment of reputation, personal humiliation and mental anguish and suffering. *Id*. at 307. However, the abstract value of a constitutional right cannot itself form the basis for damages under section 1983. *Id*. at 308. Additionally, and significantly, local governmental entities are immune from punitive damages under section 1983. *City of Newport v. Fact Concerts, Inc*., 453 U.S. 247, 271 (1981); *Winograd v. Clear Lake Water Auth*., 811 S.W.2d 147, 161 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

Particularized attention must be paid in suits brought by prisoners proceeding *in forma pauperis*. Such suits are governed by 28 U.S.C. § 1997e. That provision applies to all federal civil actions in which a prisoner alleges a constitutional violation. *Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005). Under 28 U.S.C. § 1997e(e), compensatory damages for mental or emotional injuries are non-recoverable, absent physical injury, regardless of the underlying constitutional violation alleged. *Id*. at 375 (holding that absence of physical injury barred recovery for emotional or mental injuries allegedly suffered from purported First Amendment violation).

Finally, one of the ubiquitous considerations in a section 1983 claim is the specter of attorney's fees. In an action under section 1983, the court in its discretion may award to any prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. 42 U.S.C. § 1988(b). The two most prominent issues to resolve in evaluating the prospect of attorney's fees are whether the claimant was a "prevailing party" and, if so, what considerations define the reasonableness of the fee. To be a "prevailing party" under section 1988, a party generally must secure a judgment on the merits or a court-ordered consent decree that creates a "material alteration of the legal relationship of the parties[.]" *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Resources*, 532 U.S. 598, 604 (2001). Under auspices of a judgment on the merits, a plaintiff who wins nominal damages is considered to be a "prevailing party" under section 1988. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). Significantly, though, both the Supreme Court and the Fifth Circuit have rejected the so-called "catalyst theory," under which prevailing party status could be attained where the litigation resulted in a change of the defendant's course of action, but no enforceable judgment is ever entered. *See Buckhannon*, 532 U.S. at 605; *Bailey v. Mississippi*, ___ F.3d ___, No. 04-60412, 2005 WL 906508 (5th Cir. Apr. 20, 2005). Consequently, in the absence of a consent decree, an agreed dismissal with prejudice is insufficient to convey prevailing party status, regardless of any underlying alteration of the parties' relationship. *Bailey*, 2005 WL 906508.

Calculation of attorney's fees in civil rights cases ordinarily proceeds through the "lodestar" method. Under this process, the court first calculates the "lodestar," which is the product of the number of hours reasonably expended on the litigation by a reasonable hourly billing rate. *League of Latin Am. Citizens No. 4552 (LULAC) v. Roscoe Indep. Sch. Dist.*, 119 F.3d 1228, 1232 (5th Cir. 1997) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). In calculating the reasonable number of hours expended on a case and assigning a reasonable hourly rate, courts must apply the 12 factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Id*. Those factors are: (1) the time and labor required, (2) the novelty and difficulty of the question, (3) the skill required to perform the legal service properly, (4) the preclusion of other employment by the attorney due

[24] Three Texas courts have found that a failure to plead the requisite facts to support the essential elements of a municipal liability claim under section 1983 deprives the trial court of subject matter jurisdiction because the entity's governmental immunity has not been validly overcome by the attempted section 1983 claim. *See Rocha v. Potter County*, No. 07-09-00102-CV, 2010 WL 1558690, at *2-3 (Tex. App.—Amarillo 2010, no pet.); *Gomez v. Housing Auth. of the City of El Paso*, 148 S.W.3d 471, 479-82 (Tex. App.—El Paso 2004, pet. denied); *City of Fort Worth v. Robles*, 51 S.W.3d 436, 444 (Tex. App.—Fort Worth 2001, pet. denied).

to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19. The *Johnson* factors will not always produce a hard-and-fast figure that must strictly be applied, though. As an example, where there was evidence on all 12 factors, the case was complex and the success attained was greater than expected, an upward departure from the "lodestar" amount to account for a 40 percent contingency fee agreement was found to be proper. *County of Dallas v. Wiland*, 124 S.W.3d 390, 403-04 (Tex. App.—Dallas 2003, pet. granted). Conversely, while the "technical" nature of a nominal damages award does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under section 1988. *Farrar v. Hobby*, 506 U.S. 103, 114 (1992). Indeed, as the Supreme Court bluntly pointed out, "the most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained." *Id*. (quoting *Hensley*, 461 U.S. at 436). Thus, if a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. *Id*.

Opening the Door to Liability with Policy

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If All the World's a Stage, Where's my Backstage Pass?

Outside the Reach of § 1983

- Feds
  - Agencies & agents, too
  - Immunity
- States
  - Agencies & official capacity
  - Immunity
  - "Arms of state"
    - Doesn't include local government

A state official has violated a constitutional right. Aside from rounding up a posse, what can you do?

A. Nothing.
B. Sue under section 1983 for nominal damages and attorney's fees.
C. Sue for appropriate relief under the doctrine of *Ex Parte Young*.
D. Hack their Facebook account and let Photoshop do the talking.

- **Official capacity**
- **Prospective relief**
- **Ancillary relief**

Know Your Anatomy if You're Going to "Stick it to the Man"

Foundational Considerations

- *Monell*: Learn it, Know it, Live it
  - "Persons" without immunity
  - Vicarious liability? Uh, no.
- Elements
  - Policymaker
  - Policy/custom
  - Causation ("moving force")

Fill in the Blank: A Fish Rots _____

Identifying the Relevant Policymaker

- Final policymaking authority
  - Specific to action at issue
  - Final decisionmaking
- Refer to state law, local custom
  - Setting goals
  - Unsupervised
- Is there one?
- More than one hat

A policymaker, for purposes of § 1983, tends to exercise power that is functionally:

A. administrative.
B. authoritarian.
C. legislative.
D. difficult to cover up.

Ohhh … You Said "S.O.P."

Policy and Custom

- Policy
  - Official adoption, promulgation
- Custom
- Facially unconstitutional?
  - If not, pervasive?
- Isolated acts
  - "Single incident" gets *Connick*ed

It's Kind of Like Re-Gifting

What Generally Doesn't Work

- No pattern
- Ratification by general support
- Violation of local policies/rules
- Incident-specific failure to discipline

What has been described as the *sine qua non* of municipal liability under § 1983?

A. Egregious conduct by local governmental employees.
B. A good year for local governmental tax revenue.
C. Knowledge of a policymaker that a constitutional violation will most likely result from a given policy or custom
D. I don't know, and I'll thank you not to use language like that in a professional forum like this.

Where "I Don't Care" Meets "Will You Take a Check?"

Deliberate Indifference

- Actual/constructive knowledge
- Pattern, pattern, pattern
- Conditions of confinement
- "Episodic act or omission"

Is "Moving Force" Anything Like "Excessive Force"?

Causation

- No vicarious liability
- Bad government! Bad!
- Direct causal connection
- More than "but for"

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