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## Ratification as an Exception to the § 1983 Causation Requirement: Plaintiff's Opportunity or Illusion?

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George M. Weaver\*

# Ratification as an Exception to the § 1983 Causation Requirement: Plaintiff's Opportunity or Illusion?

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Ratification is recognized as a viable theory of liability under 42 U.S.C. § 1983, but it involves several unusual issues. Ratification deserves attention because it is the only theory of § 1983 liability that appears to relax the strict requirement of proximate causation. The theory may, however, be a mirage—pleasing to plaintiffs at a distance but offering little hope upon closer inspection.

### I. BACKGROUND AND HISTORY OF § 1983 LIABILITY

Originally enacted as part of the Ku Klux Klan Act of 1871,<sup>1</sup> today 42 U.S.C. § 1983 is the workhorse of civil rights statutes. The text of § 1983 provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.<sup>2</sup>

The Supreme Court has explained that the purpose of § 1983—enacted in implementation of the Fourteenth Amendment—was to establish “the Federal Government as a guarantor of basic federal rights against state power.”<sup>3</sup>

Until *Monroe v. Pape*,<sup>4</sup> the Act was dormant. In *Monroe*, the Supreme Court reversed the dismissal of a suit brought by a plaintiff whose home was ransacked by police officers. The plaintiff was arrested but released without being charged.<sup>5</sup> Breaking new ground, the Court held that action “under color of law,” as required by § 1983, could be shown even though the officers had acted in violation of state law.<sup>6</sup> The Court also held that specific intent to deprive a person of a federal right is not required for § 1983 liability,<sup>7</sup> and that a plaintiff need not first exhaust state judicial remedies before bringing suit under § 1983.<sup>8</sup>

Other decisions after *Monroe* have also broadened the utility of § 1983 for plaintiffs. Importantly, the Supreme Court has held that

1. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, 13 (current version at 42 U.S.C. § 1983 (2006)).

2. 42 U.S.C. § 1983 (2006).

3. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

4. 365 U.S. 167 (1961), *overruled in part on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

5. *Id.* at 169.

6. *Id.* at 171–87.

7. *Id.* at 186–87.

8. *Id.* at 182–86.

cities and counties are “persons” that may be sued for damages under § 1983 and that they have no immunity from such suits.<sup>9</sup> By contrast, absent effective waiver, states may not be sued for damages in federal court under § 1983.<sup>10</sup> Moreover, states are not considered persons for § 1983 purposes.<sup>11</sup>

## II. NON-CAUSATION ELEMENTS

To recover on a § 1983 claim against any defendant (whether an entity, supervisor, or subordinate employee), the plaintiff must plead and prove a number of elements. Individual damages liability under § 1983 for personal misconduct is fairly straightforward, but the liability of corporate entities—usually governmental units<sup>12</sup>—and non-participating supervisors is subtle and complex. Liability against entities and supervisors has generally been imposed where the basic elements of § 1983 are met and either (1) the wrongdoing is directly authorized by the defendant supervisor or some policymaking agent of the defendant entity, or (2) the defendant supervisor or entity creates or enforces a policy that causes the wrongdoing.<sup>13</sup>

### A. Deprivation of a Federally-Protected Right

Section 1983 creates no substantive rights, but rather provides a vehicle for an injured person to pursue money damages or other remedies for violations of federally-protected rights.<sup>14</sup> “The first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right ‘secured by the Constitution and laws’ [of the United States].”<sup>15</sup>

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9. *Owen v. City of Independence*, 445 U.S. 622, 635, 638 (1980) (holding cities are persons within the meaning of § 1983 and finding no right to qualified immunity for good faith of officers or agents); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690, 701 (1978) (holding municipalities and other local government units are persons within the meaning of § 1983 and finding no right to absolute immunity for municipal bodies).
  10. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 66 (1989) (citing *Welch v. Tex. Dep’t of Highways and Public Transportation*, 483 U.S. 468, 472–73 (1987) (plurality opinion)).
  11. *Id.* at 72 (“States are protected by the Eleventh Amendment while municipalities are not . . .”) (citation omitted); see *Lapides v. Bd. of Regents*, 535 U.S. 613, 616 (2002); *Quern v. Jordan*, 440 U.S. 332, 345 (1979); *Edelman v. Jordan*, 415 U.S. 651, 665–66 (1974); *Schopler v. Bliss*, 903 F.2d 1373, 1378 (11th Cir. 1990).
  12. A non-governmental entity is subject to liability under § 1983 only in the rare situation in which it can be said to have acted under color of state law. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (holding private business corporation acted under color of state law in using state prejudgment attachment procedures to seize property wrongfully).
  13. See *infra* section III.A.
  14. See *City of Okla. City v. Tuttle*, 471 U.S. 808, 816 (1985) (plurality opinion); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617–18 (1979).
  15. *Baker v. McCollan*, 443 U.S. 137, 140 (1979); see *Collins v. City of Harker Heights*, 503 U.S. 115, 119 (1992) (“Although [§ 1983] provides the citizen with

Although § 1983 contains no state-of-mind requirement,<sup>16</sup> negligence is not an adequate basis for any § 1983 claim.<sup>17</sup> Instead, the Court has suggested a “deliberate indifference” standard applies across the board to all constitutional violations alleged against a municipality.<sup>18</sup> In some § 1983 cases, the state-of-mind requirement may be even more onerous for the plaintiff.<sup>19</sup>

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an effective remedy against those abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law.”); *City of L.A. v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) (“If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.”); *Hamilton ex rel. Hamilton v. Cannon*, 80 F.3d 1525, 1528 (11th Cir. 1996) (“Before a person, county, or municipality can be held liable under section 1983, a plaintiff must establish that she suffered a constitutional deprivation.”).

16. *Parratt v. Taylor*, 451 U.S. 527, 536–37 (1981), *overruled in part on other grounds* by *Daniels v. Williams*, 474 U.S. 327 (1986).
17. *Daniels*, 474 U.S. at 328, 333 (“Where a government official’s act causing injury to life, liberty, or property is merely negligent, ‘no procedure for compensation is constitutionally required.’”); *see also* *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1997) (“[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.”); *Davidson v. Cannon*, 474 U.S. 344, 347–48 (1986) (holding a mere lack of due care by prison officials is not an adequate basis for a § 1983 claim).
18. *City of Canton v. Harris*, 489 U.S. 378, 389 n.8 (1989) (“The ‘deliberate indifference’ standard we adopt for § 1983 ‘failure to train’ claims does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation.”); *see also* *Gonzalez v. Yselta Indep. Sch. Dist.*, 996 F.2d 745, 759 (5th Cir. 1993) (observing, in a case involving the liability of a school district for the actions of a policymaker, that deliberate indifference “has apparently become the rule”).
19. For example, to establish a violation of the Eighth Amendment for failing to protect one inmate from another inmate, a § 1983 plaintiff must show a heightened form of deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (stating that a plaintiff must also show that a state actor defendant subjectively knew of a “substantial risk of serious harm and disregard[ed] that risk by failing to take reasonable measures to abate it”); *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976); *LeMarca v. Turner*, 995 F.2d 1526 (11th Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994). Furthermore, a correctional officer cannot be held liable for excessive force against prison inmates unless he intends harm. *Hudson v. McMillian*, 503 U.S. 1, 6, 11–12 (1992) (“[T]he question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on ‘whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.’”) (citation omitted); *Whitley v. Albers*, 475 U.S. 312, 320 (1986). The same is true for a police officer sued under § 1983 for actions during a high-speed pursuit. *Lewis*, 523 U.S. at 854 (“High-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.”).

Equal protection claims, which have been held to require proof of intentional discrimination, provide another example. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (“Even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection

## B. Action Under Color of State Law

For conduct to be state action<sup>20</sup> it must be “made possible only because the wrongdoer is clothed with the authority of state law,”<sup>21</sup> and it must be “chargeable to the State.”<sup>22</sup> The Court has held “the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful.”<sup>23</sup> Accordingly, the Supreme Court uses several methods to determine whether conduct by private persons and entities qualifies as state action.<sup>24</sup>

## C. Conduct by a § 1983 “Person”

A § 1983 person may be an individual, corporation, city, or county.<sup>25</sup> However, as noted above, a state is not a person for § 1983 purposes.<sup>26</sup>

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Clause only if that impact can be traced to a discriminatory purpose.”); *Washington v. Davis*, 426 U.S. 229, 240 (1976); *Pearson v. Macon-Bibb Cnty. Hosp. Auth.*, 952 F.2d 1274, 1282 (11th Cir. 1992) (“An equal protection claim will prevail only upon a showing of intentional discrimination.”).

20. The Supreme Court has held that “conduct satisfying the state-action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 n.18 (1982).
21. *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) (citations omitted).
22. *Lugar*, 457 U.S. at 935 n.18 (1982); *see also Morgan v. Tice*, 862 F.2d 1495, 1499 (11th Cir. 1989) (finding that even if an official is not acting pursuant to state law, the official may be held a state actor if the official is able to perform a wrongful act because of the authority of the position he or she holds).
23. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (citations omitted).
24. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001) (“[A] challenged activity may be state action when it results from the State’s exercise of ‘coercive power,’ when the State provides ‘significant encouragement, either overt or covert,’ or when a private actor operates as a ‘willful participant in joint activity with the State or its agents.’ We have treated a nominally private entity as a state actor when it is controlled by an ‘agency of the State,’ when it has been delegated a public function by the State, when it is ‘entwined with governmental policies,’ or when government is ‘entwined in [its] management or control.’”) (citations omitted); 1 SHELDON NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983*, at 2-13 (4th ed. 2008) (“State action exists (1) where the state and the private party or entity maintain a sufficiently interdependent or symbiotic relationship; (2) where the state requires, encourages, or is otherwise significantly involved in nominally private conduct; and (3) where the private person or entity exercises a traditional state function. On the other hand, it is also true that extensive state regulation, funding, or subsidization of an otherwise private entity is not, without more, sufficient to render the entity’s conduct state action. There must be a *nexus* between the challenged conduct and the state.”) (footnotes omitted).
25. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).
26. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 72 (1989); *see Lapidus v. Bd. of Regents*, 535 U.S. 613, 616 (2002).

#### D. Damages

Like a tort claim, a § 1983 plaintiff must prove compensatory damages unless the plaintiff seeks only nominal damages, injunctive, or other non-pecuniary relief.<sup>27</sup> Compensatory damages may include general damages for emotional harm.<sup>28</sup> Damages are not, however, recoverable for the intrinsic value of a violated constitutional right.<sup>29</sup> Punitive damages may be recovered against individuals for egregious misconduct.<sup>30</sup> Punitive damages may not, however, be recovered against a municipality or governmental entity.<sup>31</sup>

### III. PROXIMATE CAUSATION ELEMENT

According to the statute, the plaintiff must show that the defendant “subject[ed] or cause[d the plaintiff] to be subjected” to a deprivation of some federally protected right.<sup>32</sup> One aspect of this causation element is “causation-in-fact.” The “but-for” test is often used to make this determination. In *Mount Healthy City School District Board of Education v. Doyle*,<sup>33</sup> a public employee speech case, the Supreme Court adopted a variation of this test by requiring that a plaintiff establish that protected conduct was a “‘substantial factor’—or, in other words, that it was a ‘motivating factor’”—in the deprivation of rights.<sup>34</sup> The Court further elaborated the test by allowing the defendant to overcome the plaintiff’s evidence of causation through showing “by a preponderance of the evidence that it would have reached the same decision as to respondent’s re-employment even in the absence of the protected conduct.”<sup>35</sup>

Yet, it is not enough for a plaintiff to establish causation-in-fact or but-for causation. For example, the Supreme Court has held the statutory language of § 1983 does not allow liability against a municipality by respondeat superior or the mere fact that the municipality employed a tortfeasor, which is an example of causation-in-fact.<sup>36</sup> Proximate causation must also be shown.

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27. *Carey v. Phipus*, 435 U.S. 247, 266–67 (1978).

28. *Id.* at 263–64.

29. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 309–11 (1986); *Carey*, 435 U.S. at 254, 258.

30. *Smith v. Wade*, 461 U.S. 30 (1983).

31. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

32. 42 U.S.C. §1983 (2006).

33. 429 U.S. 274 (1977).

34. *Id.* at 287 (footnote omitted).

35. *Id.*

36. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989); *City of Okla. City v. Tuttle*, 471 U.S. 808, 817–19 (1985) (plurality opinion); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–95 (1978).

In *Williams v. Bennett*,<sup>37</sup> the Eleventh Circuit held that a plaintiff “must prove that each individual defendant proximately caused the unconstitutional conditions in the prison.”<sup>38</sup> The court also pointed out that under 42 U.S.C. § 1983 state law governs the definition of “proximate cause.”<sup>39</sup>

Illustrating these principles, the Supreme Court found in *Martinez v. California*<sup>40</sup> that the California Parole Board could not be held liable under §1983 for the death of a 15-year-old girl who was killed by a parolee released by the Board five months earlier. The Court held that, even assuming the Board knew or should have known that the release created such a danger, “appellants’ decedent’s death is too remote a consequence of the parole officers’ action to hold them responsible under the federal civil rights law.”<sup>41</sup>

Finally, it should be noted that some courts have held a § 1983 plaintiff must meet a heightened pleading standard in alleging causation.<sup>42</sup>

### A. Standard Causation Theories

To understand the role of ratification in §1983 liability, we must first appreciate standard causation theories.

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37. 689 F.2d 1370 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

38. *Id.* at 1389.

39. *Id.*

40. 444 U.S. 277 (1980).

41. *Id.* at 285.

42. *See, e.g., Cottone v. Jenne*, 326 F.3d 1352, 1362 (11th Cir. 2003) (“The plaintiffs also do not allege any affirmative custom or policy implemented by the supervisory defendants that played a role in Cottone’s death. Nor do they allege that the supervisors instructed D’Elia and Williams to commit constitutional violations. As a result, the amended complaint does not allege the causal connection required to impose supervisory liability against these defendants.”); *id.* at 1362 n.7 (“In examining the factual allegations in a complaint, we must keep in mind the heightened pleading requirements for civil rights cases, especially those involving qualified immunity.”) (citation omitted); *see also Harper v. Lawrence County*, 592 F.3d 1227, 1233 (11th Cir. 2010) (explaining the purpose of the heightened pleading standard is to provide facts sufficiently detailed so the defendant knows which rights were violated and what actions violated those rights and to allow courts to determine if the facts set out a violation and were clearly established at the time of the actions). *But see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007); *Jones v. Bock*, 549 U.S. 199, 212–14, 224 (2007) (“[A]dopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts”); *Hill v. McDonough*, 547 U.S. 573, 576 (2006); *Swierkiewicz v. Sorema*, 534 U.S. 506, 515 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167–68 (1993) (holding that a heightened pleading standard does not apply in a § 1983 case, but not deciding whether the Court’s “qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials”).



### 1. Participation

The most obvious form of causation that can yield § 1983 liability is personal participation in a deprivation of federally-protected rights. This applies, of course, not only to a line-level employee but also to a supervisor who, for example, personally arrests a suspect without probable cause. Moreover, the supervisor can be held liable for the subordinate officer's conduct.<sup>43</sup>

Conspiracy and aiding-and-abetting are forms of personal participation and may include private actors.<sup>44</sup> A conspiracy is an agreement or "understanding" to do an unlawful act.<sup>45</sup> Still, "[a]n express agreement among all the conspirators is not a necessary element of a civil conspiracy."<sup>46</sup>

Although the touchstone of § 1983 liability is personal participation, there remain many other varieties of proximate causality. As the Eleventh Circuit has indicated, "Personal participation . . . is only one of several ways to establish the requisite causal connection."<sup>47</sup>

Courts have frequently faced the question of whether a municipality or a person in a supervisory position has proximately caused a deprivation of civil rights. The Supreme Court has stressed there must be a clear causal connection between conduct of the supervisor or municipality and the deprivation in order for a supervisor or municipality not directly involved in a deprivation of rights to become liable under

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43. *See generally* Bryson v. Gonzales, 534 F.3d 1282, 1289 (10th Cir. 2008) ("Supervisors are not strictly liable for the torts of their underlings; instead, they are liable only when they 'personally participated in the alleged violation.'") (citation omitted); *Cottone*, 326 F.3d at 1360 ("[S]upervisory liability under § 1983 occurs either when the supervisor personally participates in the alleged unconstitutional conduct or when there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation.") (citations omitted); *Hill v. DeKalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1192 (11th Cir. 1994) ("To recover individually from Lewis and Wilkinson, who were in supervisory or policymaking capacities, the Hills must show that they are liable either through their 'personal participation' in the acts comprising the alleged constitutional violation or 'the existence of a causal connection' linking their actions with the violation.") (citation omitted), *overruled in part on other grounds by* Hope v. Pelzer, 536 U.S. 730 (2002).

44. *See* Rowe v. City of Fort Lauderdale, 279 F.3d 1271, 1289 (11th Cir. 2002); *Harvey v. Harvey*, 949 F.2d 1127, 1133 (11th Cir. 1992); *NAACP v. Hunt*, 891 F.2d 1555, 1563 (11th Cir. 1990) (finding that to establish § 1983 liability based on conspiracy, plaintiff must show that private party and governmental official "reached an understanding" to deny rights); *Halberstam v. Welch*, 705 F.2d 472, 477-78, 483-84 (D.C. Cir. 1983) (summarizing civil liability for conspiracy and aiding-and-abetting in a non-§ 1983 case).

45. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

46. *Lenard v. Argento*, 699 F.2d 874, 882 (7th Cir. 1983).

47. *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986); *see also* *Sims v. Adams*, 537 F.2d 829, 831 (5th Cir. 1976) ("The language of § 1983 requires a degree of causation as an element of individual liability, but it does not specifically require 'personal participation.'") (footnote omitted).

§ 1983. For instance, in finding there was no such connection in *Rizzo v. Goode*,<sup>48</sup> the Court said:

As the facts developed, there was no *affirmative link* between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their *authorization or approval* of such misconduct.<sup>49</sup>

Note that the Court clarified the required “affirmative link” by saying that it must amount to “authorization or approval.” Accordingly, lower courts have been careful to insist on an “affirmative link” between the actions of a municipality or supervisor and a constitutional deprivation carried out by a subordinate.<sup>50</sup> Importantly, the affirmative link must reflect the elements of the particular federally-protected right at issue.<sup>51</sup>

## 2. *Liability of a Supervisor for Direct Authorization*

A supervisor who does not personally participate may nevertheless incur liability under § 1983 if he authorizes or approves of the conduct of a subordinate that deprives another of a civil right. In some cases the authorization may be express and obvious, as in *Baskin v. Parker*,<sup>52</sup> where the defendant sheriff “authorized the investigation and organized the search party” that ultimately deprived plaintiffs of constitutional rights.<sup>53</sup> More broadly, the Fifth Circuit has also said that a supervisor may be liable if “he directs, orders, participates in, or approves the acts” which result in the violation of constitutional rights.<sup>54</sup>

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48. 423 U.S. 362 (1976).

49. *Id.* at 371 (emphasis added).

50. *E.g.*, *Anderson v. City of Atlanta*, 778 F.2d 678, 685 (11th Cir. 1985) (“[A]t a minimum, a plaintiff must demonstrate some affirmative link between the policy and the particular constitutional violation alleged.”) (citations omitted); *Rock v. McCoy*, 763 F.2d 394, 398 (10th Cir. 1985); *Hays v. Jefferson County*, 668 F.2d 869, 873–74 (6th Cir. 1982) (“[A] plaintiff must show that the official at least implicitly authorized, approved or knowingly acquiesced.”); *Lee v. Downs*, 641 F.2d 1117, 1120 n.1 (4th Cir. 1981). As will be discussed shortly, a municipality “may only be held accountable if the deprivation was the result of municipal ‘custom or policy.’” *City of Okla. City v. Tuttle*, 471 U.S. 808, 817 (1985) (plurality opinion).

51. For example, mere negligence of an entity or supervisor could not provide the required affirmative link. If, for instance, the plaintiff asserts an Eighth Amendment violation, the affirmative link must amount to deliberate indifference. *See Williams v. Bennett*, 689 F.2d 1370, 1380 (11th Cir. 1982).

52. 602 F.2d 1205 (5th Cir. 1979).

53. *Id.* at 1208.

54. *Ford v. Byrd*, 544 F.2d 194, 195 (5th Cir. 1976); *see also Fogarty v. Gallegos*, 523 F.3d 1147, 1163–64 (10th Cir. 2008) (finding liability under § 1983 for a police chief who directly ordered an unlawful arrest); *Howell v. Tanner*, 650 F.2d 610, 615 (5th Cir. 1981) (dismissing a § 1983 claim against a police chief who did not directly order an unlawful arrest or dictate a custom or policy that led to the arrest), *overruled in part on other grounds by Augustine v. Doe*, 740 F.2d 322 (5th Cir. 1984); *Reimer v. Short*, 578 F.2d 621, 625 (5th Cir. 1978) (upholding the

### 3. *Liability for Failure to Intervene*

Even if a supervisor does not expressly direct the offending conduct, the required authorization or approval may be found if he stands by with knowledge of what is happening and refuses to intervene.<sup>55</sup> It is apparent, however, that knowledge acquired by a supervisor after the offending conduct does not satisfy the causality requirement.<sup>56</sup> A subordinate who has the opportunity but fails to intervene may also be held liable under § 1983.<sup>57</sup>

### 4. *Formal Policy*

Courts have held that a supervisory official or a municipality may be liable for a deprivation of civil rights through the creation or execution of a policy. Even though a supervisor or policymaker of a municipality is unaware of the conduct of his subordinates on a particular occasion, the supervisor and the municipality may be responsible for the subordinates' conduct if the supervisor or municipality authorized a policy that in some fashion causes the offending conduct.<sup>58</sup> How-

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dismissal of a complaint against a police chief who did not participate in, have knowledge of, or was negligent regarding an unlawful arrest).

55. *See* *Mercado v. City of Orlando*, 407 F.3d 1152, 1158 (11th Cir. 2005); *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003) (“[T]he causal connection may be established . . . when facts support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so.”) (internal quotation marks omitted) (citations omitted); *McQuarter v. City of Atlanta*, 572 F. Supp. 1401, 1415–16 (N.D. Ga. 1983) (“[S]upervisory officers had a duty to intervene in the excessive use of force against McQuarter and failed to do so” and therefore “are directly liable for Duncan’s excessive use of force.”), *overruled in part on other grounds* by *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988).
56. *Chestnut v. City of Quincy*, 513 F.2d 91, 92 (5th Cir. 1975).
57. *Grieverson v. Anderson*, 538 F.3d 763, 778 (7th Cir. 2008) (finding that an officer who “watched the assault but did not intervene” could be held liable); *Torres-Rivera v. O’Neill-Cancel*, 406 F.3d 43, 54 (1st Cir. 2005) (“A law enforcement officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated *in his presence* by other officers.”) (internal quotation marks omitted) (citation omitted); *Smith v. Mensinger*, 293 F.3d 641, 650 (3rd Cir. 2002) (“[A] corrections officer’s failure to intervene in a beating can be the basis of liability for an Eighth Amendment violation under § 1983 if the corrections officer had a reasonable opportunity to intervene and simply refused to do so.”); *Webb v. Hiykel*, 713 F.2d 405, 408 (8th Cir. 1983); *Richardson v. City of Indianapolis*, 658 F.2d 494, 500 (7th Cir. 1981).
58. *See* *Hill v. DeKalb Reg’l Youth Det. Ctr.*, 40 F.3d 1176, 1192 (11th Cir. 1994) (“In addition to personally participating in acts causing constitutional deprivations, [supervisors and policymakers] Lewis and Wilkinson also could be liable to the Hills indirectly if they personally instigated or adopted a policy that violated Hill’s constitutional rights.”) (citation omitted), *overruled in part on other grounds* by *Hope v. Pelzer*, 536 U.S. 730 (2002).

ever, to impose liability in this manner, there must be both an “authoriz[ed]” policy and conduct “pursuant to [that] policy.”<sup>59</sup>

In its landmark decision in *Monell v. Department of Social Services*,<sup>60</sup> the Supreme Court held that a municipality may be liable under § 1983 if “the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.”<sup>61</sup> Rejecting respondeat superior liability, the Court explained:

[T]he language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tort-feasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.<sup>62</sup>

Later the Court restated: “[I]t is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.”<sup>63</sup>

It is plain, then, that a municipality can be held responsible only for conduct which it authorizes by “official” policy. Since *Monell*, the Court has reiterated this rule. In *City of Oklahoma City v. Tuttle*, the Court said, “*Monell* teaches that the city may only be held accountable if the deprivation was the result of municipal ‘custom or policy.’”<sup>64</sup> Moreover, the “official policy must be ‘the moving force of the constitu-

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59. *City of L.A. v. Lyons*, 461 U.S. 95, 106 n.7 (1983); *see also* *Rizzo v. Goode*, 423 U.S. 362, 371 (1976) (“As the facts developed, there was no *affirmative link* between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their *authorization or approval* of such misconduct.”) (emphasis added).

60. 436 U.S. 658 (1978).

61. *Id.* at 690.

62. *Id.* at 691.

63. *Id.* at 694.

64. *City of Okla. City v. Tuttle*, 471 U.S. 808, 817 (1985) (plurality opinion); *see also* *McMillian v. Monroe County*, 520 U.S. 781, 783–85 (1997) (finding that, in intimidating witnesses into making false statements, a sheriff was a “policymaker”); *Collins v. City of Harker Heights*, 503 U.S. 115, 121 (1992) (“[M]unicipalities may not be held liable ‘unless action pursuant to official municipal policy of some nature caused a constitutional tort.’”); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 471, 478–80 (1986) (plurality opinion) (“The ‘official policy’ requirement was intended to distinguish the acts of the *municipality* from acts of *employees* of the municipality.”).

tional violation.”<sup>65</sup> There must be a clear connection between the policy and the violation for the policy to be the “moving force.”<sup>66</sup>

The same standard has been applied to other non-participating defendants such as supervisory officials. In other words, a supervisory official who creates or implements an unconstitutional policy may incur liability for such actions on the same basis as the municipality.<sup>67</sup>

Several additional points should be made about the general nature of these policies. To support § 1983 liability, a policy must be culpable and deliberate.<sup>68</sup> However, it need not itself be unconstitutional.<sup>69</sup> Although a number of early § 1983 decisions held that non-participating defendants could not be liable for *failing* to adopt or enforce ade-

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65. *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (quoting *Monell*, 436 U.S. at 694).

66. *See, e.g., Piotrowski v. City of Houston*, 237 F.3d 567, 581 (5th Cir. 2001) (holding that, even assuming that “acquiescence in police officers’ moonlighting” was a city policy, the “evidence is nevertheless insufficient to establish that it was the moving force that caused” plaintiff to be shot by her ex-boyfriend whose private investigator hired the moonlighting police officers).

67. *See Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003) (“[T]he causal connection may be established when a supervisor’s custom or policy . . . result[s] in deliberate indifference to constitutional rights.”) (internal quotation marks omitted) (citations omitted); *Baker v. Putnal*, 75 F.3d 190, 199 (5th Cir. 1996) (“Supervisory officials may be held liable only if: (i) they affirmatively participate in acts that cause constitutional deprivation; or (ii) implement unconstitutional policies that causally result in plaintiff’s injury.”); *Marchese v. Lucas*, 758 F.2d 181, 186 (6th Cir. 1985) (indicating that all § 1983 “person[s]” may incur liability for deprivations pursuant to policy); *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1388 (11th Cir. 1981), *cert. denied*, 456 U.S. 979 (1982); *Turpin v. Mailet*, 619 F.2d 196, 201 n.3 (2d Cir. 1980), *cert. denied*, 449 U.S. 1016 (1980), *overruled in part on other grounds by Leatherman v. Tarrant County*, 507 U.S. 163 (1993).

68. *See Rizzo v. Goode*, 423 U.S. 362, 373–77 (1976) (noting that only “deliberate policies” can subject nonparticipating defendants to § 1983 liability); *Garretson v. City of Madison Heights*, 407 F.3d 789, 796 (6th Cir. 2005) (finding that a “policy of inaction ‘must reflect some degree of fault before it may be considered a policy upon which § 1983 liability may be based’”) (citation omitted); *Farrad v. Hicks*, 915 F.2d 1530, 1532–33 (11th Cir. 1990); *Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988) (“Unless a supervisor has established or utilized an unconstitutional policy or custom, a plaintiff must show that the supervisory defendant breached a duty imposed by state or local law which caused the constitutional violation.”); *Owens v. City of Atlanta*, 780 F.2d 1564, 1567 (11th Cir. 1986) (holding that in order to result in § 1983 liability, a policy must contain a “fault element”).

69. *See Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 420 (1997) (“That the sheriff’s act did not itself command or require commission of a constitutional violation . . . is not dispositive under § 1983, for we have expressly rejected the contention that ‘only unconstitutional policies are actionable’ under § 1983, and have never suggested that liability under the statute is otherwise limited to policies that facially violate other federal law. The sheriff’s policy choice creating a substantial risk of a constitutional violation therefore could subject the county to liability under existing precedent.” (citing *City of Canton v. Harris*, 489 U.S. 378, 387 (1989))).

quate policies, that position is no longer well supported. This point is discussed further below.<sup>70</sup>

An offending policy may be either formal or informal. The clearest examples of official policies are those formally adopted and promulgated. In *Monell*, for example, the offending policy required pregnant employees to take unpaid leave before any medical necessity.<sup>71</sup> This official policy was formally adopted by the New York Department of Social Services and Board of Education.<sup>72</sup>

Official policies of this type may be made not only by lawmakers but also “by those whose edicts or acts may fairly be said to represent official policy.”<sup>73</sup> For municipal liability to attach, “the decision-maker [must] possess[] final authority to establish municipal policy with respect to the action ordered.”<sup>74</sup> Furthermore, the Court has held state law determines whether state or local government officials are policymakers.<sup>75</sup> It is important to recognize that, unlike an informal policy or custom, a single decision of a policymaker can subject

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70. See *infra* note 84.

71. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 661 (1978).

72. *Id.* at 660–61, 694–95; see also *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1290–91 (11th Cir. 2004) (finding that a written memo from the county school superintendent mandating student recitation of the Pledge of Allegiance could support school board liability for the plaintiff's “compelled-speech First Amendment claim” based on required reciting of the Pledge); *Little v. City of North Miami*, 805 F.2d 962, 967 (11th Cir. 1986) (holding that a city resolution censuring a law professor for First Amendment-protected expression could form the basis for municipal liability).

73. *Monell*, 436 U.S. at 694.

74. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) (plurality opinion).

75. *McMillian v. Monroe County*, 520 U.S. 781, 784–86 (1997); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (“[W]hether a particular official has ‘final policymaking authority’ is a question of state law.”) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion) (internal quotation marks omitted)); see also *Miller v. Calhoun County*, 408 F.3d 803, 813 (6th Cir. 2005) (“Whether a given individual is such a ‘policymaker’ for purposes of § 1983 is a question of state law.”); *Riddick v. Sch. Bd.*, 238 F.3d 518, 523 (4th Cir. 2000) (“The question of who possesses final policymaking authority is one of state law.”); *Rhode v. Denson*, 776 F.2d 107, 108–09 (5th Cir. 1985) (finding that a policymaking official has the “authority to define objectives and choose the means of achieving them”); *Wellington v. Daniels*, 717 F.2d 932, 936–37 (4th Cir. 1983) (holding, under state law, defendant did have final policymaking authority); *Berdin v. Duggan*, 701 F.2d 909, 913–14 (11th Cir. 1983) (examining state law to determine whether the defendant had final policymaking authority).

both the policymaker and the entity to liability.<sup>76</sup> Of course, to impose liability on this basis, “fault and causation” must also be proved.<sup>77</sup>

Policies leading to § 1983 liability need not be written. For example, in *Wanger v. Bonner*,<sup>78</sup> the sheriff of DeKalb County, Georgia, was held liable under § 1983 on the basis of three unwritten policies that he had communicated to his deputies and that “caused . . . th[e] unconstitutional search” of a home late at night in an attempt to serve an arrest warrant for a misdemeanor traffic offense.<sup>79</sup> The address on the warrant was erroneous: the person named in the warrant had never lived at the address.<sup>80</sup> The three unwritten policies that were held to support liability against the sheriff were: (1) serving arrest warrants “on the midnight shift . . . without regard to the nature of the offense charged”; (2) serving arrest warrants “without regard to . . . the likelihood that an address on the warrant would be incorrect”; and (3) “searching the premises whenever the person to be arrested could not be found.”<sup>81</sup>

The existence and implementation of an effective policy forbidding unconstitutional conduct—although not a necessary part of an entity or supervisor’s defense—precludes liability against the entity or supervisor.<sup>82</sup>

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76. *Pembaur*, 475 U.S. at 470 (plurality opinion) (“[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances.”); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 736–37 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (plurality opinion); *Gelin v. Hous. Auth. of New Orleans*, 456 F.3d 525, 527 (5th Cir. 2006); *Cooper v. Dillon*, 403 F.3d 1208, 1211–12, 1222–23 (11th Cir. 2005) (holding the City of Key West, Florida, liable for enforcement by the police chief, who was the final policymaking official, of an unconstitutional state criminal statute forbidding disclosure by a participant of a pending police internal investigation; “we reject [Police Chief] Dillon’s argument that the single enforcement of the statute against Cooper could not constitute a ‘policy’ for § 1983 purposes” and “we find that the City of Key West, through the actions of Dillon, adopted a policy that caused the deprivation of Cooper’s constitutional rights which rendered the municipality liable under § 1983”).

77. *Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 405 (1997) (“To the extent that we have recognized a cause of action under § 1983 based on a single decision attributable to a municipality, we have done so only where the evidence that the municipality had acted and that the plaintiff had suffered a deprivation of federal rights also proved fault and causation.”).

78. 621 F.2d 675 (5th Cir. 1980).

79. *Id.* at 683.

80. *Id.* at 677.

81. *Id.* at 683; *see also Pembaur*, 475 U.S. at 473–74 (finding that a sheriff’s order to “go in and get” witnesses, although an oral order, could be considered a policy that establishes § 1983 liability); *Garretson v. City of Madison Heights*, 407 F.3d 789, 796 (6th Cir. 2005) (holding that an unwritten custom of not providing medical attention to detainees who had not yet been arraigned could be the basis for § 1983 liability).

82. *See Serna v. Colo. Dep’t of Corr.*, 455 F.3d 1146, 1153 (10th Cir. 2006) (holding that a supervisor could not be liable for excessive force where subordinates “were

### 5. *Failure to Have Adequate Policy*

In *Rizzo*, the Court ruled that a mere “failure to act” by superiors is insufficient for § 1983 liability.<sup>83</sup> However, numerous more recent cases hold that entities and supervisors may indeed be liable for failing, after adequate warning, to enact or enforce policies that could have prevented unconstitutional harm.<sup>84</sup>

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acting contrary to [his] instructions”); *Hill v. DeKalb Reg. Youth Det. Ctr.*, 40 F.3d 1176, 1192–93 (11th Cir. 1994), *overruled in part on other grounds by* *Hope v. Pelzer*, 536 U.S. 730 (2002); *McClelland v. Facticeau*, 610 F.2d 693, 696 (10th Cir. 1980) (citing *Kite v. Kelly*, 546 F.2d 334, 338 (10th Cir. 1976)); *Carroll v. City of Quincy*, 441 F. Supp. 2d 215, 225 (D. Mass. 2006); *Painter v. Baltimore County*, 535 F. Supp. 321, 324 (D. Md. 1982).

83. 423 U.S. 362, 376 (1976); *see also* *Cygnar v. City of Chi.*, 865 F.2d 827, 847 (7th Cir. 1989) (finding that an official with final policymaking authority must actually have participated in the constitutional wrongdoing and that failure by policymaking official to take corrective action is insufficient in and of itself to show § 1983 liability); *Batista v. Rodriguez*, 702 F.2d 393, 399 (2d Cir. 1983) (“A causal link cannot be inferred from municipal inaction.”); *Wanger*, 621 F.2d at 680 (finding that the “failure to adopt policies to prevent constitutional violations” is “not . . . an adequate basis for liability under § 1983”).
84. *See, e.g., Johnson v. Blaukat*, 453 F.3d 1108, 1113 (8th Cir. 2006) (“Supervisors can be individually liable if they directly participate in a constitutional violation or if they failed to supervise and train officers.”); *Garretson*, 407 F.3d at 796 (indicating that to prove “unwritten custom of not providing medical attention to pre-trial detainees prior to arraignment—a policy or custom of inaction” plaintiff must show, *inter alia*, a “failure to act amounting to an official policy of inaction”); *Gibson v. County of Washoe*, 290 F.3d 1175, 1186 (9th Cir. 2002) (“[A] plaintiff can allege that through its *omissions* the municipality is responsible for a constitutional violation committed by one of its employees.”); *id.* at 1187 (“[T]here is also evidence from which a jury could properly conclude that the County’s failures to act caused its employee to violate Gibson’s rights, and that those failures amounted to deliberate indifference.”); *Fairley v. Luman*, 281 F.3d 913, 917–18 (9th Cir. 2002) (finding that inadequate “warrant procedures” that led to a twelve day detention of the twin brother of a person named in warrants supported liability against the city and noting that “the policy was one of inaction: wait and see if someone complains”); *Worrell v. Henry*, 219 F.3d 1197, 1214 (10th Cir. 2000) (“[A] plaintiff must show that an affirmative link exists between the [constitutional] deprivation and either the supervisor’s personal participation, his exercise of control or direction, or his failure to supervise.”) (internal quotation marks omitted) (citation omitted); *Vineyard v. County of Murray*, 990 F.2d 1207, 1212 (11th Cir. 1993) (upholding liability of the County for excessive force where “the Sheriff’s Department had inadequate procedures for recording and following up complaints against individual officers”); *Oviatt v. Pearce*, 954 F.2d 1470, 1474, 1477–79 (9th Cir. 1992) (“[A] local governmental body may be liable if it has a policy of inaction and such inaction amounts to a failure to protect constitutional rights.”); *id.* at 1477–79 (deciding the city could be liable under § 1983 because it failed to implement internal procedures for tracking inmate arraignments); *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992) (“A failure to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights.”); *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir. 1991) (“[L]iability may be imposed due to the existence of an improper policy or from the absence of



For example, in answering the question of what a plaintiff actually must show to impose liability for a lack of policy in a prison context, the Eleventh Circuit indicated that “any alleged failure to adopt adequate policies for inmate protection must amount to a breach of [defendant’s] duty and must evidence reckless disregard or deliberate indifference to [plaintiff’s] constitutional rights.”<sup>85</sup>

#### 6. *Informal Policy (Custom and Practice)*

As noted above, a policy need not be formal. It may be informal and may take the shape of a custom or practice. Indeed, in *Rizzo*, the Supreme Court stated that official policies could be “express or other-

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a policy.”); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 572–75 (1st Cir. 1989) (upholding judgment against police supervisors who “failed to properly investigate a potentially violent officer”); *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1551 (11th Cir. 1989) (upholding jury verdict against the City of West Palm Beach and its police chief for a pattern of unconstitutional uses of force involving police dogs); *id.* at 1555–56 (noting that the police department “had no specialized internal procedures for monitoring the performance of the canine unit”); *McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir. 1986) (“Policy or custom may be inferred if, after [constitutional violations], . . . officials took no steps to reprimand or discharge the [subordinates], or if they otherwise failed to admit the [subordinates’] conduct was in error.”); *Fiacco v. City of Rensselaer*, 783 F.2d 319, 332 (2d Cir. 1986) (“[T]he evidence was sufficient as a matter of law to permit a rational juror to find that the City had a policy of nonsupervision of its police officers that amounted to a deliberate indifference to their use of excessive force.”); *Turpin v. Mailet*, 619 F.2d 196, 198, 201 (2d Cir. 1980) (collecting cases), *cert. denied*, 449 U.S. 1016 (1980), *overruled in part on other grounds by* *Leatherman v. Tarrant County*, 507 U.S. 163 (1993); *Timberlake v. Benton*, 786 F. Supp. 676, 696 (M.D. Tenn. 1992) (“[W]hen a city provides no guidance to its officers regarding such intrusive actions as strip searches, it must face the consequences of its inaction.”); *Reynolds v. Borough of Avalon*, 799 F. Supp. 442, 447 (D.N.J. 1992). According to the Fifth Circuit, to support liability a failure to have a policy must be “an intentional choice.” *Brumfield v. Hollins*, 551 F.3d 322, 328 (5th Cir. 2008) (“At the time of Smith’s death, clearly established law required that in a claim alleging failure to promulgate policy as a basis for § 1983 liability, the failure must be ‘an intentional choice’ and amount to subjective deliberate indifference.”).

For further analysis of § 1983 liability for failure to act as a custom or policy, see Candace Cohn, Note, *Municipality Liability Under Section 1983: The Failure to Act as “Custom or Policy,”* 29 WAYNE L. REV. 1225, 1244 (1983) (“[M]unicipalities can and should be deemed liable for a custom or policy of inaction where action is necessary to protect the civil rights of the citizenry from abuse by government employees and officials.”) and Diane M. Allen, Annotation, *Liability of Supervisory Officials and Governmental Entities for Having Failed to Adequately Train, Supervise, or Control Individual Peace Officers who Violate Plaintiff’s Civil Rights Under 42 USCS § 1983*, 70 A.L.R. Fed. 17 (1984) (collecting and analyzing cases in which federal courts have discussed or decided whether a governmental entity or supervisory official can be held liable under § 1983 for the failure to properly train, supervise, or control individual officers).

85. *Zatler v. Wainwright*, 802 F.2d 397, 402 (11th Cir. 1986).

wise.”<sup>86</sup> The very language of § 1983 compels this conclusion. It provides for liability against persons who violate federal law while acting “under color of any statute, ordinance, regulation, *custom or usage*.”<sup>87</sup> As the Court said in *Monell*:

[A]lthough the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 “person,” by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental “custom” even though such a custom has not received formal approval through the body’s official decision making channels.<sup>88</sup>

Yet, the *Monell* Court went on to hold the action must be “pursuant to official municipal policy of some nature.”<sup>89</sup> Moreover, as the Court stated in *Adickes v. S.H. Kress & Co.*,<sup>90</sup> and reaffirmed in *Monell*,<sup>91</sup> “[W]e think it clear that a ‘custom or usage, of [a] State’ for purposes of § 1983 must have the *force of law* by virtue of the persistent practices of state officials.”<sup>92</sup> The “social habits” or other “customs of the people” do not satisfy the § 1983 standard.<sup>93</sup>

A great deal of judicial effort has gone into determining the parameters of an informal policy or custom. The most significant decision is probably *Rizzo*. There the Court said that in addition to a significant number of deprivations there must also be a “common thread running through them.”<sup>94</sup> The precise number of deprivations required for an informal policy depends on the case; however, one incident or even a number of isolated incidents over a period of years are usually not enough.<sup>95</sup>

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86. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976).

87. 42 U.S.C. § 1983 (2006) (emphasis added).

88. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

89. *Id.* at 691.

90. 398 U.S. 144 (1970).

91. *Monell*, 436 U.S. at 691.

92. *Adickes*, 398 U.S. at 167 (emphasis added).

93. *Id.* at 166, 167 n.38.

94. *Rizzo v. Goode*, 423 U.S. 362, 375 (1976). Of course, there must still be an “affirmative link between the occurrence of the various incidents . . . and the adoption of [a] plan or policy.” *Id.* at 371. In cases of informal policies or customs, the link is demonstrated by showing that constitutional violations are so widespread that the official “must have been aware of them.” *Holland v. Connors*, 491 F.2d 539, 541 (5th Cir. 1974).

95. *See, e.g.*, *Bd. of County Comm’rs v. Brown*, 520 U.S. 397 (1997) (holding that a single instance of inadequate employment screening of a deputy sheriff could not support § 1983 liability); *City of Okla. City v. Tuttle*, 471 U.S. 808, 821–23 (1985) (plurality opinion) (finding that municipal liability cannot be based on isolated misconduct of a subordinate); *id.* at 830–32 (Brennan, J., concurring) (same); *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003) (“[P]laintiffs have not shown that more than forty unrelated incidents occurring over ten years at thirteen separate DOCS facilities can satisfy their burden of proving that ‘the conditions of [their] confinement violate contemporary standards of decency.’”) (citation omitted); *Pineda v. City of Houston*, 291 F.3d 325, 329 (5th Cir. 2002) (“Eleven incidents

To support § 1983 liability, the deprivations must usually be “persistent and widespread. . . practices.”<sup>96</sup> In other words, there must be

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each ultimately offering equivocal evidence of compliance with the Fourth Amendment cannot support a pattern of illegality in one of the Nation’s largest cities and police forces. The extrapolation fails both because the inference of illegality is truly unconvincing—giving presumptive weight as it does to the absence of a warrant—and because the sample of alleged unconstitutional events is just too small.”); *Gable v. City of Chi.*, 296 F.3d 531, 538 (7th Cir. 2002) (“[T]hree incidents were too few to indicate that the City had a widespread custom of which City policymakers had reason to be aware.”); *Church v. City of Huntsville*, 30 F.3d 1332, 1345–46 (11th Cir. 1994) (“Even assuming that [incidents in which homeless were mistreated] amounted to constitutional violations, such isolated incidents can not support a finding that the plaintiffs demonstrated a substantial likelihood that a pervasive practice of constitutional violations now exists.”); *Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986) (“[I]t is generally necessary to show a persistent and wide-spread practice . . . . Normally random acts or isolated incidents are insufficient to establish a custom or policy.”); *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1504 (11th Cir. 1985) (finding that failure to train one policeman is not sufficient for municipal liability); *Marchant v. City of Little Rock*, 741 F.2d 201, 204 (8th Cir. 1984) (addressing “isolated instances” of which police chief had no knowledge); *Dick v. Wantonwan County*, 738 F.2d 939, 942 (8th Cir. 1984) (“[F]irst ‘isolated incident’ [is] not enough to establish a policy or custom.”) (citation omitted); *Bennett v. City of Slidell*, 728 F.2d 762, 767–68, 768 n.3 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1985); *Lozano v. Smith*, 718 F.2d 756, 771 (5th Cir. 1983); *Wellington v. Daniels*, 717 F.2d 932, 937 (4th Cir. 1983); *Iskander v. Village of Forest Park*, 690 F.2d 126, 128–29 (7th Cir. 1982); *Turpin v. Maillet*, 619 F.2d 196, 202 (2d Cir. 1980), *cert. denied*, 449 U.S. 1016 (1980) (“[A] policy could not ordinarily be inferred from a single incident of illegality” but “a single, unusually brutal or egregious beating administered by a group of municipal employees may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision.”), *overruled in part on other grounds by* *Leatherman v. Tarrant County*, 507 U.S. 163 (1993); *McClelland v. Facticeau*, 610 F.2d 693, 696 (10th Cir. 1979); *Williams v. Anderson*, 599 F.2d 923, 925 (10th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980); *Taken Alive v. Litzau*, 551 F.2d 196, 200 (8th Cir. 1977); *Chestnut v. City of Quincy*, 513 F.2d 91, 92 (5th Cir. 1975). *But see* *Wever v. Lincoln County*, 388 F.3d 601, 607–08 (8th Cir. 2004) (“[I]n most circumstances, a single incident does not provide a supervisor with notice of deficient training or supervision” but “this calculus is not rigid, and must change depending on the seriousness of the incident and its likelihood of discovery . . . . In some circumstances, one or two suicides may be sufficient to put a sheriff on notice that his suicide prevention training needs revision.”)

96. *Adickes*, 398 U.S. at 167; *see also* *Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 403–04 (1997) (“[A]n act performed pursuant to a ‘custom’ that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law.”).

a “pattern”<sup>97</sup> or a showing of “systematic” practices to support § 1983 liability.<sup>98</sup>

In *Rizzo*, the Court held that sixteen constitutional violations by 7500 policemen in Philadelphia—a city of three million inhabitants—over a period of one year did not show an informal policy or custom.<sup>99</sup> Some indication of what the Court considers sufficient to establish an informal policy can be seen in its discussion of other cases in *Rizzo*. For example, the Court cited *Lankford v. Gelston*,<sup>100</sup> in which a police department conducted some 300 warrantless searches over a nineteen-day period in a black residential area, and seemed to suggest that such facts would constitute an informal policy.<sup>101</sup> Similarly, in *Slakan v. Porter*,<sup>102</sup> the Fourth Circuit found that seven recent unjustified water hosings of inmates, in addition to the one involving the plaintiff, formed a pattern of which the defendant supervisory officials

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97. *Rizzo*, 423 U.S. at 374–75; see also *Calhoun v. Ramsey*, 408 F.3d 375, 378–82 (7th Cir. 2005) (upholding jury instruction requiring inmate to show “widespread policy or practice that was so permanent and well settled as to constitute a custom or usage with the force of law”); *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003) (“The necessary causal connection can be established ‘when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so.’”) (citations omitted); *Artis v. Francis Howell North Band Booster Ass’n*, 161 F.3d 1178, 1181–82 (8th Cir. 1998) (“For the School District to be liable, Artis must prove that the School District had an official policy or widespread custom that violated the law and caused his injury . . . . An alleged illegal custom must be widespread and may only subject a school district to liability if it is pervasive enough to have the ‘force of law.’”) (citations omitted); *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 582 (1st Cir. 1994) (“A causal link may also be forged if there exists a known history of widespread abuse sufficient to alert a supervisor to ongoing violations. When the supervisor is on notice and fails to take corrective action, say, by better training or closer oversight, liability may attach.”); *Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990) (“The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences.”), quoted in *Braddy v. Fla. Dep’t of Labor & Emp’t Sec.*, 133 F.3d 797, 802 (11th Cir. 1998); *Jones v. City of Chi.*, 856 F.2d 985, 995–96 (7th Cir. 1988) (upholding judgment against City for Fourth Amendment violation resulting from custom of “maintenance of . . . ‘street files,’ [or] police files withheld from the state’s attorney and therefore unavailable as a source of exculpatory information” which was “department-wide and of long standing”); *Watson v. Interstate Fire & Cas. Co.*, 611 F.2d 120, 123 (5th Cir. 1980) (“Since [plaintiffs] allegations do not show Cowart’s involvement in a pattern of activity designed to deny Mrs. Watson her constitutional rights and are not relevant to the claims involved, they are an insufficient basis for liability under § 1983.”).

98. *Hirst v. Gertzen*, 676 F.2d 1252, 1263 (9th Cir. 1982).

99. *Rizzo*, 423 U.S. at 368.

100. 364 F.2d 197 (4th Cir. 1966).

101. *Rizzo*, 423 U.S. at 373 n.8.

102. 737 F.2d 368 (4th Cir. 1984).

were aware and which supported § 1983 liability.<sup>103</sup> There must be a sufficient number of incidents for municipal policymakers or supervisors to become aware of the conditions in question.<sup>104</sup>

Illustrating these principles, the Eleventh Circuit concluded in *Anderson v. City of Atlanta*<sup>105</sup> that evidence supported the finding of a “pattern or practice of incidents of indifference” regarding prison understaffing.<sup>106</sup> By contrast, in another civil rights case against Atlanta, “[n]o evidence was presented of any other potential or actual adverse effects resulting from use of the restraint” that had led to the death of the plaintiff’s decedent.<sup>107</sup> Thus, there was no liability.<sup>108</sup>

Finally, any plaintiff seeking to impose liability on an entity or supervisor based on an informal policy or custom should be very careful in describing the allegedly offending policy or custom. For instance, in *Woodward v. Correctional Medical Services of Illinois, Inc.*,<sup>109</sup> the Seventh Circuit held that the lack of previous suicides in a county jail did not defeat a claim against the private contractor hired to provide medical services for the jail because the pattern or practice in question was not previous suicides but the condoning of employees’ violations of its written policies.<sup>110</sup> Denying summary judgment, the district court in *Galindez v. Miller*<sup>111</sup> held there was an issue of fact, not as to whether a city directly authorized excessive force, but rather as to whether the city condoned excessive force by allowing civilian complaints of excessive force to “molder and gray without adequate attention (until the epiphany of federal civil rights litigation inspires action).”<sup>112</sup>

#### 7. *Authorization by Training and Supervision Practices (a Policy Subset)*

As pointed out above, the training and supervision of subordinates is sometimes treated as a distinct policy area. Still, and especially with respect to supervision, it is impossible to draw meaningful lines

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103. *Id.* at 373–75; see also *McKenna v. Nassau County*, 538 F. Supp. 737, 741 (E.D.N.Y. 1982), *aff’d*, 714 F.2d 115 (2d Cir. 1982) (involving a situation in which other inmate assaults had occurred in overcrowded prison and guards knew an assault was likely, yet did nothing to prevent or interrupt an assault); *Means v. City of Chi.*, 535 F. Supp. 455, 460 (N.D. Ill. 1982) (addressing a situation in which defendant police officers had been the subject of numerous complaints, some of which had been sustained).

104. See, e.g., *Ross v. Reed*, 719 F.2d 689, 699 (4th Cir. 1973).

105. 778 F.2d 678 (11th Cir. 1985).

106. *Id.* at 685.

107. *Owens v. City of Atlanta*, 780 F.2d 1564, 1568 (11th Cir. 1986).

108. *Id.*

109. 368 F.3d 917 (7th Cir. 2004).

110. *Id.* at 929.

111. 285 F. Supp. 2d 190 (D. Conn. 2003).

112. *Id.* at 199.

between this area and other practices.<sup>113</sup> For example, the policies that led to the sheriff's liability in *Wanger v. Bonner*<sup>114</sup> could be said to be matters of training, supervision, or simply procedure. It must be remembered that, as with respect to other policies, training and supervision practices may not be a basis for § 1983 liability unless they amount to defective (or at-fault) official policies.<sup>115</sup>

It is helpful to distinguish two cases. Most § 1983 liability exposure for training and supervision practices probably results from the implementation of official policies, formal or informal, that through defective content proximately cause unconstitutional conduct. For example, as in *Wanger*, a peace officer might be directed through training or supervision to make unreasonable searches and seizures.<sup>116</sup> On the other hand, an entity or its supervisory personnel might incur § 1983 exposure by completely failing to train a subordinate. Taking the same example, liability might result from an unreasonable search by a policeman who had received no training with respect to searches. Such a failure to train might be seen as an informal policy or custom.

Thus, even where there is no defective policy content, there may still be § 1983 liability if there is a complete failure to train or supervise. In *Monell*, for example, the Court intimated that a complete failure to supervise could result in § 1983 liability. The Court said, "By our decision in *Rizzo v. Goode*, we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability."<sup>117</sup>

Although deficiencies may be present, only deliberate indifference in training or supervision may result in civil rights liability. In *City of Canton v. Harris*,<sup>118</sup> the Court explained that mere negligence in training or supervision is insufficient to support § 1983 liability.<sup>119</sup>

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113. See *City of Okla. City v. Tuttle*, 471 U.S. 808, 820 (1985) (plurality opinion) (pointing out that training and supervision practices fall under the policy label); *McCoy v. City of Monticello*, 411 F.3d 920, 922 (8th Cir. 2005); *Taylor v. Canton, Ohio Police Dep't*, 544 F. Supp. 783, 790 (N.D. Ohio 1982).

114. 621 F.2d 675 (5th Cir. 1980).

115. See *Williams v. Bennett*, 689 F.2d 1370, 1380 (11th Cir. 1982).

116. *Wanger*, 621 F.2d at 679–83 (liability resulted from three unwritten policies).

117. 436 U.S. 658, 694 n.58 (1978) (citations omitted).

118. 489 U.S. 378 (1989).

119. *Id.* at 388–89 ("We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."); see also *J.H. v. W. Valley City*, 840 P.2d 115, 118–22 (Utah 1992) (upholding summary judgment where, although police officer who molested minor was not supervised in his duties involving youth and received no additional training regarding dealing with youth, plaintiff could not show deliberate indifference or a "close nexus between city policy and his damages"); *Taylor v. Canton, Ohio Police Dep't*, 544 F. Supp. 783, 789–90 (N.D. Ohio 1982) (finding the training at issue deficient but not "grossly inadequate"—so no supervisory liability).

According to the Court, “To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983.”<sup>120</sup> Such a lesser standard would “result in de facto respondeat superior liability on municipalities” inasmuch as “[i]n virtually every instance . . . a § 1983 plaintiff will be able to point to something the city ‘could have done’ to prevent the unfortunate incident.”<sup>121</sup>

Generally, completion of state-mandated training is sufficient to avoid liability based on training deficiencies. In *Cannon v. Taylor*,<sup>122</sup> the Eleventh Circuit held that a Columbus, Georgia police officer who caused the death of Lema Cannon in an automobile collision was adequately trained and supervised:

The testimony and documentary evidence reveals that Officer Taylor received the *standard police academy training* on operating his vehicle and on applicable state laws. Additionally, the state law on operating police vehicles over the speed limit was reproduced in the Columbus police manual. This Court is unwilling to say that this training procedure is so inherently inadequate as to subject the City to liability in the absence of past officer misconduct resulting from lack of training.<sup>123</sup>

In many other cases, compliance with state training requirements has been held sufficient to defeat § 1983 claims based on inadequate training.<sup>124</sup>

Moreover, as suggested above, a single instance of inadequate training cannot support § 1983 liability.<sup>125</sup> Any other rule would, of course, circumvent the Supreme Court’s above-discussed holding that entity and supervisory liability cannot be based on a single instance or a sporadic pattern of unconstitutional subordinate conduct.<sup>126</sup>

## B. Ratification

In some circumstances the § 1983 liability of a supervisor or entity may be based on ratification of the unconstitutional conduct of a subordinate. For example, plaintiffs sometimes argue that a city or county is liable for the unconstitutional conduct of a police officer be-

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120. *Harris*, 489 U.S. at 391.

121. *Id.* at 392.

122. 782 F.2d 947, 951 (11th Cir. 1986).

123. *Id.* at 951 (emphasis added). Because *Cannon* predated *City of Canton v. Harris*, the court in *Cannon* applied the less stringent standard of “gross negligence.” *Id.* Yet, even under this more plaintiff-friendly standard, the court found the training in *Cannon* adequate. *Id.*

124. *See, e.g.*, *Colburn v. Upper Darby Twp.*, 946 F.2d 1017, 1028 (3d Cir. 1991) (finding no deliberate indifference where police officers had completed state police academy course); *Walker v. Norris*, 917 F.2d 1449, 1457 (6th Cir. 1990) (holding that a prison guard who completed a three-week state academy course and received annual in-service training was adequately trained); *Vine v. County of Ingham*, 884 F. Supp. 1153, 1159 (W.D. Mich. 1995).

125. *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1504 (11th Cir. 1985).

126. *See supra* subsection III.A.6.

cause the entity upheld or approved the officer's conduct through an internal affairs report or personnel board decision clearing him of misconduct charges.

Support for ratification as a theory of § 1983 liability can be found in a number of decisions. In the leading case of *City of St. Louis v. Praprotnik*,<sup>127</sup> a plurality of the Supreme Court reasoned:

[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.<sup>128</sup>

The Court labeled this statement as a guiding "principle,"<sup>129</sup> but did not apply the ratification doctrine in *Praprotnik*.

Many other courts have addressed ratification in § 1983 cases. Seventh Circuit Judge Richard Posner, in characteristically plain prose, has summarized "that by adopting an employee's action as its own (what is called 'ratification'), a public employer becomes the author of the action for purposes of liability under section 1983."<sup>130</sup> Accordingly, numerous courts have recognized that ratification may provide an adequate basis for liability under § 1983.<sup>131</sup>

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127. 485 U.S. 112 (1988).

128. *Id.* at 127.

129. *Id.*

130. *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 469 (7th Cir. 2001).

131. See *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189 (10th Cir. 2010) ("Municipal liability may be also be based on the decisions of employees with final policymaking authority or the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval."); *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1250 (9th Cir. 2010); *World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 755 (5th Cir. 2009) (recognizing ratification as a theory of liability but limiting it to "extreme factual situations") (internal quotation marks omitted) (citation omitted); *Waters v. City of Chi.*, 580 F.3d 575, 584–85 (7th Cir. 2009) (noting that "a municipality may be held liable based on a ratification theory," but indicating that ratification cannot result from the actions of "nonpolicymaking employees"); *Moss v. Kopp*, 559 F.3d 1155, 1169 (10th Cir. 2009) ("[I]f a subordinate's position is subject to review by the municipality's authorized policymakers and the authorized policymakers approve a subordinate's decision and the basis for it, their ratification will be chargeable to the municipality."); *Matthews v. Columbia County*, 294 F.3d 1294, 1297–98 (11th Cir. 2002) ("County liability on the basis of ratification exists when a subordinate public official makes an unconstitutional decision and when that decision is then adopted by someone who does have final policymaking authority. The final policymaker, however, must ratify not only the decision itself, but also the unconstitutional basis for it."); *Kujawski v. Bd. of Comm'rs*, 183 F.3d 734, 736–37 (7th Cir. 1999); *Christie v. Iopa*, 176 F.3d 1231, 1239–40 (9th Cir. 1999) (reversing the district court's grant of summary judgment on a § 1983 claim against a supervising prosecutor because there was evidence that he had ratified his subordinate's selective prosecution of the plaintiff); *Baskin v. City of Des*



Plaines, 138 F.3d 701, 705 (7th Cir. 1998) (“[I]t is well settled that a plaintiff seeking to establish a § 1983 claim against a municipality based on a ‘ratification’ theory must allege that a municipal official with final policymaking authority approved the subordinate’s decision and the basis for it.”); Hyland v. Wonder, 117 F.3d 405, 416 (9th Cir. 1997) (holding municipality liable because “the uncontradicted evidence in the record establishes that the officials with authority over access to Juvenile Hall, Judge Wonder of the Superior Court and later the [Juvenile Probation Commission], both ratified the ban of [plaintiff] from Juvenile Hall, and so municipal liability exists” with respect to termination of volunteer probation worker and banning him from juvenile hall in retaliation for his speech criticizing management and conditions.); Au Hoon v. City of Honolulu, No. 89-16305, 1991 WL 1677, at \*4 (9th Cir. Jan. 10, 1991) (“[I]t is not correct to say that only actions approved in advance are ‘ratified’ for purposes of imposing liability on a municipality under section 1983. To do so confuses decisionmaking authority with policymaking authority, and further ignores the fact that ratification demonstrates that the act was consonant with the policy of the entity.”); Larez v. City of L.A., 946 F.2d 630, 646 (9th Cir. 1991) (“[E]vidence that Chief Gates, an authorized policymaker on police matters, . . . made, or ratified a decision that deprived plaintiffs of their constitutional rights would suffice for official liability under *Pembaur*.”); Thompson v. City of L.A., 885 F.2d 1439, 1443 (9th Cir. 1989) (“[A] rule or regulation promulgated, adopted, or ratified by a local governmental entity’s legislative body unquestionably satisfies *Monell*’s policy requirement.”); Hammond v. County of Madera, 859 F.2d 797, 802 (9th Cir. 1988) (“The Board therefore ratified the misconduct which gives rise to the County’s liability.”), *overruled in part on other grounds by* L.W. v. Grubbs, 92 F.3d 894, 897–98 (1996); Garza v. City of Omaha, 814 F.2d 553, 556 (8th Cir. 1987) (upholding jury verdict against City because “the disparate treatment of which Garza complained took place over a period of several years” and was “both investigated and ratified by persons in the highest positions of management subordinate supervisory personnel”); Goodson v. City of Atlanta, 763 F.2d 1381, 1388 (11th Cir. 1985) (holding that by failing to take action on complaints about conditions at the City of Atlanta Jail, “it appears that the City Council ratified the customs, policies, and procedures of the Director . . . during the time period immediately after and prior to the incidents complained of by [plaintiff] Goodson”); Marchese v. Lucas, 758 F.2d 181, 188 (6th Cir. 1985) (finding that a failure to conduct “serious investigation” into assault by police held to be “ratification of the illegal acts of the unidentified officers whom the jury found to have inflicted injuries upon plaintiff Marchese which plaintiff claims warranted a judgment in his favor of \$125,000 from the Sheriff and the County”); Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983) (“We have held that municipal inaction such as the persistent failure to discipline subordinates who violate civil rights could give rise to an inference of an unlawful municipal policy of ratification of unconstitutional conduct, within the meaning of *Monell*.”) (citing cases); Shape v. Barnes County, 396 F. Supp. 2d 1067, 1076–77 (D.N.D. 2005) (finding that, regardless of whether the sheriff was a policymaker, the County could be held liable because “the Board of Commissioners directly ratified the Sheriff’s decision,” which allegedly violated the plaintiff’s First Amendment rights); Adler v. Lincoln Hous. Auth., 544 A.2d 576, 582 (R.I. 1988) (reasoning that because “the board of commissioners retains control and final authority over the executive director” and “[t]he board ratified the decision . . . to terminate plaintiff . . . *Pembaur* is applicable to the instant case and . . . the trial justice erred in dismissing the § 1983 civil rights claim against the Lincoln Housing Authority” and holding that “[t]he housing authority, as a properly constituted administrative body, is liable for acts that it has officially sanctioned or ordered”). *Contra* McQuarter v. City of Atlanta, 572 F.

Some pattern jury instructions for § 1983 cases include ratification as a basis for liability. For example, the Ninth Circuit model charge provides:

In order to prevail on [his] [her] § 1983 claim against defendant [*name of local governing body*] alleging liability based on ratification by a final policymaker, the plaintiff must prove each of the following elements by a preponderance of the evidence:

1 [*Name of defendant's employee*] acted under color of law;

2 the act[s] of [*name of defendant's employee*] deprived the plaintiff of [his] [her] particular rights under [the laws of the United States] [the United States Constitution] as explained in later instructions;

3 [*Name of person the plaintiff alleges was a final policymaker of the defendant*] acted under color of law;

4 [*Name of final policymaker*] had final policymaking authority from defendant [*name of local governing body*] concerning the act[s] of [*name of defendant's employee*]; and

5 [*Name of final policymaker*] ratified [*name of defendant's employee*]'s act and the basis for it, that is, [*name of alleged final policymaker*] knew of and specifically approved of the employee's act[s].

A person acts "under color of law" when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation. [[The parties have stipulated that] [I instruct you that] the defendant's [official] [employee] acted under color of law.]

I instruct you that [*name of final policymaker*] had final policymaking authority from defendant [*name of local governing body*] concerning the act[s] in issue and, therefore, the fourth element requires no proof.

If you find the plaintiff has proved each of these elements, and if you find that the plaintiff has proved all the elements [he] [she] is required to prove under Instruction [*specify the instruction[s] that deal with the particular right[s]*], your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any one or more of these elements, your verdict should be for the defendant.<sup>132</sup>

Before § 1983 liability can be based on ratification, it is necessary, of course, that there be an underlying unconstitutional act by a subordinate or employee. For example, if a police officer uses constitutional force, approval or ratification by the agency for which he works cannot establish liability against the agency.<sup>133</sup>

Inasmuch as § 1983 is "read against the background of tort liability,"<sup>134</sup> it is instructive to consult tort law on ratification. American

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Supp. 1401, 1420 (N.D. Ga. 1983) (finding that "ratification" by failure to discipline police officers involved in an excessive use of force did not support the inference that the City's police department had a policy of using excessive force and failing to give medical attention).

132. NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS 9.6 (Ninth Circuit Jury Instructions Comm. 2009).

133. Harris County v. Going, 896 S.W.2d 305, 309 (Tex. App. 1995) (finding that if the decisionmaker "did not violate Going's constitutional rights, the ratification of such action cannot constitute a violation of those rights").

134. Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled in part on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

law generally allows tort liability by ratification.<sup>135</sup> Ratification also is an accepted basis for liability under contract law.<sup>136</sup>

1. *Elements of Ratification under Restatements of Agency*

What is ratification and how does one prove it? According to the *Third Restatement of Agency*,

- (1) Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.
- (2) A person ratifies an act by
  - (a) manifesting assent that the act shall affect the person’s legal relations, or
  - (b) conduct that justifies a reasonable assumption that the person so consents.
- (3) Ratification does not occur unless
  - (a) the act is ratifiable as stated in § 4.03,
  - (b) the person ratifying has capacity as stated in § 4.04,
  - (c) the ratification is timely as stated in § 4.05, and
  - (d) the ratification encompasses the act in its entirety as stated in § 4.07.<sup>137</sup>

It is important that ratification occurs after the act that is purportedly affirmed or ratified.<sup>138</sup> And, although ratification operates as authorization, it is not actually a form of authorization.<sup>139</sup> Authorization is usually understood as approval that occurs before the event that is said to be authorized.

In some circumstances, ratification can occur even in the course of litigation that occurs after the act that is said to be ratified. According to the comments to the *Third Restatement*, “A person may ratify an unauthorized act by taking a position in litigation that is warranted only by consent to be bound by the act.”<sup>140</sup>

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135. RESTATEMENT (THIRD) OF AGENCY §§ 4.01–4.08 (2006).  
 136. 12 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 35:23 (4th ed. 1999).  
 137. RESTATEMENT (THIRD) OF AGENCY § 4.01 (2006). The *Second Restatement* stated: “Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.” RESTATEMENT (SECOND) OF AGENCY § 82 (1958).  
 138. RESTATEMENT (THIRD) OF AGENCY § 4.02 (2006) (“[R]atification retroactively creates the effects of actual authority.”); *Id.* § 4.01 (“Ratification is the affirmance of a prior act done by another . . . .”); *Id.* § 4.01 cmt. b (“Although ratification creates the legal effects of actual authority, it reverses in time the sequence between an agent’s conduct and the principal’s manifestation of assent.”); *see also* Villanueva v. Brown, 103 F.3d 1128, 1139 (3d Cir. 1977) (“Her act of signing the Investment Agreement clearly does not ratify an event which had not yet occurred. She cannot ratify an action that she is not aware of.”).  
 139. RESTATEMENT (SECOND) OF AGENCY § 84 cmt. b (1958) (“Ratification is not a form of authorization, but its peculiar characteristic is that ordinarily it has the same effect as authorization . . . .”).  
 140. RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. h (2006); *see* Bell Atl. Network Servs., Inc. v. P.M. Video Corp., 730 A.2d 406, 424 (N.J. Super. Ct. App. Div.

In order for ratification to occur, there must be a ratifiable act and capacity to ratify the act. Regarding acts that are ratifiable, the *Third Restatement* simply states, “A person may ratify an act if the actor acted or purported to act as an agent on the person’s behalf.”<sup>141</sup> The *Third Restatement* also provides that “[a] person may ratify an act if (a) the person existed at the time of the act, and (b) the person had capacity as defined in § 3.04 at the time of ratifying the act.”<sup>142</sup> The *Second Restatement* gives the following description of acts that may be ratified:

- (1) An act which, when done, could have been authorized by a purported principal, or if an act of service by an intended principal, can be ratified if, at the time of affirmance, he could authorize such an act.
- (2) An act which, when done, the purported or intended principal could not have authorized, he cannot ratify, except an act affirmed by a legal representative whose appointment relates back to or before the time of such act.<sup>143</sup>

This language is very important because it limits potential liability by ratification to persons or entities that could authorize the act in question. Note that according to the *Third Restatement*, “the relevant time to determine whether the principal has capacity to ratify is the time of ratification” and “it is not necessary for ratification that the principal have had capacity as well at the time of the act that the ratification concerns.”<sup>144</sup> The *Restatement* gives the example of a minor who may ratify a contract although at the time the contract was signed the minor did not have the capacity to enter into a binding contract.<sup>145</sup>

Thus, applying these principles, a non-supervisory police officer who congratulates a fellow officer for using excessive force against an arrestee could not be held liable through ratification because, as a non-supervisor, the first officer could not have authorized the excessive force. However, if the non-supervisory officer has, since the incident involving excessive force, been promoted to a supervisory position, it appears that under the *Third Restatement* his subsequent approval of the use of excessive force may act as ratification.

Notably, it is not required that affirmance or ratification take any particular form. “It is a question of fact whether conduct is sufficient to indicate consent.”<sup>146</sup> Ratification may be proved circumstan-

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1999) (holding that a corporation’s instituting a declaratory judgment action and conducting a single defense with its employee constituted ratification).

141. RESTATEMENT (THIRD) OF AGENCY § 4.03 (2006).

142. *Id.* § 4.04 (quoting *id.* § 3.04). Capacity is determined at the time of ratification “because ratification requires an externally observable indication of assent to have legal relations affected by the act done earlier and to give such assent requires capacity.” *Id.* § 4.04 cmt. b.

143. RESTATEMENT (SECOND) OF AGENCY § 84 (1958).

144. RESTATEMENT (THIRD) OF AGENCY § 4.04 cmt. b (2006).

145. *Id.*

146. *Id.* § 4.01 cmt. d.

tially,<sup>147</sup> and it may even occur by silence. “A principal may ratify an act by failing to object to it or to repudiate it.”<sup>148</sup> According to the comments to the *Third Restatement*, in some circumstances, “failure to terminate” may constitute ratification, as may “the promotion or celebration” of an employee.<sup>149</sup> For example, in *Bielicki v. Terminx International Co.*,<sup>150</sup> the Tenth Circuit upheld an award of punitive damages based on ratification by the principal, a pest control company, of its employee’s tortious conduct in spraying a harmful pesticide in a prison.<sup>151</sup> There was evidence that, after spraying caused prisoners and staff to become ill, a supervisor told the employee not to “worry about it” and to make sure the company got paid, while another supervisor “regularly joke[d] about the incident by stating that [the employee] was ‘sav[ing] the taxpayers money’ by ‘getting rid of the inmates.’”<sup>152</sup>

There is no actionable ratification unless the person who performed the original act purported to act on behalf of the ratifier. According to the *Third Restatement*, “A person may ratify an act if the actor acted or purported to act as agent on the person’s behalf.”<sup>153</sup> Hence, a city or county that employs a police officer who, while off-duty and without a display of police authority, shoots someone in a private dispute, would probably not be liable even if it later affirms the officer’s conduct.

Unlike authorization, which usually confers some general power on an agent, ratification may apply to discrete acts or transactions. Comments to the *Third Restatement* make this point: “The impact of a principal’s ratification may be limited to a single act or transaction, in contrast to acquiescence by the principal that may be understood by the agent as a manifestation by the principal creating actual authority for similar acts in the future.”<sup>154</sup> The potential usefulness to plaintiffs of ratification as a theory of § 1983 liability is evident here as well.

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147. *See id.* § 4.06 reporter’s note b (stating that, for ratification purposes, “[a] principal’s knowledge may be established circumstantially”).

148. *Id.* § 4.01 cmt. f; *see* *Lugue v. Hercules, Inc.*, 12 F. Supp. 2d 1351, 1361 (S.D. Ga. 1997); *Stathis v. Geldermann, Inc.*, 692 N.E.2d 798, 808 (Ill. App. Ct. 1998); RESTATEMENT (SECOND) OF AGENCY § 94 (1958) (“An affirmance of an unauthorized transaction can be inferred from a failure to repudiate it.”).

149. RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. d (2006).

150. 225 F.3d 1159 (10th Cir. 2000).

151. *Id.* at 1164–65.

152. *Id.* at 1164.

153. RESTATEMENT (THIRD) OF AGENCY § 4.03 (2006); RESTATEMENT (SECOND) OF AGENCY § 85 (1958). According to the comments to the *Third Restatement*, § 4.03 expands the formulation to allow ratification by “an undisclosed principal.” RESTATEMENT (THIRD) OF AGENCY § 4.03 cmt. b (2006) (“An undisclosed principal is not a stranger to the agent” and “whether to ratify is a choice an undisclosed principal should be free to make”).

154. RESTATEMENT (THIRD) OF AGENCY § 4.02 cmt. b (2006).

Under mainstream case law, a defective policy supporting the liability of an entity or supervisor cannot normally be based on singular or sporadic incidents.<sup>155</sup> Rather, “persistent and widespread . . . practices” must usually be proved.<sup>156</sup>

A person or entity that might be in a position to ratify can avoid that result if it does not have all the material facts at the time of ratification. Thus, the *Third Restatement* provides that “[a] person is not bound by a ratification made without knowledge of material facts involved in the original act when the person was unaware of such lack of knowledge.”<sup>157</sup> Yet, by a form of election, ratification may nevertheless occur because “[a] principal may choose to affirm without knowing the material facts.”<sup>158</sup> In other words, the lack of knowledge of material facts “creat[es] an election to avoid a ratification.”<sup>159</sup> Thus, for instance, a city that clears a complaint against a police officer who used excessive force might avoid ratification if the officer lied about his conduct. Still, the city might nevertheless be liable through ratification if, after learning of the lies, the city continues its position or if it is aware that it does not have all the pertinent facts and yet chooses to affirm the conduct anyway.

Moreover, in order for ratification to occur, it is not necessary that a purported principal communicate the affirmance to anyone. “The manifestation of a definitive election by the principal constitutes affirmance without communication to the agent, to the other party, or to other persons.”<sup>160</sup>

The restatements also describe several exceptions to ratification. According to the *Third Restatement*,

- (2) Ratification is not effective:
  - (a) in favor of a person who causes it by misrepresentation or other conduct that would make a contract voidable;
  - (b) in favor of an agent against a principal when the principal ratifies to avoid a loss; or
  - (c) to diminish the rights or other interests of persons, not parties to the transaction, that were acquired in the subject matter prior to the ratification.<sup>161</sup>

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155. *See supra* note 95.

156. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167 (1970); *see also* *Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 403–04 (1997) (“[A]n act performed pursuant to a ‘custom’ that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law.”).

157. RESTATEMENT (THIRD) OF AGENCY § 4.06 (2006); RESTATEMENT (SECOND) OF AGENCY § 91 (1958).

158. RESTATEMENT (THIRD) OF AGENCY § 4.06 cmt. b (2006).

159. *Id.*

160. RESTATEMENT (SECOND) OF AGENCY § 95 (1958).

161. RESTATEMENT (THIRD) OF AGENCY § 4.02 (2006); *see* RESTATEMENT (SECOND) OF AGENCY § 101 (1958).

If applied in a police misconduct case, these exceptions would limit in several respects potential ratification liability of an entity or supervisor. For example, ratification would not occur if a victim of police misconduct misstates or lies about the extent of the misconduct in an internal affairs complaint and the entity or supervisor subsequently clears the misconduct.

Finally the restatements indicate that in some cases, although the elements of ratification are not formally met, a person or entity may be estopped to deny ratification. According to the *Third Restatement*, “[i]f a person makes a manifestation that the person has ratified another’s act and the manifestation, as reasonably understood by a third party, induces the third party to make a detrimental change in position, the person may be estopped to deny the ratification.”<sup>162</sup> For example, when, under § 4.01 of the *Third Restatement*, a writing is necessary to ratify a transaction—because “written authorization is necessary to bind the principal to the transaction through the act of an agent”—the purported principal may be estopped to deny ratification “when a third party changes position in reliance on a person’s manifestation that a writing requisite to ratification has been executed by the person.”<sup>163</sup>

## 2. *The Causation Hurdle in § 1983 Ratification Liability*

How can federal courts allow § 1983 liability based solely on post-deprivation ratification, which by definition could not be said to have caused the deprivation? As discussed above, causation is required by the express language of § 1983 and the courts strictly enforce the requirement.<sup>164</sup>

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162. RESTATEMENT (THIRD) OF AGENCY § 4.08 (2006); see RESTATEMENT (SECOND) OF AGENCY § 103 (1958).

163. RESTATEMENT (THIRD) OF AGENCY § 4.08 cmt. b (2006).

164. See *Milam v. City of San Antonio*, 113 F. App’x 622, 628 (5th Cir. 2004) (setting aside a jury verdict against the City because the evidence did not show ratification and “it is hard to see how a policymaker’s ineffectual or nonexistent response to an incident, which occurs well after the fact of the constitutional deprivation, could have caused the deprivation”); *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1174–75 (11th Cir. 2001), *vacated*, 536 U.S. 953 (2002), *reinstated*, 323 F.3d 950 (11th Cir. 2003) (suggesting that liability cannot attach if a policymaker “had no opportunity to ratify the decision” before the alleged deprivation occurred); *Alexander v. Beale St. Blues Co.*, 108 F. Supp. 2d 934, 949 (W.D. Tenn. 1999) (holding that the City could not be liable for failing “to reprimand, discipline or terminate” officers for allegedly excessive force and other § 1983 claims “because subsequent ratification could not have caused [victim’s] death”); *Gainor v. Douglas County*, 59 F. Supp. 2d 1259, 1293 (N.D. Ga. 1998) (“A *post hoc* approval of an action already taken could not possibly be the motivating force for causing the action to be taken. Thus, in order to impose liability under a ratification based theory, it is necessary to show prior ratification of the policy giving rise to the action alleged to have violated the plaintiff’s federal rights, such that the ratification of that policy could be said to be the moving force behind the alleged consti-

However, even if one ignores *Prapotnik* and rejects ratification as inconsistent with the causation requirement, evidence of post-deprivation ratification may nevertheless be admissible to show the relevant policy before the deprivation.<sup>165</sup> This can be seen as a brand—or the substantial equivalent—of ratification liability.

3. *Case Study: Police Internal Affairs Reports*

Most law enforcement agencies have departments that receive and investigate citizen complaints against officers. These departments usually go by names such as internal affairs, professional standards, or review boards. As one treatise states, “Every police agency needs a functional Internal Affairs Unit (IAU) or person charged with the responsibility to oversee the acceptance, investigation, and adjudication of complaints about police performance.”<sup>166</sup> Some larger cities also have civilian boards that review complaints against officers.<sup>167</sup> After

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tutional violation.”); *Looney v. City of Wilmington*, 723 F. Supp. 1025, 1037 (D. Del. 1989) (“[T]he Supreme Court’s emphasis on the element of causation in actions involving municipal liability is a second reason to find that ratification of an employee’s actions must occur prior to when the employee acts.”); Jack C. Hanssen, Note, *Municipal Liability Under 42 U.S.C. §1983 and the Ratification Theory of City of St. Louis v. Praprotnik: An Analysis of Federal Circuit Treatment*, 27 J. LEGIS. 361, 367 (2001) (“The federal circuits, upon encountering the ratification theory of *Praprotnik*, were immediately faced with the dilemma of applying the common law of agency to a §1983 cause of action with the strict causation requirement imposed by *Monell*.”)

165. *See Milam*, 113 F. App’x at 628 (“[T]he failure to take disciplinary action in response to an illegal arrest, when combined with other evidence, could tend to support an inference that there was a preexisting de facto policy of making illegal arrests: the policymaker did not discipline the employee because, in the policymakers’ eyes, the employee’s illegal conduct actually conformed with municipal policy.”); *Foley v. City of Lowell*, 948 F.2d 10, 14 (1st Cir. 1991) (“[A]ctions taken subsequent to an event are admissible if, and to the extent that, they provide reliable insight into the policy in force at the time of the incident.”); *Bordanaro v. McLeod*, 871 F.2d 1151, 1167 (1st Cir. 1989) (“Post-event evidence can shed some light on what policies existed in the city on the date of an alleged deprivation of constitutional right.”); *McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir. 1986) (“Policy or custom may be inferred if, after [constitutional violations], . . . officials took no steps to reprimand or discharge the [subordinates], or if they otherwise failed to admit the [subordinates’] conduct was in error.”); *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985) (“[S]ubsequent acceptance of dangerous recklessness by the policymaker tends to prove his preexisting disposition and policy.”); Hanssen, *supra* note 164, at 377–78.

166. CHARLES SWANSON ET AL., *POLICE ADMINISTRATION* 328 (5th ed. 2001); *see* V.A. LEONARD & HARRY W. MORE, *POLICE ORGANIZATION AND MANAGEMENT* 193 (8th ed. 1993); *LOCAL GOVERNMENT POLICE MANAGEMENT* 341 (William A. Geller & Daniel Stephens eds., 4th ed. 2003); ROY R. ROBERG ET AL., *POLICE & SOCIETY* 362–69 (3d ed. 2005); EDWARD A. THIBAUT ET AL., *PROACTIVE POLICE MANAGEMENT* 250 (5th ed. 2001); PAUL M. WHISENAND & R. FRED FERGUSON, *THE MANAGING OF POLICE ORGANIZATIONS* 409 (4th ed. 1996).

167. LEONARD & MORE, *supra* note 166, at 195–96; Barry Loveday, *Police Complaints in the USA*, in *POLICING, VOLUME II: CONTROLLING THE CONTROLLERS: POLICE DIS-*



investigating complaints, reviewing agencies typically issue reports finding allegations of misconduct either unfounded, unsubstantiated, or sustained.<sup>168</sup> These reports may become the basis for discipline.

Many observers doubt the integrity and effectiveness of internal affairs procedures. One commentator explains:

Internal affairs is viewed with suspicion from two fronts. For citizens, suspicions are often raised as to whether making complaints will make any difference since they believe that the police will “whitewash” the incident. For police officers, internal affairs poses a threat in that it abrogates the entire notion of fraternity found in the police subculture—the inconceivable idea that fellow officers will prosecute another, resulting in fines, suspension, forced retirement, or jail.<sup>169</sup>

The *Standards for Law Enforcement Agencies*, issued by the Commission on Accreditation for Law Enforcement Agencies (CALEA), require that all law enforcement agencies fulfill the internal affairs function. The CALEA standards take particular care to emphasize the importance of internal affairs:

The internal affairs function is important for the maintenance of professional conduct in a law enforcement agency. The integrity of the agency depends on the personal integrity and discipline of each employee. To a large degree, the public image of the agency is determined by the quality of the internal affairs function in responding to allegations of misconduct by the agency or its employees.

. . . .  
Agencies having an internal affairs function consistent with these standards will have the capability to respond appropriately to allegations of misfeasance, malfeasance, and nonfeasance by employees, and to complaints about the agency’s response to community needs, thereby instilling public confidence in the agency.<sup>170</sup>

According to CALEA, an agency must, in order to be accredited, comply with numerous standards, including investigating all complaints, observing specific time limits for investigations, providing status reports to complainants, reaching “conclusion[s] of fact” regarding each allegation, and maintaining records.<sup>171</sup>

May a police internal affairs report establish ratification by a city, municipality, other entity, police chief, or supervisor? A number of different scenarios may provoke this question:

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CRETION AND ACCOUNTABILITY 375, 376–78 (Robert Reiner ed., 1996); ROBERG ET AL., *supra* note 166, at 371–74; THIBAUT ET AL., *supra* note 166, at 252.  
168. See ROBERG ET AL., *supra* note 166, at 365; THIBAUT ET AL., *supra* note 166, at 252–53.  
169. THIBAUT ET AL., *supra* note 166, at 252; see also Steven Box & Ken Russell, *The Politics of Discredibility: Disarming Complaints Against the Police*, in POLICING, VOLUME II: CONTROLLING THE CONTROLLERS: POLICE DISCRETION AND ACCOUNTABILITY 343 (Robert Reiner ed., 1996) (reviewing techniques used to discredit complaints against the police in England and Wales).  
170. COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT, at 52-1 (5th ed. 2006).  
171. *Id.* at 52-1 to 52-2.

1. an internal affairs report may clear officers of charges and result in no discipline,
2. an internal affairs report may sustain charges of misconduct yet result in no discipline,<sup>172</sup>
3. an internal affairs department may conduct no investigation of a complaint, or
4. an internal affairs department may keep no records of complaints, investigations, or its findings (making it difficult to establish a pattern or practice of misconduct).

Not surprisingly, several courts have faced issues regarding the effect of internal affairs reports in § 1983 litigation. Reversing on other grounds, the Ninth Circuit in *Larez v. City of Los Angeles*<sup>173</sup> held that the evidence was sufficient to support a judgment against Los Angeles Police Chief Daryl Gates for an unreasonable search and use of excessive force committed by his officers.<sup>174</sup> Due to the district court's erroneous admission of hearsay, the court remanded for a new trial as to Gates and the City.<sup>175</sup>

One of the plaintiffs, who were all members of the Larez family, filed an internal affairs complaint with the Los Angeles Police Department (LAPD), but “[i]n a letter signed by Chief Gates, Jessie [Larez] ultimately was notified that none of the many allegations in his complaint could be sustained.”<sup>176</sup> Discussing testimony provided by the plaintiffs’ expert on police practices, the Ninth Circuit ruled that, by signing this letter, Gates “ratif[ie]d the investigation into the Larezes’ complaint” and therefore “[t]he jury’s verdict was not in plain error.”<sup>177</sup> The court held that this action by Gates was sufficient to support his liability and apparently also that of the City.<sup>178</sup>

Like many courts, the Ninth Circuit mixed its discussion of ratification with statements from other cases that the failure to discipline could establish a policy of authorizing police misconduct. The court recognized: “Policy or custom may be inferred if, after [constitutional violations], . . . officials took no steps to reprimand or discharge the[ir subordinates], or if they otherwise failed to admit the [subordinates’] conduct was in error.”<sup>179</sup>

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172. If an internal affairs report sustains charges of misconduct and results in discipline, it obviously cannot be maintained that the agency or an involved supervisor ratified the misconduct.

173. 946 F.2d 630 (9th Cir. 1991).

174. *Id.* at 649.

175. *Id.*

176. *Id.* at 635.

177. *Id.* at 646.

178. *Id.* at 646–47.

179. *McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir. 1986), *cited with approval in Larez*, 946 F.2d at 645.

Careful analysis requires that liability by ratification be kept distinct from liability based on a formal or informal policy. True ratification occurs where an entity or supervisor becomes liable, for purposes of our case study, by post-event affirmance of alleged police misconduct. Liability by true ratification does not occur, however, when an entity or supervisor is held liable because its post-event conduct is construed as reflecting a culpable pre-event custom or policy.<sup>180</sup> Liability based on this latter concept may resemble liability based on ratification, but close examination shows it to be a different animal. In § 1983 cases, courts often confuse or conflate these concepts.<sup>181</sup>

Another case involving the intersection of ratification and police internal affairs is *Batista v. Rodriguez*.<sup>182</sup> In *Batista*, three citizens filed formal complaints with the Bridgeport, Connecticut Police Department regarding their arrest.<sup>183</sup> The Bridgeport Board of Police

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180. Note that evidence of the pre-event policy may include internal affairs clearance or other approval of prior incidents of police misconduct. *See* *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 572–75 (1st Cir. 1989) (upholding admission of thirteen civilian complaint files against one officer at a § 1983 trial for unconstitutional shooting on the theory that prior complaints, twelve of which resulted in dismissal of charges, were not offered to prove the truth of the charges or culpable conduct but rather “the effectiveness of the police disciplinary mechanism” and “supervisory liability”). Again, this is not liability based on true ratification, which would require post-event affirmance of the event upon which the current suit is based. As discussed above, entity and supervisory liability on the basis of inadequate discipline or inadequate response to prior citizen complaints is a species of liability based on informal policy or custom.

181. *Hanssen*, *supra* note 164, at 378–79. The confusion between ratification and policy is evident in *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985), where the court held liability based on ratification cannot be imposed unless a “persistent failure to take disciplinary action against officers can give rise to the inference that a municipality has ratified conduct, thereby establishing a ‘custom’ within the meaning of *Monell*.” *Id.* at 1443; *see also* *World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 755 (5th Cir. 2009) (suggesting that, for ratification to apply, not only must the conduct at issue be “extreme,” but also the “policymaker’s ratification or defense of his subordinate’s actions” must be sufficient “to establish an official policy or custom”).

The concepts are also confused in *STEPHEN YAGMAN & HAROLD S. LEWIS, JR., POLICE MISCONDUCT & CIVIL RIGHTS* § 4-1.94 (2007), which recommends the following as a jury instruction: “Refusing seriously to investigate an incident or to discipline the involved officers may constitute a pattern of conduct that ratified bad conduct as may recklessly ignoring evidence that government employees had violated plaintiff’s constitutional rights in attempting to secure their malicious prosecution.” *Id.* This is mistaken because it omits affirmance, which is a necessary element of ratification. A better jury instruction on ratification is the Ninth Circuit’s model charge, which includes the affirmance element by requiring the plaintiff to prove that the ratifying defendant “ratified [the employee]’s act and the basis for it, that is [the ratifying defendant] knew of and specifically approved of the employee’s act[s].” *NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS* 9.6 (Ninth Circuit Jury Instructions Comm. 2009).

182. 702 F.2d 393 (2d Cir. 1983).

183. *Id.* at 394.

Commissioners held a hearing but “did not take disciplinary action” against the officers.<sup>184</sup> In their § 1983 suit, the citizens alleged that the City’s liability was established on the following basis:

The failure on the part of the defendant City to take any disciplinary action whatever in any of the cases in which police officers of said City have been found responsible for violations of civil rights by the U.S. District Court and the promotion of one of the police officers of the defendant City after a jury had awarded punitive damages against him for violation of civil rights, together with a refusal to allow complainants to be present with counsel while they are being subjected to cross-examination by counsel for the police officers complained about, constitute either a negligent or wilful [sic] and malicious course of conduct designed to promote violations of civil rights. Said conduct by the defendant City is either a nonfeasance or malfeasance for which the defendant City is liable to the plaintiffs.<sup>185</sup>

The Second Circuit recognized that ratification could support civil rights liability: “We have held that municipal inaction such as the persistent failure to discipline subordinates who violate civil rights could give rise to an inference of an unlawful municipal policy of ratification of unconstitutional conduct, within the meaning of *Monell*.”<sup>186</sup> Nevertheless, in overturning a judgment against the City, the court held that the plaintiffs’ allegations were not sufficient to allege a claim:

The Fourth Court, however, fails completely to allege that the City’s pattern of inaction caused the plaintiffs any compensable injury. It does not claim that the alleged unlawful arrests and assault of November 8, 1976, were the product of the City’s alleged policy and practice or that the policy was even a substantial factor leading to those injuries. Indeed, the Fourth Court makes no reference at all to the events of November 8. For instance, there is no claim that officers Rodriguez and Nadrizny knew of the Board’s alleged past failure to discipline or of any pattern of inaction, condonation, or rewarding of unlawful conduct on the part of the City, from which it might be inferred that they implemented it, whether or not in good faith. Nor does that count allege conduct from which a causal connection between the City’s policy of inaction and the arrests and assault might permissibly be implied, such as inadequate training and supervision or prior instances of unusual brutality indicating deliberate indifference or gross negligence on the part of the municipal officials in charge.<sup>187</sup>

Issues regarding ratification and police internal affairs reports also emerged in *Fiacco v. City of Rensselaer*,<sup>188</sup> where the Second Circuit resolved a § 1983 claim against the City of Rensselaer, New York, its police chief, and two of its police officers.<sup>189</sup> Without using the term “ratification,” the court upheld a judgment against the City because “the evidence was sufficient as a matter of law to permit a rational juror to find that the City had a policy of nonsupervision of its police

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184. *Id.* at 394–95.

185. *Id.* at 395 n.1 (citation omitted in original).

186. *Id.* at 397.

187. *Id.* at 398 (citations omitted).

188. 783 F.2d 319 (2d Cir. 1986).

189. *Id.* at 320.

officers that amounted to a deliberate indifference to their use of excessive force.”<sup>190</sup> Reciting evidence of failures to investigate prior excessive-force complaints against police officers and the failure of the City’s Public Safety Board even to provide the required “form on which a civilian could make a complaint against a police officer,” the Second Circuit summarized:

The evidence was sufficient to permit the jury to find that the City Charter outlined procedures for the consideration of charges against policemen, but that in the period prior to Fiacco’s arrest the Public Safety Board had never implemented those procedures and had never held a hearing into a civilian complaint against a policeman. The evidence showed that within the 22-month period preceding Fiacco’s arrest, five complaints were made that City police officers had used excessive force, either in making arrests or in transporting or detaining those whom they had already arrested; four of the complaints came within the ten months preceding Fiacco’s arrest. Any investigation of these charges was done by [Police Chief] Stark himself, for he never assigned anyone else to make an investigation. Stark’s sole investigative act in most instances consisted of questioning the officers accused. In none of those instances did Stark open an investigative file or place any notation in the officer’s file. In no instance did Stark take a written statement from any of the five complainants. He did not even interview three of them.<sup>191</sup>

As discussed above, this is not true ratification.

Another case illustrating these principles is *Kibbe v. City of Springfield*,<sup>192</sup> in which the City was held liable under § 1983 for the fatal shooting of a fleeing motorist by one of its police officers.<sup>193</sup> The First Circuit upheld the judgment against the City based on its “policy of inadequate training.”<sup>194</sup> The appellate court rejected the district court’s rationale in denying judgment notwithstanding the verdict, finding that the City had “ratified” the shooting officer’s conduct by “clearing him and finding that he had acted in accordance with the police department’s policies.”<sup>195</sup> However, despite finding the City liable on the basis of inadequate training, the First Circuit agreed with the district court and remained “unconvinced that a failure to discipline [him] or other officers amounts to the sort of ratification from which a jury properly could infer municipal policy.”<sup>196</sup>

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190. *Id.* at 332.

191. *Id.* at 331.

192. 777 F.2d 801 (1st Cir. 1985).

193. *Id.* at 801–02.

194. *Id.* at 809.

195. *Id.* at 809 n.7.

196. *Id.*; see also *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1055 (9th Cir. 2009) (finding that the police chief’s “decision not to pursue an additional investigation into the specific arrest claims cannot be fairly characterized as an affirmative choice to ratify the alleged conduct, since he believed [the officers] had not engaged in such conduct”); *Montaño v. City of Chi.*, 535 F.3d 558, 570 (7th Cir. 2008) (reasoning that the “decision of the Chicago Police Board that overturned the suspension of an officer” accused of excessive force could not establish a mu-

#### 4. *The Converse of Ratification*

Ratification is an issue in § 1983 cases only when an entity or supervisor affirms prior conduct of a subordinate. We have considered the example of a police internal affairs report clearing an officer of misconduct charges. If the conduct turns out to be unlawful, the question becomes whether the entity or supervisor has ratified the misconduct by affirming it.

Obviously, if the entity or supervisor disavows the prior conduct of the subordinate, there is no ratification. However, the disavowal—such as a police internal affairs report sustaining misconduct charges—may be admissible in evidence under the *Federal Rules of Evidence* as a report that contains factual findings and “result[s] from an investigation made pursuant to authority granted by law.”<sup>197</sup> The elements of a Rule 803(8)(c) report are discussed in *Beech Aircraft Corp. v. Rainey*.<sup>198</sup>

Rule 803(8)(c) allows the admission into evidence of: “Records, reports, statements, or data compilations, in any form of public offices or agencies, setting forth . . . (c) in civil actions and proceedings . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.”<sup>199</sup> There is precedent for the admission of reports sustaining allegations of law enforcement misconduct.<sup>200</sup> Moreover, internal affairs reports sustaining charges of misconduct may also be admissible under Rule 801(d)(2) as admissions of a party opponent.

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nicipal policy because the fact that “the Board concluded that the forced used . . . was justified . . . hardly establishes a general policy of condoning the use of excessive force,” and the circumstances indicated that the Board’s decision was correct.”); *Thomas v. City of Chattanooga*, 398 F.3d 426, 430–34 (6th Cir. 2005) (holding that an internal affairs conclusion that a “shooting was justified” did not establish a “policy, custom, or practice of condoning the use of excessive force against suspects”); *Milam v. City of San Antonio*, 113 F. App’x 622, 624, 628 (5th Cir. 2004) (finding that the failure of City officials to take “disciplinary action against the rangers” who arrested the plaintiff did not support the “ratification verdict” inasmuch as “this record does not present a situation where the policymakers have approved the ‘decision and the basis for it’” (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988))).

197. FED. R. EVID. 803(8)(c).

198. 488 U.S. 153, 161–62 (1988).

199. FED. R. EVID. 803(8)(c).

200. *See Meriwether v. Coughlin*, 879 F.2d 1037, 1039 (2d Cir. 1989) (involving, under Rule 803(8)(c), the admission of a commission report which concluded there was widespread and institutionalized corruption among correctional staff); *Gentile v. County of Suffolk*, 129 F.R.D. 435, 447–62 (E.D.N.Y. 1990), *aff’d*, 926 F.2d 142, 151–52 (2d Cir. 1991) (finding a commission report regarding misconduct by county police department and district attorney admissible under Rule 803(8)(c)).

In some cases, this may create for lucky plaintiffs a nightmare dilemma for an entity or supervisor. The dilemma may take this form: (1) issue an internal affairs report clearing a subordinate officer's conduct and face potential liability based on ratification, or (2) issue an internal affairs report sustaining or upholding a charge against an officer and see that report potentially admitted in evidence against the entity or supervisor under the *Federal Rules of Evidence*. Neither outcome is particularly appealing for defendants.

#### IV. CONCLUSION

As shown, ratification liability under § 1983 presents a number of difficulties. The elements of ratification, even for tort and contract law purposes, are narrow. Moreover, ratification liability is in fundamental tension with the strict causation requirement under § 1983. As a result, the courts have not resoundingly embraced ratification as a theory of § 1983 liability. In short, they have not treated *Praprotnik* as a clarion call for a new plaintiffs' beachhead in civil rights law.

Nevertheless, full respect for *Praprotnik* indicates that ratification, which by its nature involves post-event affirmance, should be a viable theory of § 1983 liability. Ratification is a well-recognized theory of liability in tort and contract law, which also require strict proof of causation. If ratification is good enough for those areas of law, it is also good enough for civil rights law.

Furthermore, there is no basis for the approach of the Fifth Circuit in limiting the application of ratification to "extreme factual situations."<sup>201</sup> A court should not refuse to hold an entity or supervisor liable for ratifying a routine unconstitutional arrest, and reserve ratification for an arrest that is instead "extremely" unconstitutional or outrageous, since all constitutional violations are probably "extreme" to the victims. Thus, ratification, as recognized and applied in both contract and tort law, is an appropriate mechanism for making sure that, under the law, plaintiffs are treated justly and defendants incur the rightful consequences of their conduct.

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201. The Fifth Circuit has applied this standard in several cases, including *World Wide Street Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 755 (5th Cir. 2009) ("The theory of ratification, however, has been limited to 'extreme factual situations.'") (citing Fifth Circuit cases), and *Peterson v. City of Fort Worth*, 588 F.3d 838, 848 (5th Cir. 2009) (noting that "our precedent has limited the theory of ratification to 'extreme factual situations'" (citing Fifth Circuit cases). Notably, in *Peterson*, a dissenting judge criticized the "extreme" standard. *Id.* at 852 (Montalvo, J., dissenting).