Instructions for Civil Rights Claims Under Section 1983

Numbering of Section 1983 Instructions

4.15 Section 1983 – High-Speed Chase

4.16 Section 1983 – Duty to Protect Child in Foster Care

4.1 Section 1983 Introductory Instruction

Model

[Plaintiff][1] is suing under Section 1983, a civil rights law passed by Congress that provides a remedy to persons who have been deprived of their federal [constitutional] [statutory] rights under color of state law.[2]

[1] Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

[2] In these instructions, references to action under color of state law are meant to include action under color of territorial law. *See, e.g.*, *Eddy v. Virgin Islands Water & Power Auth.*, 955 F. Supp. 468, 476 (D.V.I. 1997) ("The net effect of the Supreme Court decisions interpreting 42 U.S.C. § 1983, including *Will* [*v. Michigan Department of State Police*, 491 U.S. 58 (1989),] and *Ngiraingas* [*v. Sanchez*, 495 U.S. 182 (1990)], is to treat the territories and their officials and employees the same as states and their officials and employees."), *reconsidered on other grounds*, 961 F. Supp. 113 (D.V.I. 1997).

4.2 Section 1983 – Burden of Proof

Model

[Provide Instruction 1.10 on burden of proof, modified (if necessary) as discussed in the Comment below.]

Comment

The plaintiff bears the burden of proof on the elements of a Section 1983 claim. *See, e.g.*, *Groman v. Township of Manalapan*, 47 F.3d 628, 638 (3d Cir. 1995). The court can use Instruction 1.10 to apprise the jury of this burden.

Where there is a jury question on the issue of qualified immunity, some additional instruction on burdens may occasionally be necessary.

Although the defendant has the burden of pleading the defense of qualified immunity, *see Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Thomas v. Independence Tp.*, 463 F.3d 285, 293 (3d Cir. 2006), the Supreme Court has not definitively established who bears the burden of proof with respect to that defense, *see, e.g., Gomez*, 446 U.S. at 642 (Rehnquist, J., concurring) (construing the opinion of the Court "to leave open the issue of the burden of persuasion, as opposed to the burden of pleading, with respect to a defense of qualified immunity").

The Third Circuit has stated that the defendant bears the burden of proof on qualified immunity. *See, e.g.*, *Kopec v. Tate*, 361 F.3d 772, 776 (3d Cir. 2004) (defendant has burden to establish entitlement to qualified immunity); *Beers-Capitol v. Whetzel*, 256 F.3d 120, 142 n.15 (3d Cir. 2001) (same); *Karnes v. Skrutski*, 62 F.3d 485, 491 (3d Cir. 1995) (same); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726 (3d Cir. 1989) (same); *Ryan v. Burlington County*, N.J., 860 F.2d 1199, 1204 n.9 (3d Cir. 1988) (same). However, some other Third Circuit opinions suggest that the burden of proof regarding qualified immunity may vary with the element in question.[3] For example, the court has stated that "[w]here a defendant asserts a qualified immunity defense in a motion for summary judgment, the plaintiff bears the initial burden of showing that the defendant's conduct violated some clearly established statutory or constitutional right. . . . Only if the plaintiff carries this initial burden must the defendant then demonstrate that no genuine issue of material fact remains as to the 'objective reasonableness' of the defendant's belief in the lawfulness of his actions." *Sherwood*

[3] As discussed below (see Comment 4.7.2), the qualified immunity analysis poses three questions: (1) whether the defendant violated a constitutional right; (2) whether the right was clearly established; and (3) whether it would have been clear to a reasonable official, under the circumstances, that the conduct was unlawful. The issue of evidentiary burdens of proof implicates only the first and third questions.

v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997); *see also Hynson By and Through Hynson v. City of Chester*, 827 F.2d 932, 935 (3d Cir. 1987) ("Although the officials claiming qualified immunity have the burden of pleading and proof . . . , a plaintiff who seeks damages for violation of constitutional rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.").

A distinction between the burden of proof as to the constitutional violation and the burden of proof as to objective reasonableness makes sense in the light of the structure of Section 1983 litigation. To prove her claim, the plaintiff must prove the existence of a constitutional violation; qualified immunity becomes relevant only if the plaintiff carries that burden. Accordingly, the plaintiff should bear the burden of proving the existence of a constitutional violation in connection with the qualified immunity issue as well. However, it would accord with decisions such as *Kopec* (and it would not contravene decisions such as *Sherwood*) to place the burden on the defendant to prove that a reasonable officer would not have known, under the circumstances, that the conduct was illegal.[4]

As noted in Comment 4.7.2, a jury question concerning qualified immunity will arise only when there are material questions of historical fact. The court should submit the questions of historical fact to the jury by means of special interrogatories; the court can then resolve the question of qualified immunity by reference to the jury's determination of the historical facts. Many questions of historical fact may be relevant both to the existence of a constitutional violation and to the question of objective reasonableness; as to those questions, the court should instruct the jury that the plaintiff has the burden of proof. Other questions of historical fact, however, may be relevant only to the question of objective reasonableness; as to those questions, if any, the court should instruct the jury that the defendant has the burden of proof.

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[4] There is language in *Estate of Smith v. Marasco*, 430 F.3d 140 (3d Cir. 2005), which may be perceived as being in tension with *Kopec*'s statement that the defendant has the burden of proof on qualified immunity. In *Marasco* the Court of Appeals held the defendants were entitled to qualified immunity on the plaintiffs' state-created danger claim because the court "conclude[d] that the Smiths cannot show that a reasonable officer would have recognized that his conduct was 'conscience-shocking.'" *Id.* at 156. While this language can be read as contemplating that the plaintiffs have a burden of persuasion, it should be noted that the court was not focusing on a factual dispute but rather on the clarity of the caselaw at the time of the relevant events. *See id.* at 154 (stressing that the relevant question was "whether the law, as it existed in 1999, gave the troopers 'fair warning' that their actions were unconstitutional") (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

4.3 Section 1983 – Elements of Claim

Model

[Plaintiff] must prove both of the following elements by a preponderance of the evidence:

First: [Defendant] acted under color of state law.

Second: While acting under color of state law, [defendant] deprived [plaintiff] of a federal [constitutional right] [statutory right].

I will now give you more details on action under color of state law, after which I will tell you the elements [plaintiff] must prove to establish the violation of [his/her] federal [constitutional right] [statutory right].

Comment

"By the plain terms of § 1983, two–and only two–allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *see also, e.g.*, *Groman v. Township of Manalapan*, 47 F.3d 628, 633 (3d Cir. 1995) ("A prima facie case under § 1983 requires a plaintiff to demonstrate: (1) a person deprived him of a federal right; and (2) the person who deprived him of that right acted under color of state or territorial law.").

Some authorities include in the elements instruction a statement that the plaintiff must prove that the defendant's acts or omissions were intentional. *See, e.g.*, Ninth Circuit Civil Instruction 11.1. It is not clear, however, that the elements instruction is the best place to address the defendant's state of mind. "Section 1983 itself 'contains no state-of-mind requirement independent of that necessary to state a violation' of the underlying federal right. . . . In any § 1983 suit, however, the plaintiff must establish the state of mind required to prove the underlying violation." *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 405 (1997) (quoting *Daniels v. Williams*, 474 U.S. 327, 330 (1986)); *see also Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3d Cir. 1994) (noting that "section 1983 does not include any *mens rea* requirement in its text, but the Supreme Court has plainly read into it a state of mind requirement specific to the particular federal right underlying a § 1983 claim"). Because the *mens rea* requirement will depend on the nature of the constitutional violation, the better course is to address the requirement in the instructions on the specific violation(s) at issue in the case.

Some authorities include, as a third element, a requirement that the defendant caused the plaintiff's damages. *See, e.g.*, Fifth Circuit Civil Instruction 10.1; Eleventh Circuit Civil Instruction 2.2. It is true that the plaintiff cannot recover compensatory damages without showing that the

defendant's violation of the plaintiff's federal rights caused those damages. *See* Instruction 4.8.1, *infra*. It would be misleading, however, to consider this an element of the plaintiff's claim: If the plaintiff proves that the defendant, acting under color of state law, violated the plaintiff's federal right, then the plaintiff is entitled to an award of nominal damages even if the plaintiff cannot prove actual damages. *See infra* Instruction 4.8.2.

If the Section 1983 claim asserts a conspiracy to deprive the plaintiff of civil rights,[5] additional instructions will be necessary. *See, e.g.*, *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 254 (3d Cir. 1999) ("In order to prevail on a conspiracy claim under § 1983, a plaintiff must prove that persons acting under color of state law conspired to deprive him of a federally protected right."); *Marchese v. Umstead*, 110 F.Supp.2d 361, 371 (E.D. Pa. 2000) ("To state a section 1983 conspiracy claim, a plaintiff must allege: (1) the existence of a conspiracy involving state action; and (2) a depravation [*sic*] of civil rights in furtherance of the conspiracy by a party to the conspiracy."); *see also* Avery, Rudovsky & Blum,[6] Instructions 12:31, 12:32, 12:33, & 12:43 (providing suggested instructions regarding a Section 1983 conspiracy claim).

[5] Such a claim should be distinguished from the use of evidence of a conspiracy in order to establish that a private individual acted under color of state law. *See infra* Instruction 4.4.3.

[6] MICHAEL AVERY, DAVID RUDOVSKY & KAREN BLUM, POLICE MISCONDUCT: LAW AND LITIGATION §§ 12:31, 12:32, 12:33, & 12:43 (updated Oct. 2005) (available on Westlaw in the POLICEMISC database).

4.4 Section 1983 – Action under Color of State Law

Model

The first element of [plaintiff's] claim is that [defendant] acted under color of state law. This means that [plaintiff] must show that [defendant] was using power that [he/she] possessed by virtue of state law.

A person can act under color of state law even if the act violates state law. The question is whether the person was clothed with the authority of the state, by which I mean using or misusing the authority of the state.

By "state law," I mean any statute, ordinance, regulation, custom or usage of any state. And when I use the term "state," I am including any political subdivisions of the state, such as a county or municipality, and also any state, county or municipal agencies.

Comment

Whenever possible, the court should rule on the record whether the conduct of the defendant constituted action under color of state law. In such cases, the court can use Instruction 4.4.1 to instruct the jury that this element of the plaintiff's claim is not in dispute.

In cases involving material disputes of fact concerning action under color of state law, the court should tailor the instructions on this element to the nature of the theory by which the plaintiff is attempting to show action under color of state law. This comment provides an overview of some theories that can establish such action; Instructions 4.4.2 and 4.4.3 provide models of instructions for use with two such theories.

"[C]onduct satisfying the state-action requirement of the Fourteenth Amendment satisfies [Section 1983's] requirement of action under color of state law." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 n.18 (1982).[7] "Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach '"merely private conduct, no matter how discriminatory or wrongful."'" *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948))). Liability under Section 1983 "attaches only to those wrongdoers 'who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.'" *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191

[7] *See also Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n.2 (2001) ("If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes.").

(1988) (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).[8]

The inquiry into the question of action under color of state law "is fact-specific." *Groman v. Township of Manalapan*, 47 F.3d 628, 638 (3d Cir. 1995). "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. . . . Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor." *Tarkanian*, 488 U.S. at 192. Circumstances that can underpin a finding of state action include the following:

- A finding of "'a sufficiently close nexus between the state and the challenged action of the [private] entity so that the action of the latter may fairly be treated as that of the State itself.'"[9]

- A finding that "the State create[d] the legal framework governing the conduct."[10]

- A finding that the government "delegate[d] its authority to the private actor."[11]

- A finding that the government "knowingly accept[ed] the benefits derived from unconstitutional behavior."[12]

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[8] *Compare Citizens for Health v. Leavitt*, 428 F.3d 167, 182 (3d Cir. 2005) (holding that a federal regulation that "authoriz[ed] conduct that was already legally permissible" – and that did not preempt state laws regulating such conduct more strictly – did not meet the "state action requirement").

[9] *McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 524 (3d Cir. 1994) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

[10] *Tarkanian*, 488 U.S. at 192 (citing *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975)).

[11] *Id.* (citing *West v. Atkins*, 487 U.S. 42 (1988)); *see also Reichley v. Pennsylvania Dept. of Agriculture*, 427 F.3d 236, 245 (3d Cir. 2005) (holding that trade association's "involvement and cooperation with the Commonwealth's efforts to contain and combat" avian influenza did not show requisite delegation of authority to the trade association).

[12] *Tarkanian*, 488 U.S. at 192 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)).

- A finding that "the private party has acted with the help of or in concert with state officials."[13] For an instruction on private action in concert with state officials, see Instruction 4.4.3.

- A finding that the action "'result[ed] from the State's exercise of "coercive power."'"[14]

- A finding that "'the State provide[d] "significant encouragement, either overt or covert."'"[15]

- A finding that "'a nominally private entity . . . is controlled by an "agency of the State."'"[16]

- A finding that "'a nominally private entity . . . has been delegated a public function by the State.'"[17]

- A finding that "'a nominally private entity . . . is "entwined with governmental policies,"

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[13] *McKeesport Hosp.*, 24 F.3d at 524. The Court of Appeals has explained that Supreme Court caselaw concerning "joint action or action in concert suggests that some sort of common purpose or intent must be shown.... [A] private citizen acting at the orders of a police officer is not generally acting in a willful manner, especially when that citizen has no self-interest in taking the action.... [W]illful participation ... means voluntary, uncoerced participation." *Harvey v. Plains Twp. Police Dept.*, 421 F.3d 185, 195-96 (3d Cir. 2005).

[14] *Benn v. Universal Health System, Inc.*, 371 F.3d 165, 171 (3d Cir. 2004) (quoting *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982))).

[15] *Benn*, 371 F.3d at 171 (quoting *Brentwood*, 531 U.S. at 296 (quoting *Blum*, 457 U.S. at 1004)).

[16] *Benn*, 371 F.3d at 171 (quoting *Brentwood*, 531 U.S. at 296 (quoting *Pennsylvania v. Bd. of Dir. of City Trusts of Philadelphia*, 353 U.S. 230, 231 (1957) (per curiam))).

[17] *Benn*, 371 F.3d at 171 (quoting *Brentwood*, 531 U.S. at 296); *compare Leshko v. Servis*, 423 F.3d 337, 347 (3d Cir. 2005) (holding "that foster parents in Pennsylvania are not state actors for purposes of liability under § 1983"); *Max v. Republican Committee of Lancaster County*, 587 F.3d 198, 199, 203 (3d Cir. 2009) (holding that, under the circumstances, a political committee, its affiliate and certain of its officials were not acting as state actors when they allegedly sought to chill the speech of plaintiff – a committeewoman for the political committee – in connection with the Republican primary election).

or [that] government is "entwined in [its] management or control."'"[18]

The fact that a defendant was pursuing a private goal does not preclude a finding that the defendant acted under color of state law. *See Georgia v. McCollum*, 505 U.S. 42, 54 (1992) (noting, in a case involving a question of "state action" for purposes of the Fourteenth Amendment, that "[w]henever a private actor's conduct is deemed 'fairly attributable' to the government, it is likely that private motives will have animated the actor's decision").

[18] *Benn*, 371 F.3d at 171 (quoting *Brentwood*, 531 U.S. at 296 (quoting *Evans v. Newton*, 382 U.S. 296, 299, 301 (1966))).

4.4.1 Section 1983 – Action under Color of State Law – Action under Color of State Law Is Not in Dispute

Model

Version A (government official):

Because [defendant] was an official of [the state of ___] [the county of ___] [the city of ___] at the relevant time, I instruct you that [he/she] was acting under color of state law. In other words, this element of [plaintiff's] claim is not in dispute, and you must find that this element has been established.

Version B (private individual):

Although [defendant] is a private individual and not a state official, I instruct you that the relationship between [defendant] and the state was sufficiently close that [he/she] was acting under color of state law. In other words, this element of [plaintiff's] claim is not in dispute, and you must find that this element has been established.

4.4.2 Section 1983 – Action under Color of State Law – Determining When an Official Acted under Color of State Law

Model

[Defendant] is an official of [the state of _____] [the county of _____] [the city of _____]. However, [defendant] alleges that during the events at issue in this lawsuit, [defendant] was acting as a private individual, rather than acting under color of state law.

For an act to be under color of state law, the person doing the act must have been doing it while clothed with the authority of the state, by which I mean using or misusing the authority of the state. You should consider the nature of the act, and the circumstances under which it occurred, to determine whether it was under color of state law.

The circumstances that you should consider include:

- *[Using bullet points, list any factors discussed in the Comment below, and any other relevant factors, that are warranted by the evidence.]*

You must consider all of the circumstances and determine whether [plaintiff] has proved, by a preponderance of the evidence, that [defendant] acted under color of state law.

Comment

"[S]tate employment is generally sufficient to render the defendant a state actor." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 935 n.18 (1982).[19] In some cases, however, a government employee defendant may claim not to have acted under color of state law. Instruction 4.4.2 directs the jury to determine, based on the circumstances, whether such a defendant was acting under color of state law.[20]

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[19] Special problems may arise if the public employee in question has a professional obligation to someone other than the government. *Compare, e.g.*, *West v. Atkins*, 487 U.S. 42, 43, 54 (1988) (holding that "a physician who is under contract with the State to provide medical services to inmates at a state-prison hospital on a part-time basis acts 'under color of state law,' within the meaning of 42 U.S.C. § 1983, when he treats an inmate") *with Polk County v. Dodson*, 454 U.S. 312, 317 n.4 (1981) ("[A] public defender does not act under color of state law when performing the traditional functions of counsel to a criminal defendant.").

[20] For an instruction concerning the contention that a private defendant acted under color of state law by conspiring with a state official, see Instruction 4.4.3.

Various factors may contribute to the conclusion concerning the presence or absence of action under color of state law.[21] The court should list any relevant factors in Instruction 4.4.2. In the case of a police officer defendant, factors could include:

- Whether the defendant was on duty.[22] This factor is relevant but not determinative. An off-duty officer who purports to exercise official authority acts under color of state law.[23] Conversely, an officer who is pursuing purely private motives, in an interaction unconnected with his or her official duties, and who does not purport to exercise official authority does not act under color of state law.[24]

- Whether police department regulations provide that officers are on duty at all times.[25]

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[21] *Compare, e.g.*, *Barna v. City of Perth Amboy*, 42 F.3d 809, 816-17 (3d Cir. 1994) (off-duty, non-uniformed officers with police-issue weapons did not act under color of law in altercation with brother-in-law of one of the officers; officers were outside the geographic scope of their jurisdiction, and altercation started when officer accused his brother-in-law of hitting his sister, after which officer's partner joined the fight, after which both officers tried to leave) *with Black v. Stephens*, 662 F.2d 181, 188 (3d Cir. 1981) (police officer acted under color of law in altercation that began with a dispute over a traffic incident; "he was on duty as a member of the Allentown Police force, dressed in a police academy windbreaker and . . . he investigated the Blacks' vehicle because he thought the driver was either intoxicated or in need of help"); *see also Paul v. Davis*, 424 U.S. 693, 717 (1976) (Brennan, J., joined by Marshall, J., and in relevant part by White, J., dissenting) ("[A]n off-duty policeman's discipline of his own children, for example, would not constitute conduct 'under color of' law.").

[22] "[G]enerally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West*, 487 U.S. at 50.

[23] "[O]ff-duty police officers who flash a badge or otherwise purport to exercise official authority generally act under color of law." *Bonenberger v. Plymouth Tp.*, 132 F.3d 20, 24 (3d Cir. 1997).

[24] "[N]ot all torts committed by state employees constitute state action, even if committed while on duty. For instance, a state employee who pursues purely private motives and whose interaction with the victim is unconnected with his execution of official duties does not act under color of law." *Bonenberger*, 132 F.3d at 24.

[25] *See Torres v. Cruz*, 1995 WL 373006, at *4 (D.N.J. Aug. 24, 1992) (holding that it was relevant to question of action under color of state law that police manual "states that although the officers will be assigned active duty hours, 'all members shall be considered on duty at all times and shall act promptly, at any time, their services are required or requested'").

- Whether the defendant was acting for work-related reasons. However, the fact that a defendant acts for personal reasons does not necessarily prevent a finding that the defendant is acting under color of state law. A defendant who pursues a personal goal, but who uses governmental authority to do so, acts under under color of state law.[26]

- Whether the defendant's actions were related to his or her job as a police officer.[27]

- Whether the events took place within the geographic area covered by the defendant's police department.[28]

- Whether the defendant identified himself or herself as a police officer.[29]

- Whether the defendant was wearing police clothing.[30]

- Whether the defendant showed a badge.[31]

- Whether the defendant used or was carrying a weapon issued by the police department.[32]

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[26] *See Basista v. Weir*, 340 F.2d 74, 80-81 (3d Cir. 1965) ("Assuming arguendo that Scalese's actions were in fact motivated by personal animosity that does not and cannot place him or his acts outside the scope of Section 1983 if he vented his ill feeling towards Basista ... under color of a policeman's badge.").

[27] "Manifestations of . . . pretended [official] authority may include flashing a badge, identifying oneself as a police officer, placing an individual under arrest, or intervening in a dispute involving others pursuant to a duty imposed by police department regulations." *Barna v. City of Perth Amboy*, 42 F.3d 809, 816 (3d Cir. 1994).

[28] *See id.* at 816-17.

[29] *See Griffin v. Maryland*, 378 U.S. 130, 135 (1964).

[30] *See Abraham v. Raso*, 183 F.3d 279, 287 (3d Cir. 1999).

[31] *See Bonenberger*, 132 F.3d at 24.

[32] "While a police-officer's use of a state-issue weapon in the pursuit of private activities will have 'furthered' the § 1983 violation in a literal sense, courts generally require additional indicia of state authority to conclude that the officer acted under color of state law." *Barna*, 42 F.3d at 817; *see also id.* at 818 (holding that "the unauthorized use of a police-issue nightstick is simply not enough to color this clearly personal family dispute with the imprimatur of state authority").

- Whether the defendant used a police car or other police equipment.[33]

- Whether the defendant used his or her official position to exert influence or physical control over the plaintiff.

- Whether the defendant purported to place someone under arrest.[34]

In a case involving a non-police officer defendant, factors could include:

- Whether the defendant was on duty.[35] This factor is relevant but not determinative. An off-duty official who purports to exercise official authority acts under color of state law.[36] Conversely, an official who is pursuing purely private motives, in an interaction unconnected with his or her official duties, and who does not purport to exercise official authority does not act under color of state law.[37]

- Whether the defendant was acting for work-related reasons. However, the fact that a defendant acts for personal reasons does not necessarily prevent a finding that the defendant is acting under color of state law. A defendant who pursues a personal goal, but who uses governmental authority to do so, acts under under color of state law.[38]

- Whether the defendant's actions were related to his or her job as a government official.[39]

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[33] *Rodriguez v. City of Paterson*, 1995 WL 363710, at *3 (D.N.J. June 13, 1995) (fact that defendant was equipped with police radio was relevant to question of action under color of state law).

[34] *See Griffin*, 378 U.S. at 135 (holding that the defendant, "in ordering the petitioners to leave the park and in arresting and instituting prosecutions against them–purported to exercise the authority of a deputy sheriff. He wore a sheriff's badge and consistently identified himself as a deputy sheriff rather than as an employee of the park"); *Abraham*, 183 F.3d at 287 ("[E]ven though Raso was working off duty as a security guard, she was acting under color of state law: she was wearing a police uniform, ordered Abraham repeatedly to stop, and sought to arrest him.").

[35] *West*, 487 U.S. at 50.

[36] *Bonenberger*, 132 F.3d at 24.

[37] *Bonenberger*, 132 F.3d at 24.

[38] *Basista*, 340 F.2d at 80-81.

[39] *Barna v. City of Perth Amboy*, 42 F.3d 809, 816 (3d Cir. 1994).

- Whether the events took place within the geographic area covered by the defendant's department.[40]

- Whether the defendant identified himself or herself as a government official.[41]

- Whether the defendant was wearing official clothing.[42]

- Whether the defendant showed a badge.[43]

- Whether the defendant used his or her official position to exert influence over the plaintiff.

[40] *See id.* at 816-17.

[41] *See Griffin*, 378 U.S. at 135.

[42] *See Abraham*, 183 F.3d at 287.

[43] *See Bonenberger*, 132 F.3d at 24.

4.4.3 Section 1983 – Action under Color of State Law – Determining Whether a Private Person Conspired with a State Official

Model

[Defendant] is not a state official. However, [plaintiff] alleges that [defendant] acted under color of state law by conspiring with one or more state officials to deprive [plaintiff] of a federal right.

A conspiracy is an agreement between two or more people to do something illegal. A person who is not a state official acts under color of state law when [he/she] enters into a conspiracy, involving one or more state officials, to do an act that deprives a person of federal [constitutional] [statutory] rights.

To find a conspiracy in this case, you must find that [plaintiff] has proved both of the following by a preponderance of the evidence:

First: [Defendant] agreed in some manner with [Official Roe and/or another participant in the conspiracy with Roe] to do an act that deprived [plaintiff] of [describe federal constitutional or statutory right].

Second: [Defendant] or a co-conspirator engaged in at least one act in furtherance of the conspiracy.

As I mentioned, the first thing that [plaintiff] must show in order to prove a conspiracy is that [defendant] and [Official Roe and/or another participant in the conspiracy with Roe] agreed in some manner to do an act that deprived [plaintiff] of [describe federal constitutional or statutory right].

Mere similarity of conduct among various persons, or the fact that they may have associated with each other, or may have discussed some common aims or interests, is not necessarily proof of a conspiracy. To prove a conspiracy, [plaintiff] must show that members of the conspiracy came to a mutual understanding to do the act that violated [plaintiff's] [describe right]. The agreement can be either express or implied. [Plaintiff] can prove the agreement by presenting testimony from a witness who heard [defendant] and [Official Roe and/or another participant in the conspiracy with Roe] discussing the agreement; but [plaintiff] can also prove the agreement without such testimony, by presenting evidence of circumstances from which the agreement can be inferred. In other words, if you infer from the sequence of events that it is more likely than not that [defendant] and [Official Roe and/or another participant in the conspiracy with Roe] agreed to do an act that deprived [plaintiff] of [describe right], then [plaintiff] has proved the existence of the agreement.

In order to find an agreement, you must find that there was a jointly accepted plan, and that [defendant] and [state official] [each other conspirator] knew the plan's essential nature and general scope. A person who has no knowledge of a conspiracy, but who happens to act in a way which

furthers some purpose of the conspiracy, does not thereby become a conspirator. However, you need not find that [defendant] knew the exact details of the plan [or the identity of all the participants in it]. One may become a member of a conspiracy without full knowledge of all the details of the conspiracy.

The second thing that [plaintiff] must show in order to prove a conspiracy is that [defendant] or a co-conspirator engaged in at least one act in furtherance of the conspiracy. [In this case, this requirement is satisfied if you find that [defendant] or a co-conspirator did any of the following things: [Describe the acts alleged by the plaintiff].] [In other words, [plaintiff] must prove that [defendant] or a co-conspirator took at least one action to further the goal of the conspiracy.]

Comment

Alternative ways to show that a private person acted under color of state law. It should be noted that demonstrating the existence of a conspiracy is not the only possible way to show that a private individual acted under color of state law. *See supra* Comment 4.4. For example, when a private person is acting, under a contract with the state, to perform a traditional public function, the question may arise whether that person is acting under color of state law. *Cf. Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974) (discussing "exercise by a private entity of powers traditionally exclusively reserved to the State"); *Richardson v. McKnight*, 521 U.S. 399, 413 (1997) (in case involving "employees of a private prison management firm," noting that the Court was not deciding "whether the defendants are liable under § 1983 even though they are employed by a private firm").

Distinct issues concerning action under color of state law also could arise when a private person hires a public official, the public official violates the plaintiff's federal rights, and the plaintiff sues the private person for actions that the private person did not agree upon with the state official, but which the state official performed within the scope of his or her employment by the private person.[44] There is some doubt whether a private entity can be held liable under Section 1983 on a theory of respondeat superior.[45] However, even if respondeat superior liability is unavailable, a

[44] If the private person hires the state official to do the act that constitutes the violation, and the state official agrees to be hired for that purpose, then this constitutes action under color of state law under the conspiracy theory. *See Abbott v. Latshaw*, 164 F.3d 141, 147-48 (3d Cir. 1998).

[45] *See, e.g.*, *Victory Outreach Center v. Melso*, 371 F.Supp.2d 642, 646 (E.D.Pa. 2004) (noting that "neither the Supreme Court nor the Third Circuit has addressed the issue of whether a private corporation can be held liable for the acts of its employees on a respondeat superior theory" in a Section 1983 case, and holding that respondeat superior liability is unavailable); *Taylor v. Plousis*, 101 F.Supp.2d 255, 263-64 & n.4 (D.N.J. 2000) (holding respondeat superior liability unavailable, but noting "a lingering doubt whether the public policy considerations

private entity should be liable for its employee's violation if a municipal employer would incur Section 1983 liability under similar circumstances.[46] Some of the theories that could establish the private employer's liability–such as deliberate indifference–could establish the private employer's liability based on facts that would not suffice to demonstrate a conspiracy.

Absent evidence that the private party and the official conspired to commit the act that violated the plaintiff's rights, the "color of law" question will focus on whether the private party acts under color of state law *because she employs the state official*.[47] Some indirect light may be shed on this question by *NCAA v. Tarkanian*, 488 U.S. 179 (1988). The dispute in *Tarkanian* arose because the NCAA penalized the University of Nevada, Las Vegas for asserted violations of NCAA rules (including violations by Tarkanian, UNLV's head basketball coach) and threatened further penalties unless UNLV severed its connection with Tarkanian. *See id.* at 180-81. The Court noted that Tarkanian presented the inverse of the "traditional state-action case," *id.* at 192: "[T]he final act challenged by Tarkanian–his suspension–was committed by UNLV" (a state actor), and the dispute focused on whether the NCAA acted under color of state law in directing UNLV to suspend Tarkanian. The Court held that the NCAA did not act under color of state law: "It would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law." *Id.* at 199. In so holding, the Court rejected the plaintiff's contention that "the power of the NCAA is so great that the UNLV had no practical alternative to compliance with its demands": As the Court stated, "[w]e are not at all sure this is true, but even if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law." *Id.* at 198-99.

It is possible to distinguish *Tarkanian* from the scenarios mentioned above. In one sense, *Tarkanian* might have presented a more persuasive case of action under color of state law, since the

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underlying the Supreme Court's decision in Monell should apply when a governmental entity chooses to discharge a public obligation by contract with a private corporation"); *Miller v. City of Philadelphia*, 1996 WL 683827, at *3 (E.D.Pa. Nov. 25, 1996) (holding respondeat superior liability unavailable, and stating that "most courts that have addressed the issue have concluded that private corporations cannot be vicariously liable under § 1983").

[46] *Cf. Thomas v. Zinkel*, 155 F. Supp.2d 408, 412 (E.D.Pa. 2001) ("Liability of [local government] entities may not rest on respondeat superior, but rather must be based upon a governmental policy, practice, or custom that caused the injury. . . . The same standard applies to a private corporation, like CPS, that is acting under color of state law.").

[47] This discussion assumes that the state official acts under color of state law when he commits the violation.

NCAA directed UNLV to do the very act that constituted the violation.[48] On the other hand, a person's employment of an off-duty state official might present a more persuasive case in other respects, in the sense that an off-duty police officer might in fact be guided by the private employer's wishes to a greater extent than UNLV would willingly be guided by the NCAA's wishes. Thus, *Tarkanian* may not foreclose the possibility that a private party may act under color of state law when employing a state official, even if the private party does not conspire with the official concerning the act that constitutes a violation of the plaintiff's rights.[49]

Comments on Instruction 4.4.3 regarding conspiracy. "[T]o act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting see *[sic]* 'under color' of law for purposes of § 1983 actions." *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980) (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *United States v. Price*, 383 U.S. 787, 794 (1966)); *see also Abbott v. Latshaw*, 164 F.3d 141, 147-48 (3d Cir. 1998). "[A]n otherwise private person acts 'under color of' state law when engaged in a conspiracy with state officials to deprive another of federal rights." *Tower v. Glover*, 467 U.S. 914, 920 (1984) (citing *Dennis*, 449 U.S. at 27-28); *see also Adickes*, 398 U.S. at 152 ("Although this is a lawsuit against a private party, not the State or one of its officials, . . . petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in The Kress store . . . ."). [50] The existence of a conspiracy can be proved through circumstantial

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[48] The *Tarkanian* majority indicated that the NCAA's directive to UNLV, and the fact that UNLV decided to follow that directive, did not establish that the NCAA and UNLV conspired (for purposes of showing that the NCAA acted under color of state law). *See Tarkanian*, 488 U.S. at 197 n.17.

[49] In *Cruz v. Donnelly*, 727 F.2d 79 (3d Cir. 1984), "two police officers, acting at the request of [a private] company's employee, stripped and searched the plaintiff for stolen goods," *id.* at 79. Because the court in *Cruz* found no indication that the store employee exercised control over the officers, *Cruz* does not address the issue discussed in the text. *See id.* at 81 ("Cruz' allegations depict only a police investigation that happens to follow the course suggested by comments from a complainant.").

[50] *See also Cruz*, 727 F.2d at 81 ("[A] store and its employees cannot be held liable under § 1983 unless: (1) the police have a pre-arranged plan with the store; and (2) under the plan, the police will arrest anyone identified as a shoplifter by the store without independently evaluating the presence of probable cause."); *Max v. Republican Committee of Lancaster County*, 587 F.3d 198, 203 (3d Cir. 2009) ("Even if we accept the premise that poll-workers are state actors while guarding the integrity of an election, the defendants here ... are not the poll-watchers. Defendants here are private parties.... At most, defendants used the poll-workers to obtain information. This is not the same as conspiring to violate Max's First Amendment rights.").

evidence. *See, e.g., Adickes*, 398 U.S. at 158 ("If a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service.").[51]

The Third Circuit has suggested that the plaintiff must establish the elements of a civil conspiracy in order to use the existence of the conspiracy to demonstrate state action. *See Melo v. Hafer*, 912 F.2d 628, 638 n.11 (3d Cir. 1990) (addressing plaintiff's action-under-color-of-state-law argument and "assum[ing], without deciding, that the complaint alleges the prerequisites of a civil conspiracy"), *aff'd on other grounds*, 502 U.S. 21 (1991). The *Melo* court cited a Seventh Circuit opinion that provides additional detail on those elements. *See Melo*, 912 F.2d at 638 & n.11 (citing *Hampton v. Hanrahan*, 600 F.2d 600, 620-21 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980)). *Melo*'s citation to *Hampton* suggests that the plaintiff must show both a conspiracy to violate the plaintiff's federal rights and an overt act in furtherance of the conspiracy that results in such a violation. *See Hampton*, 600 F.2d at 620-21 (discussing agreement and overt act requirements). Of course, in order to find liability under Section 1983, the jury must in any event find a violation of the plaintiff's federal rights; and it will often be the case that the relevant act in violation of the plaintiff's federal rights would necessarily have constituted an action by a co-conspirator in furtherance of the conspiracy. This may explain why the Supreme Court's references to the "conspiracy" test do not emphasize the overt-act-resulting-in-violation requirement. *See, e.g.*, *Adickes*, 398 U.S. at 152.

In appropriate cases, the existence of a conspiracy may also establish that a federal official was acting under color of state law. *See Hindes v. F.D.I.C.*, 137 F.3d 148, 158 (3d Cir. 1998) ("[F]ederal officials are subject to section 1983 liability when sued in their official capacity where they have acted under color of state law, for example in conspiracy with state officials.").

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[51] In *Startzell v. City of Philadelphia*, 533 F.3d 183 (3d Cir. 2008), the Court of Appeals upheld the grant of summary judgment dismissing conspiracy claims under 42 U.S.C. §§ 1983 and 1985 because the plaintiffs failed to show the required "meeting of the minds." *See Startzell*, 533 F.3d at 205 ("Philly Pride and the City 'took diametrically opposed positions' regarding how to deal with Appellants' presence at OutFest.... The City rejected Philly Pride's requests to exclude Appellants from attending OutFest; moreover, the police forced the Pink Angels to allow Appellants to enter OutFest under threat of arrest. It was also the vendors' complaints, not requests by Philly Pride, that led the police officers to order Appellants to move toward OutFest's perimeter.").

4.5 Section 1983 – Deprivation of a Federal Right

Model

[I have already instructed you on the first element of [plaintiff's] claim, which requires [plaintiff] to prove that [defendant] acted under color of state law.]

The second element of [plaintiff's] claim is that [defendant] deprived [him/her] of a federal [constitutional right] [statutory right].

[Insert instructions concerning the relevant constitutional or statutory violation.]

Comment

See below for instructions concerning particular constitutional violations. Instructions 7.0 through 7.5 concern employment discrimination and retaliation claims under Section 1983.

4.6.1 Section 1983 – Liability in Connection with the Actions of Another – Supervisory Officials

Model

[N.B.: Please see the Comment for a discussion of whether and to what extent this model instruction retains validity after Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).]

[Plaintiff] contends that [supervisor's] subordinate, [subordinate], violated [plaintiff's] federal rights, and that [supervisor] should be liable for [subordinate's] conduct. If you find that [subordinate] violated [plaintiff's] federal rights, then you must consider whether [supervisor] caused [subordinate's] conduct.

[Supervisor] is not liable for such a violation simply because [supervisor] is [subordinate's] supervisor. To show that [supervisor] caused [subordinate's] conduct, [plaintiff] must show one of three things:

First: [Supervisor] directed [subordinate] to take the action in question;

Second: [Supervisor] had actual knowledge of [subordinate's] violation of [plaintiff's] rights and [supervisor] acquiesced in that violation; or

Third: [Supervisor], with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused the violation.

As I mentioned, the first way for [plaintiff] to show that [supervisor] is liable for [subordinate's] conduct is to show that [supervisor] directed [subordinate] to engage in the conduct. [Plaintiff] need not show that [supervisor] directly, with [his/her] own hands, deprived [plaintiff] of [his/her] rights. The law recognizes that a supervisor can act through others, setting in motion a series of acts by subordinates that the supervisor knows, or reasonably should know, would cause the subordinates to violate the plaintiff's rights. Thus, [plaintiff] can show that [supervisor] caused the conduct if [plaintiff] shows that [subordinate] violated [plaintiff's] rights at [supervisor's] direction.

Alternatively, the second way for [plaintiff] to show that [supervisor] is liable for [subordinate's] conduct is to show that [supervisor] had actual knowledge of [subordinate's] violation of [plaintiff's] rights and that [supervisor] acquiesced in that violation. To "acquiesce" in a violation means to give assent to the violation. Acquiescence does not require a statement of assent, out loud: acquiescence can occur through silent acceptance. If you find that [supervisor] had authority over [subordinate] and that [supervisor] actually knew that [subordinate] was violating [plaintiff's] rights but failed to stop [subordinate] from doing so, you may infer that [supervisor]

acquiesced in [subordinate's] conduct.

Finally, the third way for [plaintiff] to show that [supervisor] is liable for [subordinate's] conduct is to show that [supervisor], with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused the conduct. [Plaintiff] alleges that [supervisor] should have [adopted a practice of] [followed the existing policy of] [describe supervisory practice or policy that plaintiff contends supervisor should have adopted or followed].

To prove that [supervisor] is liable for [subordinate's] conduct based on [supervisor's] failure to [adopt that practice] [follow that policy], [plaintiff] must prove all of the following four things by a preponderance of the evidence:

First: [The existing custom and practice without [describe supervisory practice]] [the failure to follow the policy of [describe policy]] created an unreasonable risk of [describe violation].

Second: [Supervisor] was aware that this unreasonable risk existed.

Third: [Supervisor] was deliberately indifferent to that risk.

Fourth: [Subordinate's] [describe violation] resulted from [supervisor's] failure to [adopt [describe supervisory practice]] [follow [describe policy]].

Comment

Note concerning Instruction 4.6.1 and *Ashcroft v. Iqbal*: Instruction 4.6.1 was originally drafted based on Third Circuit law prior to *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). *Iqbal* involved the request by John Ashcroft and Robert Mueller for review of the denial of their motions to dismiss the claims of Javaid Iqbal, who alleged that Ashcroft and Mueller "adopted an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin" in the wake of September 11, 2001. *Iqbal*, 129 S. Ct. at 1942. In *Iqbal*, a closely-divided Court concluded that "vicarious liability is inapplicable to *Bivens* and § 1983 suits" and that therefore "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 129 S. Ct. at 1948. It is not yet clear what *Iqbal*'s implications are for the theories of supervisors' liability that had previously been in use in the Third Circuit.[52]

[52] For cases indicating that some or all of the Third Circuit's supervisory-liability standards survive *Iqbal*, *see, e.g.*, *McKenna v. City of Philadelphia*, 582 F.3d 447, 460-61 (3d Cir. 2009) (upholding grant of judgment as a matter of law to defendants on supervisory liability claims and explaining that "[t]o be liable in this situation, a supervisor must have been involved personally, meaning through personal direction or actual knowledge and acquiescence, in the wrongs alleged"); *Marrakush Soc. v. New Jersey State Police*, 2009 WL 2366132, at *31

A theory of liability based on the supervisor's direction to a subordinate to take the action that violates the plaintiff's rights would seem viable after *Iqbal* (subject to a caveat, noted below, concerning levels of scienter); such a theory is reflected in the first of the three alternatives stated in Instruction 4.6.1. The second and third alternatives stated in Instruction 4.6.1, by contrast, may be more broadly affected by *Iqbal*. Versions of those alternative theories – a knowledge-and-acquiescence theory[53] and a deliberate-indifference theory – were invoked by the plaintiff and the dissenters in *Iqbal*; accordingly, the *Iqbal* majority's conclusion that the plaintiff had failed to state a claim, coupled with the majority's statements concerning the non-existence of vicarious liability, might be read to cast some question on the viability of those two alternatives.

However, the scope of *Iqbal*'s holding is subject to dispute. Though dictum in *Iqbal* addresses Section 1983 claims, the holding concerns *Bivens* claims. Though *Iqbal* purports to outlaw "vicarious liability" in both types of cases, it cites *Monell* with approval and indicates no intent to displace existing doctrines of municipal liability (which are, in their conceptual structure, quite similar to the theories of supervisor liability discussed in Instruction 4.6.1 and this Comment).[54] And *Iqbal* itself concerned a type of constitutional violation – discrimination on the basis of race, religion and/or national origin – that requires a showing of "discriminatory purpose";[55] it is possible to read *Iqbal* as turning upon the notion that, to be liable for a subordinate's constitutional violation, the supervisor must have the same level of scienter as is required to establish the underlying

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(D.N.J. July 30, 2009) ("Personal involvement can be asserted through allegations of facts showing that a defendant directed, had actual knowledge of, or acquiesced in, the deprivation of a plaintiff's constitutional rights.").

[53] *Cf. Bayer v. Monroe County Children and Youth Services*, 577 F.3d 186, 190 n.5 (3d Cir. 2009) ("The [district] court concluded that plaintiffs had created a triable issue 'as to whether Defendant Bahl had personal knowledge regarding the Fourteenth Amendment procedural due process violation.' In light of the Supreme Court's recent decision in [*Iqbal*], it is uncertain whether proof of such personal knowledge, with nothing more, would provide a sufficient basis for holding Bahl liable with respect to plaintiffs' Fourteenth Amendment claims under § 1983.... We need not resolve this matter here, however.").

[54] *Cf., e.g.*, *Horton v. City of Harrisburg*, 2009 WL 2225386, at *5 (M.D.Pa. July 23, 2009) ("Supervisory liability under § 1983 utilizes the same standard as municipal liability. *See Iqbal* .... Therefore, a supervisor will only be liable for the acts of a subordinate if he fosters a policy or custom that amounts to deliberate indifference towards an individual's constitutional rights.").

[55] *Cf., e.g.*, *Al-Kidd v. Ashcroft*, 580 F.3d 949, 976 n.25 (9th Cir. 2009) ("We need not address ... whether the [*Iqbal*] Court's comments relate solely to discrimination claims which have an intent element, because al-Kidd plausibly pleads 'purpose' rather than just 'knowledge' to impose liability on Ashcroft.").

constitutional violation.[56] On that reading, a claim that requires a lesser showing of scienter for the underlying violation – for example, a Fourth Amendment excessive force claim – might have different implications (for purposes of the supervisor's liability) than a claim that requires a showing of purposeful discrimination for the underlying violation.

These questions have yet to be settled. Pending further guidance from the Supreme Court or the court of appeals, the Committee decided to alert readers to these issues without attempting to anticipate the further development of the law in this area. In determining whether to employ some or all portions of Instruction 4.6.1, courts should give due attention to the implications of *Iqbal* for the particular type of claim at issue. The remainder of this Comment discusses Third Circuit law as it stood prior to *Iqbal*.

Discussion of pre-*Iqbal* caselaw

A supervisor incurs Section 1983 liability in connection with the actions of another only if he or she had "personal involvement in the alleged wrongs." *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). In the Third Circuit,[57] "[p]ersonal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." *Id.*; *see also C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 173 (3d Cir. 2005) ("To impose liability on the individual defendants, Plaintiffs must show that each one individually participated in the alleged constitutional violation or approved of it."); *Baker v. Monroe Tp.*, 50 F.3d 1186, 1194 (3d Cir. 1995) (noting that "actual knowledge can be inferred from circumstances other than actual sight"); *A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 586 (3d Cir. 2004) (noting that "a supervisor may be personally liable under § 1983 if he or she participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations"); *Black v. Stephens*, 662 F.2d 181, 189 (3d Cir. 1981) ("To hold a police chief liable under section 1983 for the unconstitutional actions of one of his officers, a plaintiff is required to establish a causal connection between the police chief's actions and the officer's unconstitutional activity."). The model instruction is designed for cases in which the plaintiff does not assert that the supervisor directly participated in the activity; if the plaintiff provides evidence of direct participation, the instruction can be altered to reflect that direct participation by the supervisor is also a basis for liability.

A number of circumstances may bear upon the determination concerning actual knowledge. *See, e.g.*, *Atkinson v. Taylor*, 316 F.3d 257, 271 (3d Cir. 2003) (holding, with respect to commissioner of state department of corrections, that "[t]he scope of his responsibilities are much

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[56] In cases where the underlying constitutional violation requires a showing of purposeful discrimination, *Iqbal* thus appears to heighten the standard for supervisors' liability even under the first of the three theories described in Instruction 4.6.1.

[57] *See Baker v. Monroe Tp.*, 50 F.3d 1186, 1194 n.5 (3d Cir. 1995) (noting that "other circuits have developed broader standards for supervisory liability under section 1983").

more narrow than that of a governor or state attorney general, and logically demand more particularized scrutiny of individual complaints").

As to acquiescence, "[w]here a supervisor with authority over a subordinate knows that the subordinate is violating someone's rights but fails to act to stop the subordinate from doing so, the factfinder may usually infer that the supervisor 'acquiesced' in (i.e., tacitly assented to or accepted) the subordinate's conduct." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1294 (3d Cir. 1997).

A supervisor with policymaking authority may also, in an appropriate case, be liable based on the failure to adopt a policy.[58] *See A.M. ex rel. J.M.K.*, 372 F.3d at 586 ("Individual defendants who are policymakers may be liable under § 1983 if it is shown that such defendants, 'with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the] constitutional harm.'") (quoting *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir.1989)). The analysis of such a claim appears to track the deliberate indifference analysis employed in the context of municipal liability. *See id.* (holding that summary judgment for the supervisors in their individual capacities was inappropriate, "[g]iven our conclusion that A.M. presented sufficient evidence to present a jury question on" the issue of municipal liability for failure to adopt adequate policies); *Sample v. Diecks*, 885 F.2d 1099, 1117-18 (3d Cir. 1989) ("Although the issue here is one of individual liability rather than of the liability of a political subdivision, we are confident that, absent official immunity, the standard of individual liability for supervisory public officials will be found to be no less stringent than the standard of liability for the public entities that they serve."); *see also id.* at 1118 (holding that "a judgment could not properly be entered against Robinson in this case based on supervisory liability absent an identification by Sample of a specific supervisory practice or procedure that Robinson failed to employ and specific findings by the district court that (1) the existing custom and practice without that specific practice or procedure created an unreasonable risk of prison overstays, (2) Robinson was aware that this unreasonable risk existed, (3) Robinson was indifferent to that risk, and (4) Diecks' failure to assure that Sample's complaint received meaningful consideration resulted from Robinson's failure to employ that supervisory practice or procedure").

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[58] When a supervisor with policymaking authority is sued on a failure-to-train theory, the standard appears to be the same as for municipal liability. *See Gilles v. Davis*, 427 F.3d 197, 207 n.7 (3d Cir. 2005) ("A supervising authority may be liable under § 1983 for failing to train police officers when the failure to train demonstrates deliberate indifference to the constitutional rights of those with whom the officers may come into contact."); *see also infra* Comment 4.6.7 (discussing municipal liability for failure to train).

4.6.2 Section 1983 – Liability in Connection with the Actions of Another – Non-Supervisory Officials – Failure to Intervene

Model

[Plaintiff] contends that [third person] violated [plaintiff's] [specify right] and that [defendant] should be liable for that violation because [defendant] failed to intervene to stop the violation.

[Defendant] is liable for that violation if plaintiff has proven all of the following four things by a preponderance of the evidence:

First: [Third person] violated [plaintiff's] [specify right].

Second: [Defendant] had a duty to intervene. [I instruct you that [police officers] [corrections officers] have a duty to intervene to prevent the use of excessive force by a fellow officer.] [I instruct you that prison guards have a duty to intervene during an attack by an inmate in the prison in which they work.]

Third: [Defendant] had a reasonable opportunity to intervene.

Fourth: [Defendant] failed to intervene.

Comment

A defendant can in appropriate circumstances be held liable for failing to intervene to prevent a constitutional violation, even if the defendant held no supervisory position. *See, e.g.*, *Smith v. Mensinger*, 293 F.3d 641, 650 (3d Cir. 2002) (holding that "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," and that "a corrections officer can not escape liability by relying upon his inferior or non-supervisory rank vis-a-vis the other officers"); *Crawford v. Beard*, 2004 WL 1631400, at *3 (E.D.Pa. July 21, 2004) (holding that to establish failure-to-intervene claim, plaintiff "must prove that: 1) the officers had a duty to intervene, 2) the officers had the opportunity to intervene, and 3) the officers failed to intervene," and that prison guards "have a duty to intervene during an attack by an inmate in the prison in which they work").

4.6.3 Section 1983 – Liability in Connection with the Actions of Another – Municipalities – General Instruction

Model

If you find that [plaintiff] was deprived of [describe federal right], [municipality] is liable for that deprivation if [plaintiff] proves by a preponderance of the evidence that the deprivation resulted from [municipality's] official policy or custom – in other words, that [municipality's] official policy or custom caused the deprivation.

[It is not enough for [plaintiff] to show that [municipality] employed a person who violated [plaintiff's] rights. [Plaintiff] must show that the violation resulted from [municipality's] official policy or custom.] "Official policy or custom" includes any of the following *[include any of the following theories that are warranted by the evidence]*:

- a rule or regulation promulgated, adopted, or ratified by [municipality's] legislative body;

- a policy statement or decision that is officially made by [municipality's] [policy-making official];

- a custom that is a widespread, well-settled practice that constitutes a standard operating procedure of [municipality]; or

- [inadequate training] [inadequate supervision] [inadequate screening during the hiring process] [failure to adopt a needed policy]. However, [inadequate training] [inadequate supervision] [inadequate screening during the hiring process] [failure to adopt a needed policy] does not count as "official policy or custom" unless the [municipality] is deliberately indifferent to the fact that a violation of [describe the federal right] is a highly predictable consequence of the [inadequate training] [inadequate supervision] [inadequate screening during the hiring process] [failure to adopt a needed policy]. I will explain this further in a moment.

I will now proceed to give you more details on [each of] the way[s] in which [plaintiff] may try to establish that an official policy or custom of [municipality] caused the deprivation.

Comment

"[M]unicipalities and other local government units [are] included among those persons to whom § 1983 applies." *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 (1978) (overruling in relevant part *Monroe v. Pape*, 365 U.S. 167 (1961)). However, "a

municipality cannot be held liable under § 1983 on a respondeat superior theory." *Id.* at 691.[59] "Instead, it 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." *Id.* at 694. The Court has elaborated several ways in which a municipality can cause a violation and thus incur liability. See Instructions 4.6.4 - 4.6.8 and accompanying Comments for further details on each theory of liability.

Ordinarily, proof of municipal liability in connection with the actions of ground-level officers will require, inter alia, proof of a constitutional violation by one or more of those officers.[60] *See, e.g.*, *Grazier* ex rel. *White v. City of Philadelphia*, 328 F.3d 120, 124 (3d Cir. 2003) ("There cannot be an 'award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm.'") (quoting *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam)). In *Fagan v. City of Vineland*, however, the court held that "a municipality can be liable under section 1983 and the Fourteenth Amendment for a failure to train its police officers with respect to high-speed automobile chases, even if no individual officer participating in the chase violated the Constitution." *Fagan v. City of Vineland*, 22 F.3d 1283, 1294 (3d Cir. 1994). A later Third Circuit panel suggested that the court erred in *Fagan* when it dispensed with the requirement of an underlying constitutional violation. *See Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 n.13 (3d Cir. 1995) ("It appears that, by focusing almost exclusively on the 'deliberate indifference' prong . . . , the panel opinion did not apply the first prong–establishing an underlying constitutional violation."). It appears that the divergence between *Fagan* and *Mark* reflects a distinction between cases in which the municipality's liability is derivative of the violation(s) by the ground-level officer(s) and cases in which the plaintiff seeks to show that the municipality's conduct itself is unconstitutional: As the court explained in *Grazier*, "We were concerned in *Fagan* that, where the standard for liability is whether state action 'shocks the conscience,' a city could escape liability for deliberately malicious conduct by carrying out its misdeeds through officers who do not recognize that their orders are unconstitutional and whose actions therefore do not shock the conscience." *Grazier*, 328 F.3d at 124 n.5 (stating that the holding in *Fagan* was "carefully confined . . . to its facts: a substantive due process claim resulting from a police pursuit," and holding that *Fagan* did not apply to "a Fourth Amendment excessive force claim").

In addition to showing the existence of an official policy or custom, plaintiff must prove "that the municipal practice was the proximate cause of the injuries suffered." *Bielevicz v. Dubinon*, 915

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[59] A suit against a municipal policymaking official in her official capacity is treated as a suit against the municipality. *See A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 580 (3d Cir. 2004).

[60] *See, e.g.*, *Startzell v. City of Philadelphia*, 533 F.3d 183, 204 (3d Cir. 2008) ("Because we have found that there was no violation of Appellants' constitutional rights, we need not reach the claim against the City under Monell.").

F.2d 845, 850 (3d Cir. 1990). "To establish the necessary causation, a plaintiff must demonstrate a 'plausible nexus' or 'affirmative link' between the municipality's custom and the specific deprivation of constitutional rights at issue." *Id.* (quoting *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985); and *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 507 (3d Cir.1985), *overruled on other grounds by DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989)); *see also Bielevicz*, 915 F.2d at 851 (holding that "plaintiffs must simply establish a municipal custom coupled with causation–i.e., that policymakers were aware of similar unlawful conduct in the past, but failed to take precautions against future violations, and that this failure, at least in part, led to their injury"); *Carswell v. Borough of Homestead*, 381 F.3d 235, 244 (3d Cir. 2004) ("There must be 'a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.'") (quoting *Brown v. Muhlenberg Township*, 269 F.3d 205, 214 (3d Cir. 2001) (quoting *Canton*, 489 U.S. at 385)). "As long as the causal link is not too tenuous, the question whether the municipal policy or custom proximately caused the constitutional infringement should be left to the jury." *Bielevicz*, 915 F.2d at 851. "A sufficiently close causal link between ... a known but uncorrected custom or usage and a specific violation is established if occurrence of the specific violation was made reasonably probable by permitted continuation of the custom." *Id.* (quoting *Spell v. McDaniel*, 824 F.2d 1380, 1391 (4th Cir. 1987)); *see also A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 582 (3d Cir. 2004) ("The deficiency of a municipality's training program must be closely related to the plaintiff's ultimate injuries.").

In the case of claims (such as failure-to-train claims) that require proof of deliberate indifference, evidence that shows deliberate indifference will often help to show causation as well. Reflecting on failure-to-train cases, the Court has observed:

> The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice--namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation--that the municipality's indifference led directly to the very consequence that was so predictable.

Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 409-10 (1997).

4.6.4 Section 1983 – Liability in Connection with the Actions of Another – Municipalities – Statute, Ordinance or Regulation

Model

In this case, there was a [statute] [ordinance] [regulation] that authorized the action which forms the basis for [plaintiff's] claim. I instruct you to find that [municipality] caused the action at issue.

Comment

It is clear that a municipality's legislative action constitutes government policy. "No one has ever doubted . . . that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body–whether or not that body had taken similar action in the past or intended to do so in the future–because even a single decision by such a body unquestionably constitutes an act of official government policy." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). Likewise, if the legislative body delegates authority to a municipal agency or board, an action by that agency or board also constitutes government policy. *See, e.g.*, *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 660-61 & n.2 (1978) (describing actions by Department of Social Services and Board of Education of the City of New York); *id.* at 694 (holding that "this case unquestionably involves official policy").

On the other hand, where an ordinance is facially valid, the mere existence of the ordinance itself will not provide a basis for municipal liability for a claim concerning discriminatory enforcement. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 292-94 (3d Cir. 2009).

4.6.5 Section 1983 – Liability in Connection with the Actions of Another – Municipalities – Choice by Policymaking Official

Model

The [governing body] of the [municipality] is a policymaking entity whose actions represent a decision by the government itself. The same is true of an official or body to whom the [governing body] has given final policymaking authority: The actions of that official or body represent a decision by the government itself.

Thus, when [governing body] or [policymaking official] make a deliberate choice to follow a course of action, that choice represents an official policy. Through such a policy, the [governing body] or the [policymaking official] may cause a violation of a federal right by:

- directing that the violation occur,
- authorizing the violation, or
- agreeing to a subordinate's decision to engage in the violation.

[The [governing body] or [policymaking official] may also cause a violation through [inadequate training] [inadequate supervision] [inadequate screening during the hiring process] [failure to adopt a needed policy], but only if the [municipality] is deliberately indifferent to the fact that a violation of [describe the federal right] is a highly predictable consequence of the [inadequate training] [inadequate supervision] [inadequate screening during the hiring process] [failure to adopt a needed policy]. I will instruct you further on this in a moment.]

I instruct you that [name(s) of official(s) and/or governmental bodies] are policymakers whose deliberate choices represent official policy. If you find that such an official policy was the cause of and the moving force behind the violation of [plaintiff's] [specify right], then you have found that [municipality] caused that violation.

Comment

A deliberate choice by an individual government official constitutes government policy if the official has been granted final decision-making authority concerning the relevant area or issue. *See Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996); *see also LaVerdure v. County of Montgomery*, 324 F.3d 123, 125 (3d Cir. 2003) ("Even though Marino himself lacked final policymaking authority that could bind the County, LaVerdure could have demonstrated that the Board delegated him the authority to speak for the Board or acquiesced in his statements."). In this context, "municipal liability under § 1983 attaches where–and only where–a deliberate choice to follow a course of action is made from among various alternatives by the official or officials

responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion); *see also Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996) ("In order to ascertain who is a policymaker, 'a court must determine which official has final, unreviewable discretion to make a decision or take action.'") (quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1481 (3d Cir.1990)). "[W]hether a particular official has 'final policymaking authority' is a question of *state law*." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion); *see also McMillian v. Monroe County, Ala.*, 520 U.S. 781, 786 (1997) ("This is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law.").[61] "As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989).

> [T]he trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue. Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur . . . , or by acquiescence in a longstanding practice or custom which constitutes the "standard operating procedure" of the local governmental entity.

Id. Not only must the official have final policymaking authority, the official must be considered to be acting as a municipal official rather than a state official in order for municipal liability to attach. *See McMillian*, 520 U.S. at 793 (holding that "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties").

Instruction 4.6.5 notes that a policymaker may cause a violation of a federal right by directing that the violation occur, authorizing the violation, or agreeing to a subordinate's decision to engage in the violation. With respect to the third option – agreement to a subordinate's decision – the relevant agreement can sometimes occur after the fact. Thus, for example, the plurality in *Praprotnik* observed that "when 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." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion); *see*

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[61] *See McGreevy v. Stroup*, 413 F.3d 359, 369 (3d Cir. 2005) (analyzing Pennsylvania law and concluding that "[b]ecause the school superintendent is a final policymaker with regard to ratings, his ratings and/or those of the school principal constitute official government policy").

also Brennan v. Norton, 350 F.3d 399, 427-28 (3d Cir. 2003) (citing *Praprotnik*); *LaVerdure v. County of Montgomery*, 324 F.3d 123, 125 (3d Cir. 2003) ("Even though Marino himself lacked final policymaking authority that could bind the County, LaVerdure could have demonstrated that the Board delegated him the authority to speak for the Board or acquiesced in his statements."); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1481 (3d Cir. 1990) ("The second means of holding the municipality liable is if Tucker knowingly acquiesced to the decisions made at AID."). In an appropriate case, Instruction 4.6.5 may be modified to refer to a policymaker's "agreeing **after the fact** to a subordinate's decision to engage in the violation."

4.6.6 Section 1983 – Liability in Connection with the Actions of Another – Municipalities – Custom

Model

[Plaintiff] may prove the existence of an official custom by showing the existence of a practice that is so widespread and well-settled that it constitutes a standard operating procedure of [municipality]. A single action by a lower level employee does not suffice to show an official custom. But a practice may be an official custom if it is so widespread and well-settled as to have the force of law, even if it has not been formally approved. [You may find that such a custom existed if there was a practice that was so well-settled and widespread that the policymaking officials of [municipality] either knew of it or should have known of it.[62] [I instruct you that [*name official(s)*] [is] [are] the policymaking official[s] for [*describe particular subject*].[63]]]

If you find that such an official custom was the cause of and the moving force behind the violation of [plaintiff's] [specify right], then you have found that [municipality] caused that violation.

Comment

Even in the absence of an official policy, a municipality may incur liability if an official custom causes a constitutional tort. *See Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996).[64] "Custom . . . can be proven by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law." *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir. 1990); *see also Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 404 (1997) ("[A]n act performed pursuant to a 'custom'

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[62] In cases where the plaintiff must show deliberate indifference on the part of a policymaking official, this language should be modified accordingly. See Comment.

[63] This language can be used if the plaintiff introduces evidence concerning a specific policymaking official. For a discussion of whether the plaintiff must introduce such evidence, see Comment.

[64] "A § 1983 plaintiff . . . may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers if able to prove that the challenged action was pursuant to a state 'custom or usage.'" *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 n.10 (1986) (plurality opinion); *see also Anela v. City of Wildwood*, 790 F.2d 1063, 1069 (3d Cir. 1986) ("Even if the practices with respect to jail conditions also were followed without formal city action, it appears that they were the norm. The description of the cells revealed a long-standing condition that had become an acceptable standard and practice for the City.").

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.").

As these statements suggest, evidence of a single incident without more will not suffice to establish the existence of a custom: "A single incident by a lower level employee acting under color of law . . . does not suffice to establish either an official policy or a custom. However, if custom can be established by other means, a single application of the custom suffices to establish that it was done pursuant to official policy and thus to establish the agency's liability." *Fletcher v. O'Donnell*, 867 F.2d 791, 793 (3d Cir. 1989) (citing *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (plurality opinion)). For example, plaintiff can present evidence of a pattern of similar incidents and inadequate responses to those incidents in order to demonstrate custom through municipal acquiescence. *See Beck*, 89 F.3d at 972 ("These complaints include the Debold incident, which, although it occurred after Beck's experience, may have evidentiary value for a jury's consideration whether the City and policymakers had a pattern of tacitly approving the use of excessive force.").

The weight of Third Circuit caselaw indicates that the plaintiff must make some showing that a policymaking official knew of the custom and acquiesced in it. Language in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), could be read to contemplate such a requirement, though the *Jett* Court did not have occasion to consider that issue in detail.[65] In a number of

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[65] In *Jett*, the Court remanded for a determination of whether the school district superintendent was a policymaking official for purposes of the plaintiff's claims under 42 U.S.C. § 1981. The Court instructed that on remand Section 1983's municipal-liability standards would govern. *See id.* at 735-36. "Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether their decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur . . . , or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." *Id.* at 737 (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 485-87 (1986) (White, J., concurring in part and in the judgment)). Though this language suggests an expectation that a custom analysis would depend on a policymaker's knowledge and acquiescence, such a requirement was not the focus of the Court's opinion in *Jett*. Moreover, the *Jett* Court's quotation from Justice White's partial concurrence in *Pembaur* is somewhat puzzling. In *Pembaur* the Court held "that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur*, 475 U.S. at 480. Because *Pembaur* focused on instances where a policymaker directed the challenged activity, municipal liability under the "custom" theory was not at issue in the case. *See id.* at 481 n.10 (plurality opinion). Justice White's *Pembaur* concurrence does not suggest otherwise; the language quoted by the *Jett* Court constitutes Justice White's explanation of his reasons for agreeing that the policymakers' directives in *Pembaur* could ground municipal liability. Justice White explained:

The city of Cincinnati frankly conceded that forcible entry of third-party property

subsequent cases, the Court of Appeals has read *Jett* to require knowledge and acquiescence. In *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990), the Court of Appeals affirmed the grant of j.n.o.v. in favor of the City on the plaintiffs' Section 1983 claims of sexual harassment by their coworkers and supervisors. The court stressed that to establish municipal liability "it is incumbent upon a plaintiff to show that a policymaker is responsible either for the policy or, through acquiescence, for the custom." *Id.* at 1480. Thus, "given the jury verdict in favor of [Police Commissioner] Tucker, the lowest level policymaker implicated," j.n.o.v. for the City was warranted. *Id.* at 1480; *see also Jiminez v. All American Rathskeller, Inc.*, 503 F.3d 247, 250 (3d Cir. 2007) (citing *Andrews* with approval). In *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991), a fractured court affirmed a judgment in favor of the mother of a man who committed suicide while detained in a city jail. *See id.* at 1048. Judge Becker, announcing the judgment of the court, viewed *Jett* as holding "that even when a plaintiff alleges that a municipal custom or practice, as opposed to a municipal policy, worked a constitutional deprivation, the plaintiff must both identify officials with ultimate policymaking authority in the area in question and adduce scienter-like evidence – in this case of acquiescence – with respect to them." *Simmons*, 947 F.2d at 1062 (opinion of Becker, J.). Chief Judge Sloviter wrote separately to stress that officials' reckless disregard of conditions of which they should have known should suffice to meet the standard, *see id.* at 1089-91 (Sloviter, C.J., concurring in part and in the judgment), but she did not appear to question the view that some sort of knowledge and acquiescence was required. Citing *Andrews* and *Simmons*, the court in *Baker v. Monroe Township*, 50 F.3d 1186 (3d Cir. 1995), held that the plaintiffs "must show that a policymaker for the Township authorized policies that led to the violations or permitted practices that were so permanent and well settled as to establish acquiescence," *id.* at 1191.[66] *See also Kneipp v. Tedder*, 95 F.3d 1199, 1212 (3d Cir. 1996) ("[A]

> to effect otherwise valid arrests was standard operating procedure. There is no reason to believe that respondent county would abjure using lawful means to execute the capiases issued in this case or had limited the authority of its officers to use force in executing capiases. Further, the county officials who had the authority to approve or disapprove such entries opted for the forceful entry, a choice that was later held to be inconsistent with the Fourth Amendment. Vesting discretion in its officers to use force and its use in this case sufficiently manifested county policy to warrant reversal of the judgment below.

Pembaur, 475 U.S. at 485 (White, J., concurring in part and in the judgment). Thus, the *Jett* Court's quote from Justice White's *Pembaur* opinion further supports the inference that the *Jett* Court did not give sustained attention to the contours of the custom branch of the municipal-liability doctrine.

[66] The *Baker* plaintiffs failed to show that the municipal police officer on the scene was a policymaker and failed to introduce evidence concerning municipal practices, and thus the court held that their claims against the city concerning the use of guns and handcuffs during a search were properly dismissed. *See id.* at 1194; *see also id.* at 1195 (upholding dismissal of illegal search claims against city due to lack of evidence "that Monroe Township expressly or tacitly

prerequisite to establishing [municipal] liability ... is a showing that a policymaker was responsible either for the policy or, through acquiescence, for the custom.").

Though it thus appears that a showing of knowledge and acquiescence is required, a number of cases suggest that actual knowledge need not be proven.[67] Rather, some showing of constructive knowledge may suffice; this view is reflected in the first bracketed sentence in Instruction 4.6.6. For example, the court seemed to approve a constructive-knowledge standard in *Bielevicz v. Dubinon*, 915 F.2d 845 (3d Cir. 1990). Citing *Andrews* and *Jett*, the court stated that the "plaintiff must show that an official who has the power to make policy is responsible for either the affirmative proclamation of a policy or acquiescence in a well-settled custom." *Bielevicz*, 914 F.2d at 850.[68] But the *Bielevicz* court took care to note that "[t]his does not mean ... that the responsible decisionmaker must be specifically identified by the plaintiff's evidence. Practices so permanent and well settled as to have the force of law [are] ascribable to municipal decisionmakers." *Id.* (internal quotation marks omitted).[69] The *Bielevicz* court then proceeded to discuss ways of showing that the municipal custom caused the constitutional violation, and explained that policymakers' failure to respond appropriately to known past violations could provide the requisite evidence of causation: "If the City is shown to have tolerated known misconduct by police officers, the issue whether the City's inaction contributed to the individual officers' decision to arrest the plaintiffs unlawfully in this instance is a question of fact for the jury." *Id.* at 851. In *Beck v. City of*

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authorized either of the searches").

[67] In *Andrews*, the court suggested that Police Commissioner Tucker's lack of actual knowledge was significant to the court's holding that the municipal-liability claim failed: "[A]lthough Tucker reviewed the decision made by AID with respect to plaintiffs' complaints, he personally did not observe or acquiesce in any sexual harassment, and he was not convinced that the AID decisions were motivated by sexual animus ...." 895 F.2d at 1481. However, the court also noted that "[t]his is not a case where there was a longstanding practice which was completely ignored by the policymaker who was absolved by the jury," *id.* at 1482 – a caveat that suggests the possibility that in such a case constructive knowledge might play a role in the acquiescence analysis.

[68] *See also Watson v. Abington Tp.*, 478 F.3d 144, 156 (3d Cir. 2007) (citing *Bielevicz* with approval on this point). The *Watson* court's explanation of its rejection of the plaintiff's municipal-liability claim seems compatible with a constructive-knowledge standard. *See Watson*, 478 F.3d at 157 (rejecting a custom-based municipal liability claim because, inter alia, the plaintiffs failed to show "that what happened at the Scoreboard was so widespread that a decisionmaker must have known about it").

[69] See also *Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996) (quoting *Bielevicz* on this point). Similarly, in *Natale v. Camden County Correctional Facility*, 318 F.3d 575 (3d Cir. 2003), the court did not pause to identify a specific policymaking official, but rather found a jury question based on "evidence that [Prison Health Services] turned a blind eye to an obviously inadequate practice that was likely to result in the violation of constitutional rights," *id.* at 584.

Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996), the court stated that custom can be shown when government officials' practices are "so permanent and well-settled as to virtually constitute law," *id.* (internal quotation marks omitted), and then continued: "Custom . . . may also be established by evidence of knowledge and acquiescence." *Id.*[70] In holding that the plaintiffs were entitled to reach a jury on their claims, the *Beck* court focused on evidence "that the Chief of Police of Pittsburgh and his department knew, or should have known, of Officer Williams's violent behavior in arresting citizens," *id.* at 973 – suggesting that the *Beck* court applied a constructive-knowledge test. Likewise, in *Berg v. County of Allegheny*, 219 F.3d 261 (2000), the court focused on whether municipal policymakers had either actual or constructive knowledge of the practice for issuing warrants. *See id.* at 276 ("We believe it is a more than reasonable inference to suppose that a system responsible for issuing 6,000 warrants a year would be the product of a decision maker's action or acquiescence.").

The *Berg* court stated, however, that where the custom in question does not itself *constitute* the constitutional violation – but rather is alleged to have led to the violation – the plaintiff must additionally meet the deliberate-indifference test set forth in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989):[71] "If ... the policy or custom does not facially violate federal law, causation can be

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[70] This language might be read to suggest that knowledge and acquiescence are merely one option for establishing a municipal custom. Likewise, in *Fletcher v. O'Donnell*, 867 F.2d 791 (3d Cir. 1989), the court, writing a few months before *Jett* was decided, stated that "[c]ustom may be established by proof of knowledge and acquiescence," *Fletcher*, 867 F.2d at 793-94 (citing *Pembaur*, 475 U.S. at 481-82 n.10 (plurality opinion)) – an observation that arguably suggests there may also exist other means of showing custom. As discussed in the text, however, the *Beck* court seemed to focus its analysis on the question of actual or constructive knowledge.

[71] Similarly, when he advocated a "scienter" requirement in *Simmons*, Judge Becker noted that he did not intend "to exclude from the scope of scienter's meaning a municipal policymaker's deliberately indifferent acquiescence in a custom or policy of inadequately training employees, even though 'the need for more or different training is [very] obvious, and the inadequacy [quite] likely to result in the violation of constitutional rights.'" *Simmons*, 947 F.2d at 1061 n.14 (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)). Judge Becker's opinion did not provide details on the application of this standard to the *Simmons* case, because he found that the City had waived "the argument that plaintiff failed to establish the essential 'scienter' element of her case." *Id.* at 1066. Chief Judge Sloviter wrote separately to explain, inter alia, her belief "that Judge Becker's emphasis on production by plaintiff of 'scienter-like evidence' when charging a municipality with deliberate indifference to deprivation of rights may impose on plaintiffs a heavier burden than mandated by the Supreme Court or prior decisions of this court." *Id.* at 1089 (Sloviter, C.J., concurring in part and in the judgment). Chief Judge Sloviter stressed "that liability may be based on the City's (i.e., policymaker's) reckless refusal or failure to take account of facts or circumstances which responsible individuals should have known," *id.* at 1090, and she pointed out that a standard requiring "actual knowledge of the conditions by a municipal policymaker ... would put a premium on blinders," *id.* at 1091.

established only by 'demonstrat[ing] that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences.'" *Berg*, 219 F.3d at 276 (quoting *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 407 (1997)); *see also Natale v. Camden County Correctional Facility* 318 F.3d 575, 585 (3d Cir. 2003) (finding a jury question on municipal liability because "the failure to establish a policy to address the immediate medication needs of inmates with serious medical conditions creates a risk that is sufficiently obvious as to constitute deliberate indifference to those inmates' medical needs"). Where a finding of deliberate indifference is required, the first bracketed sentence in Instruction 4.6.6 should be altered accordingly. Cases applying a deliberate-indifference standard for municipal liability often involve allegations of failure to adequately train, supervise or screen, *see, e.g.*, *Montgomery v. De Simone*, 159 F.3d 120, 126-26 (3d Cir. 1998) ("[A] municipality's failure to train police officers only gives rise to a constitutional violation when that failure amounts to deliberate indifference to the rights of persons with whom the police come into contact."). In cases where plaintiff seeks to establish municipal liability for failure to adequately train or supervise a municipal employee, the more specific standards set forth in Instruction 4.6.7 should be employed; Instruction 4.6.8 should be used when the plaintiff asserts municipal liability for failure to screen.

4.6.7 Section 1983 – Liability in Connection with the Actions of Another – Municipalities – Liability Through Inadequate Training or Supervision

Model

[Plaintiff] claims that [municipality] adopted a policy of [inadequate training] [inadequate supervision], and that this policy caused the violation of [plaintiff's] [specify right].

In order to hold [municipality] liable for the violation of [plaintiff's] [specify right], you must find that [plaintiff] has proved each of the following three things by a preponderance of the evidence:

First: [[Municipality's] training program was inadequate to train its employees to carry out their duties] [[municipality] failed adequately to supervise its employees].

Second: [Municipality's] failure to [adequately train] [adequately supervise] amounted to deliberate indifference to the fact that inaction would obviously result in the violation of [specify right].

Third: [Municipality's] failure to [adequately train] [adequately supervise] proximately caused the violation of [specify right].

In order to find that [municipality's] failure to [adequately train] [adequately supervise] amounted to deliberate indifference, you must find that [plaintiff] has proved each of the following three things by a preponderance of the evidence:

First: [Governing body] or [policymaking official] knew that employees would confront a particular situation.

Second: The situation involved a difficult choice, or one that employees had a history of mishandling.

Third: The wrong choice by an employee in that situation will frequently cause a deprivation of [specify right].

In order to find that [municipality's] failure to [adequately train] [adequately supervise] proximately caused the violation of [plaintiff's] federal right, you must find that [plaintiff] has proved by a preponderance of the evidence that [municipality's] deliberate indifference led directly to the deprivation of [plaintiff's] [specify right].

Comment

As noted above, municipal liability can arise from an official policy that authorizes the constitutional tort; such liability can also arise if the constitutional tort is caused by an official policy of inadequate[72] training, supervision or investigation, or by a failure to adopt a needed policy.[73] In the context of claims asserting such "liability through inaction," *Berg v. County of Allegheny*, 219 F.3d 261, 276 (3d Cir. 2000), the plaintiff will have to meet the additional hurdle of showing "deliberate indifference" on the part of the municipality.[74] "[L]iability for failure to train subordinate officers will lie only where a constitutional violation results from 'deliberate indifference to the constitutional rights of [the municipality's] inhabitants.'" *Groman v. Township of Manalapan*, 47 F.3d 628, 637 (3d Cir. 1995) (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 392 (1989)); *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) (plurality opinion) (holding that evidence of a single incident of shooting by police could not establish a municipal policy of inadequate training); *Brown v. Muhlenberg Township*, 269 F.3d 205, 216 (3d Cir.2001) (plaintiff "must present evidence that the need for more or different training was so obvious and so likely to lead to the violation of constitutional rights that the policymaker's failure to respond amounts to

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[72] As to the adequacy of a municipality's investigation, the Third Circuit has made clear that a policy must be adequate in practice, not merely on paper: "We reject the district court's suggestion that mere Department procedures to receive and investigate complaints shield the City from liability. It is not enough that an investigative process be in place; . . . '[t]he investigative process must be real. It must have some teeth.'" *Beck v. City of Pittsburgh*, 89 F.3d 966, 974 (3d Cir. 1996) (quoting plaintiff's reply brief, *Beck v. City of Pittsburgh*, No. 95-3328, 1995 WL 17147608, at *5).

[73] The Third Circuit has held that the failure to adopt a needed policy can result in municipal liability in an appropriate case, and has analyzed that question of municipal liability using the deliberate indifference test. *See Natale v. Camden County Correctional Facility*, 318 F.3d 575, 585 (3d Cir. 2003) ("A reasonable jury could conclude that the failure to establish a policy to address the immediate medication needs of inmates with serious medical conditions creates a risk that is sufficiently obvious as to constitute deliberate indifference to those inmates' medical needs.").

The Third Circuit has declined to "recognize[] municipal liability for a constitutional violation because of failure to equip police officers with non-lethal weapons." *Carswell v. Borough of Homestead*, 381 F.3d 235, 245 (3d Cir. 2004) ("We decline to [recognize such liability] on the record before us.").

[74] "If . . . the policy or custom does not facially violate federal law, causation can be established only by 'demonstrat[ing] that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences.'" *Berg v. County of Allegheny*, 219 F.3d 261, 276 (3d Cir. 2000) (quoting *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 407 (1997)).

deliberate indifference"); *Woloszyn v. County of Lawrence*, 396 F.3d 314, 324-25 (3d Cir. 2005) (discussing failure-to-train standard in case involving suicide by pre-trial detainee). The deliberate indifference test also applies to claims of "negligent supervision and failure to investigate." *Groman*, 47 F.3d at 637.

Deliberate indifference can be shown by demonstrating that a constitutional violation was sufficiently foreseeable: "[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390. Inaction in the face of complaints concerning violations can also demonstrate deliberate indifference. *Cf. id.* at 390 n.10 ("It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need."); *see also Carswell v. Borough of Homestead*, 381 F.3d 235, 244 (3d Cir. 2004) ("A plaintiff must identify a municipal policy or custom that amounts to deliberate indifference to the rights of people with whom the police come into contact . . . . This typically requires proof of a pattern of underlying constitutional violations . . . . Although it is possible, proving deliberate indifference in the absence of such a pattern is a difficult task."). Thus, for example, evidence of prior complaints and of inadequate procedures for investigating such complaints can suffice to create a jury question concerning municipal liability. *See Beck*, 89 F.3d at 974-76 (reviewing evidence concerning procedures and holding that "Beck presented sufficient evidence from which a reasonable jury could have inferred that the City of Pittsburgh knew about and acquiesced in a custom tolerating the tacit use of excessive force by its police officers"). The Third Circuit has applied a three-part test to determine whether "a municipality's failure to train or supervise to amount[s] to deliberate indifference": Under this test, "it must be shown that (1) municipal policymakers know that employees will confront a particular situation; (2) the situation involves a difficult choice or a history of employees mishandling; and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights." *Carter v. City of Philadelphia*, 181 F.3d 339, 357 (3d Cir. 1999).

4.6.8 Section 1983 – Liability in Connection with the Actions of Another – Municipalities – Liability Through Inadequate Screening

Model

[Plaintiff] claims that [municipality] adopted a policy of inadequate screening, and that this policy caused the violation of [plaintiff's] [specify right]. Specifically, [plaintiff] claims that [municipality] should be held liable because [municipality] did not adequately check [employee's] background when hiring [him/her].

[Plaintiff] cannot establish that [municipality] is liable merely by showing that [municipality] hired [employee] and that [employee] violated [plaintiff's] [specify right].

In order to hold [municipality] liable for [employee's] violation of [plaintiff's] [specify right], you must also find that [plaintiff] has proved each of the following three things by a preponderance of the evidence:

First: [Municipality] failed to check adequately [employee's] background when hiring [him/her].

Second: [Municipality's] failure to check adequately [employee's] background amounted to deliberate indifference to the risk that a violation of [specify right] would follow the hiring decision.

Third: [Municipality's] failure to check adequately [employee's] background proximately caused the violation of that federal right.

In order to find that [municipality's] failure to check adequately [employee's] background amounted to deliberate indifference, you must find that [plaintiff] has proved by a preponderance of the evidence that:

- adequate scrutiny of [employee's] background would have led a reasonable policymaker to conclude that it was obvious that hiring [employee] would lead to the particular type of [constitutional] [statutory] violation that [plaintiff] alleges, namely [specify constitutional (or statutory) violation].

In order to find that [municipality's] failure to check adequately [employee's] background proximately caused the violation of [plaintiff's] federal right, you must find that [plaintiff] has proved by a preponderance of the evidence that [municipality's] deliberate indifference led directly to the deprivation of [plaintiff's] [specify right].

Comment

Although inadequate screening during the hiring process can form the basis for municipal liability, the Supreme Court has indicated that the deliberate indifference test must be applied stringently in this context.[75] Where the plaintiff claims "that a single facially lawful hiring decision launch[ed] a series of events that ultimately cause[d] a violation of federal rights .... , rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 405 (1997). In *Brown*, the Court held that the fact that a county sheriff hired his nephew's son as a reserve deputy sheriff without an adequate background check did not establish municipal liability for the reserve deputy sheriff's use of excessive force. The Court indicated that one relevant factor was that the claim focused on a *single* hiring decision:

> Where a claim of municipal liability rests on a single decision, not itself representing a violation of federal law and not directing such a violation, the danger that a municipality will be held liable without fault is high. Because the decision necessarily governs a single case, there can be no notice to the municipal decisionmaker, based on previous violations of federally protected rights, that his approach is inadequate. Nor will it be readily apparent that the municipality's action caused the injury in question, because the plaintiff can point to no other incident tending to make it more likely that the plaintiff's own injury flows from the municipality's action, rather than from some other intervening cause.

Id. at 408-09. The Court also drew a distinction between inadequate training cases and inadequate screening cases:

> The proffered analogy between failure-to-train cases and inadequate screening cases is not persuasive. In leaving open in *Canton* the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations, we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected

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[75] The Court in *Brown* argued that it was not imposing a heightened test for inadequate screening cases. *See Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 413 n.1 (1997) ("We do not suggest that a plaintiff in an inadequate screening case must show a higher degree of culpability than the 'deliberate indifference' required in *Canton* . . . ; we need not do so, because, as discussed below, respondent has not made a showing of deliberate indifference here."). However, as discussed in the text of this Comment, the Court's holding and reasoning in *Brown* reflect a stringent application of the deliberate indifference test.

> "deliberate indifference" to the obvious consequence of the policymakers' choice--namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation–that the municipality's indifference led directly to the very consequence that was so predictable.
>
> Where a plaintiff presents a § 1983 claim premised upon the inadequacy of an official's review of a prospective applicant's record, however, there is a particular danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself. Every injury suffered at the hands of a municipal employee can be traced to a hiring decision in a "but-for" sense: But for the municipality's decision to hire the employee, the plaintiff would not have suffered the injury. To prevent municipal liability for a hiring decision from collapsing into respondeat superior liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged.

Id. at 409-10. Thus, in the inadequate screening context,

> [a] plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."

Id. at 411; *see id.* at 412 ("[A] finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff."); *id.* (question is "whether Burns' background made his use of excessive force in making an arrest a plainly obvious consequence of the hiring decision").

Instruction 4.6.8 is designed for use in cases where the plaintiff alleges that the municipality failed adequately to check the prospective employee's background. In some cases, the asserted basis for liability may be, instead, that the municipality checked the prospective employee's background, learned of information indicating the risk that the person would commit the relevant constitutional violation, and nonetheless hired the person. In such cases, Instruction 4.6.8 can be modified as needed to reflect the fact that ignoring known information also can form the basis for an inadequate screening claim.

4.7.1 Section 1983 – Affirmative Defenses – Conduct Not Covered by Absolute Immunity

Model

The defendant in this case is a [prosecutor] [judge] [witness] [legislative body]. [Prosecutors, etc.] are entitled to what is called absolute immunity for all conduct reasonably related to their functions as [prosecutors, etc.]. Thus, you cannot hold [defendant] liable based upon [defendant's] actions in [describe behavior protected by absolute immunity]. Evidence concerning those actions was admitted solely for [a] particular limited purpose[s]. This evidence can be considered by you as evidence that [describe limited purpose]. But you cannot decide that [defendant] violated [plaintiff's] [specify right] based on evidence that [defendant] [describe behavior protected by absolute immunity].

However, [plaintiff] also alleges that [defendant] [describe behavior not covered by absolute immunity]. Absolute immunity does not apply to such conduct, and thus if you find that [defendant] engaged in such conduct, you should consider it in determining [defendant's] liability.

Comment

In most cases, questions of absolute immunity should be resolved by the judge prior to trial. Instruction 4.7.1 will only rarely be necessary; it is designed to address cases in which some, but not all, of the defendant's alleged conduct would be covered by absolute immunity, and in which evidence of the conduct covered by absolute immunity has been admitted for some purpose other than demonstrating liability. In such a case, the jury should determine liability based on the conduct not covered by absolute immunity. Instruction 4.7.1 provides a limiting instruction specifically tailored to this issue; see also General Instruction 2.10 (Evidence Admitted for Limited Purpose).

Prosecutors[76] have absolute immunity from damages claims concerning prosecutorial functions. "[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *see also Imbler v. Pachtman*, 424 U.S. 409 (1976); *Burns v. Reed*, 500 U.S. 478, 492 (1991) (holding that a prosecutor's "appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing" were "protected by absolute immunity"). Moreover, "supervision or training or information-system management" activities can qualify for absolute immunity – even though such acts are administrative in nature – if the administrative action in

[76] *See Light v. Haws*, 472 F.3d 74, 78 (3d Cir. 2007) (holding that Assistant Counsel for the Pennsylvania Department of Environmental Protection, when "filing actions to enforce compliance with court orders. . . . [,] functions as a prosecutor").

question "is directly connected with the conduct of a trial." *Van De Kamp v. Goldstein*, 129 S. Ct. 855, 861-62 (2009); *see id.* at 858-59 (holding that absolute immunity "extends to claims that the prosecution failed to disclose impeachment material ... due to: (1) a failure properly to train prosecutors, (2) a failure properly to supervise prosecutors, or (3) a failure to establish an information system containing potential impeachment material about informants"). Absolute immunity does not apply, however, "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer," *Buckley*, 509 U.S. at 273, or when a prosecutor "provid[es] legal advice to the police," *Burns*, 500 U.S. at 492, 496.[77]

Judges possess absolute immunity from damages liability for "acts committed within their judicial jurisdiction." *Pierson v. Ray*, 386 U.S. 547, 554 (1967).[78] "[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they

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[77] *See also Kalina v. Fletcher*, 522 U.S. 118, 120, 131 (1997) (prosecutor lacked absolute immunity from claim asserting that she "ma[de] false statements of fact in an affidavit supporting an application for an arrest warrant," because in so doing she "performed the function of a complaining witness" rather than that of an advocate); *Reitz v. County of Bucks*, 125 F.3d 139, 146 (3d Cir. 1997) (holding that "absolute immunity covers a prosecutor's actions in (1) creating and filing of an in rem complaint; (2) preparing of and applying for the seizure warrant; and (3) participating in ex parte hearing for the issuance of the seizure warrant," but does not cover prosecutor's "conduct with respect to the management and retention of the property after the seizure, hearing, and trial").

In *Odd v. Malone*, 538 F.3d 202 (3d Cir. 2008), "prosecuting attorneys obtained bench warrants to detain material witnesses whose testimony was vital to murder prosecutions. Although the attorneys diligently obtained the warrants, they neglected to keep the courts informed of the progress of the criminal proceedings and the custodial status of the witnesses." *Id*. at 205. The Court of Appeals held that a prosecutor sued "for failing to notify the relevant authorities that the proceedings in which the detained individual was to testify had been continued for nearly four months," *id*., did not qualify for absolute prosecutorial immunity; the court based this holding on the facts of the case, including the fact that the judge who issued the material witness warrant had directed the prosecutor to notify him of any delays in the murder prosecution but the prosecutor had failed to do so. *Id*. at 212-13. The *Odd* court also held (a fortiori) that a different prosecutor sued "for failing to notify the relevant authorities that the material witness remained incarcerated after the case in which he was to testify had been dismissed," *id*. at 205, lacked absolute prosecutorial immunity. *See id.* at 215.

[78] Judges also now possess a statutory immunity from claims for injunctive relief. *See* 42 U.S.C. § 1983 (providing 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").

dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).[79] Judges do not possess absolute immunity with respect to claims arising from "the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Forrester v. White*, 484 U.S. 219, 227 (1988).

State or local legislators enjoy absolute immunity from suits seeking damages or injunctive remedies with respect to legislative acts. *See Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (recognizing absolute immunity in case where state legislators "were acting in a field where legislators traditionally have power to act"); *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (unanimous decision) (holding that "local legislators are . . . absolutely immune from suit under § 1983 for their legislative activities").

The Court of Appeals has set forth a two-part test for legislative immunity in suits against local officials: "To be legislative . . . , the act in question must be both substantively and procedurally legislative in nature . . . . An act is substantively legislative if it involves 'policy-making of a general purpose' or 'line-drawing.' . . . It is procedurally legislative if it is undertaken 'by means of established legislative procedures.'" *In re Montgomery County*, 215 F.3d 367, 376 (3d Cir. 2000) (quoting *Carver v. Foerster*, 102 F.3d 96, 100 (3d Cir. 1996)). Based on the Supreme Court's discussion in *Bogan*,[80] the Court of Appeals has questioned the two-part test's applicability to local officials[81] and has indicated that it does not govern claims against state officials.

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[79] Under the doctrine of "quasi-judicial" immunity, "government actors whose acts are relevantly similar to judging are immune from suit." *Dotzel v. Ashbridge*, 438 F.3d 320, 325 (3d Cir. 2006); *see id.* at 322 (holding that "the members of the Board of Supervisors of Salem Township, Pennsylvania are immune from suits brought against them in their individual capacities relating to their decision to deny an application for a permit for a conditional use"); *id.* at 327 (stressing the need to "closely and carefully examine the functions performed by the board in each case"); *Capogrosso v. Supreme Court of New Jersey*, 588 F.3d 180, 185 (3d Cir. 2009) (holding that individual-capacity claims against Director and Disciplinary Counsel for New Jersey Advisory Committee on Judicial Conduct were barred by quasi-judicial immunity).

[80] The *Bogan* Court declined to determine whether a procedurally legislative act by a local official must also be substantively legislative in order to qualify for legislative immunity: "Respondent . . . asks us to look beyond petitioners' formal actions to consider whether the ordinance was legislative in *substance*. We need not determine whether the formally legislative character of petitioners' actions is alone sufficient to entitle petitioners to legislative immunity, because here the ordinance, in substance, bore all the hallmarks of traditional legislation." *Bogan*, 523 U.S. at 55.

[81] The Court of Appeals stated (in a case concerning claims against state legislators) that *Bogan*

> casts doubt on the propriety of using any separate test to examine municipal-level

See, e.g., *Larsen v. Senate of Com. of Pa.*, 152 F.3d 240, 252 (3d Cir. 1998) ("[B]ecause concerns for the separation of powers are often at a minimum at the municipal level, we decline to extend our analysis developed for municipalities to other levels of government."). More recently, however, the Court of Appeals has held that "[r]egardless of the level of government, ... the two-part substance/procedure inquiry is helpful in analyzing whether a non-legislator performing allegedly administrative tasks is entitled to [legislative] immunity." *Baraka v. McGreevey*, 481 F.3d 187, 199 (3d Cir. 2007) (addressing claims against New Jersey Governor and chair of the New Jersey State Council for the Arts).[82]

Police officers who serve as witnesses generally have absolute immunity from claims concerning their testimony. *See Briscoe v. LaHue*, 460 U.S. 325, 345 (1983).[83]

In addition to the immunities recognized by the Supreme Court, there may exist other categories of absolute immunity. *See, e.g., Ernst v. Child and Youth Services of Chester County*, 108

> legislative immunity, *see Bogan*, 523 U.S. at 49 . . . (holding that local legislators are 'likewise' absolutely immune from suit under § 1983), particularly a two-part, substance/procedure test, *id.* at 55 . . . (refusing to require that an act must be 'legislative in substance' as well as of 'formally legislative character' in order to be a legislative act).

Youngblood v. DeWeese, 352 F.3d 836, 841 n.4 (2004); *see also Fowler-Nash v. Democratic Caucus of Pa. House of Representatives*, 469 F.3d 328, 339 (3d Cir. 2006) (stating, in a suit against state officials, that the *Bogan* Court "refused to insist that formally legislative acts, such as passing legislation, also be 'legislative in *substance*'").

[82] Prior to *Baraka*, the Court of Appeals had observed in *Fowler-Nash v. Democratic Caucus of Pa. House of Representatives*, 469 F.3d 328, 338 (3d Cir. 2006), that cases concerning local officials can be "instructive" in the court's analysis of whether a state official's actions were legislative in nature. *See also id.* at 332 (describing the "functional" test for legislative immunity); *id.* at 340 (holding that firing of state representative's legislative assistant was administrative rather than legislative act). And another post-*Larsen* decision by the Court of Appeals did apply the two-part test to determine whether Pennsylvania Supreme Court justices had legislative immunity from claims arising from the termination of a plaintiff's employment as the Executive Administrator of the First Judicial District of Pennsylvania. *See Gallas v. Supreme Court of Pennsylvania*, 211 F.3d 760, 776-77 (3d Cir. 2000). *Gallas* involved a question of legislative immunity because the plaintiff challenged a Pennsylvania Supreme Court order that eliminated the position of Executive Administrator of the First Judicial District of Pennsylvania. *See id.* at 766.

[83] *Compare Malley v. Briggs*, 475 U.S. 335, 344 (1986) (no absolute immunity for a police officer in connection with claim that his "request for a warrant allegedly caused an unconstitutional arrest").

F.3d 486, 488-89 (3d Cir. 1997) (holding that "child welfare workers and attorneys who prosecute dependency proceedings on behalf of the state are entitled to absolute immunity from suit for all of their actions in preparing for and prosecuting such dependency proceedings").

4.7.2 Section 1983 – Affirmative Defenses – Qualified Immunity

Note: For the reasons explained in the Comment, the jury should not be instructed on qualified immunity. Accordingly, no instruction on this issue is provided.

Comment

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The analysis of qualified immunity involves two questions. One question is whether "the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Another question is whether any such constitutional right was "clearly established,"[84] and in particular, "whether it would be clear to a reasonable officer that his conduct was unlawful in the

[84] In *Davis v. Scherer*, 468 U.S. 183, 194 (1984), the fact that the defendant's conduct violated a clearly established *state-law* right did not defeat qualified immunity regarding the violation of federal law.

situation he confronted."[85] Id. at 201-02.[86] It will often be useful for the court to address these questions in the order just stated, but on some occasions it will be preferable to adopt a different ordering; the court has discretion on this matter. *See Pearson v. Callahan*, 129 S. Ct. 808, 818-21 (2009).[87]

Even in a context where the underlying constitutional violation requires a showing of objective unreasonableness, the issue of qualified immunity presents a distinct question. As the Court explained in *Saucier*,

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[85] "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . ; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Unlawfulness can be apparent "even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *compare Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (emphasizing the need for attention to context in judging whether application of a general principle was clear under the circumstances). "[T]he salient question . . . is whether the state of the law [at the time of the conduct] gave respondents fair warning that their [conduct] was unconstitutional." *Hope*, 536 U.S. at 741; *see also Groh v. Ramirez*, 540 U.S. 551, 564 (2004) ("No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional."); *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009) ("[T]he cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law."); *compare Redding*, 129 S. Ct. at 2645 (Stevens, J., joined by Ginsburg, J., dissenting in part) ("[T]he clarity of a well-established right should not depend on whether jurists have misread our precedents.").

[86] *See also Abbott v. Latshaw*, 164 F.3d 141, 148 (3d Cir. 1998).

[87] For example, the court of appeals has ruled that where the analysis of the federal constitutional claim depends on an underlying question of unsettled state law, the court can go straight to the question of whether the federal constitutional right claimed by the plaintiff was clearly established. As the court explained, the practice of first addressing whether there was a constitutional violation is designed to permit the development of the law by leading courts to define the contours of a constitutional right even in cases where such a right, if it exists, is not clearly established. In the court's view, "the underlying principle of law elaboration is not meaningfully advanced in situations ... when the definition of constitutional rights depends on a federal court's uncertain assumptions about state law." *Egolf v. Witmer*, 526 F.3d 104, 110 (3d Cir. 2008). The *Pearson* Court cited *Egolf* with apparent approval. *See Pearson*, 129 S. Ct. at 819. For a post-*Pearson* case following *Egolf*, see *Montanez v. Thompson*, 603 F.3d 243, 251 (3d Cir. 2010).

> [t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Saucier, 533 U.S. at 205.[88]

Questions relating to qualified immunity should not be put to the jury "routinely"; rather, "[i]mmunity ordinarily should be decided by the court long before trial." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam). If there are no disputes concerning the relevant historical facts, then qualified immunity presents a question of law to be resolved by the court.

However, "a decision on qualified immunity will be premature when there are unresolved disputes of historical fact relevant to the immunity analysis." *Curley v. Klem*, 298 F.3d 271, 278 (3d Cir. 2002) ("*Curley I*"); *see also Reitz v. County of Bucks*, 125 F.3d 139, 147 (3d Cir. 1997). Material disputes of historical fact must be resolved by the jury at trial.[89] The question will then arise whether the jury should decide only the questions of historical fact, or whether the jury should also decide the question of objective reasonableness. *See Curley I*, 298 F.3d at 278 (noting that "the federal courts of appeals are divided on the question of whether the judge or jury should decide the ultimate question of objective reasonableness once all the relevant factual issues have been resolved"). Some Third Circuit decisions have suggested that it can be appropriate to permit the jury to decide objective reasonableness as well as the underlying questions of historical fact. *See, e.g.*, *Sharrar v. Felsing*, 128 F.3d 810, 830-31 (3d Cir. 1997) (noting with apparent approval that the court in *Karnes v. Skrutski*, 62 F.3d 485 (3d Cir.1995), "held that a factual dispute relating to qualified immunity must be sent to the jury, and suggested that, at the same time, the jury would decide the issue of objective reasonableness"). On the other hand, the Third Circuit has also noted

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[88] The Court of Appeals has distinguished between the underlying excessive-force inquiry and the qualified-immunity inquiry by characterizing the former as a question of fact and the latter as a question of law. *See Curley v. Klem*, 499 F.3d 199, 214 (3d Cir. 2007) ("*Curley II*") ("[W]e think the most helpful approach is to consider the constitutional question as being whether the officer made a reasonable mistake of fact, while the qualified immunity question is whether the officer was reasonably mistaken about the state of the law.").

[89] *See, e.g., Estate of Smith v. Marasco*, 430 F.3d 140, 152-53 (3d Cir. 2005) ("Marcantino ... claimed that he gave Fetterolf no directions. At this stage, however, we must assume that a jury would credit Fetterolf's version. If Marcantino did, in fact, approve the decision to enter the residence as well as the methods employed to do so, he is not entitled to qualified immunity.").

that the court can "decide the objective reasonableness issue once all the historical facts are no longer in dispute. A judge may use special jury interrogatories, for instance, to permit the jury to resolve the disputed facts upon which the court can then determine, as a matter of law, the ultimate question of qualified immunity." *Curley I*, 298 F.3d at 279. And, more recently, the court has suggested that this ultimate question *must* be reserved for the court, not the jury. *See Carswell v. Borough of Homestead*, 381 F.3d 235, 242 (3d Cir. 2004) ("The jury ... determines disputed historical facts material to the qualified immunity question.... District Courts may use special interrogatories to allow juries to perform this function.... The court must make the ultimate determination on the availability of qualified immunity as a matter of law.").[90] Most recently, the court has stated that submitting the ultimate question of qualified immunity to the jury constitutes reversible error: "[W]hether an officer made a reasonable mistake of law and is thus entitled to qualified immunity is a question of law that is properly answered by the court, not a jury.... When a district court submits that question of law to a jury, it commits reversible error." *Curley v. Klem*, 499 F.3d 199, 211 (3d Cir. 2007) ("*Curley II*").[91]

The court, then, should not instruct the jury on qualified immunity.[92] Rather, the court should determine (in consultation with counsel) what the disputed issues of historical fact are. The court

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[90] Admittedly, this statement in *Carswell* was dictum: The court in *Carswell* affirmed the district court's grant of judgment as a matter of law at the close of plaintiff's case in chief. *See Carswell*, 381 F.3d at 239, 245. *See also Harvey v. Plains Twp. Police Dept.*, 421 F.3d 185, 194 n. 12 (3d Cir. 2005) (citing *Carswell* and *Curley I* with approval).

[91] Under *Carswell*'s dictum, in cases where there exist material disputes of historical fact, the best approach is for the jury to answer special interrogatories concerning the historical facts and for the court to determine the question of objective reasonableness consistent with the jury's interrogatory answers. *See Carswell*, 381 F.3d at 242 & n.2; *see also Stephenson v. Doe*, 332 F.3d 68, 80 n.15, 81 (2d Cir. 2003) (noting that the difficult nature of qualified immunity doctrine "inherently makes for confusion," and stating that on remand the trial court should use special interrogatories if jury findings are necessary with respect to issues relating to qualified immunity); *but see Sloman v. Tadlock*, 21 F.3d 1462, 1468 (9th Cir. 1994) ("[S]ending the factual issues to the jury but reserving to the judge the ultimate 'reasonable officer' determination leads to serious logistical difficulties. Special jury verdicts would unnecessarily complicate easy cases, and might be unworkable in complicated ones.").

[92] Though the *Curley II* court stressed that "that the second step in the *Saucier* analysis, i.e., whether an officer made a reasonable mistake about the legal constraints on police action and is entitled to qualified immunity, is a question of law that is exclusively for the court," it noted in dictum the possibility of using the jury, in an advisory capacity, to determine questions relating to qualified immunity: "When the ultimate question of the objective reasonableness of an officer's behavior involves tightly intertwined issues of fact and law, it may be permissible to utilize a jury in an advisory capacity ... but responsibility for answering that ultimate question remains with the court." *Curley II*, 499 F.3d at 211 n.12.

should submit interrogatories to the jury on those questions of historical fact. Often, questions of historical fact will be relevant both to the existence of a constitutional violation and to the question of objective reasonableness; as to such questions, the court should instruct the jury that the plaintiff has the burden of proof.[93] (The court may wish to include those interrogatories in the section of the verdict form that concerns the existence of a constitutional violation.) Other questions of historical fact, however, may be relevant only to the question of objective reasonableness; as to those questions, if any, the court should instruct the jury that the defendant has the burden of proof. (The court may wish to include those interrogatories in a separate section of the verdict form, after the sections concerning the prima facie case, and may wish to submit those questions to the jury only if the jury finds for the plaintiff on liability.)

One question that may sometimes arise is whether jury findings on the defendant's subjective intent are relevant to the issue of qualified immunity. Decisions applying *Harlow* and *Harlow's* progeny emphasize that the test for qualified immunity is an objective one, and that the defendant's actual knowledge concerning the legality of the conduct is irrelevant.[94] Admittedly, the reasons given in *Harlow* for rejecting the subjective test carry considerably less weight in the context of a court's immunity decision based on a jury's findings than they do at earlier points in the litigation:

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[93] For a further discussion of burdens of proof in this context, *see supra* Comment 4.2.

[94] *See, e.g.*, *Sharrar v. Felsing*, 128 F.3d 810, 826 (3d Cir. 1997) ("[T]he officer's subjective beliefs about the legality of his or her conduct generally 'are irrelevant.'") (quoting *Anderson*, 483 U.S. at 641); *Grant v. City of Pittsburgh*, 98 F.3d 116, 123-24 (3d Cir. 1996) ("It is now widely understood that a public official who knows he or she is violating the constitution nevertheless will be shielded by qualified immunity if a 'reasonable public official' would not have known that his or her actions violated clearly established law.")

Justice Brennan's concurrence in *Harlow*, quoting language from the majority opinion, asserted that the Court's standard "would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not 'reasonably have been expected' to know what he actually did know . . . . Thus the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes." *Harlow*, 457 U.S. at 821 (Brennan, J., joined by Marshall & Blackmun, JJ., concurring). The quoted language from the majority opinion, however, appears to refer to cases in which the defendant's conduct in fact violated clearly established law:

> If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Harlow, 457 U.S. at 818-19.

The Court stressed its concerns that permitting a subjective test would doom officials to intrusive discovery, *see Harlow*, 457 U.S. at 817 (noting that "[j]udicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues"), and would impede the use of summary judgment to dismiss claims on qualified immunity grounds, *see id.* at 818 (noting that "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment"). Obviously, once a claim has reached a jury trial, concerns about discovery and summary judgment are moot. In order to reach the trial stage, the plaintiff must have successfully resisted summary judgment on qualified immunity grounds, based on the application of the objective reasonableness test. And the plaintiff must have done so without the benefit of discovery focused on the official's subjective view of the legality of the conduct. If, at trial, the jury finds that the defendant actually knew the conduct to be illegal, it arguably would not contravene the policies stressed in *Harlow* if the court were to reject qualified immunity based on such a finding. Nonetheless, the courts' continuing emphasis on the notion that the qualified immunity test excludes any element of subjective intent[95] raises the possibility that reliance on the defendant's actual knowledge could be held to be erroneous. As the Court has explained, "a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense." *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998).

In some cases, however, the defendant's motivation may be relevant to the plaintiff's claim. *See id.* In such cases, the circumstances relevant to the qualified immunity determination may include the defendant's subjective intent. For example, in a First Amendment retaliation case argued and decided after *Crawford-El*, the Third Circuit explained:

> The qualified immunity analysis requires a determination as to whether reasonable officials could believe that their conduct was not unlawful even if it was in fact unlawful. . . . In the context of a First Amendment retaliation claim, that determination turns on an inquiry into whether officials reasonably could believe that

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[95] *See, e.g.*, *Berg v. County of Allegheny*, 219 F.3d 261, 272 (3d Cir. 2000) ("The inquiry [concerning qualified immunity] is an objective one; the arresting officer's subjective beliefs about the existence of probable cause are not relevant."). However, a qualified immunity analysis concerning probable cause will take into account what facts the defendant knew at the relevant time. *See Gilles v. Davis*, 427 F.3d 197, 206 (3d Cir. 2005) ("[W]hether it was reasonable to believe there was probable cause is in part based on the limited information that the arresting officer has at the time."); *see also Harvey v. Plains Twp. Police Dept.*, 421 F.3d 185, 194 (3d Cir. 2005) (stating in context of a Fourth Amendment claim that qualified immunity analysis "involv[es] consideration of both the law as clearly established at the time of the conduct in question and the information within the officer's possession at that time"); *Blaylock v. City of Philadelphia*, 504 F.3d 405, 411 (3d Cir. 2007) (citing *Hunter v. Bryant*, 502 U.S. 224, 228-29 (1991), and *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

> their motivations were proper even when their motivations were in fact retaliatory. Even assuming that this could be demonstrated under a certain set of facts, it is an inquiry that cannot be conducted without factual determinations as to the officials' subjective beliefs and motivations . . . .

Larsen v. Senate of Com. of Pa., 154 F.3d 82, 94 (3d Cir. 1998); *see also Monteiro v. City of Elizabeth*, 436 F.3d 397, 404 (3d Cir. 2006) ("In cases in which a constitutional violation depends on evidence of a specific intent, 'it can never be objectively reasonable for a government official to act with the intent that is prohibited by law'" (quoting *Locurto v. Safir*, 264 F.3d 154, 169 (2d Cir. 2001).). In some cases where the plaintiff must meet a stringent test (on the merits) concerning the defendant's state of mind, the jury's finding that the defendant had that state of mind forecloses a defense of qualified immunity.[96] In those cases, the jury's decision on the defendant's state of mind will also determine the qualified immunity question.[97]

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[96] *See Monteiro*, 436 F.3d at 405 ("Perkins-Auguste's argument that she could have conceivably (and constitutionally) ejected Monteiro on the basis of his disruptions is unavailing in the face of a jury verdict concluding that she acted with a motive to suppress Monteiro's speech on the basis of viewpoint.").

Similarly, the Eleventh Circuit noted *Saucier*'s holding that the qualified immunity inquiry is distinct from the merits of the claim, but explained:

> It is different with claims arising from the infliction of excessive force on a prisoner in violation of the Eighth Amendment Cruel and Unusual Punishment Clause. In order to have a valid claim ... the excessive force must have been sadistically and maliciously applied for the very purpose of causing harm. Equally important, it is clearly established that all infliction of excessive force on a prisoner sadistically and maliciously for the very purpose of causing harm and which does cause harm violates the Cruel and Unusual Punishment Clause. So, where this type of constitutional violation is established there is no room for qualified immunity. It is not just that this constitutional tort involves a subjective element, it is that the subjective element required to establish it is so extreme that every conceivable set of circumstances in which this constitutional violation occurs is clearly established to be a violation of the Constitution . . . .

Johnson v. Breeden, 280 F.3d 1308, 1321-22 (11th Cir. 2002).

[97] The Third Circuit has held that the showing of subjective deliberate indifference necessary to establish an Eighth Amendment conditions-of-confinement claim necessarily negates the defendant's claim to qualified immunity. *Beers-Capitol v. Whetzel*, 256 F.3d 120, 142 n.15 (3d Cir. 2001) ("Because deliberate indifference under *Farmer* requires actual knowledge or awareness on the part of the defendant, a defendant cannot have qualified immunity if she was deliberately indifferent.").

The Supreme Court's decision in *Saucier* does not necessarily undermine the Third

Not all Section 1983 defendants will be entitled to assert a qualified immunity defense. *See, e.g.*, *Richardson v. McKnight*, 521 U.S. 399, 401 (1997) (holding that "prison guards who are employees of a private prison management firm" are not "entitled to a qualified immunity from suit by prisoners charging a violation of 42 U.S.C. § 1983"); *Wyatt v. Cole*, 504 U.S. 158, 159 (1992) (holding that "private defendants charged with 42 U.S.C. § 1983 liability for invoking state replevin, garnishment, and attachment statutes later declared unconstitutional" cannot claim qualified

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Circuit's reasoning in *Beers-Capitol*. Admittedly, the Third Circuit decided *Beers-Capitol* a week before the Supreme Court decided *Saucier*; but *Saucier*'s holding (concerning Fourth Amendment excessive force claims) followed the earlier holding in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (concerning Fourth Amendment search claims). *Anderson* and *Saucier* can be distinguished from *Beers-Capitol*. Because an official can make a reasonable mistake as to whether a particular action is reasonable, qualified immunity is available even where the contours of the relevant constitutional right depend "upon an assessment of what accommodation between governmental need and individual freedom is reasonable." *Anderson*, 483 U.S. at 644. By contrast, if the relevant constitutional standard requires that the defendant actually knew of an excessive risk (as in the case of an Eighth Amendment violation), qualified immunity seems paradoxical: It is difficult to argue that a reasonable officer in the defendant's shoes could not be expected to know the defendant's conduct was unlawful when the defendant actually knew of the excessive risk.

However, the Supreme Court's subsequent decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), does raise some doubt as to the validity of the Third Circuit's conclusion. In *Hope*, the Court held that the plaintiff's allegations, if true, established an Eighth Amendment conditions-of-confinement claim (because the plaintiff had satisfied the Eighth Amendment deliberate indifference standard), *see id.* at 737, and then proceeded to analyze whether it would have been clear to a reasonable official under the circumstances that the conduct at issue violated a clearly established constitutional right, *see id.* at 739. Although the majority ultimately concluded that the defendants were not entitled to qualified immunity, it did so on the ground that caselaw, a state regulation and a DOJ report should have made it obvious to a reasonable official that the conduct was unconstitutional. *See id.* at 741-42. If a showing of Eighth Amendment deliberate indifference automatically negates a defendant's claim of qualified immunity, then the Court could have relied upon that ground to reverse the grant of summary judgment to the defendants in *Hope*; thus, the fact that the Court instead analyzed the question of qualified immunity without mentioning the possible relevance of the showing of deliberate indifference suggests that the Court did not view that showing as dispositive of the qualified immunity question. On the other hand, the plaintiff in *Hope* apparently did not argue that the showing of deliberate indifference negated the claim of qualified immunity, so it may be that the Court simply did not consider that theory in deciding *Hope*. (In *Whitley v. Albers*, 475 U.S. 312 (1986), the court of appeals had stated that "[a] finding of [Eighth Amendment] deliberate indifference is inconsistent with a finding of ... qualified immunity," *Albers v. Whitley*, 743 F.2d 1372, 1376 (9th Cir. 1984), but the Supreme Court refused to address this contention because the Court reversed the judgment on other grounds, *see* 475 U.S. at 327-28.)

immunity); *Owen v. City of Independence, Mo.*, 445 U.S. 622, 657 (1980) (holding that "municipalities have no immunity from damages liability flowing from their constitutional violations").

The Court has left undecided whether private defendants who cannot claim qualified immunity should be able to claim "good faith" immunity. *See Wyatt*, 504 U.S. at 169 ("[W]e do not foreclose the possibility that private defendants faced with § 1983 liability ... could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens."); *id.* at 169-75 (Kennedy, J., joined by Scalia, J., concurring) (arguing in favor of a good faith defense); *Richardson*, 521 U.S. at 413 (declining to determine "whether or not . . . private defendants . . . might assert, not immunity, but a special 'good-faith' defense"). Taking up the issue thus left open in *Wyatt*, the Third Circuit has held that "private actors are entitled to a defense of subjective good faith." *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3d Cir. 1994). The discussion in *Jordan* focused on the question in the context of a due process claim arising from a creditor's execution on a judgment. *See id.* at 1276 (explaining that "a creditor's subjective appreciation that its act deprives the debtor of his constitutional right to due process" would show an absence of good faith). One district court has distinguished *Jordan* on that basis: "To import into Eighth Amendment jurisprudence a defense predicated on the elements of a common law claim for a wrongful seizure of property and the reasonableness of reliance on a facially valid statute is a leap. The good faith defense discussed in *Jordan* has yet to be afforded to other than private individuals who in concert with state officials invoke state law in pursuit of a private objective." *Pearson v. City of Philadelphia*, 1998 WL 721076, at *2 (E.D.Pa. Oct. 15, 1998).

4.7.3 Section 1983 – Affirmative Defenses – Release-Dismissal Agreement

Model

[Defendant] asserts that [plaintiff] agreed to release [plaintiff's] claims against [defendant], in exchange for the dismissal of the criminal charges against [plaintiff]. In order to rely on such a release as a defense against [plaintiff's] claims, [defendant] must prove both of the following things:

First, [defendant] must prove that the prosecutor acted for a valid public purpose when [he/she] sought a release from [plaintiff]. [Defendant] asserts that the prosecutor sought the release because the prosecutor [wanted to protect the complaining witness from having to testify at [defendant's] trial]. I instruct you that [protecting the complaining witness from having to testify at trial] is a valid public purpose; you must decide whether that purpose actually was the prosecutor's purpose in seeking the release. In other words, [defendant] must prove by a preponderance of the evidence that the reason the prosecutor sought the release from [plaintiff] was [to protect the complaining witness from having to testify at trial].

Second, [defendant] must prove [by clear and convincing evidence][98] [by a preponderance of the evidence][99] that [plaintiff] agreed to the release and that [plaintiff's] decision to agree to the release was deliberate, informed and voluntary.[100] To determine whether [plaintiff] made a deliberate, informed and voluntary decision to agree to the release, you should consider all relevant circumstances, including *[list any of the following factors, and any other factors, warranted by the evidence]*:

- The words of the written release that [plaintiff] signed;
- Whether [plaintiff] was in custody at the time [he/she] entered into the release;
- Whether [plaintiff's] background and experience helped [plaintiff] to understand the terms of the release;
- Whether [plaintiff] was represented by a lawyer, and if so, whether [plaintiff's] lawyer wrote the release;

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[98] If the release was oral, the defendant must prove voluntariness by clear and convincing evidence.

[99] The Court of Appeals has not determined the appropriate standard of proof of voluntariness in the case of a written release.

[100] If more than one defendant seeks to assert the release as a defense, the court, if the plaintiff so requests, should require the jury to consider voluntariness with respect to potential claims against each specific defendant. *See Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 526 n.13 (3d Cir. 1996).

- Whether [plaintiff] agreed to the release immediately or whether [plaintiff] took time to think about it;
- Whether [plaintiff] expressed any unwillingness to enter into the release; and
- Whether the terms of the release were clear.

Comment

The validity of release-dismissal agreements waiving potential Section 1983 claims is reviewed on a case-by-case basis. *See Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).[101] To be enforced, the agreement must be "executed voluntarily, free from prosecutorial misconduct and not offensive to the relevant public interest." *Cain v. Darby Borough*, 7 F.3d 377, 380 (3d Cir. 1993) (in banc) (citing *Rumery*).

The defense has the burden of showing voluntariness, *see Livingstone v. North Belle Vernon Borough*, 12 F.3d 1205, 1211 (3d Cir. 1993) (in banc), and if the release was oral rather than written then voluntariness must be proven by clear and convincing evidence, *see Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 534-36 (3d Cir. 1996); *see also Livingstone*, 12 F.3d at 1212-13 (noting reasons why written releases are preferable).[102] The inquiry is fact-specific. *See Livingstone*, 12 F.3d at 1210-11 (listing types of factors relevant to voluntariness). To the extent that the question whether the plaintiff made a "deliberate, informed and voluntary waiver" presents issues of witness credibility concerning the plaintiff's state of mind, the question should be submitted to the jury. *Livingstone*, 12 F.3d at 1215 n.9.

The defense must also show "that upon balance the public interest favors enforcement." *Cain*, 7 F.3d at 381; *see also Livingstone*, 12 F.3d at 1215 (discussing possible public interest rationales for releases); *Livingstone*, 91 F.3d at 527 (noting the "countervailing interest ... in detecting and deterring official misconduct"); *id.* at 528-29 (assessing possible rationales).[103] "The

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[101] "Whereas . . . the validity of a release-dismissal for a section 1983 claim is governed exclusively by federal law . . . , the validity of any purported release of . . . state claims . . . is governed by state law." *Livingstone v. North Belle Vernon Borough*, 12 F.3d 1205, 1209 n.6 (1993) (in banc); *see also Livingstone*, 91 F.3d at 539 (discussing treatment of release-dismissal agreements under Pennsylvania law).

[102] *See also Livingstone*, 91 F.3d at 536 n.34 (declining to "address the appropriate standard of proof for enforcement of a written release-dismissal agreement").

[103] *See also* Seth F. Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. Pa. L. Rev. 851, 928 (1988) (noting that release-dismissal agreements pose "a substantial cost to first amendment rights, the integrity of the criminal process, and the purposes served by section 1983").

standard for determining whether a release meets the public interest requirement is an objective one, based upon the facts known to the prosecutor when the agreement was reached." *Cain*, 7 F.3d at 381. Moreover, "the public interest reason proffered by the prosecutor must be the prosecutor's *actual reason* for seeking the release." *Id.*; *see also Livingstone*, 91 F.3d at 530 n.17. If, instead, "the decision to pursue a prosecution, or the subsequent decision to conclude a release-dismissal agreement, was motivated by a desire to protect public officials from liability," the release should not be enforced. *Livingstone*, 91 F.3d at 533.[104]

"[P]rotecting public officials from civil suits may in some cases provide a valid public interest and justify the enforcement of a release-dismissal agreement." *Cain*, 7 F.3d at 383. But "there must first be a case-specific showing that the released civil rights claims appeared to be marginal or frivolous at the time the agreement was made and that the prosecutor was in fact motivated by this reason." *Id.*[105] Whether the claims appeared to be marginal or frivolous should be assessed on the basis of the information that the prosecutor "knew or should have known" at the time. *Livingstone*, 91 F.3d at 532. If the claims did appear marginal or frivolous based on the information that the prosecutor knew and/or should have known, the court should then address "the further question whether enforcement of a release-dismissal agreement in the face of substantial evidence of police misconduct would be compatible with *Rumery* and *Cain*, notwithstanding that the evidence of misconduct was not known, or reasonably knowable, by the prosecutor at the time." *Livingstone*, 91 F.3d at 532.

The objective inquiry (whether there existed a valid public interest in the release) is for the court,[106] but the subjective inquiry (whether that interest was the prosecutor's actual reason) is for the jury. *See Livingstone*, 12 F.3d at 1215. "The party seeking to enforce the release-dismissal agreement bears the burden of proof on both of these elements." *Livingstone*, 91 F.3d at 527.

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[104] "[T]he concept of prosecutorial misconduct is embedded in [the] larger inquiry into whether enforcing the release would advance the public interest." *Cain*, 7 F.3d at 380.

[105] "As a general matter, civil rights claims based on substantial evidence of official misconduct will not be either marginal or frivolous. But this may not be true in every case. For instance, if the official involved would clearly have absolute immunity for the alleged misconduct, then a subsequent civil rights suit might indeed be marginal, whether or not there is substantial evidence that the misconduct occurred." *Livingstone*, 91 F.3d at 530 n.18.

[106] "The process of weighing the evidence of police misconduct against the prosecutor's asserted reasons for concluding a release-dismissal agreement is part of the broad task of balancing the public interests that favor and that disfavor enforcement. That task is one for the court." *Livingstone*, 91 F.3d at 533 n.28.

4.8.1 Section 1983 – Damages – Compensatory Damages

Model

I am now going to instruct you on damages. Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not [defendant] should be held liable.

If you find [defendant] liable, then you must consider the issue of compensatory damages. You must award [plaintiff] an amount that will fairly compensate [him/her] for any injury [he/she] actually sustained as a result of [defendant's] conduct.

[Plaintiff] must show that the injury would not have occurred without [defendant's] act [or omission]. [Plaintiff] must also show that [defendant's] act [or omission] played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of [defendant's] act [or omission]. [There can be more than one cause of an injury. To find that [defendant's] act [or omission] caused [plaintiff's] injury, you need not find that [defendant's] act [or omission] was the nearest cause, either in time or space. However, if [plaintiff's] injury was caused by a later, independent event that intervened between [defendant's] act [or omission] and [plaintiff's] injury, [defendant] is not liable unless the injury was reasonably foreseeable by [defendant].]

Compensatory damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence. Plaintiff has the burden of proving compensatory damages by a preponderance of the evidence.

[Plaintiff] claims the following items of damages *[include any of the following – and any other items of damages – that are warranted by the evidence and permitted under the law governing the specific type of claim]*:

- Physical harm to [plaintiff] during and after the events at issue, including ill health, physical pain, disability, disfigurement, or discomfort, and any such physical harm that [plaintiff] is reasonably certain to experience in the future. In assessing such harm, you should consider the nature and extent of the injury and whether the injury is temporary or permanent.

- Emotional and mental harm to [plaintiff] during and after the events at issue, including fear, humiliation, and mental anguish, and any such emotional and mental harm that

[plaintiff] is reasonably certain to experience in the future.[107]

- The reasonable value of the medical [psychological, hospital, nursing, and similar] care and supplies that [plaintiff] reasonably needed and actually obtained, and the present value[108] of such care and supplies that [plaintiff] is reasonably certain to need in the future.

- The [wages, salary, profits, reasonable value of the working time] that [plaintiff] has lost because of [his/her] inability [diminished ability] to work, and the present value of the [wages, etc.] that [plaintiff] is reasonably certain to lose in the future because of [his/her] inability [diminished ability] to work.

- The reasonable value of property damaged or destroyed.

- The reasonable value of legal services that [plaintiff] reasonably needed and actually obtained to defend and clear [him/her]self.[109]

- The reasonable value of each day of confinement after the time [plaintiff] would have been released if [defendant] had not taken the actions that [plaintiff] alleges.[110]

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[107] "[E]xpert medical evidence is not required to prove emotional distress in section 1983 cases." *Bolden v. Southeastern Pennsylvania Transp. Authority*, 21 F.3d 29, 36 (3d Cir. 1994). However, the plaintiff must present competent evidence showing emotional distress. *See Chainey v. Street*, 523 F.3d 200, 216 (3d Cir. 2008). And in suits filed by prisoners, the court should ensure that the instructions on emotional and mental injury comply with 42 U.S.C. § 1997e(e). *See* Comment.

[108] The Court of Appeals has not discussed whether and how the jury should be instructed concerning the present value of future damages in Section 1983 cases. For instructions concerning present value (and a discussion of relevant issues), see Instruction 5.4.4 and its Comment.

[109] This category of damages is not available for an unreasonable search and seizure. *See Hector v. Watt*, 235 F.3d 154, 157 (3d Cir. 2000), as amended (Jan. 26, 2001) ("Victims of unreasonable searches or seizures may recover damages directly related to the invasion of their privacy–including (where appropriate) damages for physical injury, property damage, injury to reputation, etc.; but such victims cannot be compensated for injuries that result from the discovery of incriminating evidence and consequent criminal prosecution.") (quoting *Townes v. City of New York*, 176 F.3d 138, 148 (2d Cir.1999)).

[110] *See Sample v. Diecks*, 885 F.2d 1099, 1112 (3d Cir. 1989) (upholding award of compensatory damages for "each day of confinement after the time Sample would have been released if Diecks had fulfilled his duty to Sample").

[Each plaintiff has a duty under the law to "mitigate" his or her damages – that means that the plaintiff must take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage caused by the defendant. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you by a preponderance of the evidence that [plaintiff] failed to take advantage of an opportunity that was reasonably available to [him/her], then you must reduce the amount of [plaintiff's] damages by the amount that could have been reasonably obtained if [he/she] had taken advantage of such an opportunity.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Comment

"[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 (1986); *see also Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) ("It is well settled that compensatory damages under § 1983 are governed by general tort-law compensation theory.").[111]

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[111] The Third Circuit has noted the potential relevance of 42 U.S.C. § 1988 to the question of damages in Section 1983 cases. *See Fontroy v. Owens*, 150 F.3d 239, 242 (3d Cir. 1998). The *Fontroy* court relied on the approach set forth by the Supreme Court in a case addressing statute of limitations issues:

> First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum State. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States."

Fontroy, 150 F.3d at 242-43 (quoting *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984) (quoting 42 U.S.C. § 1988(a))); *compare* Seth F. Kreimer, The Source of Law in Civil Rights Actions: Some Old Light on Section 1988, 133 U. Pa. L. Rev. 601, 620 (1985) (arguing that Section 1988's reference to "common law" denotes "general common law," not state common law).

As noted in the text, the Supreme Court has addressed a number of questions relating to the damages available in Section 1983 actions without making Section 1988 the focus of its analysis. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 258 n.13 (1978) (applying the tort principle of compensation in a procedural due process case and stating in passing, in a footnote, that "42 U.S.C. § 1988 authorizes courts to look to the common law of the States where this is 'necessary

"[A] Section 1983 plaintiff must demonstrate that the defendant's actions were the proximate cause of the violation of his federally protected right." *Rivas v. City of Passaic*, 365 F.3d 181, 193 (3d Cir. 2004) (discussing defendants' contentions that their conduct did not "proximately cause[] [the decedent's] death"). The requirement is broadly equivalent to the tort law's concept of proximate cause. *See, e.g*, *Hedges v. Musco*, 204 F.3d 109, 121 (3d Cir. 2000) ("It is axiomatic that '[a] § 1983 action, like its state tort analogs, employs the principle of proximate causation.'") (quoting *Townes v. City of New York*, 176 F.3d 138, 146 (2d Cir. 1999)). Thus, Instruction 4.8.1 reflects general tort principles concerning causation and compensatory damages.

With respect to future injury, the Eighth Circuit's model instructions require that the plaintiff prove the injury is "reasonably certain" to occur. *See* Eighth Circuit (Civil) Instruction 4.51. Although the Committee is not aware of Third Circuit caselaw directly addressing this issue, some precedents from other circuits do provide support for such a requirement. *See Stengel v. Belcher*, 522 F.2d 438, 445 (6th Cir. 1975) ("The Court properly instructed the jury that Stengel could recover damages only for injury suffered as a proximate result of the shooting, and for future damages which were reasonably certain to occur."), *cert. dismissed*, 429 U.S. 118 (1976); *Henderson v. Sheahan*, 196 F.3d 839, 849 (7th Cir. 1999) ("Damages may not be awarded on the basis of mere conjecture or speculation; a plaintiff must prove that there is a reasonable certainty that the anticipated harm or condition will actually result in order to recover monetary compensation."); *cf. Slicker v. Jackson*, 215 F.3d 1225, 1232 (11th Cir. 2000) ("[A]n award of nominal damages may be appropriate when the plaintiff's injuries have no monetary value or when they are not quantifiable with reasonable certainty."). On the other hand, language in some other opinions suggest that something less than "reasonable certainty," such as "reasonable likelihood," might suffice. *See, e.g., Ruiz v. Gonzalez Caraballo*, 929 F.2d 31, 35 (1st Cir. 1991) (in assessing jury's award of damages, taking into account evidence that the plaintiff's "post-traumatic stress syndrome would likely require extensive future medical treatment at appreciable cost"); *Lawson v. Dallas County*, 112 F.Supp.2d 616, 636 (N.D. Tex. 2000) (plaintiff is "entitled to recover compensatory damages for the physical injury, pain and suffering, and mental anguish that he has suffered in the past–and is reasonably likely to suffer in the future–because of the defendants' wrongful conduct"), *aff'd*, 286 F.3d 257 (5th Cir. 2002).

The court should take care not to suggest that the jury could award damages based on "the abstract value of [the] constitutional right." *Stachura*, 477 U.S. at 308. If a constitutional violation has not caused actual damages, nominal damages are the appropriate remedy. *See id.* at 308 n.11; *infra* Instruction 4.8.2. However, "compensatory damages may be awarded once the plaintiff shows actual injury despite the fact the monetary value of the injury is difficult to ascertain." *Brooks v. Andolina*, 826 F.2d 1266, 1269 (3d Cir. 1987).

In a few types of cases, "presumed" damages may be available. "When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish ... presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure." *Stachura*, 477 U.S. at 310-11. However, only a

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to furnish suitable remedies' under § 1983").

"narrow" range of claims will qualify for presumed damages. *Spence v. Board of Educ. of Christina School Dist.*, 806 F.2d 1198, 1200 (3d Cir. 1986) (noting that "[t]he situations alluded to by the *Memphis* Court that would justify presumed damages [involved] defamation and the deprivation of the right to vote").

If warranted by the evidence, the court can instruct the jury to distinguish between damages caused by legal conduct and damages caused by illegal conduct. *Cf. Bennis v. Gable*, 823 F.2d 723, 734 n.14 (3d Cir. 1987) ("Apportionment [of compensatory damages] is appropriate whenever 'a factual basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm which that defendant's conduct has been cause in fact.'") (quoting Prosser & Keeton, The Law of Torts, § 52, at 345 (5th ed. 1984)); *Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F.2d 951, 967 (3d Cir.1975) (reviewing judgment entered after bench trial in case under Labor Management Relations Act and discussing apportionment of damages between legal and illegal conduct), *overruled on other grounds by Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212, 215 (1979).
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The court should instruct the jury on the categories of compensatory damages that it should consider. Those categories will often parallel the categories of damages available under tort law. "[O]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well." *Carey v. Piphus*, 435 U.S. 247, 257-258 (1978).[112] The *Carey* Court also noted, however, that "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." *Id.* at 259.

The Prison Litigation Reform Act ("PLRA") provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). This provision "requir[es] a less-than-significant-but-more-than-de minimis physical injury as a predicate to allegations of emotional injury." *Mitchell v. Horn*, 318 F.3d 523, 536 (3d Cir. 2003). However, this provision does not bar the award of nominal and punitive damages. *See Allah v. Al-Hafeez*, 226 F.3d 247, 252 (3d Cir. 2000) (holding that "[n]either claims seeking nominal damages to vindicate constitutional rights nor claims seeking punitive damages to deter or punish

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[112] Compensatory damages in a Section 1983 case "may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation ..., personal humiliation, and mental anguish and suffering.'" *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); *see also Coleman v. Kaye*, 87 F.3d 1491, 1507 (3d Cir. 1996) (in sex discrimination case, holding that plaintiff could recover damages under Section 1983 for "personal anguish she suffered as a result of being passed over for promotion"); *Chainey v. Street*, 523 F.3d 200, 216 (3d Cir. 2008) (discussing proof of damages for emotional distress).

egregious violations of constitutional rights are claims 'for mental or emotional injury'" within the meaning of Section 1997e(e)).[113] At least one district court has interpreted Section 1997e(e) to preclude the award of damages for emotional injury absent a finding of physical injury. *See Tate v. Dragovich*, 2003 WL 21978141, at *9 (E.D.Pa. 2003) ("Plaintiff was barred from recovering compensatory damages for his alleged emotional and psychological injuries by § 803(d)(e) of the PLRA, which requires that proof of physical injury precede any consideration of mental or emotional harm, 42 U.S.C. § 1997e(e) (2003), and the jury was instructed as such."). In a case within Section 1997e(e)'s ambit,[114] the court should incorporate this consideration into the instructions.[115]

The Third Circuit has held that the district court has discretion to award prejudgment interest in Section 1983 cases. *See Savarese v. Agriss*, 883 F.2d 1194, 1207 (3d Cir. 1989). Accordingly, it appears that the question of prejudgment interest need not be submitted to the jury. *Compare Cordero v. De Jesus-Mendez*, 922 F.2d 11, 13 (1st Cir. 1990) ("[I]n an action brought under 42 U.S.C. § 1983, the issue of prejudgment interest is so closely allied with the issue of damages that federal law dictates that the jury should decide whether to assess it.").

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how

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[113] One court has held that Section 1997e's reference to "mental or emotional injury" does not encompass physical pain. *See Perez v. Jackson*, 2000 WL 893445, at *2 (E.D.Pa. June 30, 2000) ("Physical pain wantonly inflicted in a manner which violates the Eighth Amendment is a sufficient 'physical injury' to permit recovery under § 1983. Plaintiff also has not pled a claim for emotional or mental injury.").

[114] "[T]he applicability of the personal injury requirement of 42 U.S.C. § 1997e(e) turns on the plaintiff's status as a prisoner, not at the time of the incident, but when the lawsuit is filed." *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 314 (3d Cir. 2001) (en banc).

[115] It is not entirely clear that Section 1997e(e) precludes an *award* of damages for emotional injury absent a *jury finding* of physical injury; rather, the statute focuses upon the pretrial stage, by precluding the prisoner from *bringing* an action seeking damages for emotional injury absent a *prior showing* of physical injury. A narrow reading of the statute's language arguably accords with the statutory purpose of decreasing the number of inmate suits and enabling the pretrial dismissal of such suits where only emotional injury is alleged: Under this view, if a plaintiff has survived summary judgment by pointing to evidence that would enable a reasonable jury to find physical injury, it would not offend the statute's purpose to permit the jury to award damages for emotional distress even if the jury did not find physical injury. However, because it is far from clear that this view will ultimately prevail, the safer course may be to incorporate the physical injury requirement into the jury instructions.

much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

4.8.2 Section 1983 – Damages – Nominal Damages

Model

If you return a verdict for [plaintiff], but [plaintiff] has failed to prove compensatory damages, then you must award nominal damages of $ 1.00.

A person whose federal rights were violated is entitled to a recognition of that violation, even if [he/she] suffered no actual injury. Nominal damages (of $1.00) are designed to acknowledge the deprivation of a federal right, even where no actual injury occurred.

However, if you find actual injury, you must award compensatory damages (as I instructed you), rather than nominal damages.

Comment

The Supreme Court has explained that "[b]y making the deprivation of . . . rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). *Carey* involved a procedural due process claim, but the Court indicated that the rationale for nominal damages extended to other types of Section 1983 claims as well: The Court observed, with apparent approval, that "[a] number of lower federal courts have approved the award of nominal damages under § 1983 where deprivations of constitutional rights are not shown to have caused actual injury." *See id.* n.24 (citing cases involving Section 1983 claims for various constitutional violations); *see also Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) (explaining that "nominal damages . . . are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury"); *Allah v. Al-Hafeez*, 226 F.3d 247, 252 (3d Cir. 2000) (noting "the Supreme Court's clear directive that nominal damages are available for the vindication of a constitutional right absent any proof of actual injury"); *Atkinson v. Taylor*, 316 F.3d 257, 265 n.6 (3d Cir. 2003) ("[E]ven if appellee is unable to establish a right to compensatory damages, he may be entitled to nominal damages.").

An instruction on nominal damages is proper when the plaintiff has failed to present evidence of actual injury. However, when the plaintiff has presented evidence of actual injury and that evidence is undisputed,[116] it is error to instruct the jury on nominal damages, at least if the nominal damages instruction is emphasized to the exclusion of appropriate instructions on compensatory

[116] *Cf. Slicker v. Jackson*, 215 F.3d 1225, 1232 (11th Cir. 2000) ("[N]ominal damages may be appropriate where a jury reasonably concludes that the plaintiff's evidence of injury is not credible.").

damages.[117] In *Pryer v. C.O. 3 Slavic*, the district court granted a new trial, based partly on the ground that because the plaintiff had presented "undisputed proof of actual injury, an instruction on nominal damages was inappropriate." *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 452 (3d Cir. 2001). In upholding the grant of a new trial, the Court of Appeals noted that "nominal damages may only be awarded in the absence of proof of actual injury." *See id.* at 453. The court observed that the district court had "recognized that he had erroneously instructed the jury on nominal damages and failed to inform it of the availability of compensatory damages for pain and suffering." *Id.* Accordingly, the court held that "[t]he court's error in failing to instruct as to the availability of damages for such intangible harms, coupled with its emphasis on nominal damages, rendered the totality of the instructions confusing and misleading." *Id.* at 454.

[117] *Cf. Brooks v. Andolina*, 826 F.2d 1266, 1269-70 (3d Cir. 1987) (in case tried without a jury, holding that it was error to award only nominal damages because the plaintiff "demonstrated that he suffered actual injury" by testifying "that while in punitive segregation he lost his regular visiting and phone call privileges, his rights to recreation and to use the law library, and his wages from his job").

4.8.3 Section 1983 – Damages – Punitive Damages

Model [118]

In addition to compensatory or nominal damages, you may consider awarding [plaintiff] punitive damages. A jury may award punitive damages to punish a defendant, or to deter the defendant and others like the defendant from committing such conduct in the future. [Where appropriate, the jury may award punitive damages even if the plaintiff suffered no actual injury and so receives nominal rather than compensatory damages.]

You may only award punitive damages if you find that [defendant] [a particular defendant] acted maliciously or wantonly in violating [plaintiff's] federally protected rights. [In this case there are multiple defendants. You must make a separate determination whether each defendant acted maliciously or wantonly.]

- A violation is malicious if it was prompted by ill will or spite towards the plaintiff. A defendant is malicious when [he/she] consciously desires to violate federal rights of which [he/she] is aware, or when [he/she] consciously desires to injure the plaintiff in a manner [he/she] knows to be unlawful. A conscious desire to perform the physical acts that caused plaintiff's injury, or to fail to undertake certain acts, does not by itself establish that a defendant had a conscious desire to violate rights or injure plaintiff unlawfully.

- A violation is wanton if the person committing the violation recklessly or callously disregarded the plaintiff's rights.

If you find that it is more likely than not[119] that [defendant] [a particular defendant] acted

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[118] See Comment for alternative language tailored to Eighth Amendment excessive force claims.

[119] The Court of Appeals has not addressed the question of the appropriate standard of proof for punitive damages with respect to Section 1983 claims, but at least one district court in the Third Circuit has applied the preponderance standard. *See Hopkins v. City of Wilmington*, 615 F.Supp. 1455, 1465 (D. Del. 1985); *cf., e.g., White v. Burlington Northern & Santa Fe R. Co.*, 364 F.3d 789, 805 (6th Cir. 2004) (en banc) ("[T]he appropriate burden of proof on a claim for punitive damages under Title VII is a preponderance of the evidence . . . ."), *aff'd*, 126 S. Ct. 2405 (2006); *compare Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991) (noting that "[t]here is much to be said in favor of a State's requiring . . . a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt'" for punitive damages, but holding that "the lesser standard prevailing in Alabama–'reasonably satisfied from the evidence'–when buttressed . . . by [other] procedural and substantive protections . . . is constitutionally

maliciously or wantonly in violating [plaintiff's] federal rights, then you may award punitive damages [against that defendant].[120] However, an award of punitive damages is discretionary; that is, if you find that the legal requirements for punitive damages are satisfied, then you may decide to award punitive damages, or you may decide not to award them. I will now discuss some considerations that should guide your exercise of this discretion. But remember that you cannot award punitive damages unless you have found that [defendant] [the defendant in question] acted maliciously or wantonly in violating [plaintiff's] federal rights.

If you have found that [defendant] [the defendant in question] acted maliciously or wantonly in violating [plaintiff's] federal rights, then you should consider the purposes of punitive damages. The purposes of punitive damages are to punish a defendant for a malicious or wanton violation of the plaintiff's federal rights, or to deter the defendant and others like the defendant from doing similar things in the future, or both. Thus, you may consider whether to award punitive damages to punish [defendant]. You should also consider whether actual damages standing alone are sufficient to deter or prevent [defendant] from again performing any wrongful acts [he/she] may have performed. Finally, you should consider whether an award of punitive damages in this case is likely to deter other persons from performing wrongful acts similar to those [defendant] may have committed.

If you decide to award punitive damages, then you should also consider the purposes of punitive damages in deciding the amount of punitive damages to award. That is, in deciding the amount of punitive damages, you should consider the degree to which [defendant] should be punished for [his/her] wrongful conduct toward [plaintiff], and the degree to which an award of one sum or another will deter [defendant] or others from committing similar wrongful acts in the future.

In considering the purposes of punishment and deterrence, you should consider the nature of the defendant's action. For example, you are entitled to consider *[include any of the following that are warranted by the evidence]* [whether a defendant's act was violent or non-violent; whether the defendant's act posed a risk to health or safety; whether the defendant acted in a deliberately deceptive manner; and whether the defendant engaged in repeated misconduct, or a single act.] You should also consider the amount of harm actually caused by the defendant's act, [as well as the harm the defendant's act could have caused][121] and the harm that could result if such acts are not deterred

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sufficient").

[120] Use "a particular defendant" and "against that defendant" in cases involving multiple defendants.

[121] This clause may be most appropriate for cases in which a dangerous act luckily turns out to cause less damage than would have been reasonably expected. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459 (1993) (Stevens, J., joined by Rehnquist, C.J., and Blackmun, J.) (noting a state court's description of an example in which a person shoots into a crowd but fortuitously injures no one).

in the future.

[Bear in mind that when considering whether to use punitive damages to punish [defendant], you should only punish [defendant] for harming [plaintiff], and not for harming people other than [plaintiff]. As I have mentioned, in considering whether to punish [defendant], you should consider the nature of [defendant]'s conduct – in other words, how blameworthy that conduct was. In some cases, evidence that a defendant's conduct harmed other people in addition to the plaintiff can help to show that the defendant's conduct posed a substantial risk of harm to the general public, and so was particularly blameworthy. But if you consider evidence of harm [defendant] caused to people other than [plaintiff], you must make sure to use that evidence only to help you decide how blameworthy the defendant's conduct toward [plaintiff] was. Do not punish [defendant] for harming people other than [plaintiff].][122]

[The extent to which a particular amount of money will adequately punish a defendant, and the extent to which a particular amount will adequately deter or prevent future misconduct, may depend upon the defendant's financial resources. Therefore, if you find that punitive damages should be awarded against [defendant], you may consider the financial resources of [defendant] in fixing the amount of such damages.]

Comment

Punitive damages are not available against municipalities. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

"The purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986). "A jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983).[123] "While the *Smith* Court determined that it was unnecessary to show actual malice to qualify for a punitive award . . . , its intent standard, at a minimum, required recklessness in its subjective form. The Court referred to a 'subjective consciousness' of a risk of

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[122] Include this paragraph only when appropriate. *See* Comment for a discussion of *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007).

[123] *See, e.g., Coleman v. Kaye*, 87 F.3d 1491, 1509 (3d Cir. 1996) (in sex discrimination case, holding that "the jury's finding of two acts of intentional discrimination, after having been put on notice of a prior act of discrimination against the same plaintiff, evinces the requisite 'reckless or callous indifference' to [the plaintiff's] federally protected rights"); *Springer v. Henry*, 435 F.3d 268, 281 (3d Cir. 2006) ("A jury may award punitive damages when it finds reckless, callous, intentional or malicious conduct.").

injury or illegality and a "'criminal indifference to civil obligations.'"" *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 536 (1999) (discussing *Smith* in the context of a Title VII case).[124]

The Supreme Court has imposed some due process limits on both the size of punitive damages awards and the process by which those awards are determined and reviewed.[125] In performing the substantive due process review of the size of punitive awards, a court must consider three factors: "the degree of reprehensibility of" the defendant's conduct; "the disparity between the harm or potential harm suffered by" the plaintiff and the punitive award; and the difference between the punitive award "and the civil penalties authorized or imposed in comparable cases." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). The Supreme Court's due process precedents have a dual relevance in Section 1983 cases. First, those precedents presumably govern a court's review of punitive damages awards in Section 1983 cases; there is no reason to think that a different constitutional standard applies to Section 1983 cases[126] (though the *Gore* factors may well apply differently in such cases than they do in cases under state tort law). Second, the concerns elaborated by the Court in the due process cases may also provide some guidance concerning the Court's likely views on the substantive standards that should guide *juries* in Section 1983 cases. Though the Court has not held that juries hearing state-law tort claims must be instructed to consider the *Gore* factors, it is possible that the Court might in the future approve the use of analogous considerations in instructing juries in Section 1983 cases.

The Court's due process decisions, of course, concern the outer limits placed on punitive awards by the Constitution. It is also possible that the Court may in future cases develop subconstitutional principles of federal law that further constrain punitive awards in Section 1983 cases. An example of the application of such principles in a different area of substantive federal law is provided by *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). In *Exxon*, the plaintiffs sought compensatory and punitive damages from Exxon Mobil Corp. and its subsidiary arising from the Exxon Valdez oil spill. The jury awarded $ 5 billion in punitive damages against Exxon. *See id.* at 2614. The court of appeals remitted the punitive award to $ 2.5 billion. *See id.* A divided

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[124] *See also Savarese v. Agriss*, 883 F.2d 1194, 1204 (3d Cir. 1989) ("[F]or a plaintiff in a section 1983 case to qualify for a punitive award, the defendant's conduct must be, at a minimum, reckless or callous. Punitive damages might also be allowed if the conduct is intentional or motivated by evil motive, but the defendant's action need not necessarily meet this higher standard.").

[125] *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (holding that "courts of appeals should apply a de novo standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards").

[126] *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626 (2008) ("The Court's response to outlier punitive damages awards has thus far been confined by [*sic*] claims at the constitutional level, and our cases have announced due process standards that every award must pass.") (citing *State Farm* and *Gore*).

Supreme Court ordered a further reduction of the punitive award to $ 507.5 million on the ground that under the circumstances the appropriate ratio of punitives to compensatories was 1:1. *See id.* at 2634. The *Exxon* Court applied this ratio as a matter of federal "maritime common law," *see id.* at 2626, but the Court's concern with the predictability and consistency of punitive awards, *see id.* at 2627, may apply to Section 1983 cases as well.

However, the particular ratio chosen by the *Exxon* Court is unlikely to constrain all such awards in Section 1983 cases. The *Exxon* Court stressed that based on the jury's findings the conduct in the *Exxon* case involved "no earmarks of exceptional blameworthiness" such as "intentional or malicious conduct" or "behavior driven primarily by desire for gain," and that the case was not one in which the compensatory damage award was small or in which the defendant's conduct was unlikely to be detected. *Id.* at 2633. The *Exxon* Court likewise noted that some areas of law were distinguishable from the *Exxon* case in that those areas implicated a regulatory goal of "induc[ing] private litigation to supplement official enforcement that might fall short if unaided." *See id.* at 2622. These observations suggest why the *Exxon* Court's 1:1 ratio may well not translate to the context of a Section 1983 claim. Moreover, the *Exxon* Court did not state that a ratio such as the one it applied in the *Exxon* case should be included in jury instructions rather than simply being applied by the judge during review of the jury award.[127] However, given the possibility that courts may in the future apply analogous principles in the Section 1983 context, counsel may wish to seek the submission to the jury of interrogatories that elicit the jury's view on relevant factual matters such as whether the conduct qualifying for the punitive award was merely reckless or whether it involved some greater degree of culpability.

The Court's due process precedents indicate a concern that vague jury instructions may increase the risk of arbitrary punitive damages awards. *See State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) ("Vague instructions, or those that merely inform the jury to avoid 'passion or prejudice,' . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory"). However, as noted above, the Court has not held that due process requires jury instructions to reflect *Gore*'s three-factor approach.[128] To the contrary, the Court has upheld against

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[127] Admittedly, the Court explained that its use of a ratio was preferable to setting a numerical cap on punitive awards because the ratio "leave[s] the effects of inflation to the jury or judge who assesses the value of actual loss, by pegging punitive to compensatory damages using a ratio or maximum multiple." *Exxon*, 128 S. Ct. at 2629. However, this statement need not be read to mean that the jury should be instructed to apply the relevant ratio; it can as easily be taken as an observation that by "pegging punitive to compensatory damages" the ratio will incorporate the jury's stated view on the appropriate amount of compensatory damages.

[128] To date, one of the few specific requirements imposed by the Court is that "[a] jury must be instructed . . . that it may not use evidence of out of state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422. This requirement stems from the concern that a state should not impose punitive damages based

a due process challenge an award rendered by a jury that had received instructions that were much less specific. *See Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 6 n.1 (1991) (quoting jury instruction); *id.* at 43 (O'Connor, J., dissenting) (arguing that "the trial court's instructions in this case provided no meaningful standards to guide the jury's decision to impose punitive damages or to fix the amount"). It is not clear that it would be either feasible or advisable to import all three *Gore* factors into jury instructions on punitive damages in Section 1983 cases.

The first factor–the reprehensibility of the defendant's conduct–may appropriately be included in the instruction. The model instruction lists that consideration among the factors that the jury may consider in determining whether to award punitive damages and in determining the size of such damages. In assessing reprehensibility, a jury can take into account, for instance, whether an offense was violent or nonviolent; whether the offense posed a risk to health or safety; or whether a defendant was deceptive. *See Gore*, 517 U.S. at 576.[129] The jury can also take into account that "repeated misconduct is more reprehensible than an individual instance of malfeasance." *Id.* at 577.[130]

In considering reprehensibility, the jury can also be instructed to consider the harm actually caused by the defendant's act, as well as the harm the defendant's act could have caused and the harm that could result if such acts are not deterred in the future.[131] However, the Court's decision

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on a defendant's legal out-of-state conduct; that concern, of course, does not arise in the context of Section 1983 suits.

The Court's decision in *Philip Morris*, 127 S. Ct. 1057 (2007) – which addresses the jury's consideration of harm to third parties – is discussed below.

[129] *See also CGB Occupational Therapy, Inc. v. RHA Health Services, Inc.*, 499 F.3d 184, 190 (3d Cir. 2007) ("In evaluating the degree of Sunrise's reprehensibility in this case, we must consider whether: '[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.'") (quoting *Campbell*, 538 U.S. at 419).

[130] In considering whether the defendant was a recidivist malefactor, the jury should consider only misconduct similar to that directed against the plaintiff. *See State Farm*, 538 U.S. at 424 ("[B]ecause the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.").

[131] *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993) (Stevens, J., joined by Rehnquist, C.J., and Blackmun, J.) ("It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that

in *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007), underscores the need for caution with respect to such an instruction in a case where the jury might consider harm to people other than the plaintiff. If a jury bases a punitive damages award "in part upon its desire to *punish* the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent)," that award "amount[s] to a taking of 'property' from the defendant without due process." *Philip Morris*, 127 S. Ct. at 1060. The Court reasoned that permitting a jury to punish the defendant for harm caused to non-plaintiffs would deprive the defendant of the chance to defend itself and would invite standardless speculation by the jury:

> [A] defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary. For another [thing], to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer--risks of arbitrariness, uncertainty and lack of notice--will be magnified.

Philip Morris, 127 S. Ct. at 1063.

However, the *Philip Morris* Court conceded that "harm to other victims ... is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility": In other words, "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible-- although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse." *Id.* at 1064. But the Court stressed that "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* States[132] must ensure "that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* "[W]here the risk of that misunderstanding is a significant one--because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury--a court, upon request, must protect against that risk." *Id.* at 1065.

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might have resulted if similar future behavior were not deterred.") (emphasis in original).

[132] Philip Morris concerned a state-law claim litigated in state court and thus the Court focused on the limits imposed by the Fourteenth Amendment's Due Process Clause on state governments. Presumably, the Fifth Amendment's Due Process Clause imposes a similar constraint with respect to federal claims litigated in federal court.

Accordingly, where evidence or counsel's argument to the jury indicates that the defendant's conduct harmed people other than the plaintiff, *Philip Morris* requires the court – upon request – to ensure that the jury is not confused as to the use it can make of this information in assessing punitive damages. The *Philip Morris* Court did not specify how the trial court should prevent jury confusion on this issue. The penultimate paragraph in Instruction 4.8.3 attempts to explain the distinction between permissible and impermissible uses of information relating to harm to third parties. This paragraph is bracketed to indicate that it should be given only when necessitated by the evidence or argument presented to the jury.

The model does not state that reprehensibility is a prerequisite to the award of punitive damages,[133] because precedent in civil rights cases indicates that the jury can award punitive damages if it finds the defendant maliciously or wantonly violated the plaintiff's rights, without separately finding that the defendant's conduct was egregious. In *Kolstad*, the Supreme Court interpreted a statutory requirement that the jury must find the defendant acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual" in order to award punitive damages under Title VII. *See Kolstad*, 527 U.S. at 534 (quoting 42 U.S.C. § 1981a(b)(1)). Reasoning that "[t]he terms 'malice' and 'reckless' ultimately focus on the actor's state of mind," the Court rejected the view "that eligibility for punitive damages can only be described in terms of an employer's 'egregious' misconduct." *Kolstad*, 527 U.S. at 534-35. Since the *Kolstad* Court drew on the *Smith v. Wade* standard in delineating the punitive damages standard under Title VII, *Kolstad*'s reasoning seems equally applicable to the standard for punitive damages under Section 1983. The Third Circuit has applied *Kolstad*'s definition of recklessness to a Section 1983 case, albeit in a non-precedential opinion. *See Whittaker v. Fayette County*, 65 Fed. Appx. 387, 393 (3d Cir. April 9, 2003) (non-precedential opinion); *see also Schall v. Vazquez*, 322 F. Supp. 2d 594, 602 (E.D. Pa. 2004) (in a Section 1983 case, applying *Kolstad*'s holding "that a defendant's state of mind and not the egregious conduct is determinative in awarding punitive damages").

It is far less clear that the jury should be instructed to consider the second *Gore* factor (the ratio of actual to punitive damages).[134] Though the Court has "decline[d] to impose a bright line ratio which a punitive damages award cannot exceed," it has stated that "in practice, few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425. However, the analysis is complicated by the possibility that the permissible ratio will vary inversely to the size of the compensatory damages

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[133] Some sets of model instructions include a reference to "extraordinary misconduct" or equivalent terms. *See* Eighth Circuit (Civil) Instruction 4.53 ("extraordinary misconduct"); Sand Instruction 87-92 ("extreme or outrageous conduct"). One reason for the inclusion of this language may be that the instruction approved in *Smith v. Wade* referred to "extraordinary misconduct." *Smith*, 461 U.S. at 33.

[134] It is also unclear how a court would instruct a jury on the third Gore factor in the context of a Section 1983 suit; the model instruction omits any reference to this factor.

award.[135] *See id.* (stating that "ratios greater than those we have previously upheld may comport with due process" where an especially reprehensible act causes only small damages, and that conversely, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee").[136] Instructing a jury that its punitive damages award must not exceed some multiple of its compensatory damages award might have undesirable effects. Though such a directive might constrain some punitive damages awards, in other cases (where a jury would otherwise be inclined to award only a small amount of punitive damages) calling the jury's attention to a multiple of the compensatory award might anchor the jury's deliberations at a higher figure. In addition, it is possible that a jury that wished to award a particular total sum to a plaintiff might redistribute its award between compensatory and punitive damages in order to comply with the stated ratio.

Due to the complexities and potential downsides of a proportionality instruction, the Committee has not included proportionality language in the model instruction. However, in a case in which the compensatory damages will be substantial (such as a wrongful death case), it may be useful to instruct the jury to consider the relationship between the amount of any punitive award and

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[135] Indeed, an inflexible ratio would conflict with the well-established principle that compensatory damages are not a prerequisite for the imposition of punitive damages in civil rights cases. *See Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000) ("Punitive damages may . . . be awarded based solely on a constitutional violation, provided the proper showing is made."); *cf. Alexander v. Riga*, 208 F.3d 419, 430 (3d Cir. 2000) (in suit under Fair Housing Act and Civil Rights Act of 1866, noting that "beyond a doubt, punitive damages can be awarded in a civil rights case where a jury finds a constitutional violation, even when the jury has not awarded compensatory or nominal damages."); *see also Williams v. Kaufman County*, 352 F.3d 994, 1016 (5th Cir. 2003) ("Because actions seeking vindication of constitutional rights are more likely to result only in nominal damages, strict proportionality would defeat the ability to award punitive damages at all.").

The Court of Appeals has also suggested that the denominator used by a reviewing court might sometimes be larger than the amount of compensatory damages actually awarded by the jury. *See CGB Occupational*, 499 F.3d at 192 n.4 (citing with apparent approval a case in which the court "measur[ed] $150,000 punitive damages award against $135,000 award in attorney fees and costs, rather than against $2,000 compensatory award" and a case in which the court "consider[ed] expert testimony of potential loss to plaintiffs in the amount of $769,895, in addition to compensatory damages awarded for past harm, as part of ratio's denominator").

[136] *See also Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2622 (2008) (noting that "heavier punitive awards have been thought to be justifiable ... when the value of injury and the corresponding compensatory award are small (providing low incentives to sue)").

the amount of harm the defendant caused to the plaintiff.[137] In such a case, instructing the jury to consider that relationship would not unduly confine a punitive award but could help to ensure that any such award is not unconstitutionally excessive.

The Court's due process cases also raise some question about the implications of evidence concerning a defendant's financial resources. The Court has stated that such evidence will not loosen the limits imposed by due process on the size of a punitive award. *See State Farm*, 538 U.S. at 427 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").[138] Elsewhere, the Court has noted its concern that evidence of wealth could trigger jury bias: "Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994). Although those concerns may be salient in products liability cases brought against wealthy corporations, in Section 1983 cases, evidence of an individual defendant's financial resources may be more likely to constrain than to inflate a punitive damages award. However, the possibility that a government employer might indemnify an individual defendant complicates the analysis.

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[137] A jury instructed to consider this ratio should be directed, for this purpose, to consider the harm the defendant caused *the plaintiff*, not harm caused to third parties. *See Philip Morris*, 127 S.Ct. at 1063 (describing the second *Gore* factor as "whether the award bears a reasonable relationship to the actual and potential harm caused by the defendant to the plaintiff").

[138] In the same discussion, however, the Court quoted with apparent approval Justice Breyer's concurrence in Gore: "[Wealth] provides an open ended basis for inflating awards when the defendant is wealthy .... That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct." *State Farm*, 538 U.S. at 427-28 (quoting *Gore*, 517 U.S. at 591 (Breyer, J., joined by O'Connor & Souter, JJ., concurring)). Although the *State Farm* Court's quotation of this passage suggests the Court did not consider wealth an impermissible factor in the award of punitive damages, Justice Ginsburg posited that the Court's reasoning might "unsettle" that principle. *See State Farm*, 538 U.S. at 438 n.2 (Ginsburg, J., dissenting).

The Court of Appeals has considered the defendant's wealth as a factor relevant to its due process analysis; the court noted that a rich defendant may be more difficult to deter and that in some cases a rich defendant may engage in litigation misconduct in order to wear down an impecunious plaintiff. *See CGB Occupational*, 499 F.3d at 194 ("What sets this case apart and makes it, we hope, truly unusual is the repeated use of procedural devices to grind an opponent down, without regard for whether those devices advanced any legitimate interest."). The court suggested, however, that a jury might have more difficulty than judges would in assessing litigation misconduct and its possible relevance to a punitive damages analysis. *See id.* at 194 n. 7.

"[E]vidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded." *Fact Concerts*, 453 U.S. at 270. If an individual defendant will not be indemnified for an award of punitive damages, it seems clear that evidence of the defendant's financial resources is relevant and admissible on the question of punitive damages. *See Fact Concerts*, 453 U.S. at 269 ("By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, [Section 1983] directly advances the public's interest in preventing repeated constitutional deprivations.").

If the individual defendant will be indemnified, however, the relevance of the individual defendant's limited financial resources becomes more complex. Arguably, there may be an even more pressing need to ensure that jury awards are not inflated. In a partial dissent in *Keenan v. City of Philadelphia*, 983 F.2d 459 (3d Cir. 1992), Judge Higginbotham argued that when an individual defendant will be indemnified by his or her government employer, the plaintiff should be required to submit evidence of the individual defendant's net worth in order to obtain punitive damages. *See id.* at 484 (Higginbotham, J., dissenting in part). Judge Higginbotham asserted that without such evidence, a jury might be too inclined to award large punitive damages, to the detriment of innocent taxpayers. *See id.* at 477. Judge Higginbotham's view, however, has not become circuit precedent. An earlier Third Circuit panel had stated that "evidence of [the defendant's] financial status" is not "a prerequisite to the imposition of punitive damages." *Bennis v. Gable*, 823 F.2d 723, 734 n.14 (3d Cir. 1987). Though Judge Higginbotham rejected *Bennis*'s statement as "dicta," *Keenan*, 983 F.2d at 482 (Higginbotham, J., dissenting in part), Judge Becker disagreed, *see id.* at 472 n.12 (footnote by Becker, J.) (describing *Bennis* as "circuit precedent"), and a later district court opinion has taken the view that Judge Higginbotham's approach is not binding, *see Garner v. Meoli*, 19 F. Supp. 2d 378, 392 (E.D.Pa. 1998) (rejecting "defendants argument, based on Judge Higginbotham's dissent in *Keenan* . . . , that a prerequisite to the awarding of punitive damages is evidence of defendants' net worth and that the burden for producing such evidence must be carried by plaintiffs"). Thus, it appears that under current Third Circuit law the plaintiff need not submit evidence of the defendant's net worth in order to obtain punitive damages in a Section 1983 case.[139] Accordingly, the last paragraph of the model is bracketed because it should be omitted in cases where no evidence is presented concerning the defendant's finances.

The definition of "malicious" in Instruction 4.8.3 (with respect to punitive damages) differs from that provided in Instruction 4.10 (with respect to Eighth Amendment excessive force claims).

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[139] One commentator has argued that if an indemnified defendant submits evidence of limited personal means, the plaintiff should be permitted to submit evidence that the defendant will be indemnified. *See* Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1247-48 (2001) ("If a defendant introduces evidence of personal financial circumstances in order to persuade the jury to award low punitive damages, when in fact the defendant's punitive damages will be indemnified, failure to inform the jury about indemnification seriously misleads the jury."). The Third Circuit has not addressed this question.

If the jury finds that the defendant acted "maliciously and sadistically, for the purpose of causing harm" (such that the defendant violated the Eighth Amendment by employing excessive force), that finding should also establish that the defendant "acted maliciously or wantonly in violating the plaintiff's federal rights," so that the jury has discretion to award punitive damages. Thus, in an Eighth Amendment excessive force case involving only one claim and one defendant, the Committee suggests that the court substitute the following for the first three paragraphs of Instruction 4.8.3:

> If you have found that [defendant] violated the Eighth Amendment by using force against [plaintiff] maliciously and sadistically, for the purpose of causing harm, then you may consider awarding punitive damages in addition to nominal or compensatory damages. A jury may award punitive damages to punish a defendant, or to deter the defendant and others like [him/her] from committing such conduct in the future. Where appropriate, the jury may award punitive damages even if the plaintiff suffered no actual injury. However, bear in mind that an award of punitive damages is discretionary; that is, you may decide to award punitive damages, or you may decide not to award them.

However, in Eighth Amendment excessive force cases that also involve other types of claims (or that involve claims against other defendants, such as for failure to intervene), the court should not omit the first three paragraphs of Instruction 4.8.3. Rather, the court should modify the first bullet point in the second paragraph, so that it begins: "● For purposes of considering punitive damages, a violation is malicious if ...."

4.9 Section 1983 – Excessive Force (Including Some Types of Deadly Force) – Stop, Arrest, or other "Seizure"

Model

The Fourth Amendment to the United States Constitution protects persons from being subjected to excessive force while being [arrested] [stopped by police]. In other words, a law enforcement official may only use the amount of force necessary under the circumstances to [make the arrest] [conduct the stop]. Every person has the constitutional right not to be subjected to excessive force while being [arrested] [stopped by police], even if the [arrest] [stop] is otherwise proper.

In this case, [plaintiff] claims that [defendant] used excessive force when [he/she] [arrested] [stopped] [plaintiff]. In order to establish that [defendant] used excessive force, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] intentionally committed certain acts.

Second: Those acts violated [plaintiff's] Fourth Amendment right not to be subjected to excessive force.

In determining whether [defendant's] acts constituted excessive force, you must ask whether the amount of force [defendant] used was the amount which a reasonable officer would have used in [making the arrest] [conducting the stop] under similar circumstances. You should consider all the relevant facts and circumstances (leading up to the time of the [arrest] [stop]) that [defendant] reasonably believed to be true at the time of the [arrest] [stop]. You should consider those facts and circumstances in order to assess whether there was a need for the application of force, and the relationship between that need for force, if any, and the amount of force applied. The circumstances relevant to this assessment can include *[list any of the following factors, and any other factors, warranted by the evidence]*:

- the severity of the crime at issue;
- whether [plaintiff] posed an immediate threat to the safety of [defendant] or others;
- the possibility that [plaintiff] was armed;
- the possibility that other persons subject to the police action were violent or dangerous;
- whether [plaintiff] was actively resisting arrest or attempting to evade arrest by flight;
- the duration of [defendant's] action;
- the number of persons with whom [defendant] had to contend; and
- whether the physical force applied was of such an extent as to lead to unnecessary injury.

The reasonableness of [defendant's] acts must be judged from the perspective of a reasonable officer on the scene. The law permits the officer to use only that degree of force necessary to [make

the arrest] [conduct the stop]. However, not every push or shove by a police officer, even if it may later seem unnecessary in the peace and quiet of this courtroom, constitutes excessive force. The concept of reasonableness makes allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are sometimes tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

As I told you earlier, [plaintiff] must prove that [defendant] intended to commit the acts in question; but apart from that requirement, [defendant's] actual motivation is irrelevant. If the force [defendant] used was unreasonable, it does not matter whether [defendant] had good motivations. And an officer's improper motive will not establish excessive force if the force used was objectively reasonable.

What matters is whether [defendant's] acts were objectively reasonable in light of the facts and circumstances confronting the defendant.

Comment

Applicability of the Fourth Amendment standard for excessive force. Claims of "excessive force in the course of making an arrest, investigatory stop, or other 'seizure'" are analyzed under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 388 (1989). By contrast, claims of excessive force that arise after a criminal defendant has been convicted and sentenced are analyzed under the Eighth Amendment, *see id.* at 392 n.6; *see also Torres v. McLaughlin*, 163 F.3d 169, 174 (3d Cir. 1998) (holding that "post-conviction incarceration cannot be a seizure within the meaning of the Fourth Amendment"). The Supreme Court "ha[s] not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." *Graham*, 490 U.S. at 395 n.10; *compare Fuentes v. Wagner*, 206 F.3d 335, 347 (3d Cir. 2000) (holding that the Fourth Amendment objective reasonableness test did not apply to "a pretrial detainee's excessive force claim *arising in the context of a prison disturbance*" (emphasis in original)). "It is clear, however, that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham*, 490 U.S. at 395 n.10.

Because the excessive force standards differ depending on the source of the constitutional protection, it will be necessary to determine which standard ought to apply. The Fourth Amendment excessive force standard attaches at the point of a "seizure." *See Abraham v. Raso*, 183 F.3d 279, 288 (3d Cir. 1999) ("To state a claim for excessive force as an unreasonable seizure under the Fourth Amendment, a plaintiff must show that a 'seizure' occurred and that it was unreasonable."). A "seizure" occurs when a government official has, "by means of physical force or show of authority, . . . in some way restrained [the person's] liberty." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *see also Brower v. County of Inyo*, 489 U.S. 593, 596 (1989); *Berg v. County of Allegheny*, 219 F.3d 261, 269 (3d Cir. 2000) (per curiam) ("A person is seized for Fourth Amendment purposes only if he is detained by means intentionally applied to terminate his freedom of movement.").

The Fourth Amendment excessive force standard continues to apply during the process of the arrest. In *U.S. v. Johnstone*, the court held that a Fourth Amendment excessive force instruction was proper where "the excessive force committed by Johnstone took place *during* the arrests of Sudziarski, Perez, and Blevins, even if those victims were in handcuffs." *U.S. v. Johnstone*, 107 F.3d 200, 205 (3d Cir. 1997). As the *Johnstone* Court explained,

> a 'seizure' can be a process, a kind of continuum, and is not necessarily a discrete moment of initial restraint. *Graham* shows us that a citizen can remain "free" for Fourth Amendment purposes for some time after he or she is stopped by police and even handcuffed. Hence, pre-trial detention does not necessarily begin the moment that a suspect is not free to leave; rather, the seizure can continue and the Fourth Amendment protection against unreasonable seizures can apply beyond that point.

Johnstone, 107 F.3d at 206-07; *see also id.* at 206 (holding that "Johnstone's assault on Perez in the police station garage, after he had been transported from the scene of the initial beating ... also occurred during the course of Perez's arrest").

The model is designed for cases in which it is not in dispute that the challenged conduct occurred during a "seizure."

The content of the Fourth Amendment standard for excessive force. The Fourth Amendment permits the use of "reasonable" force. *Graham*, 490 U.S. at 396. "[E]ach case alleging excessive force must be evaluated under the totality of the circumstances." *Sharrar v. Felsing*, 128 F.3d 810, 822 (3d Cir. 1997); *see also Rivas v. City of Passaic*, 365 F.3d 181, 198 (3d Cir. 2004) ("While some courts 'freeze the time frame' and consider only the facts and circumstances at the precise moment that excessive force is applied, other courts, including this one, have considered all of the relevant facts and circumstances leading up to the time that the officers allegedly used excessive force."); *Abraham*, 183 F.3d at 291 (expressing "disagreement with those courts which have held that analysis of 'reasonableness' under the Fourth Amendment requires excluding any evidence of events preceding the actual 'seizure'"); *Curley v. Klem*, 499 F.3d 199, 212 (3d Cir. 2007) ("*Curley II*") (noting with approval the district court's view "that the analysis in this case could not properly be shrunk into the few moments immediately before Klem shot Curley, but instead must be decided in light of all the events which had taken place over the course of the entire evening").[140] Determining reasonableness "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade

[140] However, the court of appeals has rejected the contention that a lack of probable cause to make an arrest in itself establishes that the force used in making the arrest was excessive. *See Snell v. City of York*, 564 F.3d 659, 672 (3d Cir. 2009) (rejecting plaintiff's argument "that the force applied was excessive solely because probable cause was lacking for his arrest").

arrest by flight." *Graham*, 490 U.S. at 396.[141] Other relevant factors may include "the possibility that the persons subject to the police action are violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time." *Kopec v. Tate*, 361 F.3d 772, 777 (3d Cir. 2004).

Physical injury is relevant but it is not a prerequisite of an excessive force claim. *See Sharrar*, 128 F.3d at 822 ("We do not agree that the absence of physical injury necessarily signifies that the force has not been excessive, although the fact that the physical force applied was of such an extent as to lead to injury is indeed a relevant factor to be considered as part of the totality."); *see also Mellott v. Heemer*, 161 F.3d 117, 123 (3d Cir. 1998) (citing "the lack of any physical injury to the plaintiffs" as one of the factors supporting court's conclusion that force used was objectively reasonable).

In the context of deadly force, the Third Circuit has stated the inquiry thus: "Giving due regard to the pressures faced by the police, was it objectively reasonable for the officer to believe, in light of the totality of the circumstances, that deadly force was necessary to prevent the suspect's escape, and that the suspect posed a significant threat of death or serious physical injury to the officer or others?" *Abraham*, 183 F.3d at 289 (citing *Graham* and *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)). An instruction is provided below for use in cases where *Garner*'s deadly force analysis is appropriate. *See infra* Instruction 4.9.1. The Supreme Court has cautioned, however, that some uses of deadly force – such as an officer's decision to stop a fleeing driver by ramming the car – are not amenable to *Garner* analysis because their facts differ significantly from those in *Garner*; such cases should receive the more general *Graham* reasonableness analysis. *See Scott v. Harris*, 127 S. Ct. 1769, 1777 (2007) ("*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test ... , to the use of a particular type of force in a particular situation.").

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[141] This inquiry should be based on the facts that the officer reasonably believed to be true at the time of the encounter. *See Saucier v. Katz*, 533 U.S. 194, 205 (2001) ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back ... the officer would be justified in using more force than in fact was needed."); *Estate of Smith v. Marasco*, 318 F.3d 497, 516-17 (3d Cir. 2003) (analyzing Fourth Amendment excessive force claim based on officers' knowledge or "objectively reasonable belief" concerning relevant facts); *Curley v. Klem*, 298 F.3d 271, 280 (3d Cir. 2002) ("*Curley I*") (holding that, viewed in light most favorable to plaintiff, evidence established excessive force because "under [plaintiff]'s account of events, it was unreasonable for [defendant] to fire at [plaintiff] based on his unfounded, mistaken conclusion that [plaintiff] was the suspect in question"). One ground for finding an officer's belief unreasonable is that a reasonable officer would have taken a step that would have revealed the belief to be erroneous. *See Curley I*, 298 F.3d at 281 (analyzing qualified immunity question based on the assumption "that a reasonable officer in Klem's position would have looked inside the Camry upon arriving at the scene").

Reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"; and the decisionmaker must consider "that police officers are often forced to make split second judgments–in circumstances that are tense, uncertain, and rapidly evolving–about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

The defendant's actual "intent or motivation" is irrelevant; what matters is whether the defendant's acts were "'objectively reasonable' in light of the facts and circumstances confronting" the defendant. *Id.* at 397; *see also Estate of Smith v. Marasco*, 318 F.3d 497, 515 (3d Cir. 2003) ("[I]f a use of force is objectively unreasonable, an officer's good faith is irrelevant; likewise, if a use of force is objectively reasonable, any bad faith motivation on the officer's part is immaterial.").[142] (However, evidence that the defendant disliked the plaintiff can be considered when weighing the credibility of the defendant's testimony. *See Graham*, 490 U.S. at 399 n.12.)

Heck v. Humphrey. If a convicted prisoner must show that his or her conviction was erroneous in order to establish a Section 1983 unlawful arrest claim, then the plaintiff cannot proceed with the claim until the conviction has been reversed or otherwise invalidated. *See Heck v. Humphrey*, 512 U.S. 477, 486-87 & n.6 (1994) (giving the example of a conviction "for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest").[143] In *Lora-Pena v. F.B.I.*, 529 F.3d 503 (3d Cir. 2008), the court of appeals held that *Heck* did not bar excessive force claims by a plaintiff who had been convicted of assault on a federal officer and resisting arrest; the court reasoned that the plaintiff's "convictions for resisting arrest and assaulting officers would not be inconsistent with a holding that the officers, during a lawful arrest, used excessive (or unlawful) force in response to his own unlawful actions." *Id.* at 506.

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[142] Of course, a defendant will not be liable for using excessive force if she did not intend to commit the acts that constituted the excessive force. Thus, in holding that "the district court erred by instructing the jury as to 'deliberate indifference'" in the context of a Fourth Amendment excessive force claim, the Third Circuit noted that "there is no dispute that Wilson committed intentional acts when he arrested Mosley and used physical force against him. Whether he intended to violate his civil rights in the process is irrelevant." *Mosley v. Wilson*, 102 F.3d 85, 95 (3d Cir. 1996).

[143] *See generally* Comment 4.12 (discussing the implications of *Heck*).

4.9.1 Section 1983 – Instruction for *Garner*-Type Deadly Force Cases – Stop, Arrest, or other "Seizure"

Model

The Fourth Amendment to the United States Constitution protects persons from being subjected to excessive force while being [arrested] [stopped by police]. In other words, a law enforcement official may only use the amount of force necessary under the circumstances to [make the arrest] [conduct the stop]. Every person has the constitutional right not to be subjected to excessive force while being [arrested] [stopped by police], even if the [arrest] [stop] is otherwise proper.

In this case, [plaintiff] claims that [defendant] violated [plaintiff's] Fourth Amendment rights by using deadly force against [plaintiff] [plaintiff's decedent].

An officer may not use deadly force to prevent a suspect from escaping unless deadly force is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. Also, the officer must give the suspect a warning before using deadly force, if it is feasible under the circumstances to give such a warning.

In order to establish that [defendant] violated the Fourth Amendment by using deadly force, [plaintiff] must prove that [defendant] intentionally committed acts that constituted deadly force against [plaintiff]. If you find that [defendant] [describe nature of deadly force alleged by plaintiff], then you have found that [defendant] used deadly force. In addition, [plaintiff] must prove [at least one of the following things][144]:

- deadly force was not necessary to prevent [plaintiff's] escape; or
- [defendant] did not have probable cause to believe that [plaintiff] posed a significant threat of serious physical injury to [defendant] or others; or
- it would have been feasible for [defendant] to give [plaintiff] a warning before using deadly force, but [defendant] did not do so.

You should consider all the relevant facts and circumstances (leading up to the time of the encounter) that [defendant] reasonably believed to be true at the time of the encounter. The reasonableness of [defendant's] acts must be judged from the perspective of a reasonable officer on the scene. The concept of reasonableness makes allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are sometimes tense, uncertain, and

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[144] Include all bullet points that are warranted by the evidence. Include the bracketed language if listing more than one bullet point.

rapidly evolving, about the amount of force that is necessary in a particular situation.

As I told you earlier, [plaintiff] must prove that [defendant] intended to commit the acts in question; but apart from that requirement, [defendant's] actual motivation is irrelevant. If the force [defendant] used was unreasonable, it does not matter whether [defendant] had good motivations. And an officer's improper motive will not establish excessive force if the force used was objectively reasonable.

Comment

The Fourth Amendment excessive force standard discussed in Comment 4.9, supra, applies to cases arising from the use of deadly force; but such cases have also generated some more specific guidance from the Supreme Court and the Court of Appeals. As discussed in this Comment, in some cases involving the use of deadly force the court should use Instruction 4.9 (and not Instruction 4.9.1), while other cases may parallel the facts of *Tennessee v. Garner*, 471 U.S. 1, 3 (1985), closely enough to warrant the use of Instruction 4.9.1 instead.

The Supreme Court has held that deadly force may not be used "to prevent the escape of an apparently unarmed suspected felon . . . . unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).[145] "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Garner*, 471 U.S. at 11.

However, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11. Accordingly, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Garner*, 471 U.S. at 11-12.

The Court of Appeals has summed up the standard as follows: "Giving due regard to the pressures faced by the police, was it objectively reasonable for the officer to believe, in light of the totality of the circumstances, that deadly force was necessary to prevent the suspect's escape, and that the suspect posed a significant threat of death or serious physical injury to the officer or others?" *Abraham v. Raso*, 183 F.3d 279, 289 (3d Cir. 1999) (citing *Graham v. Connor*, 490 U.S. 386 (1989), and *Garner*).

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[145] "[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Garner*, 471 U.S. at 7.

It is important to note that the *Garner* test will not apply to all uses of deadly force. As noted in Comment 4.9, the Supreme Court has cautioned that some types of deadly force – such as an officer's decision to stop a fleeing driver by ramming the car – are not amenable to *Garner* analysis because their facts differ significantly from those in *Garner*; such cases should receive the more general *Graham* reasonableness analysis. *See Scott v. Harris*, 127 S. Ct. 1769, 1777 (2007) ("*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test ... , to the use of a particular type of force in a particular situation."). After a detailed analysis of the circumstances of the car chase in *Scott*, the Court concluded on the facts of that case that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Scott*, 127 S. Ct. at 1779.

What constitutes deadly force.[146] Although *Garner* concerned a shooting, the Court's reasoning potentially extends to other types of lethal force. *See Garner*, 471 U.S. at 31 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., dissenting) ("By declining to limit its holding to the use of firearms, the Court unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk.").

The Court of Appeals has not provided much guidance on the scope and nature of the term "deadly force."[147] *In re City of Philadelphia Litigation* is the only case in which the Court of Appeals has so far confronted the question of defining deadly force for *Garner* purposes.[148] The

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[146] As noted above, some uses of deadly force will give rise to cases in which a *Garner*-type instruction, such as Instruction 4.9.1, is not appropriate. The remainder of this Comment uses the term "deadly force" to refer to deadly force used under circumstances which render a *Garner*-type instruction appropriate.

[147] For a summary of cases in other circuits, see Avery, Rudovsky & Blum § 2.22 ("The use of instrumentalities other than firearms may constitute the deployment of deadly force. Police cars have been held to be instruments of deadly force. The lower federal courts have split on the question of whether police dogs constitute deadly force.").

[148] *Compare In re City of Philadelphia Litigation*, 49 F.3d 945, 966 (3d Cir. 1995) (opinion of Greenberg, J.) (concluding that defendants' actions in dropping explosive on roof of house and allowing ensuing fire to burn did not constitute "deadly force" so as to trigger *Garner* standard), and *id.* at 973 n.1 (opinion of Scirica, J.) ("Although I believe the police may have used deadly force against the MOVE members, that confrontation is readily distinguishable from the situation in *Garner*."), *with id.* at 978 n.1 (opinion of Lewis, J.) ("I believe that *Garner* controls, and under *Garner*, it is clear to me that the deadly force used here was excessive as a matter of law and, therefore, unlawful."). The panel members' debate, in *In re City of Philadelphia Litigation,* over whether *Garner* was the appropriate standard to apply prefigured

extraordinary facts of that case, coupled with the fact that none of the opinions handed down clearly commanded a majority of the panel on the definitional question,[149] render it difficult to distill principles from that case that can be applied more generally. However, at least two members of the panel in *City of Philadelphia* relied upon the Model Penal Code's definition of deadly force "as 'force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm,'"[150] and one district court has since followed the MPC definition, *see Schall v. Vazquez*, 322 F.Supp.2d 594, 600 (E.D.Pa. 2004) (holding that "[p]ointing a loaded gun at another person is a display of deadly force").

In some cases, there may be a jury question as to whether the force employed was "deadly." *See, e.g.*, *Marley v. City of Allentown*, 774 F. Supp. 343, 346 (E.D. Pa. 1991) (rejecting contention "that the court erred in instructing the jury to determine whether or not the force Officer Effting used was 'deadly'"), *aff'd without opinion*, 961 F.2d 1567 (3d Cir. 1992). In such cases, it may be necessary to instruct the jury both on deadly force and on excessive force more generally. *See id.* However, if the court can resolve as a matter of law whether the force used was deadly or not, the court should rule on this question and should provide either Instruction 4.9 or Instruction 4.9.1 but not both.

Probable cause to believe suspect dangerous. Probable cause to believe a suspect has committed a burglary does not, "without regard to the other circumstances, automatically justify the use of deadly force." *Garner*, 471 U.S. 21 (stating that "the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous"). The *Garner* Court did not elaborate the range of circumstances that would provide the requisite showing of probable cause to believe the suspect dangerous. *See Garner*, 471 U.S. at 32 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., dissenting) ("Police are given no guidance for determining which objects, among an array of potentially lethal weapons ranging from guns to knives to baseball bats to rope,

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the Supreme Court's decision, in *Scott v. Harris*, to limit the reach of the *Garner* test.

The Court of Appeals has decided other cases involving use of deadly force, but because those cases involved shootings, *see, e.g.*, *Carswell v. Borough of Homestead*, 381 F.3d 235, 237 (3d Cir. 2004), the court did not have occasion to consider what other types of force could fall within the definition of "deadly force."

[149] The portion of Judge Greenberg's opinion that addressed the definition of deadly force was joined by Judge Scirica, "but only for the limited purpose of agreeing that *Tennessee v. Garner* is inapplicable and that the appropriate inquiry is the reasonableness of the city defendants' acts." *In re City of Philadelphia Litigation*, 49 F.3d at 964-65.

[150] *In re City of Philadelphia Litigation*, 49 F.3d at 966 (opinion of Greenberg, J.) (quoting Model Penal Code § 3.11(2) (1994) and finding no deadly force); *see also id.* at 977 (opinion of Lewis, J.) (quoting same section of MPC and finding deadly force).

will justify the use of deadly force.").[151]

It is clear, however, that the relevant danger can be either to the officer[152] or to a third person.[153] The jury should "determine, after deciding what the real risk . . . was, what was objectively reasonable for an officer in [the defendant]'s position to believe . . . , giving due regard to the pressures of the moment." *Abraham*, 183 F.3d at 294. An officer is not justified in using deadly force at a point in time when there is no longer probable cause to believe the suspect dangerous, even if deadly force would have been justified at an earlier point in time. *See id.* ("A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect.").[154] Thus, for example, the Court of Appeals cited with approval a Ninth Circuit case holding that "the fact that a suspect attacked an officer, giving the officer reason to use deadly force, did not necessarily justify continuing to use lethal force" at a time when "[t]he officer knew help was on the way, had a number of weapons besides his gun, could see that [the suspect] was unarmed and bleeding from multiple gunshot wounds, and had a number of opportunities to evade him." *Abraham*, 183 F.3d at 295 (discussing *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir.1992)).

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[151] In *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam), the Court characterized the choice facing the defendant as "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight," and the Court held that the defendant's decision to shoot did not violate a clearly established right, *see id.* at 200.

Justice Stevens believed the qualified immunity issue in *Brosseau* presented a jury question; as he pointed out, "[r]espondent Haugen had not threatened anyone with a weapon, and petitioner Brosseau did not shoot in order to defend herself. Haugen was not a person who had committed a violent crime; nor was there any reason to believe he would do so if permitted to escape. Indeed, there is nothing in the record to suggest he intended to harm anyone." *Brosseau*, 543 U.S. at 204 (Stevens, J., dissenting) (footnote omitted); *see id.* at 207 n.5 ("The factual issues relate only to the danger that [Haugen] posed while in the act of escaping.").

[152] *See Abraham*, 183 F.3d at 293 (assessing "whether a court can decide on summary judgment that Raso's shooting was objectively reasonable in self-defense").

[153] *See Abraham*, 183 F.3d at 293 ("[T]he undisputed facts are that Abraham had stolen some clothing, resisted arrest, hit or bumped into a car, and was reasonably believed to be intoxicated. Given these facts, a jury could quite reasonably conclude that Abraham did not pose a risk of death or serious bodily injury to others and that Raso could not reasonably believe that he did.").

[154] *Compare id.* at 294-95 ("We can, of course, readily imagine circumstances where a fleeing suspect would have posed such a dire threat to an officer, thereby demonstrating that the suspect posed a serious threat to others, that the officer could justifiably use deadly force to stop the suspect's flight even after the officer escaped harm's way.").

Conduct giving rise to a need for deadly force. In *Grazier v. City of Philadelphia*, then-Chief Judge Becker argued in dissent that "it was an abuse of discretion for the trial judge not to explain to the jury at least the general principle that conduct on the officers' part that unreasonably precipitated the need to use deadly force may provide a basis for holding that the eventual use of deadly force was unreasonable in violation of the Fourth Amendment." *Grazier v. City of Philadelphia*, 328 F.3d 120, 130 (3d Cir. 2003) (Becker, C.J., dissenting) (citing *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir.1993), and *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir.1985) (en banc)).[155] The *Grazier* majority, noting that the plaintiffs had not requested that particular charge, reviewed the district court's charge under a plain error standard. *See id.* at 127. The majority found no plain error:

> Our Court has not endorsed the doctrine discussed in *Gilmere* and *Starks* and, in fact, has recognized disagreement among circuit courts on this issue. *See Abraham v. Raso*, 183 F.3d 279, 295-96 (3d Cir.1999). In *Abraham*, we announced that "[w]e will leave for another day how these cases should be reconciled." *Id.* at 296. In this context, the District Court did not abuse its discretion by refusing to instruct the jury on a doctrine that our Circuit has not adopted. As such, plain error of course did not occur.

Grazier, 328 F.3d at 127.

Municipal liability. In discussing municipal liability, the Supreme Court has noted that

> city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force ... can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

City of Canton, Ohio v. Harris, 489 U.S. 378, 390 n.10 (1989).

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[155] As Chief Judge Becker noted, the facts in *Grazier* included the following: "[T]he defendants were plain-clothes officers, forbidden by Regulations to make traffic stops, and . . . were driving an unmarked car (in a high crime neighborhood) which they pulled perpendicularly in front of plaintiffs' car to make a traffic stop, also in violation of department policy," *Grazier*, 328 F.3d at 131 (Becker, C.J., dissenting) – with the result, according to the plaintiff driver's testimony, that he believed he was being carjacked, *see id.* at 123 (majority opinion). *Compare Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995) (stating that officers who entered a dwelling unlawfully "would not be liable for harm produced by a 'superseding cause,' . . . . [a]nd they certainly would not be liable for harm that was caused by their non-tortious, as opposed to their tortious, 'conduct,' such as the use of reasonable force to arrest [the plaintiff]").

In some cases, the question may arise whether a municipality can be held liable for failure to equip its officers with an alternative to deadly force. *See Carswell v. Borough of Homestead*, 381 F.3d 235, 245 (3d Cir. 2004) ("[W]e have never recognized municipal liability for a constitutional violation because of failure to equip police officers with non-lethal weapons. We decline to do so on the record before us."); *compare id.* at 250 (McKee, J., dissenting in relevant part) (arguing that plaintiff had viable claim against municipality based on plaintiff's contention that municipality's "policy of requiring training only in using deadly force and equipping officers only with a lethal weapon, caused Officer Snyder to use lethal force even though he did not think it reasonable or necessary to do so").

4.10 Section 1983 – Excessive Force – Convicted Prisoner

Model

The Eighth Amendment to the United States Constitution, which prohibits cruel and unusual punishment, protects convicted prisoners from malicious and sadistic uses of physical force by prison officials.

In this case, [plaintiff] claims that [defendant] [briefly describe plaintiff's allegations].

In order to establish [his/her] claim for violation of the Eighth Amendment, [plaintiff] must prove that [defendant] used force against [him/her] maliciously, for the purpose of causing harm, rather than in a good faith effort to maintain or restore discipline. It is not enough to show that, in hindsight, the amount of force seems unreasonable; the plaintiff must show that the defendant used force maliciously, for the purpose of causing harm. When I use the word "maliciously," I mean intentionally injuring another, without just cause or reason, and doing so with excessive cruelty or a delight in cruelty. [Plaintiff] must also prove that [defendant's] use of force caused some [harm] [physical injury][156] to [him/her].

In deciding whether [plaintiff] has proven this claim, you should consider [whether [defendant] used force against [plaintiff],] whether there was a need for the application of force, and the relationship between that need for force, if any, and the amount of force applied. In considering whether there was a need for force, you should consider all the relevant facts and circumstances that [defendant] reasonably believed to be true at the time of the encounter. Such circumstances can include whether [defendant] reasonably perceived a threat to the safety of staff or inmates, and if so, the extent of that threat. In addition, you should consider whether [defendant] made any efforts to temper the severity of the force [he/she] used.

You should also consider [whether [plaintiff] was physically injured and the extent of such injury] [the extent of [plaintiff's] injuries]. But a use of force can violate the Eighth Amendment even if it does not cause significant injury. Although the extent of any injuries to [plaintiff] may help you assess whether a use of force was legitimate, a malicious and sadistic use of force violates the Eighth Amendment even if it produces no significant physical injury.

Comment

Applicability of the Eighth Amendment standard for excessive force. The Eighth Amendment's "Cruel and Unusual Punishments Clause 'was designed to protect those convicted of

[156] See Comment for a discussion of whether harm (and physical injury in particular), constitutes an element of this claim.

crimes,' . . . and consequently the Clause applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'" *Whitley v. Albers*, 475 U.S. 312, 318 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)). It appears that the Eighth Amendment technically does not apply to a convicted prisoner until after the prisoner has been sentenced. *See Graham v. Connor*, 490 U.S. 386, 392 n.6 (1989) (stating in dictum that the view that "the Eighth Amendment's protections [do] not attach until after conviction and sentence" was "confirmed by *Ingraham v. Wright*, 430 U.S. 651, 671 n. 40 (1977)"). However, the Third Circuit has held that "the Eighth Amendment cruel and unusual punishments standards found in *Whitley v. Albers*, 475 U.S. 312 (1986) and *Hudson v. McMillian*, 503 U.S. 1 (1992), apply to a pretrial detainee's excessive force claim *arising in the context of a prison disturbance*." *Fuentes v. Wagner*, 206 F.3d 335, 347 (3d Cir. 2000) (emphasis in original).

Content of the Eighth Amendment standard for excessive force. "The infliction of pain in the course of a prison security measure ... does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable." *Whitley*, 475 U.S. at 319. Rather, "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause," the issue is "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992).[157] The Court has stressed that prison officials' decisions are entitled to deference; although this deference "does not insulate from review actions taken in bad faith and for no legitimate purpose, . . . it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice." *Whitley*, 475 U.S. at 322.

The factors relevant to the jury's inquiry include "the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted," *Whitley*, 475 U.S. at 321 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). "But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." *Id. See, e.g.*, *Giles v. Kearney*, 571 F.3d 318, 326, 328-29 (3d Cir. 2009) (if true, testimony that inmate "was kicked in the ribs and punched in the head while restrained on the ground, after he ceased to resist" established Eighth Amendment violation; however, district court did not commit clear error in finding no excessive force with respect to other aspects of guards' interactions with the inmate).

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[157] The Third Circuit has held that, in instructing a jury under *Hudson* and *Whitley*, it is not error to state that the use of force must "shock the conscience." *See Fuentes*, 206 F.3d at 348-49. (Though *Fuentes* involved a claim by a prisoner who had pleaded guilty but had not yet been sentenced, the court held that the applicable excessive force standard was the same as that applied in Eighth Amendment excessive force cases. *See id.* at 339, 347.) The model instruction does not include the "shocks the conscience" language, because–assuming that "shocks the conscience" describes a standard equivalent to that described in *Hudson*–the "shocks the conscience" language is redundant.

In assessing the use of force, "the extent of injury suffered by [the] inmate is one factor," but a plaintiff can establish an Eighth Amendment excessive force claim even without showing "serious injury." *Hudson*, 503 U.S. at 7; *see also Wilkins v. Gaddy*, 130 S. Ct. 1175, 1177, 1178 (2010) (per curiam) (rejecting Fourth Circuit's requirement of "a showing of significant injury in order to state an excessive force claim," and reiterating "*Hudson*'s direction to decide excessive force claims based on the nature of the force rather than the extent of the injury"). "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. . . . This is true whether or not significant injury is evident." *Id.* at 9. Although "the Eighth Amendment does not protect an inmate against an objectively *de minimis* use of force, ... *de minimis* injuries do not necessarily establish *de minimis* force." *Smith v. Mensinger*, 293 F.3d 641, 648-49 (3d Cir. 2002). "[T]he degree of injury is relevant for any Eighth Amendment analysis, [but] there is no fixed minimum quantum of injury that a prisoner must prove that he suffered through objective or independent evidence in order to state a claim for wanton and excessive force." *Brooks v. Kyler*, 204 F.3d 102, 104 (3d Cir. 2000). "Although the extent of an injury provides a means of assessing the legitimacy and scope of the force, the focus always remains on the force used (the blows)." *Id.* at 108.

Other sets of model instructions include a requirement that plaintiff suffered harm as a result of the defendant's use of force. *See, e.g.*, 5th Circuit (Civil) Instruction 10.5; 8th Circuit (Civil) Instruction 4.30; 9th Circuit (Civil) Instruction 11.9; 11th Circuit (Civil) 2.3.1; O'Malley Instruction 166.23; Schwartz & Pratt Instruction 11.01.1. The model also includes this requirement, although there does not appear to be Third Circuit caselaw that specifically addresses whether harm in general (as distinct from physical injury) is an element of an Eighth Amendment excessive force claim.[158] Assuming that the plaintiff must prove some harm, proof of physical injury clearly suffices. In the light of the Supreme Court's indication that the Eighth Amendment is designed to protect against torture, *see Hudson*, 503 U.S. at 9, proof of physical pain or intense fear or emotional pain should also suffice, even absent significant physical injury.[159]

42 U.S.C. § 1997e(e) provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." As noted in the Comment to Instruction 4.8.1, this statute requires a showing of "more-than-de minimis physical injury as a predicate to

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[158] The instruction given in *Douglas v. Owens*, 50 F.3d 1226 (3d Cir. 1995), did not include harm as an element. *See id.* at 1232 n.13. However, the defendants did not request that harm be included as an element, and did not raise the issue on appeal. Thus, the *Douglas* court may not have had occasion to consider the question.

[159] In *Rhodes v. Robinson*, 612 F.2d 766, 771-72 (3d Cir. 1979), the plaintiff claimed emotional distress as a result of hearing guards beat another inmate; the court refused to "find Rhodes's claim insufficient because it alleges emotional rather than physical harm," but held that the claim failed because the plaintiff could not establish "the requisite state of mind" on the part of the defendants.

allegations of emotional injury." *Mitchell v. Horn*, 318 F.3d 523, 536 (3d Cir. 2003). However, Section 1997e(e) does not preclude the award of nominal and punitive damages. *See Allah v. Al-Hafeez*, 226 F.3d 247, 252 (3d Cir. 2000). Moreover, it appears that a plaintiff can recover damages for physical pain caused by an Eighth Amendment excessive force violation, without showing physical injury–either because the pain itself counts as physical injury, or because the pain does not count as mental or emotional injury. *See Perez v. Jackson*, 2000 WL 893445, at *2 (E.D. Pa. June 30, 2000). (*Perez*, however, was decided prior to *Mitchell*, and it is unclear whether *Perez*'s holding accords with the Third Circuit's requirement of "more-than-de minimis physical injury.") To the extent that Section 1997e(e) requires some physical injury (other than physical pain) in order to permit recovery of damages for mental or emotional injury, the jury instructions on damages should reflect this requirement.

However, not all Eighth Amendment excessive force claims will fall within the scope of Section 1997e(e). "[T]he applicability of the personal injury requirement of 42 U.S.C. § 1997e(e) turns on the plaintiff's status as a prisoner, not at the time of the incident, but when the lawsuit is filed." *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 314 (3d Cir. 2001) (en banc).

Some sets of model instructions state explicitly that the jury must give deference to prison officials' judgments concerning the appropriateness of force in a given situation. *See* 5th Circuit (Civil) Instruction 10.5; 9th Circuit (Civil) Instruction 11.9; O'Malley Instruction 166.23; Schwartz & Pratt Instruction 11.01.2. However, in *Douglas v. Owens*, 50 F.3d 1226 (3d Cir. 1995), the district court gave an instruction that omitted any explicit mention of deference, *see id.* at 1232 n.13 (quoting instruction), and the Court of Appeals held the instruction "was proper and adequate under the facts of this case" because the district court's reference to "force . . . applied in a good faith effort to maintain or restore discipline" indicated to the jury that the defendants should not necessarily be held liable merely because they used force that "is later determined to have been unnecessary," *id.* at 1233.[160]

[160] In *Douglas*, the defendants "argue[d] that the charge given by the district court [wa]s inadequate because it fail[ed] to convey the notion that 'force is not constitutionally "excessive" just because it turns out to have been unnecessary *in hindsight*.'" *Id.* at 1233. As noted in the text, the court rejected this contention. The model instruction does state that the plaintiff cannot prove an Eighth Amendment violation "merely by showing that, in hindsight, the amount of force seems unreasonable." Though the *Douglas* court held that such language was not required, it did not suggest that the language was inaccurate or misleading.

4.11 Section 1983 – Conditions of Confinement – Convicted Prisoner

N.B.: This section provides instructions on three particular types of conditions-of-confinement claims – denial of adequate medical care, failure to protect from suicidal actions, and failure to protect from attack. Possible models for conditions-of-confinement claims more generally can be found in the list of references to other model instructions. See Appendix Two.

4.11.1 Section 1983 – Conditions of Confinement – Convicted Prisoner – Denial of Adequate Medical Care

Model

Because inmates must rely on prison authorities to treat their serious medical needs, the government has an obligation to provide necessary medical care to them. In this case, [plaintiff] claims that [defendant] violated the Eighth Amendment to the United States Constitution by showing deliberate indifference to a serious medical need on [plaintiff's] part. Specifically, [plaintiff] claims that [briefly describe plaintiff's allegations].

In order to establish [his/her] claim for violation of the Eighth Amendment, [plaintiff] must prove each of the following three things by a preponderance of the evidence:

First: [Plaintiff] had a serious medical need.

Second: [Defendant] was deliberately indifferent to that serious medical need.

Third: [Defendant's] deliberate indifference caused [harm] [physical injury][161] to [plaintiff].

I will now proceed to give you more details on the first and second of these three requirements.

First, [plaintiff] must show that [he/she] had a serious medical need. A medical need is serious, for example, when *[include any of the following that are warranted by the evidence]*:

- A doctor has decided that the condition needs treatment; or

- The problem is so obvious that non-doctors would easily recognize the need for medical attention; or

- Denying or delaying medical care creates a risk of permanent physical injury; or

- Denying or delaying medical care causes needless pain.

Second, [plaintiff] must show that [defendant] was deliberately indifferent to that serious medical need. [Plaintiff] must show that [defendant] knew of an excessive risk to [plaintiff's] health, and that [defendant] disregarded that risk by failing to take reasonable measures to address it.

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[161] See Comment for a discussion of whether harm (and physical injury in particular), constitutes an element of this claim.

[Plaintiff] must show that [defendant] actually knew of the risk. If [plaintiff] proves that there was a risk of serious harm to [him/her] and that the risk was obvious, you are entitled to infer from the obviousness of the risk that [defendant] knew of the risk. [However, [defendant] claims that even if there was an obvious risk, [he/she] was unaware of that risk. If you find that [defendant] was unaware of the risk, then you must find that [he/she] was not deliberately indifferent.][162]

There are a number of ways in which a plaintiff can show that a defendant was deliberately indifferent, including the following. Deliberate indifference occurs when: *[include any of the following examples, or others, that are warranted by the evidence]*

- A prison official denies a reasonable request for medical treatment, and the official knows that the denial exposes the inmate to a substantial risk of pain or permanent injury;

- A prison official knows that an inmate needs medical treatment, and intentionally refuses to provide that treatment;

- A prison official knows that an inmate needs medical treatment, and delays the medical treatment for non-medical reasons;

- A prison official knows that an inmate needs medical treatment, and imposes arbitrary and burdensome procedures that result in delay or denial of the treatment;

- A prison official knows that an inmate needs medical treatment, and refuses to provide that treatment unless the inmate is willing and able to pay for it;

- A prison official refuses to let an inmate see a doctor capable of evaluating the need for treatment of an inmate's serious medical need;

- A prison official persists in a particular course of treatment even though the official knows that the treatment is causing pain and creating a risk of permanent injury.

[In this case, [plaintiff] was under medical supervision. Thus, to show that [defendant], a non-medical official, was deliberately indifferent, [plaintiff] must show that [defendant] knew that there was reason to believe that the medical staff were mistreating (or not treating) [plaintiff].]

[Mere errors in medical judgment do not show deliberate indifference. Thus, a plaintiff cannot prove that a doctor was deliberately indifferent merely by showing that the doctor chose a course of treatment that another doctor disagreed with. [However, a doctor is deliberately indifferent if [he/she] knows what the appropriate treatment is and decides not to provide it for some non-medical reason.] [However, a doctor is deliberately indifferent by arbitrarily interfering with a

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[162] It is unclear who has the burden of proof with respect to a defendant's claim of lack of awareness of an obvious risk. *See* Comment.

treatment, if the doctor knows that the treatment has worked for the inmate in the past and that another doctor prescribed that specific course of treatment for the inmate based on a judgment that other treatments would not work or would be harmful.]]

Comment

Applicability of the Eighth Amendment standard for denial of adequate medical care. The Eighth Amendment applies only to convicted prisoners, *see, e.g., Whitley v. Albers*, 475 U.S. 312, 318 (1986), and it appears that the Amendment does not apply to a convicted prisoner until after the prisoner has been sentenced, *see Graham v. Connor*, 490 U.S. 386, 392 n.6 (1989) (dictum).[163] Instruction 4.11 reflects the Eighth Amendment standard concerning the denial of medical care.

The Eighth Amendment standard may be more difficult for plaintiffs to meet than the standard that applies to claims regarding treatment of pretrial detainees or of prisoners who have been convicted but not yet sentenced. Although "the contours of a state's due process obligations to [pretrial] detainees with respect to medical care have not been defined by the Supreme Court. . . . , it is clear that detainees are entitled to no less protection than a convicted prisoner is entitled to under the Eighth Amendment." *A.M. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 584 (3d Cir. 2004); *see City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244 (1983) (stating that the "due process rights of a person [injured while being apprehended by police] are at least as great as the Eighth Amendment protections available to a convicted prisoner"); *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) ("Since it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners . . . it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial.").

In *Hubbard v. Taylor*, a nonmedical conditions-of-confinement case, the Third Circuit held that the district court committed reversible error by analyzing the pretrial detainee plaintiffs' claims under Eighth Amendment standards. *Hubbard v. Taylor*, 399 F.3d 150, 166-67 (3d Cir. 2005). The *Hubbard* court stressed that while the Eighth Amendment standards have been taken to establish a floor below which treatment of pretrial detainees cannot sink, those standards do not preclude the

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[163] Addressing substantive and procedural due process claims arising from placement in restrictive confinement, the Court of Appeals has treated as pretrial detainees two plaintiffs who – during the relevant period – were awaiting resentencing after the vacatur of their death sentences. *See Stevenson v. Carroll*, 495 F.3d 62, 67 (3d Cir. 2007) ("Although both Stevenson and Manley had been convicted at the time of their complaint, they are classified as pretrial detainees for purposes of our constitutional inquiry.... Their initial sentences had been vacated and they were awaiting resentencing at the time of their complaint and for the duration during which they allege they were subjected to due process violations.... The Warden does not contest the status of the appellants as pretrial detainees for purposes of this appeal.").

application of a more protective due process standard to pretrial detainees under *Bell v. Wolfish*, 441 U.S. 520 (1979). *See Hubbard*, 399 F.3d at 165-66. While *Hubbard* was a nonmedical conditions-of-confinement case, the *Hubbard* court suggested that its analysis would apply to all conditions-of-confinement cases, including those claiming denial of adequate medical care. *See id.* at 166 n. 22.[164]

Content of the Eighth Amendment standard for denial of adequate medical care. Because inmates "must rely on prison authorities to treat [their] medical needs," the government has an "obligation to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Eighth Amendment claims concerning denial of adequate medical care constitute a subset of claims concerning prison conditions. In order to prove an Eighth Amendment violation arising from the conditions of confinement, the plaintiff must show that the condition was "sufficiently serious," *Wilson v. Seiter*, 501 U.S. 294, 298 (1991), and also that the defendant was "'deliberate[ly] indifferen[t]' to inmate health or safety," *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Deliberate indifference to the inmate's serious medical needs violates the Eighth Amendment, "whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle*, 429 U.S. at 104-05.

As noted, in cases regarding medical care, the first (or objective) prong of the Eighth Amendment test requires that the plaintiff show a serious medical need. A medical condition that "has been diagnosed by a physician as requiring treatment" is a serious medical need. *Atkinson v. Taylor*, 316 F.3d 257, 266 (3d Cir. 2003). So is a medical problem "that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) (quoting *Pace v. Fauver*, 479 F.Supp. 456, 458 (D.N.J.1979), *aff'd*, 649 F.2d 860 (3d Cir. 1981)). The serious medical need prong is also met in cases where "[n]eedless suffering result[s] from a denial of simple medical care, which does not serve any penological purpose." *Atkinson*, 316 F.3d at 266. Likewise, "where denial or

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[164] On some prior occasions, the Third Circuit has indicated that the standard for pretrial detainees is identical to that for convicted prisoners. *See Groman v. Township of Manalapan*, 47 F.3d 628, 637 (3d Cir. 1995) ("Failure to provide medical care to a person in custody can rise to the level of a constitutional violation under § 1983 only if that failure rises to the level of deliberate indifference to that person's serious medical needs."). In other cases, the court has noted, but not decided, the question whether pretrial detainees should receive more protection (under the Due Process Clauses) than convicted prisoners do under the Eighth Amendment. *See, e.g., Kost v. Kozakiewicz*, 1 F.3d 176, 188 n.10 (3d Cir. 1993) ("It appears that no determination has as yet been made regarding how much more protection unconvicted prisoners should receive. The appellants, however, have not raised this issue, and therefore we do not address it."); *Natale v. Camden County Correctional Facility*, 318 F.3d 575, 581 n.5 (3d Cir. 2003); *Woloszyn v. County of Lawrence*, 396 F.3d 314, 320 n.5 (3d Cir. 2005) ("[I]n developing our jurisprudence on pre-trial detainees' suicides we looked to the Eighth Amendment ... because the due process rights of pre-trial detainees are at least as great as the Eighth Amendment rights of convicted and sentenced prisoners").

delay causes an inmate to suffer a life long handicap or permanent loss, the medical need is considered serious." *Lanzaro*, 834 F.2d at 347.

As to the second (or subjective) prong of the Eighth Amendment test, mere errors in medical judgment or other negligent behavior do not meet the mens rea requirement. *See Estelle*, 429 U.S. at 107.[165] Rather, the plaintiff must show subjective recklessness on the defendant's part. "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.[166] However, the plaintiff "need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842. In sum, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* at 847.

The plaintiff can use circumstantial evidence to prove subjective recklessness: The jury is entitled to "conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* at 842. However, the jury need not draw that inference; "it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety." *Id.* at 844. The defendants "might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave

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[165] By contrast, a plaintiff can prove deliberate indifference by showing that a physician knew what the appropriate treatment was and decided not to provide that treatment for a non-medical reason such as cost-cutting. *See Durmer v. O'Carroll*, 991 F.2d 64, 69 (3d Cir. 1993) ("[I]f the inadequate care was a result of an error in medical judgment on Dr. O'Carroll's part, Durmer's claim must fail; but, if the failure to provide adequate care in the form of physical therapy was deliberate, and motivated by non medical factors, then Durmer has a viable claim.").

Similarly, though "mere disagreements over medical judgment do not state Eighth Amendment claims," *White v. Napoleon*, 897 F.2d 103, 110 (3d Cir. 1990), a prison doctor violates the Eighth Amendment when he or she "deliberately and arbitrarily . . . 'interfer[es] with modalities of treatment prescribed by other physicians, including specialists, even though these modalities of treatment ha[ve] proven satisfactory,'" *id.* at 111 (quoting amended complaint).

[166] The subjective "deliberate indifference" standard for Eighth Amendment conditions of confinement claims is distinct from the objective "deliberate indifference" standard for municipal liability through inadequate training, supervision or screening. *See Farmer*, 511 U.S. at 840-41 (distinguishing *City of Canton v. Harris*, 489 U.S. 378 (1989)); *supra* Instruction 4.6.7 cmt. & Instruction 4.6.8 cmt.

rise was insubstantial or nonexistent." *Id.*[167]

Two bracketed sentences in the model reflect the fact that a defendant will escape liability if the jury finds that even though the risk was obvious, the defendant was unaware of the risk. A footnote appended to those sentences notes some uncertainty concerning the burden of proof on this point. On the one hand, the *Farmer* Court's references to defendants "prov[ing]" and "show[ing]" lack of awareness suggest that once a plaintiff proves that a risk was obvious, the defendant then has the burden of proving lack of awareness of that obvious risk. On the other hand, the factual issues concerning the risk's obviousness and the defendant's awareness of the risk may be closely entwined, rendering it confusing to present the latter issue as one on which the defendant has the burden of proof. Accordingly, the model does not explicitly address the question of burden of proof concerning that issue.

"[E]ven officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted"; a defendant "who act[ed] reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.* at 844-45.

The Third Circuit has enumerated a number of ways in which a plaintiff could show deliberate indifference. Deliberate indifference exists, for example:

- "[w]here prison authorities deny reasonable requests for medical treatment ... and such denial exposes the inmate 'to undue suffering or the threat of tangible residual injury'";[168]

- "where 'knowledge of the need for medical care [is accompanied by the] ... intentional refusal to provide that care'";[169]

- where "necessary medical treatment [i]s ... delayed for non-medical reasons";[170]

- "where prison officials erect arbitrary and burdensome procedures that 'result[] in

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[167] However, a defendant "would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist." *Id.* at 843 n.8.

[168] *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 346 (3d Cir. 1987) (quoting *Westlake v. Lucas*, 537 F.2d 857, 860 (6th Cir.1976)).

[169] *Id.* (quoting *Ancata v. Prison Health Servs.*, 769 F.2d 700, 704 (11th Cir.1985)).

[170] *Id.* (quoting *Ancata v. Prison Health Servs.*, 769 F.2d 700, 704 (11th Cir.1985)).

interminable delays and outright denials of medical care to suffering inmates'";[171]

- where prison officials "condition provision of needed medical services on the inmate's ability or willingness to pay";[172]

- where prison officials "deny access to [a] physician capable of evaluating the need for ... treatment" of a serious medical need;[173]

- "where the prison official persists in a particular course of treatment 'in the face of resultant pain and risk of permanent injury.'"[174]

When a prisoner is under medical supervision, "absent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official ... will not be chargeable with the Eighth Amendment scienter requirement of deliberate indifference." *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004).

Other sets of model instructions include, as an element of the claim, that the defendant's deliberate indifference to the plaintiff's serious medical need caused harm to the plaintiff. *See, e.g.*, 5th Circuit (Civil) Instruction 10.6; 8th Circuit (Civil) Instruction 4.31; 9th Circuit (Civil) Instruction 11.11. It is somewhat difficult to discern from the caselaw whether harm is a distinct element of an Eighth Amendment denial-of-medical-care claim, because courts often discuss harm (or the prospect of harm) in assessing whether the plaintiff showed a serious medical need.[175] Assuming that the

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[171] *Id.* at 347 (quoting *Todaro v. Ward*, 565 F.2d 48, 53 (2d Cir.1977)).

[172] *Id.*; *compare Reynolds v. Wagner*, 128 F.3d 166, 174 (3d Cir. 1997) (rejecting "the plaintiffs' argument that charging inmates for medical care is per se unconstitutional").

[173] *Lanzaro*, 834 F.2d at 347 (quoting *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir.1979)).

[174] *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999) (quoting *White v. Napoleon*, 897 F.2d 103, 109 (3d Cir. 1990)).

[175] For example, the court in *Brooks v. Kyler*, 204 F.3d 102 (3d Cir. 2000) rejected a medical-needs claim based on the following reasoning:

> Although a deliberate failure to provide medical treatment motivated by non-medical factors can present a constitutional claim, . . . in this case, it is uncontroverted that a nurse passing out medications looked at Brooks's injuries within minutes of the alleged beating, and that Brooks was treated by prison medical staff on the same day. Moreover, he presented no evidence of any harm resulting from a delay in medical treatment. *See Hudson v. McMillian*, 503 U.S. 1, 9 . . . (1992) ("Because society does not expect that

plaintiff must prove some harm, proof of physical injury clearly suffices. Proof of physical pain should also suffice, even absent other significant physical injury. *Cf. Atkinson*, 316 F.3d at 266 ("Needless suffering resulting from a denial of simple medical care, which does not serve any penological purpose, is inconsistent with contemporary standards of decency and thus violates the Eighth Amendment."). It is less clear whether emotional distress resulting from an increased risk of *future* physical injury gives rise to a damages claim for denial of medical care.

Addressing a claim for injunctive relief, the Supreme Court has held that "the Eighth Amendment protects against future harm to inmates." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). In *Helling*, the Court held that the plaintiff validly stated a claim "by alleging that petitioners have, with deliberate indifference, exposed him to levels of [environmental tobacco smoke] that pose an unreasonable risk of serious damage to his future health." *Id.* at 35. The Third Circuit, however, has held that "the *Helling* Court's reasoning concerning injunctive relief does not translate to a claim for monetary relief." *Fontroy v. Owens*, 150 F.3d 239, 243 (3d Cir. 1998). *Fontroy* addressed whether an inmate "can recover damages ... for emotional distress allegedly caused by his exposure to asbestos, even though he presently manifests no physical injury." *Id.* at 240. Reasoning that "[i]n a conditions of confinement case, 'extreme deprivations are required to make out a . . . claim[,]'" *id.* at 244 (quoting *Hudson*, 503 U.S. at 9), the Third Circuit held that "[f]ederal law does not provide inmates, who suffer no present physical injury, a cause of action for damages for emotional distress allegedly caused by exposure to asbestos," *id.* More recently, however, a different Third Circuit panel seemed to depart from *Fontroy* in a case involving an inmate's claim regarding a risk of future injury from environmental tobacco smoke (ETS). In *Atkinson v. Taylor*, 316 F.3d 257, 259-60, 262 (3d Cir. 2003), the plaintiff alleged both current physical symptoms and a risk of future harm from exposure to ETS. The *Atkinson* court distinguished the plaintiff's claim concerning future harm from the claim concerning present physical injury, and analyzed each separately. *See id.* at 262. The panel majority held that the defendants were not entitled to qualified immunity on the plaintiff's future injury claim. *See id.* at 264. In a footnote, the panel majority stated:

> If appellee can produce evidence of future harm, he may be able to recover monetary damages. *See Fontroy*, 150 F.3d at 244. However, the problematic quantification of those future damages is not relevant to the present inquiry concerning whether the underlying constitutional right was clearly established so that a reasonable prison official would know that he subjected appellee to the risk of future harm. Moreover, even if appellee is unable to establish a right to compensatory damages, he may be entitled to nominal damages.

Id. at 265 n.6. While the cited passage from *Fontroy* held that damages are not available for such future injury claims, the *Atkinson* majority seemed to suggest that such damages are available

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> prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are serious.").

Id. at 105 n.4; *see also Lanzaro*, 834 F.2d at 347 ("The seriousness of an inmate's medical need may also be determined by reference to the effect of denying the particular treatment.").

(though they may be difficult to quantify), and that in any event nominal damages might be available.[176]

The Supreme Court's more recent decision in *Erickson v. Pardus*, 127 S.Ct. 2197 (2007) (per curiam), may provide additional support for the notion that some damages claims for future harm are cognizable. In *Erickson*, the plaintiff sued for damages and injunctive relief after prison officials terminated his treatment program for a liver condition resulting from hepatitis C. The court of appeals affirmed the dismissal of the complaint, reasoning that the complaint failed to allege a "cognizable ... harm" resulting from the termination of the treatment program. *Erickson*, 127 S. Ct. at 2199. The Supreme Court vacated and remanded, holding that the plaintiff sufficiently alleged harm by asserting that the interruption of his treatment program threatened his life. *See id.* at 2200.[177]

42 U.S.C. § 1997e(e) provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." For discussion of this limitation, see the Comments to Instructions 4.8.1 and 4.10. To the extent that Section 1997e(e) requires some physical injury (other than physical pain) in order to permit recovery of damages for mental or emotional injury, the jury instructions on damages should reflect this requirement. However, not all Eighth Amendment denial-of-medical-care claims fall within the scope of Section 1997e(e). "[T]he applicability of the personal injury requirement of 42 U.S.C. § 1997e(e) turns on the plaintiff's status as a prisoner, not at the time of the incident, but when the lawsuit is filed." *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 314 (3d Cir. 2001) (en banc).

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[176] *Atkinson* accords with a pre-*Helling* case, *White v. Napoleon*, 897 F.2d 103 (3d Cir. 1990), in which one of the plaintiffs alleged that a prison doctor's "sadistic and deliberate indifference to his serious medical needs . . . caused him needless anxiety . . . and intentionally and needlessly put him at a substantially increased risk of peptic ulcer," *id.* at 108. Though the plaintiff had not alleged that his physical condition actually worsened as a result of the doctor's conduct, the court held that he had stated an Eighth Amendment claim. In so ruling, the court stated that it was "not prepared to hold that inflicting mental anxiety alone cannot constitute cruel and unusual punishment." *Id.* at 111. The plaintiffs in *White* sought both injunctive and monetary relief, and the court did not resolve whether the plaintiff who suffered mental anxiety and increased risk of future harm (but no present physical injury) could obtain damages. *See id.* at 111 ("What damages, if any, flow from the alleged conduct is an issue for later proceedings.").

[177] The Court explained: "The complaint stated that Dr. Bloor's decision to remove petitioner from his prescribed hepatitis C medication was 'endangering [his] life.'... It alleged this medication was withheld 'shortly after' petitioner had commenced a treatment program that would take one year, that he was 'still in need of treatment for this disease,' and that the prison officials were in the meantime refusing to provide treatment.... This alone was enough to satisfy Rule 8(a)(2)." *Id.*

4.11.2 Section 1983 – Conditions of Confinement – Convicted Prisoner – Failure to Protect from Suicidal Action

Model

Because inmates must rely on prison authorities to treat their serious medical needs, the government has an obligation to provide necessary medical care to them. If an inmate is particularly vulnerable to suicide, that is a serious medical need. In this case, [plaintiff] claims that [decedent] was particularly vulnerable to suicide and that [defendant] violated the Eighth Amendment to the United States Constitution by showing deliberate indifference to that vulnerability.

In order to establish [his/her] claim for violation of the Eighth Amendment, [plaintiff] must prove the following three things by a preponderance of the evidence:

First: [Decedent] was particularly vulnerable to suicide. [Plaintiff] must show that there was a strong likelihood that [decedent] would attempt suicide.

Second: [Defendant] was deliberately indifferent to that vulnerability.

Third: [Decedent] [would have survived] [would have suffered less harm] if [defendant] had not been deliberately indifferent.

I will now give you more details on the second of these three elements. To show that [defendant] was deliberately indifferent, [plaintiff] must show that [defendant] knew that there was a strong likelihood that [decedent] would attempt suicide, and that [defendant] disregarded that risk by failing to take reasonable measures to address it.

[Plaintiff] must show that [defendant] actually knew of the risk. [If a prison official knew of facts that [he/she] strongly suspected to be true, and those facts indicated a substantial risk of serious harm to an inmate, the official cannot escape liability merely because [he/she] refused to take the opportunity to confirm those facts. But keep in mind that mere carelessness or negligence is not enough to make an official liable. It is not enough for [plaintiff] to show that a reasonable person would have known, or that [defendant] should have known, of the risk to [plaintiff]. [Plaintiff] must show that [defendant] actually knew of the risk.]

If [plaintiff] proves that the risk of a suicide attempt by [decedent] was obvious, you are entitled to infer from the obviousness of the risk that [defendant] knew of the risk. [However, [defendant] claims that even if there was an obvious risk, [he/she] was unaware of that risk. If you find that [defendant] was unaware of the risk, then you must find that [he/she] was not deliberately

indifferent.][178]

Comment

A Section 1983 claim arising from a prisoner's suicide (or attempted suicide) falls within the general category of claims concerning denial of medical care. *See, e.g.*, *Woloszyn v. County of Lawrence*, 396 F.3d 314, 320 (3d Cir. 2005) ("A particular vulnerability to suicide represents a serious medical need."). For an overview of the Eighth Amendment standard for denial of adequate medical care, see Comment 4.11.1, *supra*. A specific instruction is provided here for suicide cases because the Court of Appeals has articulated a distinct framework for analyzing such claims.

Vulnerability to suicide. The plaintiff must show that the decedent "had a 'particular vulnerability to suicide.'" *Woloszyn*, 396 F.3d at 319 (quoting *Colburn v. Upper Darby Township*, 946 F.2d 1017, 1023 (3d Cir. 1991)). "[T]here must be a strong likelihood, rather than a mere possibility, that self-inflicted harm will occur." *Woloszyn*, 396 F.3d at 320 (quoting *Colburn*, 946 F.2d at 1024).

Deliberate indifference. The plaintiff in a case involving a convicted prisoner's suicide must meet the *Farmer* test for subjective deliberate indifference. Admittedly, in the context of claims concerning pretrial detainees' suicides, the Court of Appeals stated an objective, rather than a subjective, test: "[A] plaintiff in a prison suicide case has the burden of establishing three elements: (1) the detainee had a 'particular vulnerability to suicide,' (2) the custodial officer or officers knew or should have known of that vulnerability, and (3) those officers 'acted with reckless indifference' to the detainee's particular vulnerability." *Woloszyn*, 396 F.3d at 319 (quoting *Colburn*, 946 F.2d at 1023). However, claims regarding convicted prisoners sound in the Eighth Amendment, and plaintiffs in such cases must show subjective deliberate indifference. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Singletary v. Pennsylvania Dept. of Corrections*, 266 F.3d 186, 192 n.2 (3d Cir. 2001) (applying *Farmer* in case arising from convicted prisoner's suicide); *see also* Comments 4.11.1 & 4.11.3. The model instruction is designed for use in Eighth Amendment cases and it employs the *Farmer* standard.

Claims regarding pretrial detainees are substantive due process claims, and it is not clear whether such claims should be analyzed under *Farmer*'s stringent Eighth Amendment test. *See* Comment 4.11.1 (noting that the substantive due process test for claims concerning treatment of pretrial detainees may be less rigorous than the Eighth Amendment test for claims concerning treatment of convicted prisoners); *see also Owens v. City of Philadelphia*, 6 F. Supp. 2d 373, 380 n.6 (E.D.Pa. 1998) ("The Eighth Amendment's cruel and unusual punishments clause–which underpins the subjective 'criminal recklessness' standard articulated in *Farmer*–seems rather remote from the values appropriate for determining the due process rights of those who, although in

[178] It is unclear who has the burden of proof with respect to a defendant's claim of lack of awareness of an obvious risk. *See* Comment 4.11.1.

detention, have not been convicted of any crime."). Because the plaintiff in *Woloszyn* failed to present evidence establishing the first element (particular vulnerability to suicide), the Court of Appeals did not have occasion to decide whether *Farmer*'s subjective deliberate indifference test should apply to claims concerning pretrial detainees' suicides. *See Woloszyn*, 396 F.3d at 321.[179]

Under the *Farmer* deliberate indifference standard, even "officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Farmer*, 511 U.S. at 844.

Causation. Although the standard stated in *Woloszyn* does not explicitly include an element of causation, district court opinions have applied a causation test. *See, e.g.*, *Foster v. City of Philadelphia*, 2004 WL 225041, at *7 (E.D.Pa. 2004) ("[B]ecause Massey's failure to act consistent with Police Department Directives on High-Risk Suicide Detainees (requiring communication of suicidal tendencies to the supervisor and all other police officials coming into contact with the detainee) could be found to be found to be a factor contributing to Foster's suicide attempt, Plaintiff has made the requisite causal nexus."); *id.* at *8 ("Because a reasonable jury could find that Foster's suicide attempt could have been prevented had Moore monitored Foster more closely, Plaintiff has made the requisite causal nexus."); *Owens*, 6 F. Supp. 2d at 382-83 ("Because the omissions complained of could be found to have been among the factors resulting in the non-deliverance of the pass [to see a psychiatrist] at a time contemporaneous to the last sighting of Gaudreau alive, plaintiffs have made a showing of the requisite causal nexus."). Including the element of causation seems appropriate; as the Court of Appeals stated regarding claims of failure to protect from attack, "to survive summary judgment on an Eighth Amendment claim asserted under 42 U.S.C. § 1983, a plaintiff is required to produce sufficient evidence of (1) a substantial risk of serious harm; (2) the defendants' deliberate indifference to that risk; and (3) causation." *Hamilton v. Leavy*, 117 F.3d 742, 746 (3d Cir. 1997).

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[179] In a non-precedential opinion, the Court of Appeals had cited the *Farmer* subjective deliberate indifference standard while affirming the dismissal of a claim concerning a pretrial detainee's suicide attempt. *See Serafin v. City of Johnstown*, 53 Fed.Appx. 211, *214 (3d Cir. 2002) (non-precedential opinion); *compare id.* n.2 (noting that "[t]he due process rights of pretrial detainees are at least as great as those of a convicted prisoner"). In a more recent non-precedential opinion, the Court of Appeals cited pre-*Farmer* caselaw for the proposition that pretrial detainee suicide claims require a showing of "reckless indifference," *Schuenemann v. U.S.*, 2006 WL 408404, at *2 (3d Cir. Feb. 23, 2006) (non-precedential opinion) (quoting *Colburn v. Upper Darby Twp.*, 946 F.2d 1017, 1024 (3d Cir. 1991)), but then stated that *Woloszyn* "suggested that [the reckless indifference standard] is similar to the 'deliberate indifference' standard applied to a claim brought under the Eighth Amendment," *Schuenemann*, 2006 WL 408404, at *2 (citing *Woloszyn*, 396 F.3d at 321).

4.11.3 Section 1983 – Conditions of Confinement – Convicted Prisoner – Failure to Protect from Attack

Model

Prison officials have a duty to protect inmates from violence at the hands of other prisoners. In this case, [plaintiff] claims that [defendant] violated the Eighth Amendment to the United States Constitution by showing deliberate indifference to a substantial risk of serious harm to [[plaintiff] or [decedent]].[180] Specifically, [plaintiff] claims that [briefly describe plaintiff's allegations].

In order to establish [his/her] claim for violation of the Eighth Amendment, [plaintiff] must prove each of the following three things by a preponderance of the evidence:

First: There was a substantial risk of serious harm to [plaintiff] – namely, a substantial risk that [plaintiff] would be attacked by another inmate.

Second: [Defendant] was deliberately indifferent to that risk.

Third: [Plaintiff] [would have survived] [would have suffered less harm][181] if [defendant] had not been deliberately indifferent.

I will now proceed to give you more details on the second of these three requirements. To show deliberate indifference, [plaintiff] must show that [defendant] knew of a substantial risk that [plaintiff] would be attacked, and that [defendant] disregarded that risk by failing to take reasonable measures to deal with it.

[Plaintiff] must show that [defendant] actually knew of the risk. [Plaintiff need not prove that [defendant] knew precisely which inmate would attack [plaintiff], so long as [plaintiff] shows that [defendant] knew there was an obvious, substantial risk to [plaintiff's] safety.]

[If a prison official knew of facts that [he/she] strongly suspected to be true, and those facts indicated a substantial risk of serious harm to an inmate, the official cannot escape liability merely because [he/she] refused to take the opportunity to confirm those facts. But keep in mind that mere carelessness or negligence is not enough to make an official liable. It is not enough for [plaintiff] to show that a reasonable person would have known, or that [defendant] should have known, of the

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[180] If the plaintiff's claim concerns a fatal attack on an inmate, the name of the decedent (rather than the plaintiff's name) should be inserted in appropriate places in this instruction.

[181] For a discussion of whether physical injury is an element of this claim, see the Comment to this Instruction, below, and the Comments to Instructions 4.8.1 and 4.10.

risk to [plaintiff]. [Plaintiff] must show that [defendant] actually knew of the risk.]

If [plaintiff] proves that there was a risk of serious harm to [him/her] and that the risk was obvious, you are entitled to infer from the obviousness of the risk that [defendant] knew of the risk. [However, [defendant] claims that even if there was an obvious risk, [he/she] was unaware of that risk. If you find that [defendant] was unaware of the risk, then you must find that [he/she] was not deliberately indifferent.][182]

Comment

Applicability of the Eighth Amendment standard for failure to protect from attack. As noted above (see Comment 4.11.1), the Eighth Amendment applies to claims by convicted prisoners. Failure-to-protect claims by arrestees or pretrial detainees proceed under a substantive due process theory, and it is not clear whether the substantive due process standard is as exacting for plaintiffs as the Eighth Amendment standard. In any event, substantive due process failure-to-protect claims clearly can succeed by meeting the Eighth Amendment standards.[183]

Content of the Eighth Amendment standard for failure to protect from attack. "'[P]rison officials have a duty ... to protect prisoners from violence at the hands of other prisoners.'" *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988)).[184] "Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" *Id.* at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

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[182] It is unclear who has the burden of proof with respect to a defendant's claim of lack of awareness of an obvious risk. *See* Comment 4.11.1.

[183] *See, e.g., Urrutia v. Harrisburg County Police Dept.*, 91 F.3d 451, 456 (3d Cir. 1996) (vacating dismissal of claim concerning alleged police failure to protect arrestee from attack by third party, on the grounds that plaintiff "is certainly entitled to the level of protection provided by the Eighth Amendment"); *A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 587 (3d Cir. 2004) (reversing grant of summary judgment to child care workers, and applying Eighth Amendment standard to claim that those workers failed to protect juvenile detainee from attack); *id.* at 587 n.4 (noting that the substantive due process standard has "not been defined" but that "detainees are entitled to no less protection than a convicted prisoner").

[184] "Having incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,' ... having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Farmer*, 511 U.S. at 833 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)).

Eighth Amendment claims concerning failure to protect from attack constitute a subset of claims concerning prison conditions. In order to prove an Eighth Amendment violation arising from the conditions of confinement, the plaintiff must show that the condition was "sufficiently serious," *Wilson v. Seiter*, 501 U.S. 294, 298 (1991), and also that the defendant was "'deliberate[ly] indifferen[t]' to inmate health or safety," *Farmer*, 511 U.S. at 834. The plaintiff must also show causation. *See Hamilton v. Leavy*, 117 F.3d 742, 746 (3d Cir. 1997).

First element: substantial risk of serious harm. The first (or objective) prong of the Eighth Amendment test requires that the plaintiff show "that he is incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834.

Second element: deliberate indifference. Regarding the second (or subjective) prong of the Eighth Amendment test, the plaintiff must show subjective recklessness on the defendant's part. "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837.[185] However, the plaintiff "need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842. In sum, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* at 847.

The plaintiff can use circumstantial evidence to prove subjective recklessness: The jury is entitled to "conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* at 842.[186] For example, if the "plaintiff presents evidence showing that a substantial risk of inmate attacks was 'longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus "must have known" about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual

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[185] The subjective "deliberate indifference" standard for Eighth Amendment conditions of confinement claims is distinct from the objective "deliberate indifference" standard for municipal liability through inadequate training, supervision or screening. *See Farmer*, 511 U.S. at 840-41 (distinguishing *City of Canton v. Harris*, 489 U.S. 378 (1989)); *supra* Instruction 4.6.7 cmt. & Instruction 4.6.8 cmt.

[186] The fact that the plaintiff did not notify the defendant in advance concerning the risk of attack does not preclude a finding of subjective recklessness. *See Farmer*, 511 U.S. at 848; *Hamilton v. Leavy*, 117 F.3d 742, 747 (3d Cir. 1997).

knowledge of the risk.'" *Id.* at 842-43 (quoting respondents' brief).[187]

Even if the plaintiff does present circumstantial evidence supporting an inference of subjective recklessness, "it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety." *Id.* at 844. The defendants "might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." *Id.*

However, a defendant "would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist (as when a prison official is aware of a high probability of facts indicating that one prisoner has planned an attack on another but resists opportunities to obtain final confirmation . . .)." *Id.* at 843 n.8.[188]

Likewise, it is not a valid defense that "that, while [the defendant] was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." *Id.* at 843. As the Court explained, "it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk." *Id.*

Even "officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted"; a defendant "who act[ed] reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.* at 844-45.[189]

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[187] *See also Hamilton v. Leavy*, 117 F.3d 742, 748 (3d Cir. 1997) (holding that such evidence precluded summary judgment for defendant). As the Court of Appeals has stated the standard, "using circumstantial evidence to prove deliberate indifference requires more than evidence that the defendants should have recognized the excessive risk and responded to it; it requires evidence that the defendant must have recognized the excessive risk and ignored it." *Beers-Capitol v. Whetzel*, 256 F.3d 120, 138 (3d Cir. 2001).

[188] After noting this issue, the Court continued: "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." *Farmer*, 511 U.S. at 843 n.8.

[189] *See also Beers-Capitol*, 256 F.3d at 133 ("[A] defendant can rebut a prima facie demonstration of deliberate indifference either by establishing that he did not have the requisite level of knowledge or awareness of the risk, or that, although he did know of the risk, he took

Third element: causation. As noted above, the plaintiff must show causation. *See Hamilton*, 117 F.3d at 746 ("[T]o survive summary judgment on an Eighth Amendment claim asserted under 42 U.S.C. § 1983, a plaintiff is required to produce sufficient evidence of (1) a substantial risk of serious harm; (2) the defendants' deliberate indifference to that risk; and (3) causation.").

42 U.S.C. § 1997e(e) provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." For discussion of this limitation, see the Comments to Instructions 4.8.1 and 4.10. To the extent that Section 1997e(e) requires some physical injury (other than physical pain) in order to permit recovery of damages for mental or emotional injury, the jury instructions on damages should reflect this requirement. However, not all Eighth Amendment claims fall within the scope of Section 1997e(e). "[T]he applicability of the personal injury requirement of 42 U.S.C. § 1997e(e) turns on the plaintiff's status as a prisoner, not at the time of the incident, but when the lawsuit is filed." *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 314 (3d Cir. 2001) (en banc).

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reasonable steps to prevent the harm from occurring.").

Even if a defendant initially makes a recommendation that constitutes a reasonable response to the risk to the inmate, the defendant may be liable if she fails to take additional reasonable steps when that recommendation is rejected. For example, in *Hamilton v. Leavy*, the Court of Appeals held that the reasonableness of a prison "Multi-Disciplinary Team" (MDT)'s initial recommendation of protective custody did not warrant the grant of summary judgment in favor of the MDT members, because "while it appears that the MDT defendants acted reasonably in following the internal prison procedures by recommending to the CICC that Hamilton be placed in protective custody, the reasonableness of their actions following the rejection of that recommendation remains a question." *Hamilton*, 117 F.3d at 748.

4.12 Section 1983 – Unlawful Seizure

Model

The Fourth Amendment to the United States Constitution protects persons from being subjected to unreasonable seizures by the police. A law enforcement official may only seize a person (for example, by stopping or arresting the person) if there is appropriate justification to do so.

In this case, [plaintiff] claims that [defendant] subjected [plaintiff] to an unreasonable [stop] [arrest], in violation of the Fourth Amendment. To establish this claim, [plaintiff] must prove each of the following three things by a preponderance of the evidence:

First: [Defendant] intentionally [describe the acts plaintiff alleges led to or constituted the seizure].

Second: Those acts subjected [plaintiff] to a "seizure."

Third: The "seizure" was unreasonable.

I will now give you more details on what constitutes a "seizure" and on how to decide whether a seizure is reasonable.

[Add appropriate instructions concerning the relevant type[s] of seizure[s]. See infra Instructions 4.12.1 - 4.12.3.]

Comment

A Section 1983 claim for unlawful arrest or unlawful imprisonment must be based upon a claim of constitutional violation. *See Baker v. McCollan*, 443 U.S. 137, 146 (1979) (requiring a showing of a federal constitutional violation, on the ground that the state-law tort of "false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official"). Ordinarily, the relevant constitutional provision will be the Fourth Amendment. *See, e.g., Berg v. County of Allegheny*, 219 F.3d 261, 269 (3d Cir. 2000) ("[T]he constitutionality of arrests by state officials is governed by the Fourth Amendment rather than due process analysis."); *see also id.* (noting "the possibility that some false arrest claims might be subject to a due process analysis"); *Groman v. Township of Manalapan*, 47 F.3d 628, 636 (3d Cir. 1995) ("[W]here the police lack probable cause to make an arrest, the arrestee has a claim under § 1983 for false imprisonment based on a detention pursuant to that arrest.").

Instruction 4.12 sets forth the opening paragraphs of an instruction on Fourth Amendment unlawful seizure, and this Comment addresses a number of issues that may be relevant to such an instruction. Instructions 4.12.1 - 4.12.3 provide more specific language that can be added to the

instruction as appropriate.

The Court of Appeals has set forth "a three-step process" for assessing Fourth Amendment false arrest claims: First, the plaintiff must show that he or she "was seized for Fourth Amendment purposes"; second, the plaintiff must show that this seizure was "unreasonable" under the Fourth Amendment; and third, the plaintiff must show that the defendant in question should be held liable for the violation. *Berg*, 219 F.3d at 269.[190]

Types of "seizures." Obviously, an arrest constitutes a seizure; but measures short of arrest also count as seizures for Fourth Amendment purposes. "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16 (1968); *see also id.* at 19 n.16 (seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen").[191] For instance,

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[190] As to the third step of this test, the simplest case is presented by a defendant who intentionally seized the plaintiff. Such a defendant should be held liable if the seizure was unreasonable and the defendant lacks qualified immunity.

A more complicated question arises when a defendant intends that another person be seized, but a fellow officer, acting on that defendant's directions, seizes the plaintiff instead. The Court of Appeals has suggested that a claim may be stated against such a defendant if the plaintiff can show deliberate indifference. *See Berg*, 219 F.3d at 274 ("Where a defendant does not intentionally cause the plaintiff to be seized, but is nonetheless responsible for the seizure, it may be that a due process 'deliberate indifference' rather than a Fourth Amendment analysis is appropriate.").

This Comment focuses on the first two steps of the inquiry – seizure and unreasonableness.

[191] "[A] Fourth Amendment seizure . . . [occurs] only when there is a governmental termination of freedom of movement *through means intentionally applied*." *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (emphasis in original). "A seizure occurs even when an unintended person is the object of detention, so long as the means of detention are intentionally applied to that person." *Berg*, 219 F.3d at 269. "For example, if a police officer fires his gun at a fleeing robbery suspect and the bullet inadvertently strikes an innocent bystander, there has been no Fourth Amendment seizure. . . . If, on the other hand, the officer fires his gun directly at the innocent bystander in the mistaken belief that the bystander is the robber, then a Fourth Amendment seizure has occurred." *Id.*

An officer's attempt to stop a suspect through a show of authority does not constitute a seizure if the attempt is unsuccessful. *See California v. Hodari D.*, 499 U.S. 621, 626 (1991) ("An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority" (emphasis in original).). *See also United States v. Waterman*, 569 F.3d 144, at 146 (3d Cir. 2009) (officers' drawing their guns did not count as "physical force" within the meaning of *Hodari D.*); *United States v. Smith*, 575 F.3d 308, 311, 316 (3d Cir. 2009) (after officer asked Smith to place his hands on patrol car's hood so that officers "could 'speak with him further,'"

"[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' . . . ." *Whren v. United States*, 517 U.S. 806, 809 (1996).[192] "A seizure does not occur every time a police officer approaches someone to ask a few questions. Such consensual encounters are important tools of law enforcement and need not be based on any suspicion of wrongdoing." *Johnson v. Campbell*, 332 F.3d 199, 205 (3d Cir. 2003). However, "an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., joined by Rehnquist, J.). The Supreme Court has subsequently refined this test; it now asks "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *United States v. Drayton*, 536 U.S. 194, 202 (2002) (quoting *Florida v. Bostick*, 501 U.S. 429, 436 (1991)); *see also Drayton*, 536 U.S. at 202 (noting that "[t]he reasonable person test . . . is objective and 'presupposes an *innocent* person'" (quoting *Bostick*, 501 U.S. at 438)).[193]

As discussed below, the degree of justification required to render a seizure reasonable under the Fourth Amendment varies with the nature and scope of the seizure. "The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." *Ornelas v. U.S.*, 517 U.S. 690, 696 (1996).[194]

Justification of seizure based upon "reasonable suspicion." See Comment 4.12.1 for a discussion of *Terry* stops.

Smith's two steps toward the car, prior to fleeing, did not "manifest submission" under the circumstances).

[192] *See also Brendlin v. California*, 127 S. Ct. 2400, 2406-07 (2007) (holding that "during a traffic stop an officer seizes everyone in the vehicle, not just the driver").

[193] Citing *Drayton*, the Court of Appeals has rejected the view that a seizure should be presumed when officers approach a person for questioning based on a tip. *See United States v. Crandell*, 554 F.3d 79, 85 (3d Cir. 2009) ("The subjective intent underlying an officer's approach does not affect the seizure analysis.... [A] seizure does not occur simply because an officer approaches an individual ... to ask questions.... Therefore, a tip police received that motivates their encounter with an individual merely serves to color the backstory at this stage.").

[194] "The validity of the arrest is not dependent on whether the suspect actually committed any crime, and 'the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant.'" *Johnson*, 332 F.3d at 211 (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979)).

Justification of seizure based upon execution of a search warrant. "Under *Michigan v. Summers*, 452 U.S. 692 (1981), during execution of a search warrant, police can detain the occupant of the house they have a warrant to search. This is reasonable to protect the police, to prevent flight, and generally to avoid dangerous confusion." *Baker v. Monroe Tp.*, 50 F.3d 1186, 1191 (3d Cir. 1995); *see also Muehler v. Mena*, 125 S.Ct. 1465, 1472 (2005) (holding that, under the circumstances, officers' detention of house resident in handcuffs during execution of search warrant on house "did not violate the Fourth Amendment"); *id.* (opinion of Kennedy, J.) (concurring, but stressing the need to "ensure that police handcuffing during searches becomes neither routine nor unduly prolonged"); *Los Angeles County v. Rettele*, 127 S.Ct. 1989, 1991, 1993 (2007) (per curiam) (holding that officers searching house under valid warrant did not violate the Fourth Amendment rights of innocent residents whom they forced to stand naked for one to two minutes, because one suspect was known to have a firearm and the residents' bedding could have contained weapons). "Although *Summers* itself only pertains to a resident of the house under warrant, it follows that the police may stop people coming to or going from the house if police need to ascertain whether they live there." *Baker*, 50 F.3d at 1192.

Justification of seizure based upon "probable cause." See Comment 4.12.2 for a discussion of probable cause.

Arrests upon warrant. See Comment 4.12.3 for a discussion of claims arising from an arrest upon a warrant.

Arrests without a warrant. See Comment 4.12.2 for a discussion of claims arising from warrantless arrests.

Holding the plaintiff after arrest. The Court of Appeals has observed that the law "is not entirely settled" as to whether a police officer can be liable under Section 1983 for failing to try to secure the plaintiff's release when exculpatory evidence comes to light after a lawful arrest. *Wilson v. Russo*, 212 F.3d 781, 792 (3d Cir. 2000) (citing *Brady v. Dill*, 187 F.3d 104, 112 (1st Cir. 1999); *id.* at 117-125 (Pollak, D.J., concurring); *Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir. 1992); *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986)); *compare Rogers v. Powell*, 120 F.3d 446, 456 (3d Cir. 1997) ("Continuing to hold an individual in handcuffs once it has been determined that there was no lawful basis for the initial seizure is unlawful within the meaning of the Fourth Amendment.").

The *Heck v. Humphrey* bar. If a convicted prisoner must show that his or her conviction was erroneous in order to establish the Section 1983 unlawful arrest claim,[195] then the plaintiff cannot

[195] The Third Circuit has reasoned that "[b]ecause a conviction and sentence may be upheld even in the absence of probable cause for the initial stop and arrest . . . claims for false arrest and false imprisonment are not the type of claims contemplated by the Court in *Heck* which necessarily implicate the validity of a conviction or sentence." *Montgomery v. De Simone*, 159 F.3d 120, 126 n.5 (3d Cir. 1998); *but see Gibson v. Superintendent of NJ Dept. of Law and*

proceed with the claim until the conviction has been reversed or otherwise invalidated. *See Heck v. Humphrey*, 512 U.S. 477, 486-87 & n.6 (1994) (giving the example of a conviction "for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest").[196] However, the *Heck* impediment is only triggered once there is a criminal conviction. *See Wallace v. Kato*, 127 S.Ct. 1091, 1097-98 (2007) (holding that "the *Heck* rule for deferred accrual is called into play only when there exists 'a conviction or sentence that has not been ... invalidated,' that is to say, an 'outstanding criminal judgment.'"). Notably, *Heck* bars a plaintiff from pressing a claim but does not toll the running of the limitations period. *See Wallace*, 127 S. Ct. at 1099. Under *Wallace*, a false arrest claim accrues at the time of the false arrest, and the limitations period runs from the point when the plaintiff is no longer detained without legal process. *Wallace*, 127 S. Ct. at 1096 ("Reflective of the fact that false imprisonment consists of detention without legal process, a false imprisonment ends once the victim becomes held pursuant to such process--when, for example, he is bound over by a magistrate or arraigned on charges.").

Relationship to malicious prosecution claims. The common law tort of false arrest covers the time up to the issuance of process, whereas the common law tort of malicious prosecution would cover subsequent events. *See Heck*, 512 U.S. at 484; *Wallace*, 127 S. Ct. at 1096; *see also Montgomery*, 159 F.3d at 126 ("A claim for false arrest, unlike a claim for malicious prosecution, covers damages only for the time of detention until the issuance of process or arraignment, and not more."); *Hector v. Watt*, 235 F.3d 154, 156 (3d Cir. 2000), as amended (Jan. 26, 2001) ("[F]alse arrest does not permit damages incurred after an indictment."). Regarding malicious prosecution claims, see Instruction 4.13.

Public Safety - Division of State Police, 411 F.3d 427, 450-51 (3d Cir. 2005) ("*Heck* does not set forth a categorical rule that all Fourth Amendment claims accrue at the time of the violation. This Court's determination that the plaintiff's false arrest claim in *Montgomery* qualified as an exception to the *Heck* deferral rule, and thus accrued on the night of the arrest, does not mandate a blanket rule that all false arrest claims accrue at the time of the arrest."). *Cf. Rose v. Bartle*, 871 F.2d 331, 350-51 (3d Cir. 1989) (expressing doubt concerning the holding of another Circuit that "conviction is a complete defense to a section 1983 action for false arrest").

[196] It is unclear whether this bar also applies to persons no longer in custody. *See infra* Comment to Instruction 4.13.

4.12.1 Section 1983 – Unlawful Seizure – *Terry* Stop and Frisk

Model

A "seizure" occurs when a police officer restrains a person in some way, either by means of physical force or by a show of authority that the person obeys. Of course, a seizure does not occur every time a police officer approaches someone to ask a few questions. Such consensual encounters are important tools of law enforcement and need not be based on any suspicion of wrongdoing. However, an initially consensual encounter with a police officer can turn into a seizure, if, in view of all the circumstances, a reasonable person would have believed that [he/she] was not free to end the encounter. If a reasonable person, under the circumstances, would have believed that [he/she] was not free to end the encounter, then at that point the encounter has turned into a "stop" that counts as a "seizure" for purposes of the Fourth Amendment.

If you find that [plaintiff] has proved by a preponderance of the evidence that such a stop occurred, then you must decide whether the stop was justified by "reasonable suspicion."

The Fourth Amendment requires that any seizure must be reasonable. In order to "stop" a person, the officer must have a "reasonable suspicion" that the person has committed, is committing, or is about to commit a crime. There must be specific facts that, taken together with the rational inferences from those facts, reasonably warrant the stop. [[Plaintiff] has the burden of proving that [defendant] lacked "reasonable suspicion" for the stop.][197] In deciding this issue, you should consider all the facts available to [defendant] at the moment of the stop. You should consider all the events that occurred leading up to the stop, and decide whether those events, viewed from the standpoint of a reasonable police officer, amount to reasonable suspicion. [Keep in mind that a police officer may reasonably draw conclusions, based on his or her training and experience, that might not occur to an untrained person.][198]

[Define the relevant crime[s].]

[When an officer is investigating a person at close range and the officer is justified in believing that the person is armed and dangerous to the officer or others, the officer may conduct a limited protective search for concealed weapons. But the search must be limited to that which is necessary to discover such weapons.]

The length of the stop must be proportionate to the reasonable suspicion that gave rise to the

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[197] See Comment for a discussion of the burden of proof regarding "reasonable suspicion."

[198] This sentence may be included if there is relevant evidence of the officer's training and/or experience.

stop (and any information developed during the stop). Ultimately, unless the stop yields information that provides probable cause to arrest the person, the officer must let the person go. [I will shortly explain more about the concept of "probable cause."] There is no set rule about the length of time that a person may be detained before the seizure becomes a full-scale arrest. [Rather, you must consider whether the length of the seizure was reasonable. In assessing the length of the seizure, you should take into account whether the police were diligent in pursuing their investigation, or whether they caused undue delay that lengthened the seizure.][199]

As I told you earlier, [plaintiff] must prove that [defendant] intended to commit the acts in question; but apart from that requirement, [defendant's] actual motivation is irrelevant. If [defendant's] actions constituted an unreasonable seizure, it does not matter whether [defendant] had good motivations. And an officer's improper motive is irrelevant to the question whether the objective facts available to the officer at the time gave rise to reasonable suspicion.

Comment

"[C]ertain investigative stops by police officers [a]re permissible without probable cause, as long as 'in justifying the particular intrusion [into Fourth Amendment rights] the police officer [is] able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Karnes v. Skrutski*, 62 F.3d 485, 492 (3d Cir. 1995) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)); *Adams v. Williams*, 407 U.S. 143, 146 (1972) ("A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."); *U.S. v. Delfin-Colina*, 464 F.3d 392, 397 (3d Cir. 2006) (holding "that the *Terry* reasonable suspicion standard applies to routine traffic stops"); *see also Baker v. Monroe Tp.*, 50 F.3d 1186, 1192 (3d Cir. 1995) ("[T]he need to ascertain the Bakers' identity, the need to protect them from stray gunfire, and the need to clear the area of approach for the police to be able to operate efficiently all made it reasonable to get the Bakers down on the ground for a few crucial minutes.").[200]

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[199] If a more detailed discussion of this issue is desired, language from the second paragraph of Instruction 4.12.2 can be added here.

[200] In addition, "'[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' he may conduct a limited protective search for concealed weapons." *Adams*, 407 U.S. at 146 (quoting *Terry*, 392 U.S. at 24). To fall within this principle, such a search "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry*, 392 U.S. at 26. As the Supreme Court more recently explained:

[I]n a traffic-stop setting, the first *Terry* condition – a lawful investigatory stop –

Such stops require "reasonable suspicion," which is assessed by reference to the "totality of the circumstances." *Karnes*, 62 F.3d at 495; *see also Terry*, 392 U.S. at 21-22 (analysis considers "the facts available to the officer at the moment of the seizure"); *Johnson v. Campbell*, 332 F.3d 199, 206 (3d Cir. 2003) (holding that "officers may rely on a trustworthy second hand report, if that report includes facts that give rise to particularized suspicion").[201] "Based upon that whole picture the

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> is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity. To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.

Arizona v. Johnson, 129 S. Ct. 781, 784 (2009).

If during such a search the officer detects "nonthreatening contraband," the officer may seize that contraband. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993). As the Court of Appeals has summarized the test:

> Assuming that an officer is authorized to conduct a *Terry* search at all, he is authorized to assure himself that a suspect has no weapons. He is allowed to slide or manipulate an object in a suspect's pocket, consistent with a routine frisk, until the officer is able reasonably to eliminate the possibility that the object is a weapon. If, before that point, the officer develops probable cause to believe, given his training and experience, that an object is contraband, he may lawfully perform a more intrusive search. If, indeed, he discovers contraband, the officer may seize it, and it will be admissible against the suspect. If, however, the officer "goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed." *Dickerson*, 508 U.S. at 373.

United States v. Yamba, 506 F.3d 251, 259 (3d Cir. 2007).

[201] Where the basis for the officer's suspicion is an anonymous tip, corroboration is important. "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated . . . , 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.'" *Florida v. J.L.*, 529 U.S. 266, 270 (2000) (quoting *Alabama v. White*, 496 U.S. 325, 329 (1990)). *Cf. United States v. Mathurin*, 561 F.3d 170, 176 (3d Cir. 2009) ("We need not undertake the established legal methods for testing the reliability of this tip because a tip from one federal law enforcement agency to another implies a degree of expertise and a shared purpose in stopping illegal activity, because the agency's identity is known."). Nonetheless, "there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide

detaining officers must have a particularized and objective basis for suspecting," *U.S. v. Cortez*, 449 U.S. 411, 417 (1981), that the specific person they stop "has committed, is committing, or is about to commit a crime," *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). Reasonable suspicion can arise from "an officer's observation of entirely legal acts, where the acts, when viewed through the lens of a police officer's experience and combined with other circumstances, [lead] to an articulable belief that a crime [is] about to be committed." *Johnson*, 332 F.3d at 207.[202] The test is an objective one; "subjective good faith" does not suffice to justify a stop. *Terry*, 392 U.S. at 22.[203]

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reasonable suspicion to make the investigatory stop.'" *J.L.*, 529 U.S. at 270 (quoting *White*, 496 U.S. at 327); *see also United States v. Silveus*, 542 F.3d 993, 1000 (3d Cir. 2008) (reasonable suspicion rested in large part on anonymous tip that "appeared to be reliable, given that it was corroborated by the agents' prior knowledge").

In *United States v. Torres*, 534 F.3d 207 (3d Cir. 2008), the Court of Appeals based its finding of reasonable suspicion on the information provided by a taxi driver's 911 call; the court noted that this call constituted a tip by "an innominate (i.e., unidentified) informant who could be found if his tip proved false rather than an anonymous (i.e., unidentifiable) tipster who could lead the police astray without fear of accountability." As the court summarized the evidence: "[T]he informant provided a detailed account of the crime he had witnessed seconds earlier, gave a clear account of the weapon and the vehicle used by Torres, and specified his own occupation, the kind and color of the car he was driving, and the name of his employer. The veracity and detail of this information were enhanced by the fact that the informant continued to follow Torres, providing a stream of information meant to assist officers in the field." *Id.* at 213. *See also United States v. Johnson*, 592 F.3d 442, 449-50 (3d Cir. 2010) (reasonable suspicion existed based on non-anonymous 911 call reporting a shooting and providing details – some of which matched police observations – regarding vehicle containing persons involved in the shooting).

[202] As the Court explained in *Cortez*, "The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions inferences and deductions that might well elude an untrained person." *Cortez*, 449 U.S. at 418.

[203] An officer's misunderstanding of the law does not necessarily render a traffic stop unreasonable. As the Court of Appeals has explained:

> In situations where an objective review of the record evidence establishes reasonable grounds to conclude that the stopped individual has in fact violated the traffic-code provision cited by the officer, the stop is constitutional even if the officer is mistaken about the scope of activities actually proscribed by the cited traffic-code provision. Therefore an officer's Fourth Amendment burden of production is to (1) identify the ordinance or statute that he believed had been violated, and (2) provide specific, articulable facts that support an objective

The scope of the ensuing stop[204] and questioning must be proportionate to the reasonable suspicion, and unless that inquiry yields probable cause the officers must then let the person go. *See Berkemer*, 468 U.S. at 439-40. "[T]here is no per se rule about the length of time a suspect may be detained before the detention becomes a full-scale arrest"; rather, "the court must examine the reasonableness of the detention." *Baker*, 50 F.3d at 1192 (holding that "a detention of fifteen minutes time to identify and release a fairly large group of people during a drug raid" is not "unreasonable"). "[I]n assessing the effect of the length of the detention," the Court "take[s] into account whether the police diligently pursue their investigation." *U.S. v. Place*, 462 U.S. 696, 709 (1983).

As noted in the Comment to Instruction 4.12.2, in the case of a warrantless arrest, Third Circuit caselaw divides as to the burden of proof regarding probable cause. By contrast, the caselaw does not appear to have addressed the burden of proof regarding reasonable suspicion in the case of a *Terry* stop; but one district court decision concerning an analogous issue suggests that the burden would be on the plaintiff. *See Armington v. School Dist. of Philadelphia*, 767 F. Supp. 661, 667 (E.D.Pa.) (in Section 1983 case involving school district's order that bus driver undergo urinalysis, holding that the bus driver plaintiff "has the burden of proving that defendant lacked reasonable suspicion"), *aff'd without opinion*, 941 F.2d 1200 (3d Cir. 1991).

> determination of whether any officer could have possessed reasonable suspicion of the alleged infraction. As long as both prongs are met, an officer's subjective understanding of the law at issue would not be relevant to the court's determination.

Delfin-Colina, 464 F.3d at 399-400.

[204] *See also Johnson*, 592 F.3d at 452, 453 (given that officers "reasonably suspected that the taxi's occupants had been involved in a physical altercation and shooting just minutes before," it was not unreasonable for officers to "surround[] the vehicle, dr[a]w their weapons, shout[] at the taxicab's occupants, and subsequently handcuff" them).

4.12.2 Section 1983 – Unlawful Seizure – Arrest – Probable Cause

Model

An arrest is a "seizure," and the Fourth Amendment prohibits police officers from arresting a person unless there is probable cause to do so.

[In this case, [plaintiff] claims that [defendant] arrested [him/her], but [defendant] argues that [he/she] merely stopped [plaintiff] briefly and that this stop did not rise to the level of an arrest. You must decide whether the encounter between [plaintiff] and [defendant] was merely a stop, or whether at some point it became an arrest. In deciding whether an arrest occurred, you should consider all the relevant circumstances. Relevant circumstances can include, for example, the length of the interaction; whether [defendant] was diligent in pursuing the investigation, or whether [he/she] caused undue delay that lengthened the seizure; whether [defendant] pointed a gun at [plaintiff]; whether [defendant] physically touched [plaintiff]; whether [defendant] used handcuffs on [plaintiff]; whether [defendant] moved [plaintiff] to a police facility; and whether [defendant] stated that [he/she] was placing [plaintiff] under arrest. Relevant circumstances also include whether [defendant] had reason to be concerned about safety.][205]

[If you find that an arrest occurred, then][206] you must decide whether [[defendant] has proved by a preponderance of the evidence that the arrest was justified by probable cause] [[plaintiff] has proved by a preponderance of the evidence that [defendant] lacked probable cause to arrest [plaintiff]].[207]

To determine whether probable cause existed, you should consider whether the facts and circumstances available to [defendant] would warrant a prudent officer in believing that [plaintiff] had committed or was committing a crime.

[Define the relevant crime[s].] [Under [the relevant] law, the offense of [name offense] is a misdemeanor, not a felony. This means that because [defendant] did not have a warrant for the arrest, [defendant] could only arrest [plaintiff] for [name offense] if [plaintiff] committed [name

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[205] Include this paragraph only if the defendant disputes that an arrest occurred.

[206] Include this phrase only if the defendant disputes that an arrest occurred.

[207] In the case of a warrantless arrest, some Third Circuit caselaw supports the view that the defendant has the burden of proof as to probable cause, but other Third Circuit precedent indicates the contrary. *See* Instruction 4.12.2 cmt. Accordingly, the model includes alternative language concerning the burden on this issue.

offense] in [defendant's] presence.][208]

[In this case the state prosecutor decided not to prosecute the criminal charge against [plaintiff]. The decision whether to prosecute is within the prosecutor's discretion, and he or she may choose not to prosecute a charge for any reason. Thus, the decision not to prosecute [plaintiff] does not establish that [defendant] lacked probable cause to arrest [plaintiff]. You must determine whether [defendant] had probable cause based upon the facts and circumstances known to [defendant] at the time of the arrest, not what happened afterwards.]

Probable cause requires more than mere suspicion; however, it does not require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt. The standard of probable cause represents a balance between the individual's right to liberty and the government's duty to control crime. Because police officers often confront ambiguous situations, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable officers.

[As I told you earlier, [plaintiff] must prove that [defendant] intended to commit the acts in question; but apart from that requirement, [defendant's] actual motivation is irrelevant. If [defendant's] actions constituted an unreasonable seizure, it does not matter whether [defendant] had good motivations. And an officer's improper motive is irrelevant to the question whether the objective facts available to the officer at the time gave rise to probable cause.][209]

Comment

Justification of seizure based upon "probable cause." "The Fourth Amendment prohibits a police officer from arresting a citizen except upon probable cause." *Rogers v. Powell*, 120 F.3d 446, 452 (3d Cir. 1997); *see also Patzig v. O'Neil*, 577 F.2d 841, 848 (3d Cir. 1978) ("Clearly, an arrest without probable cause is a constitutional violation actionable under s 1983.").[210]

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[208] Third Circuit caselaw has not clearly settled whether warrantless arrests for misdemeanors committed outside the officer's presence are permitted by the Fourth Amendment. *See* Comment.

[209] If Instruction 4.12.3 (concerning warrant applications) will be given, it may be advisable to revise or omit this paragraph, because, as stated in Instruction 4.12.3, the jury will be directed to consider whether the defendant made deliberately or recklessly false statements or omissions.

[210] Sometimes there may be a dispute as to whether the defendant in fact subjected the plaintiff to an arrest rather than merely a lesser type of seizure. "There is no per se rule that pointing guns at people, or handcuffing them, constitutes an arrest. . . . But use of guns and handcuffs must be justified by the circumstances . . . ." *Baker*, 50 F.3d at 1193. (The use of guns or handcuffs can in some circumstances give rise to an excessive force claim. *See id.*; *see also*

The standard of probable cause "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975). "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Id.* at 112 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).[211] There must exist "facts and circumstances 'sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.'" *Gerstein*, 420 U.S. at 111 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). "Probable cause to arrest requires more than mere suspicion; however, it does not require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt." *Orsatti v. New Jersey State Police*, 71 F.3d 480, 482-83 (3d Cir. 1995). The analysis is a pragmatic one and should be based upon common sense.[212]

Kopec v. Tate, 361 F.3d 772, 777 (3d Cir. 2004).)

Whether the seizure rises to the level of an arrest (so as to require probable cause) depends on the circumstances. *See, e.g., Kaupp v. Texas*, 538 U.S. 626, 631 (2003) (per curiam) (holding that arrest occurred in case where defendant "was taken out in handcuffs, without shoes, dressed only in his underwear in January, placed in a patrol car, driven to the scene of a crime and then to the sheriff's offices, where he was taken into an interrogation room and questioned"); *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (holding that detention was "in important respects indistinguishable from a traditional arrest" where suspect was "taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room," was "never informed that he was 'free to go,'" and "would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody").

[211] In *United States v. Sed*, 601 F.3d 224 (3d Cir. 2010), the fact that an arrest by Pennsylvania State Police occurred in Ohio and violated Ohio state law did not establish a Fourth Amendment violation. *See id.* at 228. Rather, the Court of Appeals analyzed the totality of the circumstances – which included the fact that the arrest occurred less than 100 yards from the Pennsylvania border – and concluded that the seizure was reasonable because the failure to wait until the suspects entered Pennsylvania "was nothing more than an honest mistake and a *de minimis* one at that." *Id.* at 229.

[212] Discussing the issuance of search warrants, the Court has held:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed.

"Improper motive . . . is irrelevant to the question whether the *objective* facts available to the officers at the time reasonably could have led the officers to conclude that [the person] was committing an offense." *Estate of Smith v. Marasco*, 318 F.3d 497, 514 (3d Cir. 2003); *see also Whren v. United States*, 517 U.S. 806, 813 (1996) (rejecting the "argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved"); *Mosley v. Wilson*, 102 F.3d 85, 94-95 (3d Cir. 1996).[213]

"In a § 1983 action the issue of whether there was probable cause to make an arrest is usually a question for the jury...." *Sharrar v. Felsing*, 128 F.3d 810, 818 (3d Cir. 1997); *see also Deary v. Three Un-Named Police Officers*, 746 F.2d 185, 192 (3d Cir. 1984) (same), *overruled on other grounds by Anderson v. Creighton*, 483 U.S. 635 (1987); *Snell v. City of York*, 564 F.3d 659, 671-72 (3d Cir. 2009) ("Clarification of the specific factual scenario must precede the probable cause inquiry. We conclude that determining these facts was properly the job of the jury ....").[214]

The Court of Appeals has suggested that "the burden of proof as to the existence of probable cause may well fall upon the defendant, once the plaintiff has shown an arrest and confinement without warrant." *Patzig*, 577 F.2d at 849 n.9; *see also Losch v. Borough of Parkesburg*, 736 F.2d 903, 909 (3d Cir. 1984) (in case involving malicious prosecution claim, stating that "defendants bear the burden at trial of proving the defense of good faith and probable cause"); *compare* Comment 4.13 (discussing burden of proof regarding probable cause element of malicious prosecution claims).[215] The *Patzig* court based this observation partly on the burden-shifting scheme at common

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Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83 (1980)).

[213] Thus, for example, the fact that an officer was motivated by race would not render an otherwise proper arrest violative of the Fourth Amendment, though it would raise Equal Protection issues. *See Whren*, 517 U.S. at 813 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."); *cf. Desi's Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 425 (3d Cir. 2003) (noting that "selective prosecution may constitute illegal discrimination even if the prosecution is otherwise warranted"); *Gibson v. Superintendent of NJ Dept. of Law and Public Safety - Division of State Police*, 411 F.3d 427, 441 (3d Cir. 2005) (permitting racially selective law enforcement claim to proceed).

[214] "[T]he common law presumption raised by a magistrate's prior finding that probable cause exists does not apply to section 1983 actions." *Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 789 (3d Cir. 2000).

[215] By contrast, another Circuit has shifted the burden of production but not the burden of proof:

Although the plaintiff bears the burden of proof on the issue of unlawful arrest,

law, and partly on the Supreme Court's reasoning in *Pierson v. Ray*, 386 U.S. 547 (1967). *See Patzig*, 577 F.2d at 849 n.9 (noting that the *Pierson* Court "spoke of good faith and probable cause as defenses to a [Section] 1983 action for unconstitutional arrest").[216] Some years after deciding *Patzig* and *Losch*–and without citing either case–the Court of Appeals decided *Edwards v. City of Philadelphia*, 860 F.2d 568 (3d Cir. 1988). In *Edwards*, the Court of Appeals addressed the burden of proof on an excessive force claim arising from a warrantless arrest. *See id.* at 570-71. The *Edwards* plaintiff "concede[d] that the burden to negate probable cause in making the arrest [fell] to him," *id.* at 571, and the Court of Appeals proceeded on that assumption, holding that the plaintiff "ha[d] not demonstrated that" probable cause was absent, *id.* at 571 n.2. The Court of Appeals further held that the plaintiff had the burden of proving that the force employed was excessive: Analyzing excessive force in the course of an arrest as a deprivation of due process, the court explained that "[t]he occurrence of that deprivation . . . is the first element of the § 1983 claim and, accordingly, proving it is part of the plaintiff's burden." *Id.* at 573. In *Iafrate v. Globosits*, 1989 WL 14062 (E.D.Pa. Feb. 22, 1989), another excessive force case stemming from a warrantless arrest, the court relied on *Edwards* to hold that the "plaintiff must show that the officer lacked probable cause to effect the arrest, or that the force used was excessive," *id.* at *3. It is not clear, accordingly, which party has the burden of proof as to probable cause for a warrantless arrest.

The Committee has noted a similar question, concerning burden of proof, with respect to the

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> she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of production falls on the defendant.

Dubner v. City and County of San Francisco, 266 F.3d 959, 965 (9th Cir. 2001); *see also Davis v. Rodriguez*, 364 F.3d 424, 433 n.8 (2d Cir. 2004) (noting circuit split as to "which side carries the burden regarding probable cause" with respect to Section 1983 false arrest claims).

[216] *Pierson* is distinguishable from a typical Fourth Amendment false arrest case. In *Pierson*, clergy members attempting to use a segregated bus terminal in Jackson, Mississippi were arrested by city police and charged with misdemeanors under a state statute. *See Pierson*, 386 U.S. at 549. (The state statute was later held unconstitutional as applied to a similar situation, because it was used to enforce race discrimination in a facility used for interstate transportation. *See id.* at 550 n.4.) The core of the plaintiffs' claims in *Pierson*, then, was that the arrests were motivated by a desire to enforce segregation. *See id.* at 557 (noting plaintiffs' claim that "the police officers arrested them solely for attempting to use the 'White Only' waiting room"). That the Court placed the burden on the defendant officers to prove good faith and probable cause in *Pierson*, then, may not conclusively establish that defendants have a similar burden in run-of-the-mill Fourth Amendment false arrest cases.

In addition, under current law, an officer's subjective good faith is relevant neither to the arrest's compliance with the Fourth Amendment nor to the question of qualified immunity.

lack-of-probable cause element in claims for malicious prosecution. *See infra* Comment 4.13. Unlike Instruction 4.12.2 – which provides two alternative formulations, one with the burden on the plaintiff and one with the burden on the defendant – Instruction 4.13 places the burden on the plaintiff. The reason for the difference between the approaches taken in the two instructions is that while recent Third Circuit cases have held that malicious prosecution plaintiffs have the burden of proving lack of probable cause, the caselaw in the context of false arrest claims – as noted above – is more equivocal.

When the facts alleged to constitute probable cause include an informant's tip, the presence or absence of probable cause should be determined by assessing the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 230 (1983) (assessing probable cause in the context of a judge's issuance of a search warrant). The decisionmaker should consider "all the various indicia of reliability (and unreliability) attending an informant's tip." *Id.* at 234. Indicia of reliability can include the fact that an informant has been accurate in the past, or that the informant's account is first-hand and highly detailed, or that the informant is known to be an honest private citizen, or that the police acquire independent confirmation of some of the details stated in the informant's tip. *See id.* at 233-34, 241-44.[217] By contrast, an informant's "wholly conclusory statement"–bereft of any supporting detail–would not provide an appropriate basis for a finding of probable cause. *See id.* at 239.

The probable cause analysis in cases of eyewitness identification is fact-specific. The Court of Appeals has stated that "a positive identification by a victim witness, without more, would usually be sufficient to establish probable cause," but that might not be true if, for example, there is "[i]ndependent exculpatory evidence or substantial evidence of the witness's own unreliability that is known by the arresting officers." *Wilson v. Russo*, 212 F.3d 781, 790 (3d Cir. 2000); *id.* at 797 (Pollak, D.J., concurring in part and dissenting in part) (stating that "the court's rejection of a per se rule is surely correct"); *compare id.* at 793 (Garth, J., concurring) ("Inconsistent or contradictory evidence . . . cannot render invalid . . . a positive identification by an eyewitness who either a police officer or magistrate deemed to be reliable."); *see also Sharrar*, 128 F.3d at 818 ("When a police officer has received a reliable identification by a victim of his or her attacker, the police have probable cause to arrest.").

"The legality of a seizure based solely on statements issued by fellow officers depends on whether the officers who *issued* the statements possessed the requisite basis to seize the suspect." *Rogers v. Powell*, 120 F.3d 446, 453 (3d Cir. 1997). However, "where a police officer makes an arrest on the basis of oral statements by fellow officers, an officer will be entitled to qualified immunity from liability in a civil rights suit for unlawful arrest provided it was objectively reasonable for him to believe, on the basis of the statements, that probable cause for the arrest existed." *Id.* at 455; *see also Capone v. Marinelli*, 868 F.2d 102, 105 (3d Cir. 1989). As soon as the officer learns of the error, though, the officer must release the prisoner: "Continuing to hold an

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[217] For a decision applying the *Gates* test to an application for a search warrant, see *United States v. Stearn*, 597 F.3d 540, 555-56 (3d Cir. 2010).

individual in handcuffs once it has been determined that there was no lawful basis for the initial seizure is unlawful within the meaning of the Fourth Amendment." *Rogers*, 120 F.3d at 456.

If an officer otherwise had probable cause to believe that a suspect had violated a criminal statute, the presence of probable cause ordinarily will not be negated by the fact that the statute is later held unconstitutional. *See Michigan v. DeFillippo*, 443 U.S. 31, 37-38 (1979) (noting "the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws").[218] However, if the officer erroneously believed particular conduct was criminal when in fact it was not, the presence of probable cause to believe the suspect had committed that conduct would not provide probable cause to arrest. *See Johnson v. Campbell*, 332 F.3d 199, 214 (3d Cir. 2003) ("[W]hat Campbell believed Johnson had done - speak profane words in public - is not a crime, therefore Campbell could not have had probable cause to believe a crime was being committed.").[219]

"Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).[220] The relevant question is whether those facts provided probable cause to arrest for any crime, whether or not that crime was the stated reason for the arrest: The court should not confine the inquiry to the facts "bearing upon the offense actually invoked at the time of arrest," and should not require that "the offense supported by these known facts . . . be 'closely related' to the offense

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[218] Similarly, the fact that the charges are later dismissed as time-barred does not show that the officer lacked probable cause to make the arrest. "A police officer has limited training in the law and requiring him to explore the ramifications of the statute of limitations affirmative defense is too heavy a burden." *Sands v. McCormick*, 502 F.3d 263, 269 (3d Cir. 2007). (The *Sands* court noted that "the dates of the offenses were disclosed in the affidavit of probable cause that was submitted to the magistrate," and that "[t]here is no indication that the magistrate had any hesitancy about issuing the arrest warrant."). *See also Holman v. City of York*, 564 F.3d 225, 231 (3d Cir. 2009) ("We do not endorse the District Court's statement that affirmative defenses are 'not a relevant consideration' – as we have never so held – but we do conclude that, here, the defense of necessity need not have been considered in the assessment of probable cause for arrest for trespass at the scene.").

[219] The *Johnson* court noted the possibility that an officer might raise a qualified immunity defense regarding such a situation, but did not decide the question because the officer in *Johnson* had not argued qualified immunity. *See Johnson*, 332 F.3d at 214.

[220] *See also Gilles v. Davis*, 427 F.3d 197, 206 (3d Cir. 2005) (stating, with respect to qualified immunity analysis, that "whether it was reasonable to believe there was probable cause is in part based on the limited information that the arresting officer has at the time").

that the officer invoked" at the time of the arrest. *Id.* at 153.[221]

Warrantless arrests. "A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003).[222] "[T]he Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense." *DeFillippo*, 443 U.S. at 36. "The validity of the arrest does not depend on whether the suspect actually committed a crime; the

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[221] *Cf. United States v. Prandy-Binett*, 995 F.2d 1069, 1073-74 (D.C. Cir. 1993) ("It is simply not the law that officers must be aware of the *specific* crime an individual is likely committing... It is enough that they have probable cause to believe the defendant has committed one or the other of several offenses, even though they cannot be sure which one.").

If an officer arrested the plaintiff on two charges and had probable cause to arrest the plaintiff on one charge, but not on another, the plaintiff cannot recover for the arrest on the latter charge if the arrest on the latter charge resulted in no additional harm to the plaintiff. *See Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 790 n.7 (3d Cir. 2000) (so holding, but noting that "a different conclusion may be warranted if the additional charge results in longer detention, higher bail, or some other added disability").

[222] "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). The *Atwater* Court expressly left open whether the misdemeanor must have been committed in the officer's presence. *See Atwater*, 532 U.S. at 341 n.11 ("We need not, and thus do not, speculate whether the Fourth Amendment entails an 'in the presence' requirement for purposes of misdemeanor arrests.").

In *United States v. Myers*, the Court of Appeals decided a suppression issue based in part upon an officer's failure to comply with a state-law provision that authorized warrantless arrest "only if the offense is committed in the presence of the arresting officer or when specifically authorized by statute." *U.S. v. Myers*, 308 F.3d 251, 256 (3d Cir. 2002) (alternative holding). In *United States v. Laville*, 480 F.3d 187 (3d Cir. 2007), the Court of Appeals held "that the unlawfulness of an arrest under state or local law does not make the arrest unreasonable *per se* under the Fourth Amendment; at most, the unlawfulness is a factor for federal courts to consider in evaluating the totality of the circumstances surrounding the arrest." *Laville*, 480 F.3d at 196; *see also id.* at 192 (explaining that *Myers* "made it quite clear ... that the validity of an arrest under state law is at most a factor that a court may consider in assessing the broader question of probable cause"). More recently, the Supreme Court has made clear that the Fourth Amendment analysis is unaffected by state-law restrictions on the circumstances under which a warrantless arrest may be made for a crime committed in an officer's presence: "[W]arrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and ... while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections." *Virginia v. Moore*, 128 S.Ct. 1598, 1607 (2008).

mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest." *Id.*

"Although police may make a warrantless arrest in a public place if they have probable cause to believe the suspect is a felon, 'the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.'" *Sharrar*, 128 F.3d at 819 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)). "The government bears the burden of proving that exigent circumstances existed." *Sharrar*, 128 F.3d at 820. "[A] warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence . . . , or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling." *State v. Olson*, 436 N.W.2d 92, 97 (Minn. 1989) (quoted with general approval in *Minnesota v. Olson*, 495 U.S. 91, 100 (1990)).[223] "A court makes the determination of whether there were exigent circumstances by reviewing the facts and reasonably discoverable information available to the officers at the time they took their actions and in making this determination considers the totality of the circumstances facing them." *Marasco*, 318 F.3d at 518.

Requirement of a prompt determination of probable cause after a warrantless arrest. The government "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Gerstein*, 420 U.S. at 125. Based on the balance between the government's "interest in protecting public safety" and the harm that detention can inflict on the individual, the Supreme Court has held "that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 56 (1991). If the judicial determination is provided within 48 hours of arrest, the burden is on the prisoner to show that the length of the delay, though less than 48 hours, was nonetheless unreasonable. *See McLaughlin*, 500 U.S. at 56 (listing possible bases for a finding of unreasonableness). By contrast, if the delay extends longer than 48 hours, "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Id.* at 57.

[223] "[L]aw enforcement officers 'may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'" *Michigan v. Fisher*, 130 S. Ct. 546, 548 (2009) (per curiam) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). *See also Marasco*, 318 F.3d at 518 (exigent circumstances exist "if the safety of either law enforcement or the general public is threatened").

4.12.3 Section 1983 – Unlawful Seizure – Arrest – Warrant Application

Model

In this case, prior to arresting [plaintiff], [defendant] obtained a warrant authorizing the arrest. [Plaintiff] asserts that [defendant] obtained the warrant by [making false statements] [means of omissions that created a falsehood] in the warrant affidavit.

To show that the arrest pursuant to this warrant violated the Fourth Amendment, [plaintiff] must prove each of the following three things by a preponderance of the evidence:

First: In the warrant affidavit, [defendant] made false statements, or omissions that created a falsehood.

Second: [Defendant] made those false statements or omissions either deliberately, or with a reckless disregard for the truth.

Third: Those false statements or omissions were material, or necessary, to the finding of probable cause for the arrest warrant.

Omissions are made with reckless disregard for the truth when an officer omits facts that are so obvious that any reasonable person would know that a judge would want to know those facts. Assertions are made with reckless disregard for the truth when an officer has obvious reasons to doubt the truth of what [he/she] is asserting. It is not enough for [plaintiff] to prove that [defendant] was negligent or that [defendant] made an innocent mistake.

To determine whether any misstatements or omissions were material, you must subtract the misstatements from the warrant affidavit, and add the facts that were omitted, and then determine whether the warrant affidavit, with these corrections, would establish probable cause.

Comment

The Supreme Court's discussion in *Wallace v. Kato*, 127 S.Ct. 1091 (2007), indicates that unlawful seizure claims based upon an arrest made pursuant to a warrant are analogous to the tort of malicious prosecution rather than to the tort of false arrest. In *Wallace*, the Court held that the tort of false imprisonment provided "the proper analogy" to the plaintiff's Fourth Amendment claim because the claim arose "from respondents' detention of petitioner *without legal process* in January 1994. They did not have a warrant for his arrest." *Wallace*, 127 S.Ct. at 1095. The *Wallace* Court explained that once legal process is provided, the tort of false imprisonment ends and any subsequent detention implicates the tort of malicious prosecution. *See id.* at 1096. The *Wallace* Court did not, however, indicate how this classification would affect the elements of a claim for unlawful seizure pursuant to a warrant. *See id.* at 1096 n.2 ("We have never explored the contours of a Fourth

Amendment malicious-prosecution suit under § 1983, *see Albright v. Oliver*, 510 U.S. 266, 270-271, 275 (1994) (plurality opinion), and we do not do so here."). Malicious prosecution claims in general are discussed below in Comment 4.13.

If the officer making an affidavit in support of an arrest warrant application includes "a false statement knowingly and intentionally, or with reckless disregard for the truth," and if, without that false statement, the application would not suffice to establish probable cause, then the warrant is invalid. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).[224] "This does not mean . . . that every fact recited in the warrant affidavit [must] necessarily [be] correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily." *Id.* at 165. "[A] plaintiff may succeed in a § 1983 action for false arrest made pursuant to a warrant if the plaintiff shows, by a preponderance of the evidence: (1) that the police officer 'knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant;' and (2) that 'such statements or omissions are material, or necessary, to the finding of probable cause.'" *Wilson v. Russo*, 212 F.3d 781, 786-87 (3d Cir. 2000) (quoting *Sherwood v. Mulvihill*, 113 F.3d 396, 399 (3d Cir.1997)); *see also Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 789 (3d Cir. 2000).[225]

"Proof of negligence or innocent mistake is insufficient." *Lippay v. Christos*, 996 F.2d 1490, 1501 (3d Cir. 1993); *see Franks*, 438 U.S. at 171. In addition, when a government affiant includes information provided by another government agency pursuant to a court order, the *Franks* standard becomes harder to meet because "government agents should generally be able to presume that information received from a sister governmental agency is accurate." *U.S. v. Yusuf*, 461 F.3d 374, 378 (3d Cir. 2006).[226] On the other hand, "the police cannot insulate a deliberate falsehood from a

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[224] A modified version of this instruction could be used with respect to search warrants.

[225] In *Wilson*, the plaintiff contended "that even if the statements are not material, he should at least get nominal damages for [the defendant's] failure to provide the judge with exculpatory information," but the court refused to address this argument because it was not timely raised. *See Wilson*, 212 F.3d at 789 n.6.

[226] The *Yusuf* court held that when information provided by a sister government agency under court order turns out to be false,

> [t]o demonstrate that a government official acted recklessly in relying upon such information, a defendant must first show that the information would have put a reasonable official on notice that further investigation was required. If so, a defendant may establish that the officer acted recklessly by submitting evidence: (1) of a systemic failure on the agency's part to produce accurate information upon request; or (2) that the officer's particular investigation into possibly inaccurate information should have given the officer an obvious reason to doubt the accuracy

Franks inquiry simply by laundering the falsehood through an unwitting affiant who is ignorant of the falsehood." *U.S. v. Shields*, 458 F.3d 269, 276 (3d Cir. 2006).[227]

Shields and *Yusuf* might at first glance seem to be in tension, but they can be reconciled by focusing on whether each case involved a danger that government investigators colluded to launder a falsehood through an unwitting government affiant. In *Yusuf*, the problem with the federal government's warrant application stemmed from erroneous information provided by the Virgin Islands Bureau of Internal Revenue, which produced the information pursuant to a court order rather than as part of a program of cooperation with the federal authorities. The Court of Appeals stressed that

> VIBIR did not disclose United's tax records voluntarily, but rather was required to do so because of an independent court order. This fact is important, as it detracts from any possible allegations that VIBIR and the FBI colluded to produce false information in the affidavit. Nor did VIBIR initiate the investigation with the FBI, which helps allay concerns that VIBIR deliberately provided false information to the FBI to cover up bad faith or improper motive.

461 F.3d at 387; *see also id.* at 396 (emphasizing the need to avoid "invit[ing] collusion among different agencies to insulate deliberate misstatements").

The reckless disregard standard applies differently to omissions than to affirmative statements: "(1) omissions are made with reckless disregard for the truth when an officer recklessly

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of the information.

Yusuf, 461 F.3d at 378. The Court of Appeals noted that this alternative holding was ultimately "inconsequential" to the outcome of the case, because even if the affidavit were reformulated to exclude the challenged portions, "[t]he reformulated affidavit clearly establishes probable cause to authorize the search warrants." *Id.* at 388.

[227] In *Shields*, an undercover FBI agent subscribed to a website in the course of his investigation of online child pornography. *See Shields*, 458 F.3d at 270-71. That agent distributed to other agents a template containing information for use in prosecuting child pornography cases; the template asserted that all those who joined the website in question were automatically subscribed to a particular email list, by means of which child pornography was distributed. *See id.* at 271-72. A second FBI agent incorporated this assertion into an affidavit in support of a search warrant application in connection with his investigation of Shields. *See id.* at 272-73. It was subsequently discovered that the assertion concerning automatic subscription was false. *See id.* at 274-75. The *Shields* court, however, rejected Shields' challenge to the warrant, because the court held that the affidavit "even purged of the offending material supports a finding of probable cause," *id.* at 277; thus, *Shields*' discussion of laundering a falsehood through an unwitting affiant is dictum.

omits facts that any reasonable person would know that a judge would want to know; and (2) assertions are made with reckless disregard for the truth when an officer has obvious reasons to doubt the truth of what he or she is asserting." *Wilson*, 212 F.3d at 783; *see also Lippay*, 996 F.2d at 1501 (to show reckless disregard, plaintiff must prove that defendant "made the statements in his affidavits 'with [a] high degree of awareness of their probable falsity'" (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964))). "To determine the materiality of the misstatements and omissions," the decisionmaker must "excise the offending inaccuracies and insert the facts recklessly omitted, and then determine whether or not the 'corrected' warrant affidavit would establish probable cause." *Wilson*, 212 F.3d at 789 (quoting *Sherwood*, 113 F.3d at 400).

"[A] mistakenly issued or executed warrant cannot provide probable cause for an arrest," even if the arrest is carried out by an officer other than the one who obtained the warrant. *Berg v. County of Allegheny*, 219 F.3d 261, 270 (3d Cir. 2000). As the Supreme Court has explained, although "police officers called upon to aid other officers in executing arrest warrants are entitled to assume" that the warrant application contained a showing of probable cause, "[w]here . . . the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Whiteley v. Warden*, 401 U.S. 560, 568 (1971); *see also Berg*, 219 F.3d at 270 (quoting *Whiteley*).

However, qualified immunity may protect an officer who relied on the existence of a warrant. *See Malley v. Briggs*, 475 U.S. 335, 343 (1986). An officer who obtained a warrant "will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Id.* at 341. Thus, the qualified immunity question "is whether a reasonably well trained officer in [the defendant's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.* at 345.[228] Similarly, if an officer makes an arrest based upon a warrant obtained by another officer, qualified immunity will protect the arresting officer if he acted "based on an objectively reasonable belief that" the warrant was valid; but "an apparently valid warrant does not render an officer immune from suit if his reliance on it is unreasonable in light of the relevant circumstances." *Berg*, 219 F.3d at 273.

In *Malley*, the trial court had ruled that "the act of the judge in issuing the arrest warrants for respondents broke the causal chain between petitioner's filing of a complaint and respondents' arrest." *Malley*, 475 U.S. at 339. Although the defendants did not press this argument before the Supreme Court, the Court noted in a footnote its rejection of the rationale:

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[228] The Court of Appeals has held that if that if the reckless disregard standard (discussed above) is met then the defendant is foreclosed from establishing qualified immunity: "If a police officer submits an affidavit containing statements he knows to be false or would know are false if he had not recklessly disregarded the truth, the officer obviously failed to observe a right that was clearly established." *Lippay*, 996 F.2d at 1504. For a discussion of related considerations, see Comment 4.7.2.

> It should be clear . . . that the District Court's "no causation" rationale in this case is inconsistent with our interpretation of § 1983. As we stated in Monroe v. Pape, 365 U.S. 167, 187 . . . (1961), § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link.

Malley, 475 U.S. at 345 n.7. The Court of Appeals has given this language a narrow interpretation:

> To the extent that the common law recognized the causal link between a complaint and the ensuing arrest, it was in the situation where "misdirection" by omission or commission perpetuated the original wrongful behavior. . . . If, however, there had been an independent exercise of judicial review, that judicial action was a superseding cause that by its intervention prevented the original actor from being liable for the harm. . . . Thus, the cryptic reference to the common law in *Malley*' s footnote 7 would appear to preclude judicial action as a superseding cause only in the situation in which the information, submitted to the judge, was deceptive.

Egervary v. Young, 366 F.3d 238, 248 (3d Cir. 2004).

Egervary's interpretation of *Malley*'s dictum is questionable, because the Supreme Court's description of the defendants' conduct in *Malley* includes no suggestion that they submitted deceptive information. In addition, more recent precedent confirms that an officer can be liable for executing a defective search warrant, even where there was no allegation of deception in the warrant application. In *Groh v. Ramirez*, the defendant executed a search pursuant to a warrant that "failed to identify any of the items that petitioner intended to seize" (though the warrant application had described those items with particularity). *Groh v. Ramirez*, 540 U.S. 551, 554 (2004). The lack of particularity rendered the warrant "plainly invalid." *Id.* at 557. The Court rejected the defendant's "argument that any constitutional error was committed by the Magistrate, not petitioner," explaining that the defendant "did not alert the Magistrate to the defect in the warrant that petitioner had drafted, and we therefore cannot know whether the Magistrate was aware of the scope of the search he was authorizing. Nor would it have been reasonable for petitioner to rely on a warrant that was so patently defective, even if the Magistrate was aware of the deficiency." *Id.* at 561 n.4. Having held it "incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted," *id.* at 563, the Court denied the defendant qualified immunity because "even a cursory reading of the warrant in this case–perhaps just a simple glance–would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal," *id.* at 564.

Thus, though *Egervary* seems to indicate that the supervening cause doctrine applies when an officer obtains a warrant (unless the warrant application contains misleading information),

Egervary's approach appears to be in some tension with Supreme Court precedent.[229] In any event, Instruction 4.12.3 is designed for use in cases where the plaintiff asserts that the warrant application contained material falsehoods or omissions.

Unlike a person arrested without a warrant, "a person arrested pursuant to a warrant issued by a magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial." *Baker v. McCollan*, 443 U.S. 137, 143 (1979); *see id.* at 145 (assuming, "*arguendo*, that, depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process,'" but holding that "a detention of three days over a New Year's weekend does not and could not amount to such a deprivation").

[229] An additional Court of Appeals decision, though, seemed to rely on a magistrate's review of a warrant application as evidence that the officer did not err in seeking the warrant: In *Sands v. McCormick*, 502 F.3d 263 (3d Cir. 2007), when the court held that the later dismissal of a charge as time-barred does not show that the officer lacked probable cause to obtain an arrest warrant, the court also noted that "the dates of the offenses were disclosed in the affidavit of probable cause that was submitted to the magistrate," and that "[t]here is no indication that the magistrate had any hesitancy about issuing the arrest warrant." *See id*. at 269-70.

4.13 Section 1983 – Malicious Prosecution

Model

[Plaintiff] claims that [defendant] violated [plaintiff's] Fourth Amendment rights by initiating the prosecution of [plaintiff] for [describe crime[s]].

To establish this claim of malicious prosecution, [plaintiff] must prove the following [five] things by a preponderance of the evidence:

First: [Defendant] initiated the criminal proceeding against [plaintiff].

Second: [Defendant] lacked probable cause to initiate the proceeding.[230]

Third: The criminal proceeding ended in [plaintiff's] favor.

Fourth: [Defendant] acted maliciously or for a purpose other than bringing [plaintiff] to justice.

Fifth: As a consequence of the proceeding, [plaintiff] suffered a significant deprivation of liberty.[231]

[In this case, the first, third and fifth of these issues are not in dispute: [Defendant] admits that [he/she] initiated the criminal proceeding; and I instruct you that the criminal proceeding ended in [plaintiff's] favor and that [plaintiff] suffered a deprivation of liberty consistent with the concept of seizure.][232]

As to the second element of [plaintiff's] malicious prosecution claim, [plaintiff] must prove that [defendant] lacked probable cause to initiate the proceeding. To determine whether probable cause existed, you should consider whether the facts and circumstances available to [defendant] would warrant a prudent person in believing that [plaintiff] had committed the crime of [name the crime]. [Define the relevant crime under state law.]

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[230] See Comment for a discussion of the burden of proof with respect to this element.

[231] If this element of the claim is disputed, the court may wish to give examples of deprivations of liberty that would rise to the level of a seizure. *See* Comment (discussing *Gallo v. City of Philadelphia*, 161 F.3d 217 (3d Cir. 1998), and *DiBella v. Borough of Beachwood*, 407 F.3d 599 (3d Cir. 2005)).

[232] The defendant's initiation of the proceeding will often be undisputed. If possible, the court should rule as a matter of law on the questions of favorable termination and of seizure.

[[Defendant] has pointed out that [plaintiff] was indicted by a grand jury. The indictment establishes that there was probable cause to initiate the proceeding unless [plaintiff] proves by a preponderance of the evidence that the indictment was obtained by fraud, perjury or other corrupt means.]

As to the fourth element of the malicious prosecution claim, [plaintiff] must prove that in initiating the proceeding, [defendant] acted out of spite, or that [defendant] did not [himself/herself] believe that the proceeding was proper, or that [defendant] initiated the proceeding for a purpose unrelated to bringing [plaintiff] to justice.

[Even if you find that [plaintiff] has proven the elements of [plaintiff's] malicious prosecution claim, [defendant] asserts that [he/she] is not liable on this claim because [plaintiff] was in fact guilty of the offense with which [he/she] was charged. The fact that [plaintiff] was acquitted in the prior criminal case does not bar [defendant] from trying to prove that [plaintiff] was in fact guilty of the offense; a verdict of not guilty in a criminal case only establishes that the government failed to prove guilt beyond a reasonable doubt. If you find that [defendant] has proven by a preponderance of the evidence that [plaintiff] was actually guilty of the offense, then [defendant] is not liable on [plaintiff's] malicious prosecution claim.]

Comment

Third Circuit law concerning Section 1983 claims for malicious prosecution is not entirely clear. Prior to the Supreme Court's decision in *Albright v. Oliver*, 510 U.S. 266 (1994), the Court of Appeals held that the common law elements of malicious prosecution were both necessary and sufficient to state a Section 1983 claim. Post-*Albright*, those elements are not sufficient, but they are still necessary.

The pre-Albright test. Before 1994, plaintiffs in the Third Circuit could "bring malicious prosecution claims under § 1983 by alleging the common law elements of the tort." *Donahue v. Gavin*, 280 F.3d 371, 379 (3d Cir. 2002) (citing *Lee v. Mihalich*, 847 F.2d 66, 69-70 (3d Cir. 1988)); *see also Albright*, 510 U.S. at 270 n.4 (plurality opinion) (stating that among the federal courts of appeals, "[t]he most expansive approach is exemplified by the Third Circuit, which holds that the elements of a malicious prosecution action under § 1983 are the same as the common-law tort of malicious prosecution"). Typically, a plaintiff was required to prove "(1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in plaintiff's favor; (3) the proceeding was initiated without probable cause; and (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice." *Donahue*, 280 F.3d at 379 (stating test determined by reference to Pennsylvania law); *see also Lippay v. Christos*, 996 F.2d 1490, 1503 (3d Cir. 1993) (discussing malice element with reference to Pennsylvania law); *Rose v. Bartle*, 871 F.2d 331, 349 (3d Cir. 1989). The Court of Appeals "assumed that by proving a violation of the common law tort, the plaintiff proved a violation of substantive due process that would support a § 1983 claim for malicious prosecution suit." *Donahue*, 280 F.3d at 379.

Albright v. Oliver. In *Albright*, the plaintiff surrendered to authorities after a warrant was issued for his arrest; he was released on bail, and the charge was later dismissed because it failed to set forth a crime under state law. *See Albright*, 510 U.S. at 268 (plurality opinion). Albright sued under Section 1983, asserting a "substantive due process [right] . . . to be free from criminal prosecution except upon probable cause." *Id.* at 269. A fractured Court affirmed the dismissal of Albright's claim. Writing for a four-Justice plurality, Chief Justice Rehnquist explained that "it is the Fourth Amendment, and not substantive due process, under which petitioner Albright's claim must be judged." *Id.* at 271. The plurality reasoned that in the field of criminal procedure, "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" *Id.* at 273 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).[233] While conceding that not all the "required incidents of a fundamentally fair trial" flow from the Bill of Rights, the plurality argued that any such incidents not covered by a Bill of Rights provision would arise as a matter of procedural, not substantive, due process. *See Albright*, 510 U.S. at 273 n.6.

Justice Kennedy, joined by Justice Thomas, concurred in the judgment. He agreed that a claim for arrest without probable cause should be analyzed under the Fourth Amendment. However, Justice Kennedy noted that Albright's claim focused on malicious prosecution, not unlawful arrest, and he argued that the Court should extend the rule of *Parratt v. Taylor*, 451 U.S. 527 (1981), to govern claims like Albright's: Because the relevant state "provides a tort remedy for malicious prosecution," Justice Kennedy asserted that Albright's claim should not be cognizable under Section 1983. *Albright*, 510 U.S. at 285 (Kennedy, J., joined by Thomas, J., concurring in the judgment).

Justice Souter also concurred in the judgment. Though he did not believe that the existence of a relevant Bill of Rights provision necessarily precluded a due process claim, he argued that the Court should exercise "restraint" in recognizing such a due process right: It should not do so absent a substantial violation not redressable under a specific Bill of Rights provision. *Albright*, 510 U.S. at 286, 288-89 (Souter, J., concurring in the judgment).

Justice Stevens, joined by Justice Blackmun, dissented, arguing that "the initiation of a criminal prosecution ... [is] a deprivation of liberty," and that the process required prior to such a deprivation includes a justifiable finding of probable cause. *See id.* at 295-97, 300 (Stevens, J., joined by Blackmun, J., dissenting).

The *Albright* plurality explicitly left open the possibility that a Fourth Amendment violation could ground a malicious prosecution claim. *See id.* at 275 ("[W]e express no view as to whether

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[233] Justice Scalia concurred in the plurality opinion; as he explained, he both disagrees with the notion of substantive due process and takes the view that the Court's precedents recognizing substantive due process rights do not extend to situations addressed by provisions in the Bill of Rights. *See Albright*, 510 U.S. at 275-76 (Scalia, J., concurring). Justice Ginsburg also concurred in the plurality opinion. *See id.* at 276 (Ginsburg, J., concurring).

petitioner's claim would succeed under the Fourth Amendment."). Also, because Albright did not assert a procedural due process claim, *see id.* at 271, *Albright* appears to leave open the possibility that such a violation could provide the basis for a malicious prosecution claim.

Post-Albright cases. The Court of Appeals, while recognizing "that *Albright* commands that claims governed by explicit constitutional text may not be grounded in substantive due process," has noted that malicious prosecution claims may be grounded in "police conduct that violates the Fourth Amendment, the procedural due process clause or other explicit text of the Constitution." *Torres v. McLaughlin*, 163 F.3d 169, 172-73 (3d Cir. 1998).[234] Instruction 4.13 is designed for use in cases where the plaintiff premises the malicious prosecution claim on a Fourth Amendment violation; adjustment would be necessary in cases premised on other constitutional violations.

Where the malicious prosecution claim sounds in the Fourth Amendment, the plaintiff "must show 'some deprivation of liberty consistent with the concept of "seizure."'" *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998) (quoting *Singer v. Fulton County Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995)). In *Gallo*, the court found a seizure where the plaintiff "had to post a $10,000 bond, he had to attend all court hearings including his trial and arraignment, he was required to contact Pretrial Services on a weekly basis, and he was prohibited from traveling outside New Jersey and Pennsylvania." *Gallo*, 161 F.3d at 222; compare *DiBella v. Borough of Beachwood*, 407 F.3d 599, 603 (3d Cir. 2005) (acknowledging that "[p]retrial custody and some onerous types of pretrial, non custodial restrictions constitute a Fourth Amendment seizure," but holding that plaintiffs' "attendance at trial did not qualify as a Fourth Amendment seizure").[235] The plaintiff also must show that the seizure was unreasonable under the Fourth Amendment; in the malicious prosecution context, that requirement typically will be equivalent to the traditional common law element of lack of probable cause, discussed below.

The law has not developed uniformly, in recent years, on the applicability of the common law elements of malicious prosecution. Five months after *Albright*, in *Heck v. Humphrey*, the Court

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[234] A plaintiff can state a claim by alleging that the defendant initiated the malicious prosecution in retaliation for the plaintiff's exercise of First Amendment rights. *See Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 798 (3d Cir. 2000) (holding school district superintendent not entitled to qualified immunity on plaintiff's claim "that [the superintendent], and through him the District, maliciously prosecuted Merkle in retaliation for her protected First Amendment activities"); *see also Losch v. Borough of Parkesburg*, 736 F.2d 903, 907-08 (3d Cir. 1984) ("[I]nstitution of criminal action to penalize the exercise of one's First Amendment rights is a deprivation cognizable under § 1983."). In a First Amendment retaliatory-prosecution claim, the plaintiff must plead and prove lack of probable cause (among other elements). *See Hartman v. Moore*, 126 S. Ct. 1695, 1707 (2006).

[235] "Although Fourth Amendment seizure principles may in some circumstances have implications in the period between arrest and trial, . . . posttrial incarceration does not qualify as a Fourth Amendment seizure." *Torres*, 163 F.3d at 174.

shaped the contours of a Section 1983 claim for unconstitutional conviction in part by reference to the common law tort's requirement of favorable termination. *See Heck v. Humphrey*, 512 U.S. 477, 484 (1994). However, four Justices, concurring in the judgment, denied that the common law elements should apply to the constitutional tort. *See id.* at 494 (Souter, J., joined by Blackmun, Stevens, & O'Connor, JJ., concurring in the judgment) (arguing for example that a plaintiff–who had been convicted on the basis of a confession that had been coerced by police officers who had probable cause to believe the plaintiff was guilty–should not be barred from bringing a Section 1983 unconstitutional conviction claim for failure to show a lack of probable cause); *cf. Hartman v. Moore*, 126 S. Ct. 1695, 1702 (2006) (noting in a First Amendment retaliatory-prosecution case that "the common law is best understood here more as a source of inspired examples than of prefabricated components of *Bivens* torts").

In a post-*Heck* case, the Court of Appeals rejected the contention that a Section 1983 claim alleging "unconstitutional conviction and imprisonment on murder charges" does not accrue until there is "a judicial finding of actual innocence"; the court relied partly on the rationale that *Heck* "should not be read to incorporate all of the common law of malicious prosecution into the federal law governing civil rights cases of this kind." *Smith v. Holtz*, 87 F.3d 108, 110, 113-14 (3d Cir. 1996).[236] Similarly, the Court of Appeals noted in *Gallo* that

> by suggesting that malicious prosecution in and of itself is not a harm, *Albright* also suggests that a plaintiff would not need to prove all of the common law elements of the tort in order to recover in federal court. For instance, if the harm alleged is a seizure lacking probable cause, it is unclear why a plaintiff would have to show that the police acted with malice.

Gallo, 161 F.3d at 222 n.6.

However, in other post-*Albright* cases the Court of Appeals has stated that Section 1983 plaintiffs must establish not only a specific constitutional violation but also the common-law elements for malicious prosecution:[237]

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[236] The *Smith* court also stated that "[a]ctual innocence is not required for a common law favorable termination." *Smith*, 87 F.3d at 113 (citing Restatement of the Law of Torts §§ 659, 660 (1938)).

[237] The Court of Appeals applied the common-law elements in *Hilfirty v. Shipman*, 91 F.3d 573, 579 (3d Cir. 1996) ("In order to state a prima facie case for a section 1983 claim of malicious prosecution, the plaintiff must establish the elements of the common law tort as it has developed over time."). However, the *Hilfirty* court did not mention *Albright*, so *Hilfirty* does not shed light on the test that should apply post-*Albright*. *But see Nawrocki v. Tp. of Coolbaugh*, 34 Fed. Appx. 832, 837 (3d Cir. April 8, 2002) (nonprecedential opinion) (citing *Hilfirty* for the proposition that "*Albright* left standing" the requirement that Section 1983 plaintiffs establish the common-law elements).

> [A] plaintiff must show that: (1) the defendant initiated a criminal proceeding; (2) the criminal proceeding ended in plaintiff's favor; (3) the proceeding was initiated without probable cause; (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding.

Camiolo v. State Farm Fire & Cas. Co., 334 F.3d 345, 362-63 (3d Cir. 2003) (quoting *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003)); *see also DiBella v. Borough of Beachwood*, 407 F.3d 599, 601 (3d Cir. 2005).[238]

In 2009, the en banc Court of Appeals approved the approach that requires the plaintiff to establish the common law elements. *See Kossler v. Crisanti*, 564 F.3d 181, 186 (3d Cir. 2009). Thus, the discussion that follows considers each element in turn.

Initiation. Though post-*Albright* Third Circuit Court of Appeals cases have not focused on this element, it seems appropriate to require the plaintiff to establish that the defendant was involved in initiating the prosecution.

Where the relevant law enforcement policy is not to file charges unless the alleged crime victim so requests and not to drop those charges without the alleged victim's permission, and where

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In *Merkle v. Upper Dublin School Dist.*, the Court of Appeals held that the district court had erred in failing to require proof of a Bill of Rights violation, but the *Merkle* majority did not appear to take issue with the district court's assumption that the plaintiff must establish the common law malicious prosecution elements. *See Merkle*, 211 F.3d at 792; *see also id.* at 794 ("We believe that whether these defendants' actions against Merkle were retaliatory is, for purposes of summary judgment, influenced by the strength of Merkle's claim against them for common law malicious prosecution."). With respect to the common law elements, the district court had held that the plaintiff had failed to show a lack of probable cause; the Court of Appeals majority disagreed, finding evidence of a lack of probable cause and of malicious intent. *See Merkle*, 211 F.3d at 791, 795-96.

[238] In a nonprecedential opinion, the Court of Appeals has questioned *Marasco*'s statement: "Given that the twenty-three page opinion in *Marasco* contains but a one-paragraph discussion of the plaintiff's claim under § 1983, our quote may merely be *dictum*, still leaving uncertain what is required." *Backof v. New Jersey State Police*, 92 Fed. Appx. 852, 858 (3d Cir. Feb. 13, 2004). However, as to the lack-of-probable-cause requirement, *Marasco*'s statement is a holding. *See Marasco*, 318 F.3d at 522 ("Because initiation of the proceeding without probable cause is an essential element of a malicious prosecution claim, summary judgment in favor of the defendants was appropriate on this claim."). *Camiolo*'s holding, as well, concerned the lack-of-probable-cause element. *See Camiolo*, 334 F.3d at 363 ("Because Camiolo did not demonstrate that he was prosecuted without probable cause, the District Court appropriately concluded that his § 1983 malicious prosecution claim could not survive summary judgment.").

the alleged victim acted under color of state law, the alleged victim can be sued for malicious prosecution under Section 1983 if the requisite elements are present. *See Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 791 (3d Cir. 2000) (holding that "the School Defendants, not just the Police Defendants, are responsible for Merkle's prosecution"); *see also Gallo*, 161 F.3d at 220 n.2 ("Decisions have 'recognized that a § 1983 malicious prosecution claim might be maintained against one who furnished false information to, or concealed material information from, prosecuting authorities'" (quoting 1A Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation, § 3.20, at 316 (3d ed. 1997).).

Favorable termination. Post-*Albright*, the Court of Appeals has continued to require malicious prosecution plaintiffs to show favorable termination. *See Donahue v. Gavin*, 280 F.3d 371, 383 (3d Cir. 2002) (citing *Heck*, 512 U.S. at 484 and noting that "*Heck* was decided [soon] after *Albright*").

In *Donahue* the court held that entry of a *nolle prosequi* only counts as a favorable termination when the circumstances of the entry indicate the plaintiff's innocence. *See Donahue*, 280 F.3d at 383 (citing Restatement (Second) of Torts §§ 659 & 660 (1976)); *see also Hilfirty v. Shipman*, 91 F.3d 573, 575 (3d Cir. 1996) ("Because we find that Miller neither compromised with the prosecution to obtain her grant of nolle prosequi nor formally accepted the nolle prosequi in exchange for a release of future civil claims, we conclude that the underlying proceeding terminated in her favor."). Resolution of a criminal case under Pennsylvania's Accelerated Rehabilitation Disposition program "is not a favorable termination under *Heck*." *Gilles v. Davis*, 427 F.3d 197, 211 (3d Cir. 2005).[239]

"[T]he favorable termination of some but not all individual charges does not necessarily establish the favorable termination of the criminal proceeding as a whole. Rather ... , upon examination of the entire criminal proceeding, the judgment must indicate the plaintiff's innocence of the alleged misconduct underlying the offenses charged." *Kossler v. Crisanti*, 564 F.3d 181, 188 (3d Cir. 2009) (en banc); *see also id.* at 189 (holding on the specific facts of the case that plaintiff's "acquittal on the aggravated assault and public intoxication charges cannot be divorced from his simultaneous conviction for disorderly conduct when all three charges arose from the same course of conduct"). The *Kossler* majority stressed the fact-intensive nature of this inquiry and left "for another day the establishment of universal contours of when a criminal proceeding which includes both an acquittal (or dismissal) and a conviction constitutes a termination in the plaintiff's favor." *Id.* at 192.

Lack of probable cause. "Under § 1983, false arrest, false imprisonment, and malicious prosecution claims require a showing that the arrest, physical restraint, or prosecution was initiated

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[239] The relevant claim in *Gilles* asserted a First Amendment violation and did not sound in malicious prosecution, *see Gilles*, 427 F.3d at 203, but the Court of Appeals found *Heck*'s reasoning "equally applicable" to the First Amendment claim and thus applied *Heck*'s favorable-termination requirement, *id.* at 209.

without probable cause." *Pulice v. Enciso*, 39 Fed. Appx. 692, 696 (3d Cir. July 17, 2002) (nonprecedential opinion); *see also Wright v. City of Philadelphia*, 409 F.3d 595, 604 (3d Cir. 2005) ("Wright bases her malicious prosecution claim on alleged Fourth Amendment violations arising from her arrest and prosecution. To prevail on this claim, she must show that the officers lacked probable cause to arrest her.").

In some cases, a finding of probable cause for one among multiple charges will foreclose a malicious prosecution claim with respect to any of the charges. Thus, in *Wright*, the decision that there was probable cause to arrest the plaintiff for criminal trespass "dispose[d] of her malicious prosecution claims with respect to all of the charges brought against her, including the burglary." *Wright*, 409 F.3d at 604. But *Wright* does not "'insulate' law enforcement officers from liability for malicious prosecution in all cases in which they had probable cause for the arrest of the plaintiff on any one charge." *Johnson v. Knorr*, 477 F.3d 75, 83 (3d Cir. 2007). Otherwise, "an officer with probable cause as to a lesser offense could tack on more serious, unfounded charges which would support a high bail or a lengthy detention, knowing that the probable cause on the lesser offense would insulate him from liability for malicious prosecution on the other offenses." *Johnson*, 477 F.3d at 84 (quoting *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir.1991)). Under *Johnson*, the court must analyze probable cause with respect to each charge that was brought against the plaintiff. *See id.* at 85. *Johnson* distinguished *Wright* by scrutinizing the duration and nature of the defendants' alleged conduct: In *Wright*, the defendants' "involvement apparently ended at the time of the arrest," whereas the plaintiff in *Johnson* alleged that the defendant's involvement "lasted beyond the issuing of an affidavit of probable cause for his arrest and the arrest itself" and that the defendant "intentionally and fraudulently fabricated the charges against him," leading to the prosecution. *Johnson*, 477 F.3d at 84. If a plaintiff establishes that the facts of the case warrant application of *Johnson*'s rule rather than *Wright*'s,[240] it apparently is still open to the defendant to argue that "the prosecution for the additional charges for which there might not have been probable cause in no way resulted in additional restrictions on [the plaintiff's] liberty beyond those attributable to the prosecution on the ... charges for which there was probable cause." *Id.* at 86.

The en banc Court of Appeals has "note[d] the considerable tension that exists between our treatment of the probable cause element in *Johnson* and our treatment of that element in the earlier case of *Wright*." *Kossler*, 564 F.3d at 193. Though the *Kossler* court noted that if *Wright* and

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[240] In *Startzell v. City of Philadelphia*, 533 F.3d 183 (3d Cir. 2008), the Court of Appeals concluded that the district court properly held on summary judgment that there was probable cause to arrest the plaintiffs for disorderly conduct. On this basis the panel majority affirmed the grant of summary judgment dismissing Fourth Amendment claims for false arrest and malicious prosecution. In a footnote, the Court of Appeals stated that it "need not address whether there was probable cause with respect to the remaining charges – failure to disperse and obstructing a public passage – for the establishment of probable cause as to any one charge is sufficient to defeat Appellants' Fourth Amendment claims. *Cf. Johnson*, 477 F.3d at 82 n. 9, 84-85 (applying this rule to malicious prosecution claim only where the circumstances leading to the arrest and prosecution are intertwined)." *Startzell*, 533 F.3d at 204 n.14.

Johnson were "in unavoidable conflict" the earlier of the two precedents would control, *Kossler*, 564 F.3d at 194 n.8, the *Kossler* court did not conclude that such an unavoidable conflict exists. Rather, the *Kossler* court indicated that courts should, when necessary, "wrestle" with the question of which precedent – *Wright* or *Johnson* – governs in a given case, bearing in mind the "fact-intensive" nature of the inquiry. *Kossler*, 564 F.3d at 194.

"[T]he question of probable cause in a section 1983 damage suit is one for the jury." *Montgomery v. De Simone*, 159 F.3d 120, 124 (3d Cir. 1998) (discussing Section 1983 claim for malicious prosecution). In *Losch v. Borough of Parkesburg*, 736 F.2d 903, 909 (3d Cir. 1984), the Court of Appeals stated that "defendants bear the burden at trial of proving the defense of good faith and probable cause" with respect to a malicious prosecution claim. However, cases such as *DiBella*, *Camiolo* and *Marasco* (none of which cites *Losch*) list the absence of probable cause as an element of the malicious prosecution claim, and thus indicate that the plaintiff has the burden of proof on that element. *See, e.g.*, *Camiolo*, 334 F.3d at 363 (holding that malicious prosecution claim was properly dismissed due to plaintiff's inability to show lack of probable cause); *Marasco*, 318 F.3d at 522 ("Because initiation of the proceeding without probable cause is an essential element of a malicious prosecution claim, summary judgment in favor of the defendants was appropriate on this claim."). More recently, the Court of Appeals has stated explicitly that the malicious prosecution plaintiff has the burden to show lack of probable cause. See *Johnson*, 477 F.3d at 86 ("[O]n the remand Johnson will have the burden to 'show that the criminal action was begun without probable cause for charging the crime the first place.' *Hartman v. Moore* ... , 126 S.Ct. 1695, 1702 (2006)."). Accordingly, Instruction 4.13 assigns to the plaintiff the burden of proving the absence of probable cause. *Compare* Comment 4.12.2 (discussing burden of proof as to probable cause with respect to false arrest claims stemming from warrantless arrests).

"[A] grand jury indictment or presentment constitutes prima facie evidence of probable cause to prosecute, but . . . this prima facie evidence may be rebutted by evidence that the presentment was procured by fraud, perjury or other corrupt means." *Camiolo*, 334 F.3d at 363 (quoting *Rose*, 871 F.2d at 353);[241] *compare Montgomery*, 159 F.3d at 125 (holding "that the Restatement's rule that an

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[241] The defendant might also argue that a grand jury indictment breaks the chain of causation. The Court of Appeals has explained the concept of superseding causes:

> [I]n situations in which a judicial officer or other independent intermediary applies the correct governing law and procedures but reaches an erroneous conclusion because he or she is misled in some manner as to the relevant facts, the causal chain is not broken and liability may be imposed upon those involved in making the misrepresentations or omissions. . . . However, ... where . . . the judicial officer is provided with the appropriate facts to adjudicate the proceeding but fails to properly apply the governing law and procedures, such error must be held to be a superseding cause, breaking the chain of causation for purposes of § 1983 and *Bivens* liability.

overturned municipal conviction presumptively establish[es] probable cause contravenes the policies underlying the Civil Rights Act and therefore does not apply to a section 1983 malicious prosecution action").

Where a claim exists against a complaining witness for that person's role in the alleged malicious prosecution of the plaintiff, the factfinder should perform a separate probable cause inquiry concerning the complaining witness. *See Merkle*, 211 F.3d at 794 ("As instigators of the arrest ... it is possible that the District and Brown were in possession of additional information, not provided to Detective Hahn, that would negate any probable cause they may otherwise have had to prosecute Merkle.").

Malice or other improper purpose. It might be argued that a showing of malice should not be required where the plaintiff's Section 1983 claim is premised on a Fourth Amendment violation. *See Brooks v. City of Winston-Salem*, N.C., 85 F.3d 178, 184 n.5 (4th Cir. 1996) (noting that "the reasonableness of a seizure under the Fourth Amendment should be analyzed from an objective perspective" and thus that "the subjective state of mind of the defendant, whether good faith or ill will, is irrelevant in this context"). However, the Third Circuit Court of Appeals has listed malice as an element of Section 1983 malicious prosecution claims premised on Fourth Amendment violations. *See Camiolo*, 334 F.3d at 362-63; *Marasco*, 318 F.3d at 521.[242]

Pre-*Albright* caselaw defined the malice element "as either ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose." *Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988). Following Pennsylvania law, the Court of Appeals held in another pre-*Albright* case that "[m]alice may be inferred from the absence of probable cause." *Lippay v. Christos*, 996 F.2d 1490, 1502 (3d Cir. 1993); *cf. Trabal v. Wells Fargo Armored Service Corp.*, 269 F.3d 243, 248 (3d Cir. 2001) (applying New Jersey law in a malicious prosecution case arising in diversity).

Egervary v. Young, 366 F.3d 238, 250-51 (3d Cir. 2004). Though *Egervary* involved a judge's decision, rather than a grand jury's, the rationale of *Egervary* seems equally applicable to the grand jury context. (For a discussion of the possibility that Supreme Court precedents may limit the application of the superseding cause principle with respect to the issuance of warrants, see *supra* Instruction 4.12 cmt.) In any event, assuming that the supervening cause doctrine applies to grand jury indictments, its net effect seems similar to that of the lack-of-probable-cause requirement: Where a grand jury has indicted the plaintiff, the plaintiff must present evidence that the indictment was obtained through misrepresentations or other corrupt means.

[242] Admittedly, both *Marasco* and *Camiolo* were decided based upon the lack-of-probable-cause element, so the statements in those cases concerning malice do not constitute holdings. But more recently the court of appeals affirmed the dismissal of a Section 1983 malicious prosecution claim based on "insufficient evidence of malice." *McKenna v. City of Philadelphia*, 582 F.3d 447, 461-62 (3d Cir. 2009).

The *Heck v. Humphrey* bar. A convicted prisoner cannot proceed with a Section 1983 claim challenging the constitutionality of the conviction pursuant to which the plaintiff is in custody, unless the conviction has been reversed or otherwise invalidated.[243] *See Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).[244] Four Justices, concurring in the judgment, argued that this favorable-termination requirement should not apply to plaintiffs who are not in custody. *See id.* at 503 (Souter, J., joined by Blackmun, Stevens, & O'Connor, JJ., concurring in the judgment). The *Heck* majority rejected that argument, albeit in dicta. *See id.* at 490 n.10. Four years later, in *Spencer v. Kemna*, five Justices stated that *Heck*'s requirement of favorable termination does not apply when a plaintiff is out of custody.[245] The Court of Appeals, however, has indicated that it is not at liberty to follow the

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[243] The Court of Appeals has indicated that the *Heck* bar is conceptually distinct from the favorable-termination element of a Section 1983 claim. *See Kossler*, 564 F.3d at 190 n.6 (stating that the court did "not need to apply *Heck*'s test in the present case" because the plaintiff had in any event failed to establish the common law element of favorable termination).

[244] *See also Leamer v. Fauver*, 288 F.3d 532, 542 (3d Cir. 2002) ("[W]henever the challenge ultimately attacks the 'core of habeas' --the validity of the continued conviction or the fact or length of the sentence--a challenge, however denominated and regardless of the relief sought, must be brought by way of a habeas corpus petition."); *Torres v. Fauver*, 292 F.3d 141, 143 (3d Cir. 2002) ("[T]he favorable termination rule does not apply to claims that implicate only the conditions, and not the fact or duration, of a prisoner's incarceration.").

The Third Circuit had previously reasoned that the *Heck* rationale extends to pending prosecutions: "[A] claim that, if successful, would necessarily imply the invalidity of a conviction on a pending criminal charge is not cognizable under § 1983." *Smith v. Holtz*, 87 F.3d 108, 113 (3d Cir. 1996). However, the Supreme Court more recently rejected the assertion "that an action which would impugn *an anticipated future conviction* cannot be brought until that conviction occurs and is set aside." *Wallace v. Kato*, 127 S.Ct. 1091, 1098 (2007). Under *Wallace*, prior to the defendant's actual conviction *Heck* bars neither the accrual of a claim nor the running of the limitations period. Rather, "[i]f a plaintiff files a false arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended.... If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit." *Wallace*, 127 S. Ct. at 1098.

[245] *See Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., joined by O'Connor, Ginsburg & Breyer, JJ., concurring) ("[A] former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable termination requirement that it would be impossible as a matter of law for him to satisfy."); *id.* at 25 n.8 (Stevens, J., dissenting) ("Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice

suggestion made by those Justices.[246]

Plaintiff's guilt as a defense. "Even if the plaintiff in malicious prosecution can show that the defendant acted maliciously and without probable cause in instituting a prosecution, it is always open to the defendant to escape liability by showing in the malicious prosecution suit itself that the plaintiff was in fact guilty of the offense with which he was charged." *Hector v. Watt*, 235 F.3d 154, 156 (3d Cir. 2000), as amended (Jan. 26, 2001) (quoting W. Keeton et al., Prosser & Keeton on the Law of Torts 885 (5th ed. 1984) (citing Restatement (Second) of Torts § 657 (1977))). "This requirement can bar recovery even when the plaintiff was acquitted in the prior criminal proceedings, for a verdict of not guilty only establishes that there was not proof beyond a reasonable doubt." *Hector*, 235 F.3d at 156. It appears that the defendant would have the burden of proof on this issue by a preponderance of the evidence. *See* Restatement (Second) of Torts § 657 cmt. b.[247]

Limits on types of damages. The plaintiff's choice of constitutional violation upon which to ground the malicious prosecution claim may limit the types of damages available. In particular, "damages for post-conviction injuries are not within the purview of the Fourth Amendment." *Donahue*, 280 F.3d at 382. Thus, a plaintiff who premises a malicious prosecution claim on a seizure in violation of the Fourth Amendment must "distinguish between damages that may have been caused by that 'seizure'"–which are recoverable on that claim–and "damages that are the result

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SOUTER explains, that he may bring an action under 42 U.S.C. § 1983.").

[246] The Court of Appeals explained:

> We recognize that concurring and dissenting opinions in Spencer v. Kemna ... question the applicability of *Heck* to an individual, such as Petit, who has no recourse under the habeas statute.... But these opinions do not affect our conclusion that *Heck* applies to Petit's claims. We doubt that *Heck* has been undermined, but to the extent its continued validity has been called into question, we join on this point, our sister courts of appeals for the First and Fifth Circuits in following the Supreme Court's admonition "to lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court 'the prerogative of overruling its own decisions.'" *Figueroa v. Rivera*, 147 F.3d 77, 81 n. 3 (1st Cir. 1998) (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)); *see Randell v. Johnson*, 227 F.3d 300, 301- 02 (5th Cir. 2000).

Gilles v. Davis, 427 F.3d 197, 209-10 (3d Cir. 2005).

[247] However, in a nonprecedential opinion, the Court of Appeals has read *Hector* to assign the burden of proof on this issue to the plaintiff. *See Steele v. City of Erie*, 113 Fed. Appx. 456, 459 (3d Cir. Oct. 20, 2004) ("In *Hector* . . . , we held that a plaintiff claiming malicious prosecution must prove *actual* innocence as an element of his *prima facie* case.").

of his trial, conviction and sentence"–which are not. *Id.*; *see also DiBella v. Borough of Beachwood*, 407 F.3d 599, 603 (3d Cir. 2005) ("[T]he Fourth Amendment does not extend beyond the period of pretrial restrictions.").

Section 1983 claim for abuse of process. Prior to *Albright*, the Court of Appeals recognized a Section 1983 claim for abuse of process. "In contrast to a section 1983 claim for malicious prosecution, a section 1983 claim for malicious abuse of process lies where 'prosecution is initiated legitimately and thereafter is used for a purpose other than that intended by the law.'" *Rose*, 871 F.2d at 350 n.17 (quoting *Jennings v. Shuman*, 567 F.2d 1213, 1217 (3d Cir.1977)). Favorable termination is not an element of a Section 1983 abuse of process claim. *See Rose*, 871 F.2d at 351. Nor is a lack of probable cause. *See Jennings*, 567 F.2d at 1219. "To prove abuse of process, plaintiffs must prove three elements: (1) an abuse or perversion of process already initiated (2) with some unlawful or ulterior purpose, and (3) harm to the plaintiffs as a result." *Godshalk v. Borough of Bangor*, 2004 WL 999546, at *13 (E.D. Pa. May 5, 2004).

It seems clear that, post-*Albright*, the plaintiff must establish a constitutional violation (not sounding in substantive due process) in order to prevail on a Section 1983 claim for abuse of process. It may be possible for the plaintiff to satisfy this requirement by showing a violation of procedural due process. *See Jennings*, 567 F.2d at 1220 ("An abuse of process is by definition a denial of procedural due process.");[248] *Godshalk*, 2004 WL 999546, at *13 (accepting argument that abuse of process can constitute denial of procedural due process).

Section 1983 claim for conspiracy to prosecute maliciously. The Court of Appeals has recognized a Section 1983 claim for conspiracy to engage in a malicious prosecution. *See Rose*, 871 F.2d at 352 (reversing district court's dismissal of malicious prosecution conspiracy claims).

[248] The abuse of process alleged by the plaintiff in Jennings involved the use of the prosecution as leverage for an extortion scheme. *Jennings*, 567 F.2d at 1220 ("The goal of that conspiracy was extortion, to be accomplished by bringing a prosecution against him without probable cause and for an improper purpose.").

4.13.1 Section 1983 – Burdens of Proof in Civil and Criminal Cases

Model

As you know, [plaintiff's] claims in this case relate to [his/her] [arrest] [prosecution] for the crime of [describe crime].

[At various points in a criminal case,] the government must meet certain requirements in order to [stop, arrest, and ultimately] convict a person for a crime. It is important to distinguish between those requirements and the requirements of proof in this civil case.

[In order to "stop" a person, a police officer must have a "reasonable suspicion" that the person they stop has committed, is committing, or is about to commit a crime. There must be specific facts that, taken together with the rational inferences from those facts, reasonably warrant the stop.]

[In order to arrest a person, the police must have probable cause to believe the person committed a crime. Probable cause requires more than mere suspicion; however, it does not require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt. The standard of probable cause represents a balance between the individual's right to liberty and the government's duty to control crime. Because police officers often confront ambiguous situations, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable officers.]

In order for a jury to convict a person of a crime, the government must prove the person's guilt beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves the jury firmly convinced of the defendant's guilt. If a jury in a criminal case thinks there is a real possibility that the defendant is not guilty, the jury must give the defendant the benefit of the doubt and find [him/her] not guilty.

[Thus, the fact that the jury found [plaintiff] not guilty in the criminal trial does not necessarily indicate that the jury in the criminal trial found [plaintiff] innocent; it indicates only that the government failed to prove [plaintiff] guilty beyond a reasonable doubt.]

[The existence of probable cause to make an arrest is evaluated in light of the facts and circumstances available to the police officer at the time. And probable cause is a less demanding standard than guilt beyond a reasonable doubt. Thus, the fact that the jury found [plaintiff] not guilty in the criminal trial does not indicate whether or not the police had probable cause to arrest [plaintiff].]

[Unlike the prior criminal trial, this is a civil case. [Plaintiff] has the burden of proving [his/her] case by the preponderance of the evidence. That means [plaintiff] has to prove to you, in light of all the evidence, that what [he/she] claims is more likely so than not so. In other words, if you were to put the evidence favorable to [plaintiff] and the evidence favorable to [defendant] on

opposite sides of the scales, [plaintiff] would have to make the scales tip somewhat on [his/her] side. If [plaintiff] fails to meet this burden, the verdict must be for [defendant]. Notice that the preponderance-of-the-evidence standard, which [plaintiff] must meet in this case, is not as hard to meet as the beyond-a-reasonable-doubt standard, which the government must meet in a criminal case.]

Comment

When this instruction is given, the last sentence of General Instruction 1.10 should be omitted.

4.14 Section 1983 – State-created Danger

Model

[Plaintiff] claims that [he/she] was injured as a result of [describe alleged conduct of defendant official or officials]. Under the Due Process Clause of the Fourteenth Amendment, state officials may not deprive an individual of life, liberty, or property without due process of law. The Due Process Clause generally does not require the state and its officials to protect individuals from harms [caused by persons who are not acting on behalf of the government][249] [that the government did not cause][250]. However, the Due Process Clause does prohibit state officials from engaging in conduct that renders an individual more vulnerable to such harms.

In this case, [plaintiff] claims that [defendant] rendered [him/her] more vulnerable to harm by [describe the particular conduct]. To establish this claim, [plaintiff] must prove all of the following four things by a preponderance of the evidence:

First: [The harm to [plaintiff]] [describe harm to plaintiff] was a foreseeable and fairly direct result of [defendant's] conduct.

Second: [Defendant] acted with [conscious disregard of a great risk of serious harm] [deliberate indifference].[251]

Third: There was some type of relationship between [defendant] and [plaintiff] that distinguished [plaintiff] from the public at large.

Fourth: [Defendant's] action made [plaintiff] more vulnerable to [describe the harm].

The first of these four elements requires [plaintiff] to show that [the harm to [plaintiff]] [describe harm to plaintiff] was a foreseeable and fairly direct result of [defendant's] conduct. This element includes two related concepts: foreseeability and directness. Foreseeability concerns whether [defendant] should have foreseen [the harm at issue] [that [describe harm]]. Directness concerns whether it is possible to draw a direct enough connection between [defendant's] conduct and [the harm at issue] [describe harm]. To consider the question of directness, you should look at the chain of events that led to [the harm at issue] [describe harm], and you should consider where

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[249] Use this phrase if the plaintiff claims harm from a third party.

[250] Use this phrase if the plaintiff claims harm from a source other than an individual (e.g., from a medical problem).

[251] Select the appropriate level of culpability. See Comment for a discussion of this element.

[defendant's] conduct fits within that chain of events, and whether that conduct can be said to be a fairly direct cause of [the harm at issue] [describe harm]. In appropriate cases, the sufficient directness requirement can be met even if some other action or event comes between the defendant's conduct and the harm to the plaintiff.

[[For cases in which the requisite level of culpability is subjective deliberate indifference:][252] The second of these four elements requires [plaintiff] to show that [defendant] acted with deliberate indifference. To show that [defendant] was deliberately indifferent, [plaintiff] must show that [defendant] knew that there was a strong likelihood of harm to [plaintiff], and that [defendant] disregarded that risk by failing to take reasonable measures to address it. [Plaintiff] must show that [defendant] actually knew of the risk. If [plaintiff] proves that the risk of harm was obvious, you are entitled to infer from the obviousness of the risk that [defendant] knew of the risk. [However, [defendant] claims that even if there was an obvious risk, [he/she] was unaware of that risk. If you find that [defendant] was unaware of the risk,[253] then you must find that [he/she] was not deliberately indifferent.]]

[For cases in which the requisite level of culpability is objective deliberate indifference, see Comment for discussion of the second element.]

[[For cases in which the requisite level of culpability is gross negligence or arbitrariness that shocks the conscience:][254] The second of these four elements requires [plaintiff] to show that [defendant] acted with conscious disregard of a great risk of serious harm. It is not enough to show that [defendant] was careless or reckless. On the other hand, [plaintiff] need not show that [defendant] acted with the purpose of causing harm. Rather, [plaintiff] must show that [defendant] knew there was a great risk of serious harm, and that [defendant] consciously disregarded that risk.]

The third of these four elements requires [plaintiff] to show that there was some type of relationship between [defendant] and [plaintiff] that distinguished [plaintiff] from the public at large. It is not enough to show that [defendant's] conduct created a risk to the general public. Instead, [plaintiff] must show that [defendant's] conduct created a foreseeable risk to [plaintiff] [a definable

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[252] This option can be used if the court concludes that the requisite level of culpability is subjective deliberate indifference. If the court concludes that the appropriate standard is objective deliberate indifference, a different formulation would be necessary. The Court of Appeals has not yet determined definitively which standard is appropriate in state-created danger cases. See Comment.

[253] It is unclear who has the burden of proof with respect to a defendant's claim of lack of awareness of an obvious risk. *See* Comment 4.11.1.

[254] This option is designed for use in cases where the requisite level of culpability is gross negligence or arbitrariness that shocks the conscience. *See* Comment (discussing the explanation of this standard provided in *Ziccardi v. City of Philadelphia*, 288 F.3d 57 (3d Cir. 2002)).

group of people including [plaintiff]][255].

Comment

To recover on a theory of state-created danger, "a plaintiff must prove four elements: (1) the harm ultimately caused was foreseeable and fairly direct;" (2) the defendant possessed the requisite degree of culpable intent; "(3) there existed some relationship between the state and the plaintiff; and (4) the state actors used their authority to create an opportunity that otherwise would not have existed" for harm to occur. *Estate of Smith v. Marasco*, 318 F.3d 497, 506 (3d Cir. 2003).

These elements appear to overlap significantly. Though each element is discussed more fully below, the following rough summary may help to demonstrate the overlap: The first element, obviously, focuses on foreseeability. The second element, culpable intent, is formulated by weighing both the foreseeability of the harm and the defendant's opportunity to reflect on that risk of harm. The third element, the relationship between the state and the plaintiff, is designed to eliminate claims arising merely from a risk to the public at large; this element focuses on whether the plaintiff is a member of a discrete group whom the defendant subjected to a foreseeable risk. The fourth element again returns to the question of foreseeability and risk, this time by asking whether the defendant subjected the plaintiff to an increased risk of harm. The overlap among these elements shows their interconnected nature; but by elaborating this four-part test for liability, the Court of Appeals has indicated that each of the four elements adds something important to the analysis. The model therefore enumerates each element and attempts to explain its significance in terms that distinguish it from the others.

The first element. "The first element . . . requires that the harm ultimately caused was a foreseeable and a fairly direct result of the state's actions." *Morse v. Lower Merion School Dist.*, 132 F.3d 902, 908 (3d Cir. 1997) (holding "that defendants . . . could not have foreseen that allowing construction workers to use an unlocked back entrance for access to the school building would result in the murderous act of a mentally unstable third party, and that the tragic harm which ultimately befell Diane Morse was too attenuated from defendants' actions to support liability"). Though the concepts of foreseeability and directness may largely overlap, they do express somewhat distinct concepts, both of which presumably should be conveyed to the jury.

Foreseeability, of course, concerns whether the defendant should have foreseen the harm at issue. *See, e.g., Marasco*, 318 F.3d at 508 ("[T]he Smiths have presented sufficient evidence to allow a jury to find that at least some of the officers were aware of Smith's condition and should have foreseen that he might flee and suffer adverse medical consequences when SERT was activated."); *Phillips v. County of Allegheny*, 515 F.3d 224, 237 (3d Cir. 2008) ("We have never held that to

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[255] Use the second of these options in cases where the plaintiff claims that the defendant's conduct created a risk to a group of which plaintiff was a member. In such cases, it may be advisable to explain what "a definable group of people" means in the context of the case.

establish foreseeability, a plaintiff must allege that the person who caused the harm had a 'history of violence.' Indeed, these types of cases often come from unexpected or impulsive actions which ultimately cause serious harm.").

Directness concerns whether the chain of causation is too attenuated for liability to attach. For example, in *Morse*, the Court of Appeals held both that the defendants could not have foreseen that leaving a back door unlocked would result in the murder of someone in the school building (i.e., that foreseeability was lacking), and that "[t]he causation, if any, is too attenuated" (i.e., that the harm was not a direct enough result of the defendant's actions). *Compare Phillips*, 515 F.3d at 240 (holding this element met where complaint's allegations justified the inference "that Michalski used the time, access and information given to him by the defendants to plan an assault on Mark Phillips and Ferderbar").

The second element. Prior to 1998, the Court of Appeals held that "[t]he second prong . . . asks whether the state actor acted with willful disregard for or deliberate indifference to plaintiff's safety." *Morse*, 132 F.3d at 910. "In other words, the state's actions must evince a willingness to ignore a foreseeable danger or risk." *Id.* In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Supreme Court held that a "shocks-the-conscience test" governs substantive due process claims arising from high-speed chases, and that in the context of a high-speed chase that test requires "a purpose to cause harm." *Id.* at 854. The Court of Appeals has since made clear that state-created danger claims require "a degree of culpability that shocks the conscience." *Bright v. Westmoreland County*, 443 F.3d 276, 281 (3d Cir. 2006).[256]

However, "the precise degree of wrongfulness required to reach the conscience-shocking level depends on the circumstances of a particular case." *Marasco*, 318 F.3d at 508. "The level of culpability required to shock the conscience increases as the time state actors have to deliberate decreases." *Sanford v. Stiles*, 456 F.3d 298, 309 (3d Cir. 2006); *see also, e.g.*, *Walter v. Pike County, Pa.*, 544 F.3d 182, 192-93 (3d Cir. 2008). "For example, in the custodial situation of a prison, where forethought about an inmate's welfare is possible, deliberate indifference to a prisoner's medical

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[256] *See also Marasco*, 318 F.3d at 507 (noting that *Miller v. City of Philadelphia*, 174 F.3d 368, 374-75 (3d Cir.1999) "suggested that the 'shocks the conscience' standard [applies] to all substantive due process cases"); *Schieber v. City of Philadelphia*, 320 F.3d 409, 419 (3d Cir. 2003) (opinion of Stapleton, J.) ("[N]egligence is not enough to shock the conscience under any circumstances. . . . [M]ore culpability is required to shock the conscience to the extent that state actors are required to act promptly and under pressure. Moreover, the same is true to the extent the responsibilities of the state actors require a judgment between competing, legitimate interests."); *id.* at 423 (reversing denial of summary judgment to police officers sued by parents who alleged their daughter was murdered after officers responded to 911 call but failed to enter daughter's apartment, "[b]ecause the record would not support a finding of more than negligence on the part of" the officers); *see also id.* at 423 (Nygaard, J., concurring) (stating that he did "not disagree with [Judge Stapleton's] analysis as far as it goes" but that the crux of the case was the plaintiff's failure to show an affirmative act on the part of the police).

needs may be sufficiently shocking, while '[a] much higher fault standard is proper when a government official is acting instantaneously and making pressured decisions without the ability to fully consider the risks.'" *Marasco*, 318 F.3d at 508 (quoting *Miller*, 174 F.3d at 375). Between the deliberate indifference standard (appropriate to controlled environments where deliberation is practicable)[257] and the purpose to cause harm standard (applied to high-speed chases) is an intermediate standard–"arbitrariness"–that governs in instances that present neither the urgency of a high-speed chase nor a full opportunity for deliberate response.[258] *See Miller*, 174 F.3d at 375-77 & n.7 (where "a social worker act[ed] to separate parent and child," requiring "evidence of acts . . . that rose to a level of arbitrariness that shocks the conscience"); *see id.* at 375-76 (stating the applicable standard as "exceed[ing] both negligence and deliberate indifference, and reach[ing] a level of gross negligence or arbitrariness that indeed 'shocks the conscience'").[259]

In other words, "except in those cases involving either true split-second decisions or, on the other end of the spectrum, those in which officials have the luxury of relaxed deliberation, an official's conduct may create state-created danger liability if it exhibits a level of gross negligence

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[257] In *Phillips*, Michalski was suspended and then fired from his job as a 911 dispatcher. After his suspension, two of his former dispatcher colleagues gave him information that would help him to locate Phillips (Michalski's ex-girlfriend's new boyfriend). After being fired, Michalski told his former colleagues that he had nothing to live for and that his ex-girlfriend and Phillips would "pay for putting him in his present situation." The dispatchers failed to contact Phillips, the ex-girlfriend, or the police departments of the areas in which those two people were located. Michalski then shot and killed his ex-girlfriend, her sister, and Phillips. *Phillips*, 515 F.3d at 228-29. The court of appeals held that the deliberate indifference standard applied to the dispatchers because they "had no information which would have placed them in a 'hyperpressurized environment.'" *Id.* at 241.

[258] Dictum in *Ye v. United States*, 484 F.3d 634 (3d Cir. 2007), briefly discusses some but not all of the points along this spectrum. *See id.* at 638 n.2 (discussing "intent-to-harm," "gross negligence," and "gross recklessness" standards, but omitting to mention deliberate-indifference standard).

[259] Subsequently, however, in *Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000) (en banc), the Court of Appeals held that a family services worker's alleged failure to investigate in connection with a foster care placement "should be judged under the deliberate indifference standard," *id.* at 811.

Neither *Nicini* nor *Miller* was a state-created danger case (*Nicini* proceeded on a "special relationship" theory, while the plaintiff in *Miller* alleged that a social worker pursued a child abuse investigation without probable cause). But both *Nicini* and *Miller* involved substantive due process claims and the Court of Appeals applied the *Lewis* framework in both cases. For further discussion of the "special relationship" theory, see *infra* Instruction 4.16.

or arbitrariness that shocks the conscience." *Marasco*, 318 F.3d at 509.[260] In *Ziccardi v. City of Philadelphia*, 288 F.3d 57, 66 (3d Cir. 2002), the Court of Appeals provided some detail on the nature of this standard.[261] Specifically, the Court of Appeals held that the plaintiff must prove "that the defendant[paramedics] consciously disregarded, not just a substantial risk, but a great risk that serious harm would result if, knowing Smith was seriously injured, they moved Smith without support for his back and neck." *Ziccardi*, 288 F.3d at 66; *see also Sanford*, 456 F.3d at 310 (holding that "the relevant question is whether the officer consciously disregarded a great risk of harm").[262]

In *Kaucher v. County of Bucks*, 455 F.3d 418 (3d Cir. 2006), the Court of Appeals noted uncertainty whether the deliberate-indifference test that applies under the *Lewis* substantive due process framework is an objective or a subjective test, see id. at 428 n.5.[263] The Court observed that

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[260] For example, the Court of Appeals has held that emergency medical technicians "who responded to an emergency in an apartment where a middle-aged man was experiencing a seizure" would be held to have violated substantive due process only if they "consciously disregard[ed] a substantial risk that [the man] would be seriously harmed by their actions." *Rivas v. City of Passaic*, 365 F.3d 181, 184, 196 (3d Cir. 2004); *see id.* at 196 (stating that this test would be met if the EMTs had falsely told police officers that the man was violent and had failed to tell the police officers that the man was suffering a seizure); *cf. Brown v. Commonwealth of Pennsylvania*, 318 F.3d 473, 481 (3d Cir. 2003) (holding that "EMTs who attempted to arrive at the scene of the incident as rapidly as they could" did not behave in a way that shocks the conscience).

[261] *See id.* at 66 n.6 (observing that the phrase 'gross negligence or arbitrariness that shocks the conscience' "is not well suited for th[e] purpose" of conveying the nature of the standard). Though *Ziccardi* is technically not a "state-created danger" case because the plaintiff alleged that the *Ziccardi* defendants injured the plaintiff themselves, rather than creating the danger of injury, *Ziccardi* applied the teachings of *Lewis* and is thus instructive here. *See Ziccardi*, 288 F.3d at 64; *see also Estate of Smith v. Marasco*, 430 F.3d 140, 154 n.10 (3d Cir. 2005) ("We think that the definition adopted in *Ziccardi* is useful in assessing [state-created danger] claims.").

[262] Despite stating the standard as one involving conscious disregard, the *Sanford* court also noted in the next sentence – and apparently with respect to the same point on the shocks-the-conscience spectrum – that "it is possible that actual knowledge of the risk may not be necessary where the risk is 'obvious.'" *Sanford*, 456 F.3d at 310. Earlier in its opinion (as mentioned in the footnote following this one), the *Sanford* court discussed a similar point in connection with the deliberate indifference standard, *see id.* at 309 & n.13.

[263] *See also Sanford*, 456 F.3d at 309 & n.13 (noting "the possibility that deliberate indifference might exist without actual knowledge of a risk of harm when the risk is so obvious that it should be known," but "leav[ing] to another day the question whether actual knowledge is required to meet the culpability requirement in state-created danger cases").

the Eighth Amendment deliberate-indifference test is subjective, *see id.* at 427, but that the deliberate-indifference test for municipal liability is objective, *see id.* at 428 n.5. The *Kaucher* Court "recognize[d] strong arguments weighing in favor of both standards," but declined to decide the question because the plaintiff's claim failed under either standard. *Id.*[264]

In *Walter v. Pike County*, 544 F.3d 182 (3d Cir. 2008), the Court of Appeals considered claims arising from the July 2002 murder of a man who was pressing charges against the murderer for sexually assaulting the victim's daughters. The plaintiffs' claims focused on two sets of law enforcement actions: first, law enforcement officials' August 2001 actions in involving the father in the perpetrator's arrest on the sexual assault charges, and second, the officials' failure to warn the father of the perpetrator's subsequent menacing behavior (in the summer and perhaps the spring of 2002) toward the police chief who arrested him. In holding that the plaintiffs' state-created danger claims failed, the Court of Appeals disaggregated the defendants' actions at the time of the arrest from the defendants' state of mind when they later failed to warn the victim about the perpetrator's menacing behavior. The Court of Appeals held that (1) at the time of the arrest in 2001 the defendants lacked the requisite culpable state of mind, and (2) at the time of the subsequent failure to warn in 2002 the defendants may have had a culpable state of mind but they took no affirmative act that would ground a state-created danger claim. *See id.* at 192-96. Under *Walter*, it appears that some state-created danger claims may fail because the culpable state of mind occurs too long after the affirmative act.

The third element. The third element requires "a relationship between the state and the person injured . . . during which the state places the victim in danger of a foreseeable injury." *Kneipp v. Tedder*, 95 F.3d 1199, 1209 (3d Cir. 1996) (holding that jury could find third element met where defendant, "exercising his powers as a police officer, placed [the plaintiff] in danger of foreseeable injury when he sent her home unescorted in a visibly intoxicated state in cold

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[264] The plaintiffs in *Kaucher* were a corrections officer and his spouse, both of whom contracted drug-resistant Staphylococcus aureus infections. The Court of Appeals upheld the dismissal of the plaintiffs' substantive due process claims, on the ground that the evidence would not permit a reasonable jury to find deliberate indifference on the part of the defendants. *See id.* at 431. The *Kaucher* court, relying on *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992), for the proposition "that the Constitution does not guarantee public employees a safe working environment," *Kaucher*, 455 F.3d at 424, distinguished claims by corrections employees from prisoner claims. Noting a recent verdict in favor of inmates who had contracted staph infections, the Court of Appeals observed that the inmates had presented evidence of conditions that "did not affect corrections officers, who were free to seek outside medical treatment, who did not live in the jail, and who received detailed instructions on infectious disease prevention in the jail's standard operating procedures." *Id.* at 429 n.6. More generally, the Court of Appeals noted "well recognized differences between the duties owed to prisoners and the duties owed to employees and others whose liberty is not restricted." *Id.* at 430.

weather").[265] This element excludes cases "where the state actor creates only a threat to the general population." *Morse*, 132 F.3d at 913 (citing *Martinez v. California*, 444 U.S. 277, 285 (1980)); *see also Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 (3d Cir. 1995) ("When the alleged unlawful act is a policy directed at the public at large–namely a failure to protect the public by failing adequately to screen applicants for membership in a volunteer fire company"–the requisite relationship is absent). However, the Court of Appeals has suggested that the plaintiff need not always show that injury to the specific plaintiff was foreseeable–i.e., that "in certain situations, [a plaintiff may] bring a state-created danger claim if the plaintiff was a member of a discrete class of persons subjected to the potential harm brought about by the state's actions." *Morse*, 132 F.3d at 913 (dictum).[266] "The primary focus when making this determination is foreseeability." *Id.*

The fourth element. "The final element . . . is whether the state actor used its authority to create an opportunity which otherwise would not have existed for the specific harm to occur," *Morse*, 132 F.3d at 914, or, in other words, "whether, but for the defendants' actions, the plaintiff would have been in a less harmful position," *Marasco*, 318 F.3d at 510.[267] In *Morse*, the Court of Appeals reasoned that "the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or an omission." *Morse*, 132 F.3d at 915.[268] More recently, however, the Court of Appeals has required a "showing that state authority was affirmatively exercised," on the theory that "[i]t is misuse of state authority, rather than a failure to

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[265] *See also Rivas*, 365 F.3d at 197 ("If the jury credits ... testimony that [the police] were told by the EMTs that Mr. Rivas physically assaulted Rodriguez but were not given any information about his medical condition, it is foreseeable that Mr. Rivas would be among the 'discrete class' of persons placed in harm's way as a result of [the EMTs'] actions.").

[266] *See also Marasco*, 318 F.3d at 507 ("In *Morse* we held that the third requirement–a relationship between the state and the plaintiff–ultimately depends on whether the plaintiff was a foreseeable victim, either individually or as part of a discrete class of foreseeable victims."); *Bright*, 443 F.3d at 281 (third element requires "a relationship between the state and the plaintiff ... such that 'the plaintiff was a foreseeable victim of the defendant's acts,' or a 'member of a discrete class of persons subjected to the potential harm brought about by the state's actions,' as opposed to a member of the public in general").

[267] *See also Rivas*, 365 F.3d at 197 ("A reasonable factfinder could conclude that the EMTs' decision to call for police backup and then (1) inform the officers on their arrival that Mr. Rivas had assaulted [an EMT], (2) not advise the officers about Mr. Rivas's medical condition, and (3) abandon control over the situation, when taken together, created an opportunity for harm that would not have otherwise existed.").

[268] *Compare Kneipp*, 95 F.3d at 1210 (concluding that a reasonable jury could find the fourth element satisfied where "[t]he affirmative acts of the police officers ... created a dangerous situation").

use it, that can violate the Due Process Clause." *Bright*, 443 F.3d at 282.[269] The panel majority in *Bright* stressed that the fourth element requires an affirmative act on the defendant's part. *See id.*[270] Moreover, in *Kaucher*, the Court of Appeals noted that "a specific and deliberate exercise of state authority, while necessary to satisfy the fourth element of the test, is not sufficient. There must be a direct causal relationship between the affirmative act of the state and plaintiff's harm. Only then will the affirmative act render the plaintiff 'more vulnerable to danger than had the state not acted at all.'" *Kaucher*, 455 F.3d at 432 (quoting *Bright*, 443 F.3d at 281).[271]

The Court of Appeals has summarized the fourth element's requirements thus: "The three

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[269] *See also Burella v. City of Philadelphia*, 501 F.3d 134, 146 (3d Cir. 2007) ("Jill Burella cannot succeed on her state-created danger claim because she fails to allege any facts that would show that the officers *affirmatively* exercised their authority in a way that rendered her more vulnerable to her husband's abuse.... As in *Bright*, Jill Burella does not allege any facts that would establish that the officers did anything other than fail to act."); *Jiminez v. All American Rathskeller, Inc.*, 503 F.3d 247, 255-56 (3d Cir. 2007) (following *Bright*); *Phillips v. County of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008) (same).

[270] The dissent in *Bright*, by contrast, argued that the fourth element can be satisfied by combining an action with subsequent omissions. *See Bright*, 443 F.3d at 290 (Nygaard, J., dissenting) ("The conduct alleged here, when taken together, contains both an initial act–the confrontation between the parole officer and Koschalk–and then an omission–the parole officer's abdication of his responsibility to take action on a clear parole violation.").

[271] *See Phillips*, 515 F.3d at 236 (following *Kaucher*). The requirement of a causal relationship between the affirmative act and the plaintiff's harm appears to have been the dispositive problem for a state-created danger claim dismissed in *Bennett v. City of Philadelphia*, 499 F.3d 281 (3d Cir. 2007). In *Bennett*, the Bennett family was placed under the Philadelphia Department of Human Services' supervision because the mother posed a serious risk of harm to her children. Some three years later, DHS successfully petitioned the family court to discharge its supervision of the family based on its contention that it could not locate the family. Some three years after that, DHS received a hotline report that the man with whom the Bennett children then lived beat them; but whatever actions were taken by the DHS worker assigned to investigate that report failed to prevent one of the Bennett children from being beaten to death three days after the hotline report. The surviving children based their state-created danger claim against DHS on the argument "that the closing of their dependency case rendered them more vulnerable to harm by their mother and acquaintances because closing the case effectively prevented a private source of aid, the Child Advocate, from looking for the children." *Bennett*, 499 F.3d at 289. The court upheld the grant of summary judgment to the defendants, reasoning that "DHS' case closure did not prevent the Child Advocacy Unit from searching for the children," and thus that "Appellants failed to demonstrate a material issue of fact that the City used its authority to create an opportunity for the Bennett sisters to be abused that would not have existed absent DHS intervention." *Id.*

necessary conditions to satisfy the fourth element of a state-created danger claim are that: (1) a state actor exercised his or her authority,[272] (2) the state actor took an affirmative action, and (3) this act created a danger to the citizen or rendered the citizen more vulnerable to danger than if the state had not acted at all." *Ye v. United States*, 484 F.3d 634, 639 (3d Cir. 2007). In *Ye*, the plaintiff presented evidence that despite the plaintiff's cardiac symptoms the defendant, a government-employed physician, told him there was nothing to worry about; that due to this assurance, he and his family failed to seek timely emergency medical care; and that due to that failure, he suffered permanent physical harm. *See id.* at 635-36. The Court of Appeals indicated that this evidence would justify a reasonable jury in finding that the fourth element's first and third sub-elements were met – i.e., that the physician was exercising state authority, *see id.* at 639-40, and that but for the physician's assurance that he was fine, the plaintiff would have sought emergency treatment, *see id.* at 642-43. But the Court of Appeals held that no reasonable jury could find for the plaintiff on the second sub-element – the "affirmative action" requirement – because "a mere assurance cannot form the basis of a state-created danger claim." *Id.* at 640. The *Ye* Court, noting that the state-created danger doctrine is an outgrowth of the Supreme Court's discussion in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), relied on language in *DeShaney* stating that "[i]n the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause." *Ye*, 484 F.3d at 640-41 (quoting *DeShaney*, 489 U.S. at 200). The Court of Appeals reasoned that just as an assurance that someone will be arrested does not meet the affirmative-act requirement, see *Bright*, 443 F.3d at 284, neither does a doctor's assurance that the patient is fine, *see Ye*, 484 F.3d at 641-42.

The *Ye* court recognized that the *DeShaney* opinion focused much of its attention on the "special relationship" theory of liability (as distinct from a state-created danger theory), *see Ye*, 484 F.3d at 641, which raises some question as to whether the "deprivation of liberty" concept should provide the template for judging all state-created danger claims. Perhaps for this reason, the *Ye* Court noted that "[t]he act that invades a plaintiff's personal liberty may not always be a restraint, as in the special-relationship context." *Ye*, 484 F.3d at 641 n.4. *See, e.g.*, *Phillips*, 515 F.3d at 229, 243 (holding that complaint properly alleged state-created danger claim where it alleged that 911 dispatchers gave their co-worker confidential information that enabled him to locate and kill his ex-girlfriend's current boyfriend).

See the discussion of the second element, above, for a summary of *Walter v. Pike County*,

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[272] Having set forth the first sub-element (requiring exercise of government authority), the *Ye* Court acknowledged that this sub-element merely duplicates the "state action" requirement for all Section 1983 claims (see supra Instructions 4.4 through 4.4.3): The court rejected the defendant's contention "that there exists an independent requirement that the 'authority' exercised must be peculiarly within the province of the state," and explained that "[t]he 'authority' language is simply a reflection of the 'state actor' requirement for all § 1983 claims." *Id.* at 640.

544 F.3d 182 (3d Cir. 2008), in which the plaintiffs' claims failed because the defendants' affirmative acts occurred at a time when the defendants did not (yet) have the requisite culpable state of mind.

4.15 Section 1983 – High-Speed Chase

Model

[Plaintiff] claims that [defendant] violated [plaintiff's] Fourteenth Amendment rights by [describe the high-speed chase].

To establish this claim, [plaintiff] must prove both of the following things by a preponderance of the evidence:

First: [Defendant] [describe [plaintiff's] allegations concerning the high-speed chase].

Second: [Defendant] acted for the purpose of causing harm unrelated to the goal of [apprehending [plaintiff]] [doing [his/her] job as a law enforcement officer]. It is not enough for [plaintiff] to show that [defendant] was careless or even reckless in pursuing [plaintiff]. [Plaintiff] must prove that [defendant] acted for the purpose of causing harm unrelated to the valid goal of pursuing [plaintiff].

Comment

"[H]igh 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." *County of Sacramento v. Lewis*, 523 U.S. 833, 854 (1998).[273] "[I]n a high speed

[273] Such claims will be governed by substantive due process rather than Fourth Amendment standards, because there is no "seizure" for Fourth Amendment purposes either during a high-speed chase or even when the police accidentally crash into a suspect. *See Lewis*, 523 U.S. at 843-44; compare infra note [xxx] (discussing possibility that seizure might result from use of force during high-speed chase). By contrast, when police "s[eek] to stop [a suspect] by means of a roadblock and succeed[] in doing so[,] [t]hat is enough to constitute a 'seizure' within the meaning of the Fourth Amendment," and the seizure will be evaluated under the Fourth Amendment reasonableness standard. *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989); *see also Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007) (noting that law enforcement officer defendant did not dispute "that his decision to terminate the car chase by ramming his bumper into respondent's vehicle constituted a [Fourth Amendment] 'seizure'").

Prior to the Supreme Court's decision in *Lewis*, the Court of Appeals had already applied the "shocks the conscience" standard to police pursuit claims. *See Fagan v. City of Vineland*, 22 F.3d 1296, 1308-09 (3d Cir. 1994) (en banc). Because *Lewis* provides a more specific articulation of the "shocks the conscience" standard as applied to police pursuit cases, the model instruction follows *Lewis*.

automobile chase aimed at apprehending a suspected offender .... only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Id.* at 836. The *Lewis* Court rejected a less demanding standard (such as deliberate indifference) because it reasoned that the decision whether to pursue a high-speed chase had to be made swiftly and required police to weigh competing concerns: "on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high speed threat to all those within stopping range, be they suspects, their passengers, other drivers, or bystanders." *Id.* at 853. Based on the conclusion that "the officer's instinct was to do his job as a law enforcement officer, not to induce [the motorcycle driver's] lawlessness, or to terrorize, cause harm, or kill," the Court found no substantive due process violation in *Lewis*. *Id.* at 855.

Courts should not "second guess a police officer's decision to initiate pursuit of a suspect so long as the officers were acting 'in the service of a legitimate governmental objective,'" such as "to apprehend one fleeing the police officers' legitimate investigation of suspicious behavior." *Davis v. Township of Hillside*, 190 F.3d 167, 170 (3d Cir. 1999) (quoting *Lewis*, 523 U.S. at 846). In *Davis*, the plaintiff asserted that a police car chasing a suspect bumped the suspect's car, causing the suspect to hit his head and pass out, which caused the suspect's car to collide with other cars, one of which hit and injured the plaintiff (a bystander). *See id.* at 169. Finding no "evidence from which a jury could infer a purpose to cause harm unrelated to the legitimate object of the chase," the Court of Appeals affirmed the grant of summary judgment to the defendants. *Id.* Judge McKee concurred but wrote separately to note that "if the record supported a finding that police gratuitously rammed [the suspect's] car, and if plaintiff properly alleged that they did so to injure or terrorize [the suspect], liability could still attach under *Lewis*." *Id.* at 172-73 (McKee, J., concurring); *see also id.* at 173 ("I do not read the majority opinion as holding that police can use any amount of force during a high speed chase no matter how tenuously the force is related to the legitimate law enforcement objective of arresting the fleeing suspect.").[274]

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[274] In at least some instances, the use of force by police during a high-speed chase could effect a seizure so as to trigger the application of Fourth Amendment standards. In explaining that a seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*," *Brower*, 489 U.S. at 597, the Court gave the following example:

> [I]n the hypothetical situation that concerned the Court of Appeals[,] [t]he pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit; and though he was in fact stopped, he was stopped by a different means–his loss of control of his vehicle and the subsequent crash. If, instead of that, the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure.

Id.; *see also Scott v. Harris*, 127 S. Ct. 1769, 1777-79 (2007) (using Fourth Amendment

4.16 Section 1983 – Duty to Protect Child in Foster Care

Model

When the state places a child in foster care, the state has entered into a special relationship with that child and this relationship gives rise to a duty under the Fourteenth Amendment to the United States Constitution. [Plaintiff] claims that [defendant] violated [his/her] duty by placing [[plaintiff] [child]][275] in foster care with John and Jane Doe. [The parties agree that] [Plaintiff claims that] *[describe abuse of plaintiff while in foster care]*.

To establish this claim, [plaintiff] must prove both of the following things by a preponderance of the evidence:

First: [Defendant] acted with deliberate indifference when [he/she] placed [plaintiff] in the Does' foster home.

Second: [Plaintiff] was harmed by that placement.

I will now proceed to give you more details on the first of these two requirements.

[Deliberate indifference means that [defendant] knew of a substantial risk that [Mr. Doe] [Ms. Doe] would abuse [plaintiff], and that [defendant] disregarded that risk. [Plaintiff] must show that [defendant] actually knew of the risk. If [defendant] knew of facts that [he/she] strongly suspected to be true, and those facts indicated a substantial risk that [Mr. Doe] [Ms. Doe] would abuse [plaintiff], [defendant] cannot escape liability merely because [he/she] refused to take the opportunity to confirm those facts. But keep in mind that mere carelessness or negligence is not enough to make an official liable. It is not enough for [plaintiff] to show that a reasonable person would have known, or that [defendant] should have known, of the risk to [plaintiff]. [Plaintiff] must show that [defendant] actually knew of the risk. If [plaintiff] proves that there was an obvious risk of abuse, you are entitled to infer from the obviousness of the risk that [defendant] knew of the risk. [However, [defendant] claims that even if there was an obvious risk, [he/she] was unaware of that risk. If you find that [defendant] was unaware of the risk,[276] then you must find that [he/she] was not

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excessive force analysis to assess claim arising from county deputy's decision to ram fleeing suspect's car with his bumper in order to end the chase).

[275] If the plaintiff is someone other than the child, then the child's name (rather than the plaintiff's name) should be inserted in appropriate places in this instruction.

[276] It is unclear who has the burden of proof with respect to a defendant's claim of lack of awareness of an obvious risk. *See* Comment 4.11.1.

deliberately indifferent.]][277]

Comment

"[W]hen the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties. The failure to perform such duties can give rise, under sufficiently culpable circumstances, to liability under section 1983." *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc).

The culpability requirement in such a "special relationship" case is governed by the framework set forth in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). *See Nicini*, 212 F.3d at 809.[278] Under that framework, the plaintiff must show that the defendant's conduct "shocked the conscience"; the precise level of culpability required will vary depending on the circumstances, and especially on the availability (or not) of the opportunity for the defendant to deliberate before acting. *See id.* at 810. In *Nicini*, the Court of Appeals applied a "deliberate indifference" standard. *See id.* at 811 ("In the context of this case . . . Cyrus's actions in investigating the Morra home should be judged under the deliberate indifference standard.").[279] The *Nicini* court did not, however, decide

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[277] This paragraph provides a subjective definition of "deliberate indifference," drawn from the Eighth Amendment standard discussed in *Farmer v. Brennan*, 511 U.S. 825 (1994). As discussed in the Comment, Third Circuit precedent leaves open the possibility that a plaintiff could establish liability for failure to protect a child in foster care under an objective deliberate indifference standard. If the objective standard applies, then this paragraph must be redrafted accordingly.

[278] Some district court decisions within the Third Circuit have recognized an alternative theory of liability: Under the "'professional judgment' standard . . . . , defendants could be held liable if their actions were 'such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.'" *Jordan v. City of Philadelphia*, 66 F. Supp. 2d 638, 646 (E.D. Pa. 1999) (quoting *Wendy H. v. City of Philadelphia*, 849 F. Supp. 367, 372 (E.D. Pa. 1994) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982))). The Court of Appeals in *Nicini* declined to "decide whether, consistent with *Lewis*, [the professional judgment] standard could be applied to" substantive due process claims for failure to protect a child in foster care. *Nicini*, 212 F.3d at 811 n. 9.

[279] *Compare Miller v. City of Philadelphia*, 174 F.3d 368, 375-76 (3d Cir. 1999) ("[A] social worker acting to separate parent and child . . . . rarely will have the luxury of proceeding in a deliberate fashion . . . . As a result, . . . the standard of culpability for substantive due process purposes must exceed both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed 'shocks the conscience.'").

whether this "deliberate indifference" standard should follow the subjective "deliberate indifference" standard applied to prisoners' Eighth Amendment claims, *see Nicini*, 212 F.3d at 811 (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)),[280] or whether a defendant's "failure to act in light of a risk of which the official should have known, as opposed to failure to act in light of an actually known risk, constitutes deliberately indifferent conduct in this setting," because under either standard the court held the plaintiff's claim should fail, *see Nicini*, 212 F.3d at 812 (holding that defendant's conduct "amounted, at most, to negligence").

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[280] For a discussion of this standard, see the Comment to Instruction 4.11, supra.

A number of circuits have adopted a subjective standard. *See, e.g.*, *Hernandez ex rel. Hernandez v. Texas Dept. of Protective and Regulatory Services*, 380 F.3d 872, 882 (5th Cir. 2004) ("[T]he central inquiry for a determination of deliberate indifference must be whether the state social workers were aware of facts from which the inference could be drawn, that placing children in the Clauds foster home created a substantial risk of danger."); *Lewis v. Anderson*, 308 F.3d 768, 775-76 (7th Cir. 2002) ("If state actors are to be held liable for the abuse perpetrated by a screened foster parent, under K.H. the plaintiffs must present evidence that the state officials knew or suspected that abuse was occurring or likely."); *Ray v. Foltz*, 370 F.3d 1079, 1083-84 (11th Cir. 2004) (issue is whether "defendants had actual knowledge or deliberately failed to learn of the serious risk to R.M. of the sort of injuries he ultimately sustained").