



1996

A Return to Owen: Depersonalizing Section 1983 Municipal Liability Litigation

Barbara Kritchevsky

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Barbara Kritchevsky, *A Return to Owen: Depersonalizing Section 1983 Municipal Liability Litigation*, 41 Vill. L. Rev. 1381 (1996).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol41/iss5/2>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

1996]

Article

A RETURN TO OWEN: DEPERSONALIZING SECTION 1983 MUNICIPAL LIABILITY LITIGATION

BARBARA KRITCHEVSKY*

TABLE OF CONTENTS

I. INTRODUCTION	1381
II. THE TWO USES OF DELIBERATE INDIFFERENCE	1387
A. <i>The Constitutional Inquiry</i>	1387
B. <i>The Municipal Liability Inquiry</i>	1393
1. <i>Owen v. City of Independence: Distinguishing Individual and Municipal Liability</i>	1393
2. <i>A Departure from Owen: The Personalization of the Municipal Liability Inquiry</i>	1397
3. <i>Personalization Takes Hold: The Lower Courts' Two-Step Municipal Liability Inquiry</i>	1405
4. <i>The Problems with the Personalized Approach</i>	1409
III. <i>FARMER V. BRENNAN</i>	1415
IV. <i>FARMER AS A RETURN TO OWEN'S MODEL OF MUNICIPAL LIABILITY</i>	1422
A. <i>Farmer's Significance as a Municipal Liability Decision</i>	1426
B. <i>Farmer as a Model for § 1983 Entity Liability Analysis</i>	1435
V. CONCLUSION	1442

I. INTRODUCTION

STATE of mind plays two roles in § 1983 litigation.¹ First, the defendant's state of mind often determines whether he or she

* Professor of Law, The University of Memphis, Cecil C. Humphreys School of Law. B.A., 1977, Middlebury College; J.D., 1980, Harvard Law School.

I am indebted to the research assistants who assisted me with this Article: Mary Jane Palmer, for her considerable help, and Marlinee Clark. I also gratefully acknowledge the support of a University of Memphis Faculty Research Grant.

1. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

has committed a constitutional violation, a prerequisite to liability in most § 1983 cases.² Second, state of mind is crucial in determining when a municipality is liable for a constitutional violation.³ Both inquiries often require a finding of “deliberate indifference.” Many Eighth and Fourteenth Amendment violations require a determination that defendant officials acted with deliberate indifference to the plaintiff’s health or safety.⁴ Under *City of Canton v.*

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1994), *as amended* by Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 101 Stat. 3853.

Congress enacted § 1983, derived from § 1 of the Civil Rights Act of 1871 (Ku Klux Klan Act), ch. 22, 17 Stat. 13, pursuant to its power to enforce the Fourteenth Amendment, H.R. REP. NO. 320 (1871), to provide redress for Klan activities that local governments could or would not correct. *See* CONG. GLOBE, 42d Cong. 374 (1871) (remarks of Rep. Lowe) (“[L]ocal administrations have been found inadequate or unwilling to apply the proper corrective.”). *See generally* *Monroe v. Pape*, 365 U.S. 167, 174-78 (1961), *overruled in part* by *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978) (discussing reasons for enacting § 1983); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1154-55 (1977) (same).

2. *See* *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled in part* by *Daniels v. Williams*, 474 U.S. 327 (1986) (stating that “two essential elements to a § 1983 action” are that “conduct complained of was committed by a person acting under color of state law” and that conduct deprive “a person of rights, privileges, or immunities secured by the Constitution or laws of the United States”). As *Parratt* indicates, § 1983 provides a remedy for deprivations of constitutional and federal statutory rights. *See* *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (recognizing § 1983 action for statutory violations).

In nonstatutory § 1983 claims, the plaintiff must prove that the challenged action was a constitutional violation, not simply a tort. State of mind determines whether a defendant’s action is a tort or a constitutional violation in Eighth Amendment and due process litigation. *See* *Daniels*, 474 U.S. at 330-33 (negligence not actionable under Due Process Clause); *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976) (negligence not actionable under Eighth Amendment). For a discussion of the reasons for the state-of-mind requirements in § 1983 claims, see *infra* notes 30-32 and accompanying text.

3. *See* *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (holding that “inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact”).

4. *See* *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (stating that in cases challenging prison conditions under Eighth Amendment, plaintiff must show that defendant prison officials were deliberately indifferent to inmate health or safety); *Helling v. McKinney*, 509 U.S. 25, 35 (1993) (same); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (same); *Estelle*, 429 U.S. at 106 (same).

The Due Process Clause protects the constitutional rights of pre-trial detainees. *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989). Most courts use a deliber-

Harris,⁵ inadequate police training can give rise to municipal liability only when the failure to train amounts to deliberate indifference to citizens' constitutional rights.⁶

Not surprisingly, lower courts generally assumed that the constitutional and municipal liability deliberate indifference inquiries were the same.⁷ Many lower courts used municipal liability cases to aid in determining whether the deliberate indifference that gives rise to an Eighth Amendment violation was present.⁸ Others relied

ate indifference standard to determine if official action violated a pre-trial detainee's due process rights. *See, e.g.*, *Hale v. Tallapoosa County*, 50 F.3d 1579, 1583 (11th Cir. 1995) (applying *Farmer* deliberate indifference standard to pre-trial detainee's due process claim); *Anderson v. County of Kern*, 45 F.3d 1310, 1313 (9th Cir.) (same), *cert. denied*, 116 S. Ct. 306 (1995). *But cf.* *Hare v. City of Corinth*, 74 F.3d 633, 643 (5th Cir. 1996) (en banc) (using deliberate indifference standard in determining constitutionality of episodic act or omission but testing constitutionality of detainees' conditions of confinement by asking whether restraint is reasonably related to legitimate government interest or was instead for punishment).

Some courts also require a showing of "deliberate indifference" to establish liability in Fourteenth Amendment due process cases outside the prison context. *See Hill v. Shobe*, 93 F.3d 418, 421 n.1 (7th Cir. 1996) (equating Eighth Amendment deliberate indifference standard with Fourteenth Amendment criminal recklessness standard in case arising out of automobile accident); *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989) (using *Canton's* deliberate indifference standard as constitutional culpability standard in substantive due process case).

5. 489 U.S. 378 (1989).

6. *Id.* at 388. State of mind is only an element of failure-to-train cases. No state-of-mind inquiry is necessary when municipal liability rests on a policymaker's unconstitutional policy or decision. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 484-85 (1986) (finding City liable for policymaker's order that deputy sheriffs break into doctor's office to arrest third parties); *Monell*, 436 U.S. at 690-91 (holding municipal defendants liable for unconstitutional policy requiring women to take unpaid leaves of absence in fifth month of pregnancy). For a discussion of the *Pembaur* case, see *infra* notes 91-98 and accompanying text.

7. *See* Oral Argument at 16, *Farmer v. Brennan*, 511 U.S. 825 (1994) (No. 92-7247) (recording *Farmer's* attorney told Court during oral argument, "it would seem odd if the Court were, without telling anyone, to 2 years after it had announced—defined deliberate indifference in *Canton*, to without saying it announce a different—adopt a different deliberate indifference standard in the *Wilson* case").

This assumption was also logical because the earliest cases to require a showing of deliberate indifference in the municipal liability context relied on Eighth Amendment precedent. *See Leite v. City of Providence*, 463 F. Supp. 585, 590 (D.R.I. 1978) (relying on Eighth Amendment precedent in establishing deliberate indifference standard). For a discussion of *Leite*, see *infra* notes 104-08 and accompanying text. Additionally, the Supreme Court cited *Canton* in its discussion of the Eighth Amendment deliberate indifference standard in *Wilson*, 501 U.S. at 300-01.

8. *See Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989) (using *Canton's* deliberate indifference standard in substantive due process case). *See, e.g.*, *Hill v. Marshall*, 962 F.2d 1209, 1214 (6th Cir. 1992) (finding *Canton* useful in "determining the perimeters [sic] of 'deliberate indifference'" in Eighth Amendment case); *DeGidio v. Pung*, 920 F.2d 525, 531 (8th Cir. 1990) (using *Canton* in Eighth Amendment case); *Santiago v. Lane*, 894 F.2d 218, 223 (7th Cir. 1990) (same).

on Eighth Amendment precedent in inquiring into deliberate indifference in municipal liability cases.⁹

Commingleing Eighth Amendment and municipal liability precedent and conceptions of deliberate indifference led to difficulties, especially in municipal liability litigation. The Eighth Amendment deliberate indifference inquiry looks to the state of mind of the person who took the challenged action.¹⁰ That individual is often easily identifiable.¹¹ Because the Eighth Amendment deliberate indifference standard requires an inquiry into some human being's state of mind, many courts assumed that the same inquiry governed in municipal liability cases.¹² Focusing on an individual's indifference led courts to personalize the municipal liability inquiry. These courts required plaintiffs to identify a person whose state of mind governed the municipal liability inquiry—a policymaker—and then to establish that policymaker's deliberate

9. See *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1064 n.20 (3d Cir. 1991) (noting Supreme Court's discussion of Eighth Amendment deliberate indifference standard in *Wilson*, 501 U.S. at 294, supports conclusions on meaning of municipal liability deliberate indifference standard); *Berry v. City of Muskogee*, 900 F.2d 1489, 1495-96 (10th Cir. 1990) (equating Eighth Amendment and municipal liability deliberate indifference standards); see also *Moore v. Winebrenner*, 927 F.2d 1312, 1320 (4th Cir. 1991) (Murnaghan, J., dissenting) (same).

10. *Wilson*, 501 U.S. at 300 ("If the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." (emphasis added)); *Graham v. Connor*, 490 U.S. 386, 398 (1989) (noting Eighth Amendment inquiry focuses on "the subjective motivations of the individual officers").

The plaintiff must prove the subjective indifference of "each" defendant official. *Bagola v. Kindt*, 39 F.3d 779, 779-80 (7th Cir. 1994) (per curiam). Only an officer who was personally involved in an Eighth Amendment violation can be held personally liable. *Grimsley v. MacKay*, 93 F.3d 676, 679 (10th Cir. 1996).

11. See *Estelle v. Gamble*, 429 U.S. 97, 108 (1976) (concluding that treating physician was not deliberately indifferent to plaintiff's medical needs, but remanding for consideration of indifference of other prison officials). It can, however, be very difficult to identify the responsible officials in Eighth Amendment cases challenging unconstitutional conditions of confinement. "Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined . . ." *Wilson*, 501 U.S. at 310 (White, J., concurring). Justice Blackmun elaborated on this point in his concurrence in *Farmer*. *Farmer v. Brennan*, 511 U.S. 825, 856-57 (1994) (Blackmun, J., concurring) (arguing against subjective approach which tries to identify culpable wrongdoer). For a further discussion of Justice Blackmun's concurring opinion in *Farmer*, see *infra* notes 229-33 and accompanying text.

12. For a discussion of the requisite state of mind, see *supra* note 10 and accompanying text. The Supreme Court's municipal liability cases encouraged this assumption because the Court appeared to require a determination that a city's policymakers were deliberately indifferent to the need for more or different training. See *City of Canton v. Harris*, 489 U.S. 378, 390 (1989) (speaking of municipal policymakers' deliberate indifference toward police training). For a discussion of *Canton*, see *infra* notes 116-26 and accompanying text.

indifference.¹³ If the policymaker was not subjectively indifferent, the municipality could avoid liability.¹⁴

Compounding the difficulties of this merging of standards was a lack of guidance from the United States Supreme Court on the meaning of "deliberate indifference" in either the constitutional or municipal liability context.¹⁵ Specifically, lower courts did not know whether the deliberate indifference standards were objective or subjective. Did deliberate indifference require subjective recklessness, or was it sufficient that an official should have known of a danger?¹⁶

In *Farmer v. Brennan*,¹⁷ the Supreme Court held that the Eighth Amendment deliberate indifference standard is subjective. "[A] prison 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."¹⁸ The *Farmer* Court also established that the Eighth Amendment and municipal liability deliberate indifference standards are not the same. The municipal liability standard is objective.¹⁹ In announcing that conclusion, the Court relied on the difficulty of trying to personalize entity liability.²⁰ "[C]onsiderable conceptual difficulty would attend any

13. See *Simmons*, 947 F.2d at 1060-61 ("City of Canton, similarly to *Monell*, therefore appears to require that a plaintiff, in order to meet the deliberate indifference standard for directly subjecting a municipality to § 1983 liability, must present scientist-like evidence of indifference on the part of a particular policymaker or policymakers."). For a discussion of Judge Becker's opinion in *Simmons*, see *infra* notes 129-40 and accompanying text.

14. One way of disproving an allegation of deliberate indifference was by showing that challenged conditions were due to factors, such as inadequate funding, that were beyond the policymakers' personal control. For a discussion of cases that address budgetary constraints as a factor negating deliberate indifference, see *infra* notes 172-79 and accompanying text.

15. See Martin A. Schwartz, *Section 1983 Litigation*, 11 *TOURO L. REV.* 299, 315 (1995) (responding to Court's statement in *Farmer* that it had never "paused" to define meaning of deliberate indifference with "two words: for shame!").

16. Compare *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991) (applying subjective standard in the Eighth Amendment context), with *Young v. Quinlan*, 960 F.2d 351, 360-61 (3d Cir. 1992) (applying objective "knows or should have known" standard); compare *Simmons*, 947 F.2d at 1060-61 (requiring "scientist-like evidence of indifference" in municipal liability context), with *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1326 (7th Cir. 1993) (holding plaintiff must show that policymakers had "actual or constructive knowledge" that omission was likely to cause constitutional violation).

17. 511 U.S. 825 (1994).

18. *Id.* at 837. Justice Souter wrote the Court's opinion. *Id.* at 828. Justices Blackmun and Stevens concurred in the Court's opinion. *Id.* at 852 (Blackmun, J., concurring); *id.* at 858 (Stevens, J., concurring). Justice Thomas concurred only in the judgment. *Id.* at 859 (Thomas, J., concurring).

19. *Id.* at 842.

20. *Id.* at 841.

search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official.”²¹

The *Farmer* Court’s statements about municipal liability are striking and should prove more far-reaching than the Court’s Eighth Amendment holding.²² The *Farmer* opinion suggests that the Court has recognized what commentators have long argued: inquiries into subjective mental state have no role in determining entity liability.²³ *Farmer* explains that municipal liability is not subjective and suggests that it should not be personalized. Because the municipal liability standard is objective, a municipality should be subject to liability when there is an obvious risk that its actions, or failures to act, will cause constitutional harm.

Farmer establishes that different standards determine individual and municipal liability. While few courts have yet realized the decision’s significance for municipal liability litigation, its import is considerable.²⁴ It provides a model for the proper allocation of responsibility in § 1983 cases. While individual defendants may avoid liability if they lack personal culpability, their exoneration should not mean that injured plaintiffs will go without redress. The municipality should be liable if its policies manifested deliberate indifference and those policies caused the plaintiff’s harm.

This division of responsibility allows a proper allocation of costs among the parties involved in a constitutional violation. The plaintiff can be compensated, the government actor will be liable only if he or she is culpable, and the municipality must pay if its policies caused constitutional harm. As the Supreme Court recognized in *Owen v. City of Independence*,²⁵ one of its first municipal liability cases, this is the proper allocation of responsibility in § 1983 cases because it allows the statute to serve its intended purposes by

21. *Id.*

22. For a discussion of the Supreme Court cases suggesting that the Eighth Amendment standard was subjective, see *supra* note 10 and *infra* notes 33-46 and accompanying text. These cases foreshadowed the *Farmer* Court’s Eighth Amendment holding.

23. See Susannah M. Mead, 42 *U.S.C. § 1983 Municipal Liability: The Monell Sketch Becomes a Distorted Picture*, 65 N.C. L. REV. 517, 556-59 (1987) (criticizing use of subjective “fault requirement”); Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 248-49 (1986) (discussing problems with determining “state of mind” of institution); see also Barbara Kritchevsky, “Or Causes to Be Subjected”: *The Role of Causation in Section 1983 Municipal Liability Analysis*, 35 UCLA L. REV. 1187, 1230-34 (1988) (discussing complexity of state-of-mind requirements for institutions).

24. For a discussion of the lower courts’ application of *Farmer*, see *infra* note 234 and accompanying text.

25. 445 U.S. 622 (1980).

detering constitutional violations attributable to the interactive conduct of individually-blameless officials.²⁶

This Article explains how *Farmer v. Brennan*'s recognition that there are two standards of deliberate indifference should change § 1983 municipal liability litigation. After sketching the Supreme Court's development of the deliberate indifference inquiry in the constitutional and municipal liability contexts, it explains the problems that arose when lower courts used a subjective deliberate indifference inquiry to personalize entity liability.²⁷ The Article then details the *Farmer v. Brennan* opinion, highlighting its distinction between the constitutional and municipal liability deliberate indifference standards.²⁸ It explains how *Farmer*'s identification of two standards of indifference should simplify and clarify municipal liability litigation and why the decision leads to a proper allocation of responsibility in § 1983 municipal liability actions.²⁹

II. THE TWO USES OF DELIBERATE INDIFFERENCE

A. *The Constitutional Inquiry*

Section 1983 provides redress to the victims of constitutional violations, not to the victims of torts.³⁰ The Supreme Court has struggled to differentiate the two.³¹ While objective standards distinguish torts from constitutional violations in the Fourth Amend-

26. *Id.* at 657. For a discussion of the *Owen* Court's view of the proper allocation of responsibility in § 1983 cases, see *infra* notes 73-81 and accompanying text.

27. For a discussion of the Supreme Court's development of the deliberate indifference inquiry, see *infra* notes 30-60 and accompanying text. For a discussion of the subjective deliberate indifference inquiry used in the lower courts, see *infra* notes 127-85 and accompanying text.

28. For a detailed analysis of the *Farmer* opinion, see *infra* notes 186-233 and accompanying text.

29. For an in-depth analysis of the implications of the *Farmer* decision, see *infra* notes 234-308 and accompanying text.

30. 42 U.S.C. § 1983 (1994), *as amended by* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 101 Stat. 3853. *Baker v. McCollan*, 443 U.S. 137, 142 (1979) ("Respondent's claim is that his detention in the Potter County jail was wrongful. Under a tort-law analysis it may well have been. The question here, however, is whether his detention was unconstitutional."). For the statutory language of § 1983, see *supra* note 1.

31. See *Paul v. Davis*, 424 U.S. 693 (1976) (expressing fears that failure to draw clear line between two will make § 1983 source of generalized federal tort law). *Paul* was the Supreme Court's first, and most forceful, statement of this fear. In *Paul*, the Court said that a reading of the Due Process Clause that would give individuals "a right to be free of injury wherever the State may be characterized as the tortfeasor . . . would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 701.

ment area, the Court generally relies on the defendant's state of mind to demarcate the division.³²

The Court's development of the state-of-mind and the deliberate indifference inquiry is clearest in its Eighth Amendment decisions. The Court first articulated the deliberate indifference requirement in *Estelle v. Gamble*,³³ a § 1983 action in which a prison inmate alleged that inadequate medical treatment violated his Eighth Amendment rights. The *Estelle* Court decided that the Eighth Amendment proscribes punishments that "are incompatible with 'the evolving standards of decency that mark the progress of a maturing society'"³⁴ or which "'involve the unnecessary and wanton infliction of pain.'"³⁵ A state had a duty to provide medical care because a failure to do so could produce physical pain or death, the unnecessary infliction of which was "inconsistent with contemporary standards of decency."³⁶

The Court emphasized that inadequate medical treatment alone did not violate the United States Constitution.³⁷ Medical malpractice was not unconscionable and was not a constitutional violation merely because the victim was a prisoner.³⁸ To state a claim, the prisoner had to "allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."³⁹ The official's culpability—his deliberate indifference to the prisoner's

32. *Graham v. Connor*, 490 U.S. 386, 396-99 (1989) (discussing Fourth Amendment's "reasonableness" inquiry); *Brower v. County of Inyo*, 489 U.S. 593 (1989) (discussing what constitutes "a seizure"). The *Graham* Court said that the term "unreasonable" did not suggest an inquiry into "subjective state of mind." *Graham*, 490 U.S. at 398. While the *Brower* Court held that only "intentional" acts could be seizures, the Court explained that determining whether an act was intentional did not depend on the actor's subjective intent. *Brower*, 489 U.S. at 596-98; see also *id.* at 600 (Stevens, J., concurring) (calling standard one of "objective intent").

33. 429 U.S. 97 (1976).

34. *Id.* at 102 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

35. *Id.* at 103 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion)).

The Court foreshadowed the *Estelle* state-of-mind requirement in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), holding that a second attempted electrocution did not violate the Eighth Amendment because the officials did not intend to inflict unnecessary pain. *Id.* at 463-64. See generally Stacy Lancaster Cozad, *Cruel But Not So Unusual: Farmer v. Brennan and the Devolving Standards of Decency*, 23 PEPP. L. REV. 175, 176-88 (1995) (discussing evolution of deliberate indifference standard).

36. *Estelle*, 429 U.S. at 103.

37. *Id.* at 105-06.

38. *Id.*

39. *Id.* at 106.

needs—provided the element of wantonness that the Eighth Amendment required.⁴⁰

The Court again discussed the deliberate indifference standard in *Wilson v. Seiter*,⁴¹ deciding that inhumane prison conditions only violated the Eighth Amendment if the conditions existed due to prison officials' deliberate indifference.⁴² The *Wilson* Court explained that the Eighth Amendment inquiry had objective and subjective components.⁴³ The objective component asked if the harm was sufficiently serious.⁴⁴ The subjective component asked if the officials acted with a "sufficiently culpable state of mind."⁴⁵ Ex-

40. *Id.* at 104 (quoting *Gregg*, 428 U.S. at 173 (joint opinion)). Justice Stevens dissented, arguing that state of mind was irrelevant. *Id.* at 116 (Stevens, J., dissenting). "[W]hether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it." *Id.* (Stevens, J., dissenting).

41. 501 U.S. 294 (1991).

42. *Wilson*, 501 U.S. at 303. Wilson, an inmate at an Ohio state correctional facility, sued the director of the state corrections department and the warden of the prison under § 1983, alleging that a number of the conditions of his confinement, such as overcrowding, excessive noise, and inadequate heating and cooling constituted cruel and unusual punishment. *Id.* at 296. Wilson charged that the authorities failed to take remedial action after receiving notification of the conditions. *Id.* at 294. The officials denied that some of the alleged conditions existed and explained that they had made efforts to improve the others. *Id.* Justice Scalia wrote for the Court. Justice White, joined by Justices Marshall, Blackmun and Stevens, concurred in the judgment.

The Court discussed the state of mind necessary to establish an Eighth Amendment violation in one other case in the years between *Estelle* and *Wilson*. See *Whitley v. Albers*, 475 U.S. 312 (1986) (holding that deliberate indifference standard did not adequately account for importance of competing obligations present when officials used force as security measure). In *Whitley*, a prisoner, who authorities shot while they were attempting to quell a prison riot, brought a § 1983 case. In such cases, "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). The year after *Wilson*, the Court held that the "malicious and sadistic" standard applied to all official uses of excessive physical force against a prisoner. *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992).

43. *Wilson*, 501 U.S. at 298-99.

44. See *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (rejecting claim that double-celling of inmates was unconstitutional). The *Rhodes* Court established that "only those deprivations denying 'the minimal civilized measure of life's necessities,' . . . are sufficiently grave to form the basis of an Eighth Amendment violation." *Id.*; see also *Wilson*, 501 U.S. at 298 (quoting *Rhodes*, 452 U.S. at 347).

45. *Wilson*, 501 U.S. at 298. The state-of-mind inquiry applied in all cases claiming that an official inflicted cruel and unusual punishment, even in conditions cases. "If the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." *Id.* at 300 (emphasis added); see Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 374, 396 (1995) (criticizing *Wilson* Court for turning

plaining that the requisite culpability depended on the constraints facing the officials, the Court decided that the *Estelle* deliberate indifference standard governed conditions cases.⁴⁶

In establishing that the deliberate indifference standard applied to conditions claims, the *Wilson* majority sidestepped two concerns raised by the four Justices concurring in the judgment.⁴⁷ Writing for those Justices, Justice White first explained that the majority's standard would often be impossible to apply because inhumane conditions are frequently "the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time."⁴⁸ Justice White criticized the majority for not explaining whose intent should govern in those cases.⁴⁹ "[I]ntent," he stated, "simply is not very meaningful when considering a challenge to an institution, such as a prison system."⁵⁰ The majority did not respond to that argument.

Justice White then stated that the majority's standard was unwise because it left open the possibility that prison officials could defeat Eighth Amendment conditions claims by showing that insufficient funding, not officials' deliberate indifference, caused the conditions.⁵¹ He argued that a showing that officials exhibited con-

Eighth Amendment from "a substantive limit on state-imposed punishment to a provision that basically polices the warden's conduct").

46. See *Wilson*, 501 U.S. at 303 (stating that "there is no justification for a standard more demanding than *Estelle's*" in conditions cases). The Court said that, viewed in terms of the constraints facing officials, claims alleging inadequate medical care and those challenging inadequate conditions of confinement were essentially the same. *Id.* "Indeed, the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates." *Id.* The Court then remanded the case for reconsideration under the deliberate indifference standard. *Id.* at 306.

In adopting the deliberate indifference standard, the *Wilson* Court rejected the suggestion that the duration of a condition's existence should affect the state-of-mind requirement. "The long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent." *Id.* at 300. "[B]ut there is no logical reason why it should cause the *requirement* of intent to evaporate." *Id.* at 300-01 (comparing *Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989) (discussing need to train officers on using deadly force)).

47. See *id.* at 306 (White, J., concurring) (arguing that challenges to conditions of confinement did not require showing of deliberate indifference because prison conditions were part of offender's punishment).

48. *Id.* at 310 (White, J., concurring).

49. *Id.* (White, J., concurring).

50. *Id.* (White, J., concurring).

51. *Id.* at 311 (White, J., concurring). *Wilson* requires looking to "constraints" facing the officials in deciding if they were deliberately indifferent. *Id.* at 303. Defendant officials can argue that a lack of funding to take remedial action was a constraint preventing a finding of indifference. See *Alberti v. Sheriff of Harris County*, 937 F.2d 984 (5th Cir. 1991) (finding, in case decided after *Wilson*, that

cern or unsuccessfully tried to ameliorate problems should not insulate inhumane conditions from constitutional challenge.⁵² The majority responded that the validity of a “cost” defense was not at issue and noted that there was no indication that litigants had raised such a defense in an effort to avoid *Estelle*.⁵³

Although the *Wilson* Court called the deliberate indifference standard “subjective,”⁵⁴ it did not otherwise define deliberate indif-

facts did not justify defense). For a discussion of *Alberti*, see *infra* notes 60, 175 and accompanying text.

Justice White did note, however, that a number of lower court decisions had found that inadequate funding could not excuse unconstitutional conditions of confinement. *Wilson*, 501 U.S. at 311 n.2 (White, J., concurring) (citing *Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983) (noting state prison officials are deliberately indifferent to serious medical needs although deficiencies are closely related to lack of funding); *Ramos v. Lamm*, 639 F.2d 559, 573 n.19 (10th Cir. 1980) (“The lack of funding is no excuse for depriving inmates of their constitutional rights.”); *Smith v. Sullivan*, 611 F.2d 1039, 1043-44 (5th Cir. 1980) (stating neither inadequate funding nor allegedly contrary state law duty will excuse perpetuation of unconstitutional prison conditions); *Battle v. Anderson*, 564 F.2d 388, 396 (10th Cir. 1977) (holding that lack of funding is not defense to failure to provide minimum constitutional prison conditions); *Gates v. Collier*, 501 F.2d 1291, 1319 (5th Cir. 1974) (commenting that state officials’ duty to operate constitutional prison system is not dependent on legislative funding)); see *Marjorie Rifkin, Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 304-05 (1995) (discussing cases rejecting cost defense to Eighth Amendment liability).

52. *Wilson*, 501 U.S. at 311 (White, J., concurring). Justice White observed, however, that lower court decisions established that “inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement.” *Id.* at 311 n.2 (quoting *Smith*, 611 F.2d at 1043-44). For a discussion of *Smith*, see *supra* note 51 and accompanying text.

53. *Wilson*, 501 U.S. at 302. In *Kish v. City of Milwaukee*, 441 F.2d 901 (7th Cir. 1971), however, the court had found that a sheriff could not be held liable for an assault attributable to overcrowding when he had done all that he could to obtain money and to improve conditions. *Id.* at 906. The Supreme Court later found economic considerations relevant in determining whether official conduct violated the Due Process Clause. *Collins v. City of Harker Heights*, 503 U.S. 115 (1992). The *Collins* Court refused to find a due process violation when a municipal worker died from asphyxiation in a manhole. *Id.* at 118. The Court said that its refusal to characterize the city’s failure to warn the worker of danger “as arbitrary in a constitutional sense” rested on the presumption that government administration is a “rational decisionmaking process that takes account of competing social, political, and economic forces.” *Id.* at 128. Decisions regarding the allocation of resources for municipal programs “involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country.” *Id.* at 128-29; accord *Lewellen v. Metropolitan Gov’t of Nashville & Davidson County*, 34 F.3d 345, 351 n.5 (6th Cir. 1994) (noting, in course of rejecting due process claim by injured worker, “it is not up to the courts to say in the case at bar that the defendant school board should have chosen to pay the extra \$600 - \$1,000 necessary to have the power line relocated on a weekend”), *cert. denied*, 115 S. Ct. 903 (1995).

54. *Wilson*, 501 U.S. at 303. The Supreme Court repeated that label in *Helling v. McKinney*, 509 U.S. 25 (1993), holding that a prisoner could make out an Eighth Amendment violation by showing that prison officials, acting with deliberate indif-

ference.⁵⁵ Some lower courts found that an objective deliberate indifference inquiry survived *Wilson*. The United States Court of Appeals for the Ninth Circuit took that approach in *Redman v. County of San Diego*,⁵⁶ holding that a prison official was deliberately indifferent when he knew or should have known of the danger facing the inmate.⁵⁷ Other courts held that the deliberate indifference standard mandated proof of a prison official's subjective mental state. In *McGill v. Duckworth*,⁵⁸ for example, the United States Court of Appeals for the Seventh Circuit held that Eighth Amendment liability required proof of subjective recklessness and said that it was error to instruct a jury that defendant officials could be held liable if they "should have known" of a risk.⁵⁹

True to Justice White's prediction, *Wilson's* focus on individual indifference led a number of courts to accept arguments that prison officials did not violate the Eighth Amendment if factors beyond their control caused the challenged conditions. Chief among these defenses was the claim that an officer's inability to act due to budgetary constraints should preclude a finding of deliberate indifference.⁶⁰

ference, exposed him to levels of environmental tobacco smoke posing an unreasonable risk to his health. *Id.* at 31-35. The *Helling* Court said that, on remand, the court should determine "the subjective factor, deliberate indifference, . . . in light of the prison authorities' current attitudes and conduct." *Id.* at 36.

55. See *The Supreme Court, 1993 Term: Leading Cases*, 108 HARV. L. REV. 139, 239 (1994) [hereinafter *The Supreme Court, 1993 Term*] (reporting that *Wilson* did not define deliberate indifference or decide if it turned on objective or subjective standard).

56. 942 F.2d 1435 (9th Cir. 1991) (en banc).

57. *Id.* at 1443. *Redman* was decided two and one-half months after *Wilson*.

The Third Circuit followed the Ninth Circuit in *Young v. Quinlan*, 960 F.2d 351 (3d Cir. 1992). The Third Circuit explained that it used a "know or should know" standard of deliberate indifference in resolving Fourteenth Amendment claims. See *Colburn v. Upper Darby Township*, 946 F.2d 1017, 1023 (3d Cir. 1991) (holding Fourteenth Amendment obliges officials who "know or should know" of individual's vulnerability to suicide not to act with deliberate indifference to that vulnerability). The Third Circuit also said that it was appropriate to use the same standard under the Eighth Amendment. *Young*, 960 F.2d at 360.

58. 944 F.2d 344 (7th Cir. 1991).

59. *Id.* at 349. *McGill* was decided three months after *Wilson*. The court said that use of such an objective standard, one used in tort law, would approach imposing absolute liability because guards could always foresee violence in a prison setting. *Id.* at 347-48.

60. See *Alberti v. Sheriff of Harris County*, 937 F.2d 984, 999-1000 (5th Cir. 1991) (noting availability of lack of funding defense is open question after *Wilson*); *Moore v. Winebrenner*, 927 F.2d 1312, 1316 (4th Cir. 1991) (holding warden whose efforts to remedy offending prison conditions were hampered by lack of funds and lack of authority to take immediate action was not deliberately indifferent and did not violate Eighth Amendment); see also Daniel T. Dalton, *Tightening the Thumb Screws on Civil Liberties: Wilson v. Seiter: Its Impact on Prisoner Claims and*

While the lower courts attempted to determine the meaning of deliberate indifference in Eighth Amendment law, they were engaged in the same struggle in the municipal liability context.

B. *The Municipal Liability Inquiry*

1. *Owen v. City of Independence: Distinguishing Individual and Municipal Liability*

The Supreme Court's first municipal liability cases did not suggest that the municipal liability analysis contained a state-of-mind inquiry. In *Monell v. Department of Social Services*,⁶¹ which decided that municipalities were "persons" subject to liability under § 1983,⁶² the Court held only that municipalities could be held lia-

Eighth Amendment Jurisprudence, 60 UMKC L. REV. 541, 551-52 (1992) (discussing how *Wilson* opens door to "cost defense"); Daniel Yves Hall, Note, *The Eighth Amendment, Prison Conditions and Social Context*, 58 MO. L. REV. 207, 224 (1993) (suggesting that *Wilson* calls into question validity of cases holding that costs are not relevant in determining whether prison conditions violate Eighth Amendment); cf. *Birrell v. Brown*, 867 F.2d 956, 959 (6th Cir. 1989) (noting district court should have granted prison official summary judgment on his qualified immunity defense because plaintiff did not "allege that Brown did anything other than the best he could with the money provided by the legislature"). For a discussion of lack of funding as evidence negating deliberate indifference, see *infra* note 175 and accompanying text.

The argument that cost considerations should preclude Eighth Amendment liability enters § 1983 litigation in two ways. As Justice White said in *Wilson*, officials can claim that their failure to take action was not due to their indifference, but to factors beyond their control, such as inadequate funding. In those cases, the cost defense seeks to negate the state of mind that constitutional liability requires.

Officials can also argue that their inability to act is a consideration entitling them to immunity from damages under § 1983, as *Birrell* illustrates. Executive officials are usually immune from liability only if their actions did not violate established constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). The *Harlow* Court left open, however, the possibility that officials may also be immune when "extraordinary circumstances" prevent them from acting. *Id.* at 819. The Supreme Court has also held that mental health professionals are not subject to liability if budgetary constraints prevent them from satisfying professional standards. *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982). Some courts have said that prison officials can avail themselves of the *Youngberg* or *Harlow* "extraordinary circumstances" immunity defense when budgetary constraints limit their ability to act. *McCord v. Maggio*, 927 F.2d 844, 848 (5th Cir. 1991); *Birrell*, 867 F.2d at 958; see *Flournoy v. Sheahan*, No. 93 C 1983, 1994 U.S. Dist. LEXIS, at *18 n.7 (N.D. Ill. Nov. 2, 1994) (suggesting that same analysis applies whether lack of funding is termed immunity defense or showing of no deliberate indifference). For a discussion of the qualified immunity defense as the *Owen* Court viewed it, see *infra* note 305 and accompanying text.

61. 436 U.S. 658 (1978).

62. 42 U.S.C. § 1983 (1994), as amended by Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 101 Stat. 3853. Section 1983 authorizes relief against every "person" who engages in prohibited conduct. *Id.* *Monell* partially overruled *Monroe v. Pape*, 365 U.S. 167 (1961), which had held that municipalities were not "persons" within the meaning of § 1983. *Monell*, 436 U.S. at 624.

ble when their “policies” or “customs” caused constitutional violations.⁶³ The Court’s next decisions, *Owen v. City of Independence*⁶⁴ and *City of Newport v. Fact Concerts, Inc.*,⁶⁵ sharply distinguished municipal liability from individual culpability.

Owen was a § 1983 suit brought by Owen, the City of Independence’s former Police Chief.⁶⁶ The City Manager summarily fired Owen after the City Council voted to release various reports of his alleged misfeasance to the news media.⁶⁷ Owen’s lawsuit alleged that his dismissal and concurrent stigmatization violated his procedural due process rights.⁶⁸ The Supreme Court held that the municipality was liable and was not entitled to immunity from liability because its agents acted in “good faith.”⁶⁹

In reaching its decision, the Court first found that the joint actions of the City Manager and City Council violated Owen’s constitutional rights.⁷⁰ The Court noted that the city impugned Owen’s integrity through a unanimous resolution of the City Council and that the City Manager discharged Owen the next day.⁷¹ In

The *Monell* Court held that “local government units which are not considered part of the State for Eleventh Amendment purposes” are “persons” that can be held responsible for constitutional violations. *Id.* at 690 n.54. States and other entities that are arms of the state under the Eleventh Amendment are not “persons” within the meaning of § 1983. *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 63-64 (1989).

63. *Monell*, 436 U.S. at 690-91. Respondeat superior was not a proper basis for imposing liability; however, a municipality could not be held liable solely for employing a wrongdoer. *Id.* at 691.

64. 445 U.S. 622 (1980).

65. 453 U.S. 247 (1981).

66. *Owen*, 445 U.S. at 625, 629-30.

67. *Id.* at 627-29.

68. *Id.* at 630.

69. *Id.* at 634, 638. The court of appeals affirmed the district court’s denial of relief against the City, finding the officials immune from liability because the Supreme Court did not crystallize the right to a name-clearing hearing until two months after Owen’s discharge. *Owen v. City of Independence*, 589 F.2d 335, 338 (8th Cir. 1978), *rev’d*, 445 U.S. 622 (1980). The Supreme Court reversed, holding that “municipalities have no immunity from damages liability flowing from their constitutional violations.” *Owen*, 445 U.S. at 657.

At the time *Owen* was decided, the Court still used a subjective immunity inquiry. See *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975) (“[T]he official himself must be acting sincerely and with a belief that he is doing right.”). The Court did not establish that individual immunity rested on objective considerations until 1982. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982) (rejecting subjective “good faith” inquiry because it made it difficult to resolve immunity issues on summary judgment).

70. *Owen*, 445 U.S. at 633. While the City did not petition the Court for review of the constitutional issue, the Court stated that “[w]e find no merit” in the City’s contention that there was no deprivation of a protected interest. *Id.*

71. See *id.* at 628-29 (detailing resolution and noting that City Manager discharged Owen).

other words, the Court looked to the interactive conduct of various city officials in finding the constitutional violation.⁷²

The Court then explained the policies that supported holding the municipality liable for that violation in a way that differentiated the city's acts from those of its officials.⁷³ Section 1983 actions serve both to compensate victims of constitutional violations and to deter such deprivations.⁷⁴ The Court explained that knowledge that a municipality could be liable for violations inflicted in good faith would provide an incentive for officials to protect constitutional rights and would encourage policymakers to institute rules to minimize the likelihood of unintentional violations.⁷⁵ "Such procedures are particularly beneficial in preventing those 'systemic' injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith."⁷⁶ The Court explained that the city caused the harm in such a case and thus should bear the loss.⁷⁷ Imposing municipal liability properly allocated the costs of the constitutional violation among the three relevant parties: the victim; the officer who engaged in the acts that caused the injury (and who could raise an immunity defense); and the "public, as represented by the municipal entity."⁷⁸

In explaining that municipal liability aimed to deter constitutional violations attributable to the interactive behavior of individually-blameless officials, the *Owen* Court determined that municipal liability did not rest on any individual official's culpability.⁷⁹ *Owen* recognized that municipalities, unlike individuals, could be held liable for "systemic" injuries, harms that occurred when the interactive conduct of different agents violated an individual's rights.⁸⁰ Impos-

72. See *Whitman*, *supra* note 23, at 262 ("The Court . . . refused to divide the city of Independence into separate decisionmakers (the council and the manager) and require that one of these be found to have acted unconstitutionally. It emphasized, instead, the effect on the plaintiff of the city's actions, taken as a whole." (footnote omitted)).

73. *Owen*, 445 U.S. at 641-50.

74. *Id.* at 651.

75. *Id.* at 651-52.

76. *Id.* at 652.

77. See *id.* at 654 (stating that: "Elemental notions of fairness dictate that one who causes a loss should bear the loss."). The Court explained that it was not unfair to divert tax revenues to pay damages for a constitutional violation because the public at large, which enjoys the benefits of the government's activities, is ultimately responsible for its administration. *Id.* at 654-55.

78. *Id.* at 657.

79. *Id.* at 649-50.

80. *Id.* at 652.

ing municipal liability for systemic injuries meant that an entity could be liable even though its agents were blameless.⁸¹

The Court further distinguished individual and municipal liability in *City of Newport v. Fact Concerts, Inc.*,⁸² holding that municipalities could not be held liable for punitive damages in § 1983 actions.⁸³ In explaining the policies supporting its decision, the Court stated that “ordinary principles of retribution” dictate that the wrongdoer himself be “made to suffer for his unlawful conduct.”⁸⁴ A government official who acts maliciously may thus be a proper “object of the community’s vindictive sentiments” and a proper target of a punitive damages award.⁸⁵ The municipality, however, “can have no malice independent of the malice of its officials. Damages awarded for punitive purposes, therefore, are not sensibly assessed against the governmental entity itself.”⁸⁶

The *Fact Concerts* Court thus refused to equate municipal liability and individual culpability, recognizing that municipal entities cannot be subjectively malicious. It may sometimes be proper to punish an individual official by imposing punitive damages.⁸⁷ An individual’s maliciousness, however, does not justify punishing the taxpayers the municipality represents.⁸⁸ The municipal entity is not a proper target of punitive damages because the entity cannot be malicious.⁸⁹

81. *Id.* at 625.

82. 453 U.S. 247 (1981).

83. *Id.* at 271.

84. *Id.* at 267. The Court first decided that municipal corporations were immune from punitive damages at common law. *Id.* at 259. It then asked whether public policy required a contrary result. *Id.* at 266.

85. *Id.* Two years later, in *Smith v. Wade*, 461 U.S. 30 (1983), the Court elaborated on the standards for awarding punitive damages against individuals. The *Smith* Court held that “reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law, should be sufficient to trigger a jury’s consideration of the appropriateness of punitive damages.” *Id.* at 51.

86. *Fact Concerts*, 453 U.S. at 267.

87. *Id.* at 269.

88. *Id.* at 267. The Court said that an “award of punitive damages against a municipality ‘punishes’ only the taxpayers, who took no part in the commission of the tort.” *Id.*

89. *Id.* The Court did note that it was “perhaps possible to imagine an extreme situation where the taxpayers are directly responsible for perpetuating an outrageous abuse of constitutional rights.” *Id.* at 267 n.29. The Court did not further address that issue, finding it unlikely. *Id.* It appears that no lower courts have found municipalities liable for punitive damages under the rationale of this footnote, although some plaintiffs have raised the argument. See *Heritage Homes v. Seekonk Water Dist.*, 670 F.2d 1, 2 (1st Cir. 1982) (arguing for punitive damages); 1 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES AND FEES § 7.2 (2d ed. 1991 & Supp. 1996, Nos. 1-2) (discussing municipal immunity from punitive damages).

2. *A Departure from Owen: The Personalization of the Municipal Liability Inquiry*

After providing general guidelines on the nature of municipal liability in *Owen* and *Fact Concerts*, the Supreme Court's municipal liability decisions turned to the question of when municipalities could be held liable. These cases elaborated on *Monell's* "policy or custom" inquiry, addressing the two key issues the Court left open in *Monell*: first, who could make municipal policy; and second, which policies and customs could give rise to liability.⁹⁰ As the Court addressed those issues, it increasingly looked to the actions of identifiable government officials as the trigger for municipal liability.

One line of cases focused on the "policymaker" question, explaining how to identify the persons who make policy on behalf of a municipality and the effect of their decisions. The cornerstone of those cases is *Pembaur v. City of Cincinnati*,⁹¹ in which the Court found the defendant city liable for the county prosecutor's instruction that deputy sheriffs break into a doctor's office to effectuate an arrest.⁹² The Court emphasized that "*Monell* is a case about responsibility."⁹³ The Court explained that the *Monell* inquiry aimed to distinguish the acts of the municipality from those of its employees.⁹⁴ A municipality is liable for "acts which the municipality has

90. See *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 695 (1978) (failing to identify who could make municipal policy or types of policies and customs that could give rise to liability). The Court purposefully left those questions "to another day." *Id.*

The *Monell* Court said that the municipal defendants in the case before it could be held liable because "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. The *Monell* Court said that municipalities could also be held liable for injuries "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 691.

Basing liability on municipal policies or customs raised the question of who could make municipal policy or ratify customs. The *Monell* Court also addressed this question in general terms, stating that a municipality's officers, not its low-level employees or agents, could make policy. *Id.* at 690-94. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

91. 475 U.S. 469 (1986).

92. *Id.* at 484.

93. *Id.* at 478.

94. *Id.* at 479-80. But see Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 253-55 (criticizing distinction).

officially sanctioned or ordered.”⁹⁵ Accordingly, the Court said, a municipality is liable for the unconstitutional acts or orders of its “authorized decisionmakers,” those who establish policy on its behalf.⁹⁶ A municipality can be held liable when its legislative body makes an unconstitutional decision.⁹⁷ It can also be held liable when an individual official “whose acts or edicts may fairly be said to represent official policy” orders others to take unconstitutional action.⁹⁸

The Court has struggled since *Pembaur* to decide exactly how to determine which officers’ acts do make policy.⁹⁹ This has led to inconsistent, and sometimes very narrow, lower court definitions of who is a policymaker.¹⁰⁰ The Seventh Circuit, for example, refused to hold a municipality liable for its police chief’s actions because the chief had only executive authority.¹⁰¹ A policymaker, the court said, is not an executive officer but a person who has final authority

95. *Pembaur*, 475 U.S. at 480.

96. *Id.* at 481. Liability does not hinge on whether the unconstitutional action occurs once or repeatedly. *Id.*

97. *Id.* at 480; see *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981) (finding defendant City liable when city council canceled license for concert because of content of performance); *Owen v. City of Independence*, 445 U.S. 622 (1980) (finding City liable when city council passed resolution firing person without pre-termination hearing).

98. *Pembaur*, 475 U.S. at 480 (quoting *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 694 (1978)).

The Supreme Court has granted certiorari to decide whether a municipality can be held liable when a policymaker adopts a constitutional policy that causes a constitutional violation. *Brown v. Bryan County*, 67 F.3d 1174 (5th Cir. 1995), *cert. granted*, 116 S. Ct. 1540 (1996).

99. While a majority of the *Pembaur* Court agreed that the Cincinnati County Prosecutor was such an official, there was no majority opinion on how to identify policymakers. The Court returned to that question in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (plurality opinion). Justice O’Connor, writing for a four-Justice plurality, argued that state law governed the identification of policymakers. *Id.* at 124-27. Justice Brennan, writing for a three-Justice concurrence, agreed that state law was the appropriate starting point but argued that ultimately the factfinder must determine where policymaking authority actually resides. *Id.* at 142-47 (Brennan, J., concurring). Justice Stevens, dissenting, argued that high-level municipal officials were policymakers. *Id.* at 167-74 (Stevens, J., dissenting).

Most recently, in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), the Court held that the responsibility of identifying “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” rested with the trial judge. *Id.* at 737. The question of who was a policymaker was a legal one to be decided before a case went to the jury. *Id.*

100. For a discussion of the lower court cases, see SCHWARTZ & KIRKLIN, *supra* note 89, § 7.7.

101. *Auriemma v. Rice*, 957 F.2d 397 (7th Cir. 1992).

to make rules for the conduct of government.¹⁰² Had the police chief been a policymaker, the city would have been responsible for his unconstitutional acts.

In most instances, however, a plaintiff cannot point to a policymaker's order to engage in unconstitutional conduct. Most cases present challenges to facially constitutional policies, such as police training policies, that plaintiffs claim caused constitutional violations. The plaintiffs in these cases do not assert that municipal policies are themselves unconstitutional or that they mandate unconstitutional action. Rather, plaintiffs claim that police officers would not have violated their constitutional rights if the officers had better training.¹⁰³

From the earliest inadequate training cases, lower courts based municipal liability on municipal fault. *Leite v. City of Providence*,¹⁰⁴ one of the first post-*Monell* municipal liability cases, relied on *Estelle* in holding that a city could only be found liable for inadequate training if the plaintiff could show that the city was deliberately indifferent to the harm.¹⁰⁵ The Supreme Court followed the lower

102. *Id.* at 400-01. Other courts adopt a more lenient view. See *Davis v. Mason County*, 927 F.2d 1473 (9th Cir. 1991) (holding that county's sheriff, its chief executive officer, made county training policy); John C. Ryland, Comment, *Constitutional Law—Auriemma v. Rice: The Seventh Circuit's Narrow Construction of § 1983 Municipal Liability*, 24 MEMPHIS ST. U. L. REV. 111 (1993) (describing various approaches courts apply in determining which officials are policymakers).

103. See, e.g., *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985) (involving assertion by plaintiffs that improper training of police led to violation of their constitutional rights), *cert. granted*, 475 U.S. 1064 (1986), *cert. dismissed*, 480 U.S. 257 (1987); *Rymer v. Davis*, 775 F.2d 756 (6th Cir. 1985) (same); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985) (same). Other cases challenge policies of tolerating or acquiescing in police abuse. See, e.g., *Patzner v. Burkett*, 779 F.2d 1363 (8th Cir. 1985) (involving plaintiffs' allegations that police department had improper customs or policies of supervision of officers); *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985) (same); *Batista v. Rodriguez*, 702 F.2d 393 (2d Cir. 1983) (same). Other policies said to have caused constitutional violations fall into neither of these molds. See, e.g., *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990) (involving policy allowing officers placed on medical leave to retain their weapons); *Anderson v. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985) (examining policy of understaffing city detention center). All Supreme Court cases discussing this issue involve challenges to allegedly inadequate police training policies.

104. 463 F. Supp. 585 (D.R.I. 1978).

105. *Id.* at 590; see also *The Supreme Court, 1977 Term: Leading Cases*, 92 HARV. L. REV. 5, 322 & n.60 (1978) [hereinafter *The Supreme Court, 1977 Term*] (drawing analogy between *Estelle* and culpability possibly required for municipal liability).

Many courts followed the *Leite* court's analysis and *Leite* was one of the leading early municipal liability cases. See *Gilmere v. City of Atlanta*, 737 F.2d 894, 904 (11th Cir. 1984); see also Christopher L. Cardani, *Municipal Liability After City of Oklahoma City v. Tuttle: A Single Incident of Police Misconduct May Establish Municipal Liability Under 42 U.S.C. § 1983 When Based on Inadequate Training or Supervision*, 20 SUFFOLK U. L. REV. 551, 555-57 (1986) (describing significance of *Leite*);

courts' lead in basing municipal liability on fault, although it never clearly articulated the source of that requirement.¹⁰⁶

The Supreme Court first discussed municipal liability for inadequate training in *City of Oklahoma City v. Tuttle*,¹⁰⁷ in which a plurality declared that *Monell* provided a "fault-based analysis for imposing municipal liability."¹⁰⁸ Municipal liability was proper only if the plaintiff could prove that inadequate training was responsible for the harm and that municipal policymakers were at fault.¹⁰⁹

Kathryn Pruessner Peters, *Municipal Liability After Owen v. City of Independence and Maine v. Thiboutot*, 13 URB. LAW. 407, 431 (1981) (depicting *Leite* court's formulation of "gross misconduct" standard).

106. For a discussion of the lack of support for this proposition in *Monell*, see *infra* note 108 and accompanying text. At the time of *Leite*, the Supreme Court had not decided whether § 1983 itself imposed a state-of-mind requirement, leaving open the question of whether negligence could ever give rise to § 1983 liability. *Leite*, 463 F. Supp. at 589. The lower courts continued to focus on fault even after the Supreme Court held that municipalities could not assert immunities based on the good faith of their agents. *Owen v. City of Independence*, 445 U.S. 622 (1980). The lower courts continued to use this analysis even after the Supreme Court held that § 1983 itself contained no state-of-mind requirement. *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part* by *Daniels v. Williams*, 474 U.S. 327 (1986); see *Means v. City of Chicago*, 535 F. Supp. 455, 461-62 (N.D. Ill. 1982) (questioning whether cases requiring more than negligence to establish municipal liability survive *Parratt*).

107. 471 U.S. 808 (1985) (plurality opinion).

108. *Id.* at 818. The *Tuttle* litigation arose when an officer with ten months experience on the Oklahoma City police force shot and killed Albert Tuttle after responding to a call reporting a bar robbery by a person matching Tuttle's description. *Id.* at 810-11. Tuttle's widow sued the officer and the City, claiming that the shooting violated Tuttle's constitutional rights. *Id.* at 811. She argued that the City was liable because it was grossly negligent in training, supervising and disciplining its officers and because those inadequacies constituted deliberate indifference to constitutional violations and acquiescence in the likelihood of misconduct. *Id.* at 812-13.

Justice Rehnquist wrote for the plurality. *Id.* at 810. Chief Justice Burger and Justices White and O'Connor joined his opinion. *Id.* Justice Brennan, joined by Justices Marshall and Blackmun, concurred in part and concurred in the judgment. *Id.* at 824 (Brennan, J., concurring). Justice Stevens dissented. *Id.* at 834 (Stevens, J., dissenting). Justice Powell did not participate.

Writing for the plurality, Justice Rehnquist said that the *Monell* Court found that the 1871 Congress's rejection of a proposed amendment to the Civil Rights Acts that would have held municipalities liable for acts of violence by private citizens was "telling evidence that municipal liability should not be imposed when the municipality was not itself at fault." *Id.* at 818. He did not explain where the *Monell* opinion made that point. Two footnotes in *Monell* mentioned fault. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 681, 692 nn.40 & 57 (1978). Both, however, simply discussed liability based on "fault" as an alternative to respondeat superior liability. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986) (discussing legislative history relevant to theories of municipal liability).

109. *Tuttle*, 471 U.S. at 821. The plurality added that it would be difficult to prove that facially constitutional policies, such as those of inadequate training, caused constitutional violations. *Id.* at 823. The *Tuttle* plurality also suggested that

The *Tuttle* plurality explained that *Monell* required that the injury occur pursuant to a municipal policy.¹¹⁰ A “policy” implied a conscious choice to pursue one course of action from among various alternatives.¹¹¹ Thus, evidence would have to show “that the inadequacies resulted from conscious choice—that is, that the policymakers deliberately chose a training program which would prove inadequate.”¹¹² After making that showing, the plaintiff would have to prove “the requisite fault on the part of the municipality” and that the challenged policy caused the violation.¹¹³

The *Tuttle* plurality’s determination that municipal liability for injuries stemming from facially-constitutional policies was based on fault raised the question of whose fault determined liability. The plurality appeared to answer this question by looking to municipal policymakers. It was the policymakers who deliberately had to chose an inadequate training program.¹¹⁴ Thus, it was the policymakers’ fault that determined causation.¹¹⁵

The Supreme Court unanimously adopted a fault-based approach to municipal liability several years later, in *City of Canton v. Harris*.¹¹⁶ The plaintiff in *Canton* claimed that a city policy of vest-

facially constitutional policies might never be able to meet the *Monell* policy requirement. *Id.* at 824 n.7.

Justice Rehnquist’s opinion announced the Court’s decision that a jury could not infer the existence of a municipal policy causing a constitutional violation from one incident of misconduct by a nonpolicymaking official because such an inference incorrectly assumed that training caused the harm and that municipal policymakers were at fault. *Id.* at 821; *id.* at 831 (Brennan, J., concurring). The inference would allow imposition of liability without proof that “municipal policymakers” took any wrongful actions. *Id.* at 821. This would also contravene the *Monell* Court’s goal of preventing “the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers.” *Id.*

110. *Id.* at 817.

111. *Id.* at 823 & n.6.

112. *Id.* at 823.

113. *Id.* at 824. The plurality also rooted the fault requirement in causation. It questioned whether a policymaker’s gross negligence could establish a policy that would be a moving force behind a violation “or whether a more conscious decision on the part of the policymaker would be required.” *Id.* at 824 n.7. The plurality also noted that facially constitutional policies were “far more nebulous” and further removed from constitutional violations than were unconstitutional policies. *Id.* at 822.

Justice Brennan agreed that municipal liability could not be imposed without proof of the municipality’s actions. *Id.* at 829-30 (Brennan, J., concurring). Without evidence of a municipal policy independent of the challenged incident, “there is no way of knowing whether the city is at fault.” *Id.* at 831 (Brennan, J., concurring).

114. *Id.* at 823.

115. *Id.* at 824 & n.7.

116. 489 U.S. 378 (1989). Justice White wrote the *Canton* opinion. *Id.* at 380. Justice Brennan filed a concurring opinion. *Id.* at 393 (Brennan, J., concurring).

ing an inadequately-trained police supervisor with total authority to determine whether arrestees needed medical treatment caused a violation of her due process right to receive necessary medical care while in police custody.¹¹⁷ The Supreme Court concluded that a municipality could be held liable for injuries caused by facially-constitutional policies, such as the inadequate training policy at issue, but only when there was municipal fault.¹¹⁸ Inadequate training could serve as the basis for § 1983 liability “only where the failure to

Justices O'Connor, Scalia and Kennedy concurred in part and dissented in part, but joined most of the majority opinion. *Id.* (O'Connor, J., concurring in part and dissenting in part).

Two years after *Tuttle*, in *City of Springfield v. Kibbe*, 480 U.S. 257 (1987) (per curiam), four members of the Court argued that *Monell's* causation requirement mandated basing municipal liability on fault. *Id.* at 268-72 (O'Connor, J., dissenting). In *Kibbe*, the administratrix of the estate of a man who a Springfield, Massachusetts police officer shot after a lengthy automobile chase sued the city, claiming that the shooting violated the decedent's constitutional rights and was attributable to inadequate training in the apprehension of fleeing vehicles. *Id.* at 260-61. The Supreme Court granted certiorari to decide whether the court properly awarded damages against the City on that basis, but dismissed the writ as improvidently granted because it found itself unable to resolve the “fairly included” question of whether more than negligence in training was required to establish liability. *Id.* at 258. Justices Brennan, Marshall, Blackmun, Stevens and Scalia voted to dismiss the writ of certiorari. *Id.* at 260. Justice O'Connor, joined by Chief Justice Rehnquist, and Justices White and Powell, dissented from the dismissal. *See id.* at 260-72 (O'Connor, J., dissenting) (arguing that negligence question was properly before Court). Justice O'Connor's dissent then discussed the merits. *Id.* at 268-72 (O'Connor, J., dissenting).

The *Kibbe* dissent argued that it was necessary to show fault in order to impose municipal liability when the municipal policy at issue did not compel a constitutional violation because the causal link in such a case was “inherently tenuous.” *Id.* at 268 (O'Connor, J., dissenting). The opinion concluded that “the ‘inadequacy’ of police training may serve as the basis for § 1983 liability only where the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the city's domain.” *Id.* at 268-69 (O'Connor, J., dissenting).

117. *Canton*, 489 U.S. at 381-82. In *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983), the Court held that due process requires the responsible government entity to provide medical care to persons who the police have injured during apprehension. *Id.* at 244.

118. *Canton*, 489 U.S. at 387. “[T]here are limited circumstances in which an allegation of a ‘failure to train’ can be the basis for liability under § 1983.” *Id.*

The *Canton* Court appeared to equate liability for actions taken pursuant to facially constitutional policies with liability for “failure to train.” For a discussion of failure-to-train cases, see *supra* note 102. The *Canton* Court did not indicate whether its opinion reached such situations, but courts often apply the *Canton* standard when analyzing other constitutional policies said to have caused constitutional violations. *See Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 757 (5th Cir. 1993) (“The circuits have uniformly interpreted *Canton's* ‘deliberate indifference’ requirement . . . to apply to all cases involving facially constitutional policies.”); *Davis v. City of Ellensburg*, 869 F.2d 1230, 1235 (9th Cir. 1989) (applying *Canton* to policy of inadequate supervision, finding “no principled reason to apply a different standard”).

train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”¹¹⁹

The Court suggested two ways in which a plaintiff could meet the deliberate indifference standard. First, “the need for more or different training” could be so obvious in light of officers’ duties “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.”¹²⁰ Second, police might so often violate constitutional rights in exercising their discretion that “the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are ‘deliberately indifferent’ to the need.”¹²¹ All Justices agreed with these two methods of establishing liability: “Where a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied.”¹²²

119. *Canton*, 489 U.S. at 388.

120. *Id.* at 390. The Court said that deliberate indifference could be shown if a municipality failed to train its officers in the use of deadly force because “city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons” and, having armed them to accomplish that task, the need to train was “so obvious” that a failure to train “could properly be characterized as ‘deliberate indifference’ to constitutional rights.” *Id.* at 390 n.10.

121. *Id.*

122. *Id.* at 396 (O’Connor, J., concurring in part and dissenting in part).

The *Canton* Court offered two reasons for this conclusion. *Id.* at 388-89. It first looked to causation. *Id.* Out of the possible degrees of fault that could impose liability, a requirement of deliberate indifference was most consistent with the idea that a municipality could be liable “only where its policies are the ‘moving force [behind] the constitutional violation.’” *Id.* at 389 (quoting *Polk County v. Dodson*, 454 U.S. 312, 326 (1981); *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 694 (1978)). The Supreme Court has never defined “moving force,” but the *Kibbe* opinion appeared to equate it with a requirement that the causal link be “direct” and “affirmative.” See *City of Springfield v. Kibbe*, 480 U.S. 257, 268-69 (1987) (O’Connor, J., dissenting).

The Court’s other, more fully explained, reason responded to the *Tuttle* plurality’s concern that it would be difficult to prove that a city pursued a policy of inadequate training. See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (plurality opinion) (noting complexity of proving that policy “inadequacies resulted from conscious choice”). For a discussion of *Tuttle*, see *supra* notes 111-13 and accompanying text. The *Canton* Court explained that a policy was a deliberate choice to follow a course of action from among various alternatives. *Canton*, 489 U.S. at 389. The issue in an inadequate training case, then, was whether inadequate training represented city policy. *Id.* at 390. A municipality could only be held liable if it made a “deliberate” or “conscious” choice not to train, manifesting deliberate indifference to the rights of persons with whom the untrained employees would come into contact. *Id.* at 389.

The *Canton* Court added that proof of deliberate indifference in training would not itself establish municipal liability. *Id.* at 390. The plaintiff also had to

The *Canton* Court did not define “deliberate indifference” or state explicitly whether the term contemplated an objective or subjective inquiry. The Court also did not discuss *whose* deliberate indifference mattered. In places, the *Canton* Court appeared to look to municipal policymakers’ indifference, as had the *Tuttle* plurality.¹²³ The need to train could be so obvious, the Court said, “that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.”¹²⁴ On the other hand, the *Canton* Court sometimes spoke generally of “municipal fault” and did not consider who made policies for the City of Canton.¹²⁵

The *Canton* Court could have envisioned one of two inquiries. It could have meant for courts to premise liability on the subjective indifference of identified policymakers. Or it could have meant for courts to apply an objective inquiry and determine if the risk should have been obvious to “the municipality” or to any person or governing body in a position to make municipal policy.¹²⁶ The fact that the *Canton* Court never identified the City of Canton’s policymaker nor suggested that the policymaker’s identity was relevant to the imposition of municipal liability suggested that the latter approach was correct. Nonetheless, many lower courts followed the first possibility, resulting in a two-step, personalized municipal liability inquiry.

prove that the inadequate training caused the violation, meaning that the injury would have been avoided if the training were not deficient. *Id.* at 391.

The Court remanded the case to allow the court of appeals to decide whether to allow the plaintiff an opportunity to prove her case under the new standard. *Id.* at 392. Justices O’Connor, Scalia and Kennedy argued that a remand was unnecessary because the plaintiff could not satisfy the Court’s fault and causation requirements. *Id.* at 394 (O’Connor, J., concurring in part and dissenting in part).

123. *Canton*, 489 U.S. at 388-90.

124. *Id.* at 390.

125. *Id.* at 388 (“[T]here is substantial division among the lower courts as to what *degree of fault* must be evidenced by the municipality’s inaction.”); *id.* at 389 (stating that municipality could be found liable “where a failure to train reflects a ‘deliberate’ or ‘conscious’ choice by a municipality”).

126. It would theoretically be possible for the Court to have intended a third alternative and to require an inquiry into the objective indifference of an identified policymaker. For a discussion of how there is no need to identify a specific policymaker in order to apply an objective inquiry, see *infra* notes 258-72 and accompanying text. Additionally, the Court did not identify Canton’s policymaker.

It would have been illogical for the Court to adopt the fourth possibility and to require an inquiry into the subjective state of mind of “the municipality” because entities cannot have subjective mental states. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 841 (1994) (stating that “considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official”). For a more detailed discussion of the intricacies of attributing subjective intent to municipalities, see *supra* notes 84-89 and *infra* notes 256, 258 and accompanying text.

3. *Personalization Takes Hold: The Lower Courts' Two-Step Municipal Liability Inquiry*

A number of lower courts combined the *Canton* Court's focus on municipal policymakers' deliberate indifference with the Eighth Amendment origins of the deliberate indifference requirement and read *Canton* to require a two-step approach to determining municipal liability.¹²⁷ These courts found that *Canton* required them first to identify the municipality's policymaker and then to determine whether the policymaker was subjectively indifferent to the risk of harm.¹²⁸

Simmons v. City of Philadelphia,¹²⁹ a jail-suicide case, most clearly illustrates the two-step municipal liability analysis. The question in *Simmons* was whether the City of Philadelphia violated Simmons's due process rights through either "a policy or custom of inattention amounting to deliberate indifference to [detainees'] serious medical needs" or through "a deliberately indifferent failure to train its officers to detect and to meet those serious needs."¹³⁰ The United States Court of Appeals for the Third Circuit analyzed the requirements for establishing municipal liability in determining that the City was not entitled to a judgment notwithstanding the verdict.¹³¹

127. For a discussion of the lower courts' holdings in municipal liability cases, see *infra* notes 128-79 and accompanying text.

128. For a discussion of the lower courts' interpretation of *Canton*, see *infra* notes 128-79 and accompanying text.

129. 947 F.2d 1042 (3d Cir. 1991).

130. *Id.* at 1050.

131. Judge Becker wrote an opinion announcing the court's judgment. *Id.* at 1048. Chief Judge Sloviter concurred in the judgment and Judge Weis dissented. *Id.* at 1089 (Sloviter, C.J., concurring); *id.* at 1092 (Weis, J., dissenting).

No other Judge joined Judge Becker's opinion in *Simmons*. Additionally, Judge Becker's analysis of the issue was not strictly necessary to his resolution of the case because he decided that the City had waived the right to argue that the plaintiff had failed to prove that the municipal policymakers possessed the necessary mental state. *Id.* at 1065. His opinion is nonetheless crucial because it clearly illustrates one influential reading of *Canton's* requirements, one that the Third Circuit treats as binding. The Third Circuit has relied on *Simmons* in holding that "to hold the City liable for municipal policy or procedure, 'scien-ter-type evidence must have been adduced with respect to a high-level official.'" *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692 (3d Cir. 1993) (quoting *Simmons*, 947 F.2d at 1063) (not inadequate training case). The Third Circuit treats Judge Becker's opinion as the court's holding. See *Beck v. City of Pittsburgh*, 89 F.3d 966, 972 (3d Cir. 1996) (speaking of what court "held"). District courts consider Judge Becker's opinion "Third Circuit precedent." *Miller v. Correctional Medical Sys., Inc.*, 802 F. Supp. 1126, 1133 (D. Del. 1992). See, e.g., *Malignaggi v. County of Gloucester*, 855 F. Supp. 74, 78 (D.N.J. 1994) (relying on *Simmons* to require proof of "scien-ter-like" evidence of indifference); *Wendy H. v. City of Philadelphia*, 849 F. Supp. 367, 376-77 (E.D. Pa. 1994) (same); *Herman v. Clearfield County*, 836 F. Supp. 1178, 1188 (W.D. Pa. 1993) (same), *aff'd*, 30 F.3d 1486 (3d Cir. 1994); *Agresta v. City of Philadelphia*, 801 F. Supp. 1464, 1472 (E.D. Pa. 1992) (same),

According to Judge Becker, the Supreme Court's municipal liability cases imposed two preconditions to municipal liability.¹³² First, the court must identify the local government's policymakers.¹³³ Next, the court must determine whether those policymakers culpably caused the constitutional violations at issue.¹³⁴ "[A]bsent the conscious decision or deliberate indifference of some natural person, a municipality, as an abstract entity, cannot be deemed to have engaged in a constitutional violation by virtue of a policy, a custom, or a failure to train."¹³⁵ Municipal liability rested on a showing of "scienter-like evidence of indifference on the part of a particular policymaker or policymakers."¹³⁶ This standard required an inquiry into an identified policymaker's actual knowledge and mental state.¹³⁷

Judge Becker's focus on officials' subjective indifference led him to consider the possibility that officials might negate a finding of deliberate indifference by showing that external factors, such as

aff'd sub nom. Agresta v. Sambor, 993 F.2d 223 (3d Cir. 1993); Sorlucco v. New York City Police Dep't, 780 F. Supp. 202, 211 (S.D.N.Y.) (same), *rev'd*, 971 F.2d 864 (2d Cir. 1992); Vallejo v. Rahway Police Dep't, 678 A.2d 1135, 1142 (N.J. Super. Ct. App. Div. 1996) (citing Judge Becker's opinion as what Third Circuit "held" in *Simmons*).

132. *Simmons*, 947 F.2d at 1062.

133. *Id.*

134. *Id.*

135. *Id.* at 1064.

136. *Id.* at 1060-61. Judge Becker said that *Monell* and *Canton* appeared to require such a showing, as did the Supreme Court's "policymaker cases." *Id.* at 1059-61 (citing *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986)). For a further discussion of *Canton*, see *supra* notes 116-22 and accompanying text. Judge Becker explained that *Pembaur* predicated municipal liability on the acts of legislators or other policymakers and that *Praprotnik* held that municipal policy can only be established with "evidence of scienter attending the decision-making of particular officials." *Simmons*, 947 F.2d at 1062.

Judge Becker also relied on *Wilson v. Seiter*, 501 U.S. 294 (1991), which required deliberate indifference to establish Eighth Amendment violations, in mandating "scienter-like evidence of the deliberate indifference of specific policymakers" to impose municipal liability. *Simmons*, 947 F.2d at 1064 n.20.

137. According to Judge Becker, the plaintiff in *Simmons* would have to make one of two showings, each looking to policymakers' actual knowledge. *Simmons*, 947 F.2d at 1064. The plaintiff would have to show either that the City had a "municipal policy or custom of deliberate indifference to the serious medical needs of intoxicated and potentially suicidal detainees" or a "deliberately indifferent failure to train." *Id.* Establishing the first theory would require showing that policymakers "were aware of" suicides and of ways to prevent them but "deliberately chose" not to pursue the alternatives or acquiesced in a custom of inaction. *Id.* Establishing the second theory would require showing that policymakers, "knowing of the number of suicides in City lockups, . . . deliberately chose not to provide officers with training" or "acquiesced" in a policy of nontraining. *Id.*

limited funding, constrained their decisionmaking.¹³⁸ Adequacy of training, he said, “may implicate extra-judicial decisions” concerning matters such as resource allocation.¹³⁹ According to Judge Becker, it might be permissible for the City to tolerate some suicides “as a result of costs or other factors relating to a legitimate countervailing governmental interest.”¹⁴⁰

The other members of the *Simmons* Third Circuit panel did not disagree with Judge Becker’s conclusion that Supreme Court decisions required focusing on the indifference of identifiable policy-makers.¹⁴¹ However, Chief Judge Sloviter, concurring in the judgment, thought that Judge Becker’s notion of deliberate indifference was unduly subjective.¹⁴² She argued that Supreme Court precedent in both the municipal liability and Eighth Amendment areas allowed liability where the plaintiff proved “reckless disregard of the relevant circumstances.”¹⁴³ *Canton’s* determination that a city could be found deliberately indifferent if “the need . . . is . . . obvious, and the inadequacy . . . likely to result in the violation of constitutional rights,” meant that an emphasis on scienter could not properly exclude liability for conditions of which officials should have known.¹⁴⁴

Chief Judge Sloviter, arguing against a subjective view of indifference, objected to Judge Becker’s references to weighing officials’ decisions concerning “resource allocation” in determining whether the City acted unconstitutionally.¹⁴⁵ She said that a municipality’s decisions about resource allocation or cost efficiency were not a

138. Judge Becker did not explicitly state that he based his consideration of a cost defense on a subjective view of deliberate indifference. The use of a subjective state-of-mind requirement and allowance of a lack-of-funding defense, however, are logically linked, as courts relying on *Simmons* have noted. For an explanation of this link, see *supra* note 60 and *infra* notes 172-79 and accompanying text.

139. *Simmons*, 947 F.2d at 1069.

140. *Id.* at 1071.

141. *Id.* at 1089 (Sloviter, C.J., concurring); *Id.* at 1093 (Weis, J., dissenting).

142. *Id.* at 1090-91 (Sloviter, C.J., concurring).

143. *Id.* at 1090 (Sloviter, C.J., concurring).

144. *Id.* at 1091 (Sloviter, C.J., concurring) (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)).

Chief Judge Sloviter explained that she would find that the evidence of past jail suicides in Philadelphia, the City’s knowledge that intoxicated detainees were at high risk, its awareness of standards for preventing suicides and its failure to implement expert suggestions provided a sufficient basis for a jury to find that “unnamed officials with responsibility over the City’s prisons acted recklessly or with deliberate indifference, thereby contributing to the deprivation of constitutional rights of plaintiff’s decedent.” *Id.*

145. *Id.* (Sloviter, C.J., concurring).

central factor in determining the municipality's deliberate indifference.¹⁴⁶

Many cases echo the *Simmons* court's conclusions. Other opinions read Supreme Court precedent to premise municipal liability on the subjective indifference of identified policymakers. In *Miller v. Correctional Medical Systems*,¹⁴⁷ for example, the district court stated that establishing municipal liability under a policy or custom theory required the plaintiff to identify a policymaker and adduce "'evidence of scienter.'"¹⁴⁸ A municipality, it said, "cannot be held liable 'as an abstract entity.'"¹⁴⁹ Other cases supported each prong of this approach. Some cases held that imposing municipal liability for inadequate training required the court to identify a policymaker

146. *Id.* at 1091-92 (Sloviter, C.J., concurring) (citing *Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979)). In view of the jury's finding that the City did not do all that it reasonably could have done, the Chief Judge saw no need to decide if Supreme Court precedent allowed costs to justify a failure to prevent a constitutional violation. *Id.* at 1092 (Sloviter, C.J., concurring).

Judge Weis, dissenting, said that financial considerations were relevant. *Id.* at 1092-93 (Weis, J., dissenting). He explained that the record showed that the City had adopted a policy to limit or eliminate jail suicides. *Id.* at 1093 (Weis, J., dissenting). The policy's lack of complete success, whether due to negligence or a budget shortage, did not show deliberate indifference. *Id.* (Weis, J., dissenting). Given the City's attention to the jail suicide problem, the question of whether the policy could have been more effective or "the City should have devoted more resources to the problem may have some bearing on whether the municipality acted negligently—it does not make out a case of deliberate indifference." *Id.* at 1096 (Weis, J., dissenting). Expert testimony did not establish deliberate indifference and the evidence did not suffice "to allow the jury to override the City's decision to allocate its limited resources among this problem and other perhaps more pressing needs." *Id.* (Weis, J., dissenting).

147. 802 F. Supp. 1126 (D. Del. 1992).

148. *Id.* at 1133 (quoting *Simmons*, 947 F.2d at 1062). The defendant, Correctional Medical Systems, Inc., was a private corporation, but the court held that municipal liability principles governed its liability. *Id.* at 1131-32.

149. *Id.* (quoting *Simmons*, 947 F.2d at 1063). While the court stated that the defendant corporation could not be held liable as an abstract entity, its quotation of *Simmons* and equation of corporate and municipal liability suggests that the court understood the statement to apply to municipalities. *Accord* *Wendy H. v. City of Philadelphia*, 849 F. Supp. 367, 376-77 (E.D. Pa. 1994) (noting City cannot be liable absent conscious decision of natural person because municipality, "as an abstract entity," cannot violate Constitution by failure to train (quoting *Simmons*, 947 F.2d at 1063)); *Gunn v. City of Allentown*, No. 91-2341, 1992 U.S. Dist. LEXIS 11608, at *9-10 (E.D. Pa. Aug. 3, 1992) (stating that plaintiff must identify policymakers as "government policy can only be made by identified natural persons").

whose deliberate indifference could be assessed.¹⁵⁰ Others required a subjective inquiry into deliberate indifference.¹⁵¹

4. *The Problems with the Personalized Approach*

Cases such as *Simmons* and those which agree with it illustrate the logical extension of the Supreme Court's precedents as they stood before *Farmer*.¹⁵² The cases said that proving municipal liability, even in failure-to-train cases, required proving that identifiable municipal policymakers were deliberately indifferent to citizens' rights.¹⁵³ Borrowing an Eighth Amendment standard of deliberate indifference, the courts reasoned that they had to inquire into the policymakers' subjective mental state in order to find municipal indifference. This subjective inquiry led to the possibility that external factors, such as a lack of funding, could negate deliberate indifference, excusing the policymakers' failure to react to constitutional violations. Policymakers could tolerate constitutional violations without being deliberately indifferent to the violations' existence, thus precluding a finding of municipal liability.

This two-step approach makes it very difficult for a plaintiff to establish municipal liability. The first step requires showing that a "policymaker" was responsible for the challenged policy. Identify-

150. See, e.g., *Baker v. Monroe Township*, 50 F.3d 1186 (3d Cir. 1995) (holding that plaintiffs must show that township policymaker authorized policies or acquiesced in practices that led to violation); *Davis v. Mason County*, 927 F.2d 1473 (9th Cir. 1991) (identifying sheriff as county policymaker in training matters and looking to his decisions in finding that Mason County was deliberately indifferent); *Carroll v. Borough of State College*, 854 F. Supp. 1184, 1195-96 (M.D. Pa. 1994) (determining that municipal liability is premised on policymaking official's culpable conduct), *aff'd*, 47 F.3d 1160 (3d Cir. 1995); *Brown v. City of Elba*, 754 F. Supp. 1551, 1557 (M.D. Ala. 1990) (holding that plaintiff must show that policymakers were aware, or should have been aware, of need for different policies or training). For a discussion of various courts' definitions of deliberate indifference, see *supra* note 151 and cases cited therein.

151. *Hinkfuss v. Shawano County*, 772 F. Supp. 1104, 1110 (E.D. Wis. 1991) (relying on Model Penal Code definition of criminal recklessness in holding that deliberate indifference requires proving that official conduct "was deliberate or indifferent in a criminal sense" (emphasis added)); see *Berry v. City of Muskogee*, 900 F.2d 1489, 1495-96 (10th Cir. 1990) (relying on Eighth Amendment cases to define municipal liability standard of deliberate indifference but finding that Eighth Amendment does not require criminal recklessness). For a discussion of cases relying on *Simmons* in requiring proof of scienter-like evidence of indifference, see *infra* note 131. *But cf.* *Fulkerson v. City of Lancaster*, 801 F. Supp. 1476, 1482-83 (E.D. Pa. 1992) (noting that *Simmons* requires "scienter-type evidence," but stating that requirement can be met by showing that policymakers were "actually or constructively" on notice of need for more training), *aff'd*, 993 F.2d 876 (3d Cir. 1993).

152. *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1059-61 (3d Cir. 1991).

153. *Id.*

ing a responsible policymaker can be difficult when courts adopt stringent standards for identifying policymakers and find that relatively few persons meet that criteria.¹⁵⁴ Second, establishing a policymaker's subjective indifference requires the plaintiff to prove that the official actually knew of the challenged conditions. This can require proof of a history of violations. In *Thelma D. v. Board of Education*,¹⁵⁵ for instance, the United States Court of Appeals for the Eighth Circuit held that the defendant entity could not be held liable for failing to stop a teacher's sexual misconduct unless the plaintiff proved that the board members knew of it. "Without notice of the prior incidents, the Board, as a matter of law, cannot be said to have shown deliberate indifference towards [the teacher's] misconduct."¹⁵⁶

Moreover, the two prongs of the inquiry, identifying a policymaker and then inquiring into deliberate indifference, do not function independently. A court's answer to the first question can predetermine its answer to the second. The reason is that narrow standards for determining who is a policymaker are likely to identify only persons who are so insulated from the day-to-day actions of municipal employees that they are unlikely to know of specific misconduct.¹⁵⁷

Cases from the Seventh and Ninth Circuits illustrate this point. The Seventh Circuit has decided that only persons with legislative authority, the power to make rules for the conduct of government, are policymakers.¹⁵⁸ In *Auriemma v. Rice*,¹⁵⁹ the Seventh Circuit

154. *Auriemma v. Rice*, 957 F.2d 397, 400-01 (7th Cir. 1992). The Seventh Circuit, for instance, has held that executive officials do not make policy because they do not have final authority to make rules for the conduct of government. For a further discussion of *Auriemma*, see *supra* notes 101-02 and accompanying text.

155. 934 F.2d 929 (8th Cir. 1991).

156. *Id.* at 934. The court said that the board would not be liable even if the teacher's conduct "had comprised a pattern of unconstitutional misconduct." *Id.*; see also *Jane Doe "A" v. Special Sch. Dist.*, 901 F.2d 642 (8th Cir. 1990) (holding school district not liable for bus driver's child abuse because no school district official received more than two complaints and none had knowledge of sufficient number of incidents to constitute notice of pattern of unconstitutional behavior).

Similarly, the *Simmons* court's "scienter" standard requires inquiry into an identified policymaker's actual knowledge and mental state. *Simmons*, 947 F.2d at 1064. For a discussion of *Simmons*, see *supra* note 136 and accompanying text.

157. See *Antonelli v. Sheahan*, 81 F.3d 1422, 1428 (7th Cir. 1996) (finding sheriff and director of department of corrections are far removed from day-to-day decisions affecting inmates); *Risley v. Hawk*, 918 F. Supp. 18, 23 (D.D.C. 1996) (explaining that high-level prison officials are not responsible for micro-managing prison and that showing their subjective knowledge of a risk would require "much more" than showing that plaintiff sent them letters).

158. *Auriemma*, 957 F.2d at 397.

159. 957 F.2d 397 (7th Cir. 1992).

held that the police chief did not make employment policy because he had only executive authority; only the local legislative body made policy.¹⁶⁰ Applying this logic to an inadequate training case and requiring subjective indifference would make it virtually impossible for a plaintiff to establish municipal liability. The police chief controls the day-to-day actions of a police department and is the person in the position to know when more or different training is necessary. Members of a legislative body are not likely to know of daily incidents in the field.

The Ninth Circuit case of *Davis v. Mason County*¹⁶¹ further illustrates how a court's standard for identifying policymakers can determine whether a municipality can be held liable under the two-step approach.¹⁶² The *Davis* majority found the County liable for a rash of incidents in which sheriff's deputies stopped individuals for alleged traffic violations, beat them and arrested them on false charges.¹⁶³ The court premised its decision on a finding that the sheriff was the county's policymaker and that he followed a practically-nonexistent "field training" program instead of sending deputies to the police academy as state law required.¹⁶⁴ A jury could readily find that the sheriff knew of training inadequacies and of his deputies' actions.¹⁶⁵

The dissenting judge disagreed with the finding of municipal liability because he found that the Washington Civil Service Commission, not the sheriff, established training policy.¹⁶⁶ The County could not be held liable, he said, because no *county* policymaker showed deliberate indifference.¹⁶⁷

The dissent's approach can preclude municipal liability in two ways. First, a finding that a state entity makes policy may preclude

160. *Id.* at 399-401. The court said that the plaintiffs could not hold the city liable for the police chief's allegedly discriminatory employment decisions. *Id.* at 401. The chief, an executive officer, did not make employment policy. *Id.* The Municipal Code of Chicago, which the City Council evidently controlled, set the relevant policies. *Id.* at 399.

161. 927 F.2d 1473 (9th Cir. 1991).

162. *Id.* at 1480-81.

163. *Id.* at 1477-79.

164. *Id.* at 1480-83.

165. The court used an objective standard. *Id.* at 1481. It should have been, however, easy for a plaintiff to satisfy even a subjective standard of indifference.

166. *Id.* at 1490-92 (Wallace, J., concurring in part and dissenting in part).

167. *Id.* at 1492 (Wallace, J., concurring in part and dissenting in part) (arguing that *Canton* "requires findings that (1) a county official with final decisionmaking authority (2) acted with deliberate indifference in adopting a policy that (3) caused the tort to occur").

entity liability.¹⁶⁸ Second, a focus on the indifference of members of the Civil Service Commission would be likely to preclude a finding of municipal liability even if the Commission were a municipal entity. Members of such a legislative body are unlikely to be in a position to learn of the abusive actions of individuals.¹⁶⁹

Use of the two-step approach to municipal liability, which allows municipalities to avoid liability if their policymakers are not indifferent, can allow municipalities to avoid liability if their policymakers can show that they lacked funds to take curative action. A number of courts have found that an individual who cannot remedy conditions because he or she lacks funding is not individually indifferent. The United States Court of Appeals for the Fourth Circuit followed that reasoning in *Moore v. Winebrenner*,¹⁷⁰ finding that the defendant warden, whose ability to rectify a problem was limited "due to a lack of funds and a lack of authority to take immediate and drastic action," did not violate the Eighth Amendment.¹⁷¹

Courts have applied that rationale in municipal liability cases, finding that a determination of whether municipal officials were deliberately indifferent in failing to train should include a consideration of external constraints on their ability to act. For example, in *Marshall v. Borough of Ambridge*,¹⁷² a jail-suicide case, the municipal-

168. *Id.* (Wallace, J., concurring in part and dissenting in part). The Washington Civil Service Commission, a state entity, could not be sued under § 1983.

The Supreme Court has not decided the extent to which municipal liability can be premised on the actions of a person that state law considers a state official. The Court has granted certiorari to determine whether an Alabama county sheriff, who state law denominates a state official, is a municipal policymaker for purposes of § 1983 liability. *McMillian v. Johnson*, 88 F.3d 1573 (11th Cir.), cert. granted, 117 S. Ct. 554 (1996).

169. For a discussion of high-ranking officials' lack of actual knowledge regarding an individual's actions, see *supra* note 157 and accompanying text.

The *Davis* dissent's view would preclude liability under either *Canton* theory. See *Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989). The identified policymaker ordered proper training and could be unaware of the inadequacies of the program it ordered, precluding liability for a failure to order training. The policymaker also most likely could not be held liable for failing to correct a history of malfeasance. It is extremely unlikely that a commission would know of individual instances of brutality, precluding liability if subjective indifference is required. Even an objective standard might preclude liability, because a jury might not find that a civil service commission should know of deputies' actions.

170. 927 F.2d 1312 (4th Cir. 1991).

171. *Id.* at 1316. The defendant, the warden of a state institution, was sued in his individual and official capacities. *Id.* at 1312. The Fourth Circuit said that the relevant inquiry was whether the warden acted "obdurately and wantonly," a standard that appeared to look to his subjective mental state. *Id.* The dissenting judge, who would have allowed the Eighth Amendment claim to go to a jury, argued for application of *Canton's* deliberate indifference standard. *Id.* at 1317-21 (Murnaghan, J., dissenting).

172. 798 F. Supp. 1187 (W.D. Pa. 1992).

ity argued that its "great financial problems . . . limited the amount of funding available for the training of police officers [and] that the cost of training officers, and of paying their replacements during the period of training, was prohibitive given its fiscal difficulties."¹⁷³ The court, relying on *Simmons*, said that the municipality's argument was "not without support" and said that a jury should consider "[s]uch mitigating factors."¹⁷⁴ A number of courts find that budgetary constraints are relevant in assessing indifference in prison conditions cases in which municipal liability is at stake.¹⁷⁵

173. *Id.* at 1197.

174. *Id.* ("Judge Becker stated that factors such as a municipality's decision not to allocate resources should be considered to determine whether a municipality breached a constitutional duty for failure to train." (citing *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1069 (3d Cir. 1991))). For a discussion of *Simmons*, see *supra* notes 132-40 and accompanying text. The court denied both parties' motions for summary judgment on the failure to train issue.

Judge Kravitch echoed similar concerns in her concurrence in the Eleventh Circuit's en banc opinion in *Tittle v. Jefferson County Commission*, 10 F.3d 1535 (11th Cir. 1994) (en banc), another jail-suicide case. One of the questions in the case was whether the municipality violated the Eighth Amendment by allowing horizontal pipes, attractive to suicidal inmates, in the jail. *Id.* at 1536. Judge Kravitch said that authorities' duty to act when they discovered a link between a prison condition and inmate suicides did not imply that authorities must remove the condition. *Id.* at 1542-43 (Kravitch, J., concurring). Governmental interests could affect a determination of deliberate indifference and measures that fell short of complete removal could be sufficient if legitimate countervailing governmental interests existed. *Id.* at 1544 n.4 (Kravitch, J., concurring). She quoted the *Simmons* court's reasoning that factors relating to costs or other countervailing interests could allow toleration of some detainee suicides. *Id.* at 1545-46 (relying on *Simmons*, 947 F.2d at 1070-71) (Kravitch, J., concurring). Similarly, the court in *Hood v. Itawamba County*, 819 F. Supp. 556 (N.D. Miss. 1993), another detainee suicide case, said that the county sheriff was not deliberately indifferent to detention center staffing requirements when he had unsuccessfully attempted to secure funding to hire an extra officer. *Id.* at 566 n.18.

175. See *Hale v. Tallapoosa County*, 50 F.3d 1579, 1584 (11th Cir. 1995) (stating that it was for jury to decide if monetary restraints frustrated sheriff's good faith efforts to improve conditions or if he recklessly disregarded solutions within his means); *Harris v. Angelina County*, 31 F.3d 331, 336 (5th Cir. 1994) (calling validity of cost defense open question after *Wilson*); *Alberti v. Sheriff of Harris County*, 937 F.2d 984, 999-1000 (5th Cir. 1991) (same); *Wysinger v. Sheahan*, No. 94 C 513, 1995 WL 407381, at *3 (N.D. Ill. July 6, 1995) (holding official policy or custom did not cause deprivation because defendants did not make budgetary decisions that control conditions); *Dye v. Sheahan*, No. 93 C 6645, 1995 WL 109318, at *8 (N.D. Ill. Mar. 10, 1995) (explaining that lack of funding may mean official was not deliberately indifferent; it is open question whether county can claim that defense); *Watson v. Sheahan*, No. 93 C 6671, 1994 U.S. Dist. LEXIS 4773, at *8 (N.D. Ill. Apr. 14, 1994) (holding sheriff's lack of direct access to funds to improve conditions shows lack of deliberate indifference under *Canton*); see also *Garvin v. Fairman*, No. 94 C 4435, 1995 WL 548638, at *2 (N.D. Ill. Sept. 13, 1995) (concluding defendant officials could not build larger facility and cannot be liable in official capacities for actions of other policymakers). For a discussion of cases raising similar issues, see *infra* note 178 and accompanying text.

If a policymaker's inability to act, due to inadequate funding, precludes municipal liability, municipalities can insulate themselves from liability by refusing to give policymakers control over funding. Decisions in the extensive litigation over the constitutionality of conditions in Chicago's Cook County Jail offer a helpful example. The Cook County Sheriff is the jail policymaker and the Cook County Board of Commissioners allocates funds.¹⁷⁶ The sheriff is not subjectively indifferent if he or she cannot remedy inadequate conditions due to inadequate funding.¹⁷⁷ Some decisions rely on these determinations to find that the sheriff's lack of control over funding precludes municipal liability.¹⁷⁸ At the same time, some decisions say that plaintiffs cannot sue the county for constitutional violations because the sheriff, an independently-elected official who does not answer to the Cook County Board, makes jail policy.¹⁷⁹ Combining these decisions insulates the county from liability for constitutional violations attributable to a refusal to fund the jail.

This two-step analysis, resting municipal liability on a policymaker's culpability, is vastly different from the approach that the

176. See *Houston v. Sheahan*, 62 F.3d 902, 903 (7th Cir. 1995) (charging Cook County Board of Commissioners, not sheriff, with duty to fund); *Moy v. County of Cook*, 640 N.E.2d 926, 928-29 (Ill. 1994) (explaining sheriff exercises independent decisionmaking authority over Cook County Jail).

177. See, e.g., *Stone-El v. Sheahan*, 914 F. Supp. 202, 205-06 (N.D. Ill. 1995) (holding sheriff not subjectively indifferent because sheriff could not remedy deficient jail conditions).

178. *Stone-El*, 914 F. Supp. at 205-06 (holding sheriff is independent from board, and finding it is board, not sheriff, who controls Cook County Jail's design and funding); *Garvin*, 1995 WL 548638, at *2 (holding defendants not responsible for jail crowding because they cannot build larger facility); *Wysinger*, 1995 WL 407381, at *3 (stating no official custom or practice caused deprivation); *Watson*, 1994 U.S. Dist. LEXIS 4773, at *8 (holding no deliberate indifference under *Canton*). But see *Houston*, 62 F.3d at 903 (per curiam) (stating sheriff and warden could be ordered to take appropriate steps to alleviate unconstitutional overcrowding in official capacity suit for injunctive relief but cannot be held liable for damages because they cannot build larger facility); *Dye*, 1995 WL 109318, at *8 (stating that while sheriff's lack of control over resources may be basis for qualified immunity defense, action against sheriff in his official capacity survives motion to dismiss because it is open question whether officials who lack funding are deliberately indifferent); *Flournoy v. Sheahan*, No. 93 C 1983, 1994 WL 605584, at *7 (N.D. Ill. Nov. 2, 1994) (concluding that plaintiff makes out official capacity claim against sheriff because jail conditions can be said to be official policy or custom).

179. *Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989) (barring plaintiff's suit against Cook County for jail policies because sheriff, not county, sets policies); *Jenkins v. County of DuPage*, No. 93 C 5587, 1994 WL 327485, at *4 (N.D. Ill. July 6, 1994) (finding plaintiffs cannot link county policy with problems in jail because county lacks authority over jail but sheriff, who answers to electorate, does have authority). But see *Wilson v. Cook County Bd. of Comm'rs*, 878 F. Supp. 1163, 1170 (N.D. Ill. 1995) (denying motion to dismiss because detainee alleged board failed to appropriate sufficient funds for jail).

Supreme Court articulated in its earliest cases following *Monell*. In those cases, the Court sharply distinguished municipal liability from the liability of individual municipal officials. In *Owen v. City of Independence*,¹⁸⁰ the 1980 case denying municipalities immunity based on the “good faith” of their agents, the Court explained that municipal liability would deter “systemic” injuries resulting “from the interactive behavior of several government officials, each of whom may be acting in good faith.”¹⁸¹ The next year, in *City of Newport v. Fact Concerts, Inc.*,¹⁸² the Court distinguished the “municipality’s” liability from that of its officials.¹⁸³

Then, in June of 1994, in *Farmer v. Brennan*,¹⁸⁴ the Supreme Court rejected the view of municipal liability set forth in cases such as *Simmons* and appeared poised to return to the *Owen* and *Fact Concerts* approach.¹⁸⁵

III. *FARMER V. BRENNAN*

Dee Farmer, a pre-operative transsexual serving a prison term for credit card fraud, sued various federal prison officials, claiming that they violated the Eighth Amendment by their deliberate indifference to her safety.¹⁸⁶ Prison officials had transferred Farmer from the Federal Correctional Institute in Oxford, Wisconsin to the

180. 445 U.S. 622 (1980).

181. *Id.* at 624, 652. For a discussion of the *Owen* opinion, see *supra* notes 66-81 and accompanying text.

182. 453 U.S. 247 (1981).

183. *Id.* at 267. For a discussion of the *Fact Concerts* opinion, see *supra* notes 82-89 and accompanying text.

184. 511 U.S. 825 (1994).

185. *Id.* at 829-31.

186. *Id.* Farmer brought suit under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), in which the Supreme Court implied a federal right of action against federal officials who violated the Fourth Amendment. *Id.* at 396. The Court extended *Bivens* to Eighth Amendment claims in *Carlson v. Green*, 446 U.S. 14, 18 (1980).

Farmer sued the wardens of the Federal Correctional Institute in Oxford, Wisconsin, and the United States Penitentiary in Terre Haute, Indiana, a case manager at the Oxford prison, the Director of the Bureau of Prisons, the Director of the North Central Region Office of the Bureau of Prisons, and an official in that office. *Farmer*, 511 U.S. at 830-31.

The Court explained that Farmer is biologically male but had undergone “estrogen therapy, received silicone breast implants, and submitted to unsuccessful ‘black market’ testicle-removal surgery.” *Id.* at 829. Farmer wore women’s clothing at trial and the parties agreed that Farmer “projects feminine characteristics.” *Id.* at 831.

The Supreme Court referred to Farmer as “petitioner” throughout its opinion, avoiding any gender-specific pronoun. This Article uses the feminine pronoun, as did the Seventh Circuit. *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir.), *cert. denied*, 114 S. Ct. 438 (1993), *vacated*, 114 S. Ct. 1970 (1994) (“[T]he defendants

United States Penitentiary in Terre Haute, Indiana for disciplinary reasons.¹⁸⁷ Initially, Farmer stayed in administrative segregation at Terre Haute, but officials then moved her to the general population.¹⁸⁸ Within two weeks, another inmate beat and raped Farmer in her cell.¹⁸⁹ Farmer's suit alleged that the defendant officials transferred her to Terre Haute and placed her in the general population there, despite a knowledge that the prison "had a violent environment and a history of inmate assaults" and that Farmer was "particularly vulnerable to sexual attack."¹⁹⁰ Farmer alleged that the defendants were deliberately indifferent to her safety, thereby violating her Eighth Amendment rights.¹⁹¹

The district court granted the defendants' motion for summary judgment, concluding that the officials were not deliberately indifferent.¹⁹² The court said that prison officials' failure to prevent inmate violence could violate the prisoners' Eighth Amendment rights if the prison officials were "reckless in a criminal sense," which requires "actual knowledge of a potential danger."¹⁹³ Farmer, however, failed to satisfy that standard because she had not informed officials that she was concerned for her safety and, therefore, the officials were unaware of the potential danger Farmer faced.¹⁹⁴ The Seventh Circuit affirmed summarily.¹⁹⁵

The Supreme Court granted certiorari to decide the proper standard for deliberate indifference.¹⁹⁶ Prison officials had a duty to protect prisoners from violence at the hands of fellow inmates.¹⁹⁷ It was clear that they only violated the Eighth Amendment if they were "deliberate[ly] indifferen[t]" to the prisoners' health or

say 'he,' but Farmer prefers the female pronoun and we shall respect her preference.").

187. *Farmer*, 511 U.S. at 830.

188. *Id.* Farmer did not voice an objection to her transfer to Terre Haute or to her placement in the general population there. *Id.*

189. *Id.* The Court explained that federal prison authorities generally incarcerate pre-operative transsexuals with prisoners of their biological sex. *Id.* at 829.

190. *Id.* at 830-31.

191. *Id.*

192. *Id.* at 831.

193. *Id.*

194. *Id.* at 832.

195. *Farmer v. Brennan*, 11 F.3d 668 (7th Cir. 1992), *vacated*, 114 S. Ct. 1970 (1994).

196. *Farmer*, 511 U.S. at 832. For a discussion of the lower courts' disagreement on the proper standard for determining deliberate indifference under the Eighth Amendment, see *supra* notes 54-59 and accompanying text.

197. *Farmer*, 511 U.S. at 832 (relying primarily on *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir. 1988)).

safety.¹⁹⁸ The Supreme Court, however, had never defined “deliberate indifference.”¹⁹⁹

The *Farmer* Court explained that it first used the term in *Estelle v. Gamble*²⁰⁰ to describe a mental state “more blameworthy than negligence.”²⁰¹ Later cases established that deliberate indifference did not require an intentional infliction of harm.²⁰² Because deliberate indifference lay between the poles of negligence and purpose or knowledge, lower courts “routinely equated [the term] with recklessness.”²⁰³ The Court agreed that it was “fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.”²⁰⁴

Equating deliberate indifference with recklessness does not define the level of culpability, however, because recklessness is not a “self-defining” term.²⁰⁵ In defining recklessness, civil and criminal law have taken differing approaches. Civil law considers a person reckless if he or she acts “in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.”²⁰⁶ Criminal law, however, requires that the person disregard “a risk of harm of which he is aware.”²⁰⁷ The parties proposed that the Court adopt standards that mirrored the different approaches. *Farmer* requested an objective standard similar to the

198. *Id.* at 834 (relying primarily on *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)). As *Wilson* established, the plaintiff also had to prove that the deprivation was objectively sufficiently serious to give rise to an Eighth Amendment violation. *Id.* For a discussion of the Eighth Amendment’s objective component, see *supra* note 44 and accompanying text.

199. *Farmer*, 511 U.S. at 835; see Schwartz, *supra* note 15, at 315 (criticizing Court for not defining term).

200. 429 U.S. 97 (1976). For a discussion of *Estelle v. Gamble*, see *supra* notes 33-40 and accompanying text.

201. *Farmer*, 511 U.S. at 835. The Court explained that *Estelle* stood for the proposition that the Eighth Amendment requires “‘more than ordinary lack of due care for the prisoner’s interests or safety.’” *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

202. *Id.* The Court said that “the cases are also clear that [deliberate indifference] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” *Id.* (discussing *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992)).

203. *Id.* at 836. See, e.g., *La Marca v. Turner*, 995 F.2d 1526, 1535-36 (11th Cir. 1993) (equating deliberate indifference to recklessness).

204. *Farmer*, 511 U.S. at 836.

205. *Id.*

206. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 500 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 213-14 (5th ed. 1984)).

207. *Id.* at 837 (citing MODEL PENAL CODE § 2.02(2)(c) (1985)).

civil approach while the prison officials requested a subjective standard comparable to the criminal approach.²⁰⁸

After taking both approaches into consideration, the Court held that the Eighth Amendment mandated a subjective test for deliberate indifference.²⁰⁹ The Court explained that the Eighth Amendment prohibits cruel and unusual punishments, and “an official’s failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.”²¹⁰ Moreover, prior cases had already required Eighth Amendment plaintiffs to satisfy a subjective requirement.²¹¹ Accordingly, proving an Eighth Amendment violation requires that a person “‘consciously disregar[d]’ a substantial risk of serious harm.”²¹²

The Court said that its decision rested on the Constitution and case law, “not merely on a parsing of the phrase ‘deliberate indifference.’”²¹³ The term “deliberate indifference” itself does not resolve whether the standard requires actual awareness of a risk.²¹⁴ “Deliberate” might require only that the indifferent act be “voluntary, not accidental.”²¹⁵ Assuming that the term “deliberate,” implies knowledge of a risk, then the concept of constructive knowledge means that “deliberate indifference” could incorporate a presumption that a risk’s obviousness demonstrates awareness.²¹⁶ Stating that “deliberate indifference” is “a judicial gloss, appearing neither in the Constitution nor in a statute,” the Court rejected Farmer’s argu-

208. *Id.* The Court quoted the parties’ briefs. *Id.* at 837. Farmer argued that an official was deliberately indifferent if he knew facts that made a risk obvious, charging him with knowledge of the risk as a matter of law. *Id.* at 837 n.5. Respondents said that deliberate indifference required that officials know of the risk. *Id.* at 837 n.6.

209. *Id.* at 837. The Court explained its decision by stating:
[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.

210. *Id.* at 838.

211. *Id.* (citing *Helling v. McKinney*, 509 U.S. 25 (1993); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Wilson v. Seiter*, 501 U.S. 294 (1991)).

212. *Id.* at 839 (quoting MODEL PENAL CODE § 2.02(2)(c)).

213. *Id.*

214. *Id.* at 840.

215. *Id.* (citing *Estelle v. Gamble*, 429 U.S. 97, 105 (1976)).

216. *Id.*

ment that the proper test for “deliberate indifference” is the one the Court applied in the municipal liability context.²¹⁷

The *Farmer* Court explained that, under *City of Canton v. Harris*,²¹⁸ “a municipality can be liable for failure to train its employees when the municipality’s failure shows ‘a deliberate indifference to the rights of its inhabitants.’”²¹⁹ The Court stated that *Canton*’s deliberate indifference standard was an objective one.²²⁰ The *Canton* majority said that it was possible, in light of specific officers’ duties, that “‘the need for more or different training [was] so obvious, and the inadequacy so likely to result in the violation of constitutional rights,’” that a failure to train would reveal deliberate indifference.²²¹ Justice O’Connor’s partial concurrence in *Canton* agreed with the majority’s focus on “‘obvious[ness]’” and said that liability was appropriate when policymakers had “‘actual or constructive notice’ of the need to train.”²²² The *Farmer* Court concluded: “It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective.”²²³

Finally, the Court explained why the two standards were different. First, the term “deliberate indifference” serves different purposes in the two contexts.²²⁴ In the Eighth Amendment area, deliberate indifference acted “to ensure that only inflictions of punishment carry liability.”²²⁵ The *Canton* Court, however, used the term “‘for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents.’”²²⁶ The *Canton* Court found that purpose satisfied by “permitting liability when a municipality

217. *Id.* at 840-41 (citing *City of Canton v. Harris*, 489 U.S. 378, 389 (1989)). The *Canton* Court established the test for deliberate indifference in the municipal liability context. *Id.*

218. 489 U.S. 378 (1989).

219. *Farmer*, 511 U.S. at 840 (quoting *Canton*, 489 U.S. at 389).

220. *Id.* at 841.

221. *Id.* at 840-41 (quoting *Canton*, 489 U.S. at 390).

222. *Id.* (quoting *Canton*, 489 U.S. at 396 (O’Connor, J., concurring in part and dissenting in part)).

223. *Id.* at 841. While the *Farmer* Court established that the *Canton* standard is an objective one, and while *Farmer* had argued that the standard was objective, a number of lower courts had interpreted the standard to require subjective recklessness. Petitioner’s Opening Brief at 37, *Farmer v. Brennan*, 511 U.S. 825 (1994) (No. 92-7247). For a discussion of the subjective standard, see *supra* notes 135-37, 147-51 and accompanying text.

224. *Farmer*, 511 U.S. at 841.

225. *Id.* (citing *Wilson v. Seiter*, 501 U.S. 294, 299-300 (1991)).

226. *Id.* (quoting *Collins v. Harker Heights*, 503 U.S. 115, 124 (1992)).

disregards 'obvious' needs."²²⁷ Moreover, the search for a subjective state of mind was ill-suited to assessing entity liability. The *Farmer* Court explained that "considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official."²²⁸

227. *Id.*

228. *Id.* Accordingly, *Canton* did not compel the conclusion that an individual defendant's lack of awareness of a substantial, obvious risk could justify Eighth Amendment liability. *Id.* at 841-42.

The Court rejected the argument that a subjective standard would allow prison officials to ignore obvious dangers to inmates, emphasizing that official knowledge was a question of fact that could be proved by various methods, including circumstantial evidence. *Id.* at 842. "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* The Court added that, while an official could escape liability by showing that "the obvious escaped him," he could not do so by refusing to verify facts he suspected to be true or to "confirm inferences of risk that he strongly suspected exist[ed]." *Id.* at 843 n.8. An official also could not escape liability by showing that he knew of a general risk to inmate safety, but not of a risk to a particular inmate. *Id.* at 843. Nonetheless, officials would not be liable if they could show "that they did not know of the underlying facts indicating a sufficiently substantial 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.* at 844. Officials who knew of a substantial risk could avoid liability, however, if they responded to the risk in a reasonable manner, even if they did not avert the harm. *Id.* "Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.* at 845.

The Court said that a subjective deliberate indifference inquiry would not require prisoners to suffer injury before they could obtain a court order to correct unconstitutional conditions. *Id.* In a suit seeking injunctive relief against a risk of injury, however, the subjective indifference inquiry "should be determined in light of the prison authorities' current attitudes and conduct." *Id.* (quoting *Helming v. McKinney*, 509 U.S. 25, 36 (1993)).

The Court remanded the case for consideration under the proper standard. *Id.* at 851. It explained that the district court may have determined that the defendant officials lacked notice of Farmer's vulnerability and may have granted defendants' motion for summary judgment based solely on Farmer's failure to notify them of a risk of harm. *Id.* at 848. "[T]he failure to give advance notice is not dispositive. Petitioner may establish respondents' awareness by reliance on any relevant evidence." *Id.* On remand, the district court promptly dismissed Farmer's suit, but the Seventh Circuit reversed and remanded because the district court did not allow Farmer adequate opportunity to develop the record. *Farmer v. Brennan*, 81 F.3d 1444, 1445 (7th Cir. 1996).

Despite the *Farmer* Court's insistence that plaintiffs could readily meet its standard, some commentators view *Farmer* as creating "a virtually insurmountable barrier for inmates who challenge the conditions of their confinement." See Gutterman, *supra* note 45, at 396-97 (criticizing *Farmer* and *Wilson* for excusing inhumane treatment when prison officials "are doing the best they can" and for making liability turn on "the motivations of the warden"); Heather M. Kinney, *The "Deliberate Indifference" Test Defined: Mere Lip Service to the Protection of Prisoners' Civil Rights*, 5 TEMPLE POL. & CIV. RTS. L. REV. 121, 133 (1995) (criticizing opinion for "impos[ing] a virtually impossible burden on prisoners" to prove subjective indifference); *The Supreme Court, 1993 Term, supra* note 55, at 231 (discussing *Farmer*).

Justice Blackmun's concurrence argued that the *Farmer* Court's focus on individual culpability was as inappropriate in Eighth Amendment prison conditions litigation as it was in municipal liability cases.²²⁹ Criticizing the Court's "myopic focus on the intentions of *prison officials*," Justice Blackmun explained that most inhumane conditions did not result from an individual's culpable action.²³⁰ "Where a legislature refuses to fund a prison adequately, the resulting barbaric conditions should not be immune from constitutional scrutiny simply because no prison official acted culpably."²³¹ Cruel conditions were often attributable to "'cumulative agglomeration of action (and inaction) on an institutional level,'"

Others see the case as increasing the plaintiff's burden. See *Lowrance v. Coughlin*, 862 F. Supp. 1090, 1115-16 (S.D.N.Y. 1994) (terming subjective standard "more rigorous"); *The Supreme Court, 1993 Term, supra* note 55, at 237-38 (discussing problems prisoner will encounter in attempting to prove subjective indifference); Diana L. Davis, Comment, *Deliberate Indifference: An "Unnecessary" Change?*, 29 Hous. L. Rev. 923, 947 n.192 (1992) ("Proving subjective intent is more difficult than proving an objective violation of rights."). But see Rifkin, *supra* note 51, at 295 (suggesting that *Farmer* may make it more likely that Eighth Amendment claims will go to trial).

Nonetheless, some plaintiffs have met the *Farmer* standard. See, e.g., *Harris v. Angelina County*, 31 F.3d 331, 335-36 (5th Cir. 1994) (upholding injunctive relief imposing cap of county jail population); *Smith v. Norris*, 877 F. Supp. 1296, 1296 (E.D. Ark. 1995) (granting injunctive relief for unconstitutional conditions of confinement based on inadequate number of security guards).

229. *Farmer*, 511 U.S. at 851-52 (Blackmun, J., concurring). Justice Blackmun also argued that inhumane prison conditions violated the Eighth Amendment even if no prison official had an improper subjective mindset, urging that *Wilson v. Seiter*, 501 U.S. 294 (1991), be overruled. *Farmer*, 511 U.S. at 852 (Blackmun, J., concurring). He joined the Court's opinion, however, because it created no new obstacles to inmate suits. *Id.* (Blackmun, J., concurring).

Justice Blackmun argued that "[p]unishment" does not necessarily imply a culpable mental state" because a prisoner experiences punishment when he or she suffers severe treatment, regardless of whether officials intended the treatment to chastise or deter. *Id.* at 854 (Blackmun, J., concurring). He explained that two individuals in different prisons, one violent and one safe and well-run, suffered different punishments, official state of mind notwithstanding. *Id.* at 855 (Blackmun, J., concurring).

230. *Farmer*, 511 U.S. at 855 (Blackmun, J., concurring). Justice Blackmun's comment was directed specifically at the Court's creation of a state of mind standard for prison conditions cases in *Wilson*. *Id.* (Blackmun, J., concurring).

231. *Id.* (Blackmun, J., concurring).

Justice Blackmun emphasized that the Constitution sets the minimal standards for administering punishment, regardless of the reason for an inmate's suffering. *Id.* at 853 (Blackmun, J., concurring) (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). "[A]nd thus it is no answer to the complaints of the brutalized inmate that the resources are unavailable to protect him from what, in reality, is nothing less than torture." *Id.* at 853-54 (Blackmun, J., concurring); see Gutterman, *supra* note 45, at 395 ("The legislature, judiciary, and correctional personnel are all components of a continuous system of administration of justice. The state entity has an obligation to treat its citizen-inmates with decency and humanity. This responsibility, although shared, does not negate 'institutional obligations.'").

not to the acts of individual officials.²³² As Justice White had argued in his concurrence in *Wilson*, intent is not very meaningful in challenging an institution.²³³

IV. *FARMER* AS A RETURN TO *OWEN'S* MODEL OF MUNICIPAL LIABILITY

Farmer v. Brennan reached several very important conclusions regarding municipal liability under § 1983.²³⁴ The *Farmer* Court es-

232. *Farmer*, 511 U.S. at 855 (Blackmun, J., concurring) (quoting *The Supreme Court, 1993 Term, supra* note 55, at 243).

233. *Id.* at 856-57 (Blackmun, J., concurring) (citing *Wilson v. Seiter*, 501 U.S. 294, 310 (1991) (White, J., concurring)); see also Hall, *supra* note 60, at 223-24 (explaining Court's approach in *Wilson* fails to take notice of "institutional deliberate indifference" (quoting *The Supreme Court, 1993 Term, supra* note 55, at 242)). For a discussion of Justice White's opinion, see *supra* notes 47-52 and accompanying text.

Although Justice Stevens concurred because he believed the *Farmer* opinion followed precedent, he stated that he continues "to believe that a state official may inflict cruel and unusual punishment without any improper subjective motivation." *Farmer*, 511 U.S. at 858 (Stevens, J., concurring). Justice Thomas concurred in the judgment only, reiterating his belief that only "judges or juries—but not jailers—impose 'punishment'". *Id.* at 859 (Thomas, J., concurring).

234. *Farmer*, 511 U.S. at 832-51. The lower courts, however, have been slow to realize its significance. Despite the *Farmer* Court's detailed discussion of *Canton*, and perhaps because the discussion was dicta, only a few courts have discussed *Farmer's* significance to municipal liability litigation. Moreover, only one case carefully analyzes *Farmer's* significance in the municipal liability area. *Jackson v. City of Detroit*, 537 N.W.2d 151, 156-57 (Mich. 1995). For a discussion of the Michigan Supreme Court's decision in *Jackson*, see *infra* notes 294-96 and accompanying text. The other cases that discuss *Farmer* as a municipal liability decision engage in little analysis of *Farmer's* requirements. See, e.g., *Scott v. Moore*, 85 F.3d 230, 233, 235 (5th Cir. 1996) (engaging in slim analysis of *Farmer's* requirements); *Hare v. City of Corinth*, 74 F.3d 633, 640 (5th Cir. 1996) (same); *Paiva v. City of Reno*, 939 F. Supp. 1474, 1494 n.27 (D. Nev. 1996) (same); *Young v. City of Augusta*, 59 F.3d 1160, 1172 (11th Cir. 1995) (same); *Oponski v. Michaels*, No. CIV.A.94-4452, 1995 WL 732811, at *5-6 (E.D. Pa. Dec. 8, 1995) (same); *Scott v. Abate*, No. CV-93-4589 (CPS), 1995 WL 591306, at *4-5, 7 (E.D.N.Y. Sept. 27, 1995) (same); *Barney v. City of Greenville*, 898 F. Supp. 372, 377 (N.D. Miss. 1995) (same); *Litz v. City of Allentown*, 896 F. Supp. 1401, 1409 n.8, 1409 & n.9 (E.D. Pa. 1995) (same); *Parastino v. Frame*, No. 94-0755, 1995 WL 20827, at *2 (E.D. Pa. Jan. 17, 1995) (mem.) (same); *Lowrance v. Coughlin*, 862 F. Supp. 1090, 1115-16 (S.D.N.Y. 1994) (same); *Inerra v. Nedeau*, No. 93-279-SD, 1994 U.S. Dist. LEXIS 16278, at *8 (D.N.H. Nov. 10, 1994) (same); *Grant v. McBride*, No. CIV.A.94-1313, 1994 WL 510561, at *3 (E.D. Pa. Sept. 15, 1994) (same); *Millard v. Town of Wolfboro*, No. CIV.A.94-38-B, 1994 WL 461700, at *3 (D.N.H. Aug. 18, 1994) (same).

A number of cases that raise questions of both Eighth or Fourteenth Amendment liability and municipal liability cite *Farmer*, but only discuss its relevance to the constitutional inquiry. See, e.g., *Hill v. Shobe*, 93 F.3d 418, 421 (7th Cir. 1996) (discussing constitutional issues raised by *Farmer*); *Sheppard v. Fairman*, 64 F.3d 665, available at No. 94-3588, 1995 WL 481449, at *2 (7th Cir. 1995) (same); *Hale v. Tallapoosa County*, 50 F.3d 1579, 1582 (11th Cir. 1995) (same); *Harrell v. Sheahan*, 937 F. Supp. 754, 760 (N.D. Ill. 1996) (same); *Espinoza v. Freeman*, No. 3:95-CV-727RP, 1996 WL 478721, at *5 (N.D. Ind. Aug. 2, 1996) (same); *Lugenbeel v.*

tablished that the deliberate indifference standard for municipal liability cases is objective.²³⁵ The municipal liability inquiry is the tort law recklessness standard that imposes liability when a person acts or fails to act “in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.”²³⁶

Farmer thus establishes that lower courts were incorrect in reading *Canton* to require a finding of subjective deliberate indifference.²³⁷ *Canton* does not require a showing of “scienter-like evidence of indifference on the part of a particular policymaker or policymakers.”²³⁸ *Canton* requires only that the “municipality disregard[] ‘obvious’ needs.”²³⁹ In adopting this standard, the *Farmer*

Pennsylvania Institutional Health Servs., No. 95-CV-1167, 1996 WL 365818, at *2 (N.D.N.Y. June 24, 1996) (same); *Spicer v. Johnson*, No. 95 C 6397, 1996 WL 341551, at *4 (N.D. Ill. June 20, 1996) (same); *Stone-El v. Sheahan*, 914 F. Supp. 202, 205-06 (N.D. Ill. 1995) (same); *Abrams v. Hunter*, 910 F. Supp. 620, 625 (M.D. Fla. 1995) (same); *Hogan v. Franco*, 896 F. Supp. 1313, 1318 (N.D.N.Y. 1995) (same); *Thomas v. District of Columbia*, 887 F. Supp. 1, 4 (D.D.C. 1995) (same); *Lucas v. County of Los Angeles*, 54 Cal. Rptr. 2d 655 (Ct. App. 1996) (citing *Farmer* only in discussing immunities).

The lower courts’ failure to discuss *Farmer*’s significance as a municipal liability decision has led some courts to make statements that are flatly inconsistent with *Farmer*. For a discussion of these statements, see *infra* notes 239, 256 and accompanying text.

235. *Farmer*, 511 U.S. at 835-44.

236. *Id.* at 836 (citing RESTATEMENT (SECOND) OF TORTS § 500 (1965); KEETON ET AL., *supra* note 206, § 34, at 213-14).

The *Farmer* opinion does not explicitly state that the municipal liability and tort standards are the same, but the Court’s reasoning leads to that conclusion. The Court recognized that deliberate indifference was the equivalent of recklessness, but said that there were two definitions of recklessness. *Id.* at 836-37. The civil law standard is objective, and the criminal law generally requires subjective awareness of the risk. *Id.* The standards that the parties proposed tracked the two approaches. *Id.* at 837. For a discussion of these approaches, see *supra* notes 206-08 and accompanying text. The *Farmer* Court adopted the subjective standard as the proper Eighth Amendment inquiry, but said that an objective inquiry, one that premises liability on “obviousness,” was the municipal liability standard. *Id.* at 836-44.

237. For a discussion of cases as examples, see *supra* notes 131, 151, 156 and accompanying text.

238. *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1060-61 (3d Cir. 1991). For a further discussion of the supporting cases, see *supra* note 131.

239. *Farmer*, 511 U.S. at 841; see *Young v. City of Augusta*, 59 F.3d 1160, 1172 (11th Cir. 1995) (citing *Farmer* and *Canton* in support); *Jackson v. City of Detroit*, 537 N.W.2d 151, 156-57 (Mich. 1995) (same).

In view of *Farmer*’s clarity on this point, it is surprising that some courts continue to rely on *Simmons*’s requirement of subjective knowledge. *Beck v. City of Pittsburgh*, 89 F.3d 966, 972 (3d Cir. 1996), *cert. denied*, No. 96-1159, 1997 WL 28709 (Feb. 24, 1997) (quoting *Simmons* and failing to cite *Farmer*); *Vallejo v. Rahway Police Dep’t*, 678 A.2d 1135, 1142 (N.J. Super. Ct. App. Div. 1996) (same); *cf. Oponski v. Michaels*, No. CIV.A.94-4452, 1995 WL 732811, at *2, *5, *7 & n.10 (E.D. Pa. Dec. 8, 1995) (discussing both *Farmer* and *Simmons* on municipal liability); *Barney v. City of Greenville*, 898 F. Supp. 372, 377 (N.D. Miss. 1995) (citing

Court recognized that entities cannot have subjective states of mind.²⁴⁰ The Court's focus on *entity* liability suggests that municipal liability does not depend on the indifference of individual municipal policymakers.²⁴¹ If no individual's mental state is in issue, there is no reason to identify an individual to represent the municipality.

The *Farmer* Court's recognition that there are different deliberate indifference standards for establishing Eighth Amendment and

Farmer in stating that municipal liability is based on disregard of "obvious" needs, but then requiring that municipality have subjective knowledge of obvious constitutional violation).

The lower courts required subjective indifference to establish municipal liability largely because they equated the Eighth Amendment and municipal liability deliberate indifference standards and assumed that the former standard's subjective inquiry into fault carried over into the latter. For a discussion of the lower courts' use of Eighth Amendment precedent in municipal liability cases, see *supra* notes 9-15, 104-06 and accompanying text. *Farmer* clarified that the term "deliberate indifference" is a judicial gloss, appearing neither in the Constitution nor in a statute" and that its meaning varies with the context in which it applies. *Farmer*, 511 U.S. at 840.

240. *Farmer*, 511 U.S. at 840. "Needless to say, moreover, considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official." *Id.* at 841; see SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS 191-92 (1995) (explaining how *Farmer* Court, which "insisted on the essentially subjective nature of deliberate indifference in a prison setting with respect to individual liability," had "sharply distinguished" objective nature of municipal liability indifference inquiry because inquiry "was into the state of mind of a governmental entity"); see also Lisa Dibartolomeo, Comment, *Constitutional Law—Subjective Awareness Governs the Deliberate Indifference Standard in Cruel and Unusual Punishment Claims—Farmer v. Brennan*, 114 S. Ct. 1970 (1994), 29 SUFFOLK U. L. REV. 294, 299 n.29 (1995) (noting that Court used objective standard for deliberate indifference in municipal liability cases because "a state of mind inquiry proved unfeasible" given fact that government entities lack ability to possess "subjective awareness").

241. *Farmer*, 511 U.S. at 840-41. The Supreme Court's first inadequate training case said that liability for inadequate training required proof that the municipal policymakers were at fault. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1985) (plurality opinion). For a discussion of the *Tuttle* plurality's comments on municipal fault, see *supra* notes 107-15 and accompanying text. The *Canton* Court, while it sometimes spoke generally of "municipal fault," also said that the indifference of "city policymakers" was at stake. *City of Canton v. Harris*, 489 U.S. 378, 389, 390 n.10 (1989). For a discussion of *Canton's* different statements regarding which fault governs, see *supra* notes 120-26 and accompanying text. Some lower courts assumed that *Canton's* municipal liability standard required establishing the indifference of identified policymakers. For a discussion of the lower courts' views, see *supra* notes 133-37, 147-51, 159-67 and accompanying text. *Farmer* suggests that this personalization of the municipality is improper. See SCHWARTZ & KIRKLIN, *supra* note 89, at 311 (criticizing Third Circuit for misreading Supreme Court's municipal liability decisions by requiring showing of individual culpability in order to establish municipal liability and rejecting notion that abstract entity may be deliberately indifferent). For a discussion of the *Farmer* view, see *infra* notes 218-28 and accompanying text. A number of lower courts, however, require the identification of policymakers even after *Farmer*. For a discussion of those courts, see *infra* note 264.

municipal liability raises a question that the opinion does not address: the question of how the two standards interrelate.²⁴² If Farmer had been an inmate in a county jail, she could have brought a § 1983 action against the municipality, claiming that its inmate-classification policies caused a violation of her constitutional rights.²⁴³ In such a case, would Farmer's claim against the municipality require showing jail officials' subjective deliberate indifference or could the plaintiff succeed by proving only the objective indifference that *Canton* requires? This Article argues that the only answer that gives the *Farmer* opinion's careful distinction between the two deliberate indifference inquiries any meaning is the latter.²⁴⁴ A prisoner should be able to recover upon a showing that a municipality, acting through the persons and bodies that control a jail and its funding, did not take action to remedy a serious risk of harm of which it should have known. *Farmer* provides a model for

242. Farmer was a federal prisoner, so she had to pursue her claim as a *Bivens* action against individual defendants. She could not sue prison officials or the United States agencies that employed them under § 1983. Section 1983 liability only extends to persons who act under color of state law. For the text of § 1983, see *Monroe v. Pape*, 365 U.S. 167, 168 (1961), *overruled in part by* *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658 (1978), and *supra* note 1.

Individuals are the only proper defendants in *Bivens* actions. In *FDIC v. Meyer*, 510 U.S. 471 (1994), the Supreme Court held that *Bivens* actions could not be sustained against federal agencies. *Id.* at 484. See generally Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 336-50 (1995) (criticizing *Meyer* decision).

243. See, e.g., *Harris v. Angelina County*, 31 F.3d 331, 335-36 (5th Cir. 1994) (winning challenge to overcrowding in county jail under Eighth Amendment); *James v. Milwaukee County*, 956 F.2d 696, 703 (7th Cir. 1992) (losing challenge to classification system under Eighth Amendment after attack by fellow inmates causing serious injury). She could have argued that the municipality's policy of placing pre-operative transsexuals in the general prison population manifested deliberate indifference to the obvious risk of attack. See *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996) (winning challenge to random classification scheme). The same question arises in pre-trial detainees' suits alleging Fourteenth Amendment violations because many courts use the *Farmer* deliberate indifference standard in deciding detainees' claims. See, e.g., *Hale v. Tallapoosa County*, 50 F.3d 1579, 1582-83 (11th Cir. 1995) (applying *Farmer's* standard of deliberate indifference in detainee's claim against individual jailer, sheriff and county).

244. The objective inquiry would cease to have practical importance if a plaintiff had to prove subjective indifference before the court could reach the objective municipal liability inquiry. Policymaking officials who met the subjective deliberate indifference standard would automatically meet the objective standard. The question of municipal indifference is unlikely to have practical relevance in many cases in which the subjective indifference of nonpolicymaking officials violates the Eighth Amendment because the official's indifference is likely to break the causal link between municipal indifference and the harm. *Canton*, 489 U.S. at 385-92.

recognizing that municipal liability is not dependent on individual liability, a model that can apply to all municipal liability cases.²⁴⁵

Farmer's recognition that municipal liability rests on objective deliberate indifference should simplify municipal liability litigation and make it easier for plaintiffs to obtain redress for constitutional harms. Combining the *Farmer* Court's reasoning with a proper understanding of the relationship between individual and entity liability will enable individuals to hold municipal defendants liable for injuries attributable to "systemic" failings, even when no individual is culpable. The *Farmer* model of municipal liability thus helps to return § 1983 municipal liability analysis to where it stood after *Owen v. City of Independence*, enabling plaintiffs to recover for injuries that municipalities cause through the joint interaction of various officials.²⁴⁶

A. *Farmer's Significance as a Municipal Liability Decision*

The first way in which *Farmer* eases the plaintiff's burden in § 1983 municipal liability cases is by emphasizing that the *Canton* deliberate indifference standard is objective. The plaintiff must show that the need for more or different training was obvious, that policymakers were "'on actual or constructive notice'" of the need to act.²⁴⁷

245. For a discussion of the appropriate municipal liability analysis, see *infra* notes 293-302 and accompanying text.

The question of whether municipal liability is dependent on individual liability is largely the question that the Supreme Court's opinion in *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam), raises. In *Heller*, the Court said that a municipal defendant cannot be held liable when defendant officials inflicted no "constitutional harm." *Id.* Some courts hold that *Heller* allows municipal liability when officials lack the culpable mental state necessary to establish that they individually violated the Constitution. See, e.g., *Fagan v. City of Vineland*, 22 F.3d 1283, 1292-94 (3d Cir. 1994) ("We hold that in a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution."). But others read *Heller* to preclude municipal liability when individual defendants did not themselves violate the Constitution. See, e.g., *Apodaca v. Rio Arriba County Sheriff's Dep't*, 905 F.2d 1445, 1447-48 (10th Cir. 1990). See generally Douglas Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 537-52 (1993) (analyzing *Heller*); Barbara Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 GEO. WASH. L. REV. 417, 459-73 (1992) (analyzing *Heller* and arguing that municipal liability is not dependent on individual liability).

246. *Owen v. City of Independence*, 445 U.S. 622, 652 (1980).

247. *Farmer v. Brennan*, 511 U.S. 825, 841 (1994) (quoting *Canton v. Harris*, 489 U.S. 378, 396 (1989) (O'Connor, J., concurring in part and dissenting in part)).

Canton itself was limited to municipal liability for inadequate training, but lower courts use its standard in all cases seeking to hold municipalities liable for

After *Farmer*, plaintiffs should not face the daunting task of trying to prove municipal officials' actual knowledge of the challenged conditions, as some courts had required out of the incorrect belief that the municipal liability standard was subjective.²⁴⁸ A court applying an objective standard can hold a municipality liable if there were an obvious need for preventive action, even if the policymakers did not know of the actual problem.²⁴⁹

Recognizing, even before *Farmer*, that *Canton* allowed liability based on constructive notice, the district court in *Reynolds v. Borough of Avalon*²⁵⁰ held that the municipality could be liable for sexual harassment, even if policymakers were unaware.²⁵¹ The court said that a jury should decide whether the municipality's inaction constituted deliberate indifference.²⁵² It explained that a standard basing liability on constructive knowledge was especially important when the nature of the constitutional violation meant that individual violations might not be reported, as in the harassment case before it.²⁵³

As *Reynolds v. Borough of Avalon* suggests, a constructive notice standard that focuses on the obviousness of the risk should mean that municipalities cannot escape liability because policymakers lacked notice of previous instances of misconduct.²⁵⁴ The absence of a direct notice requirement, in turn, means that municipalities cannot escape liability because the challenged violation was not part of a pattern of unconstitutional conduct. An actual notice requirement can result in a determination that municipal liability can

violations attributable to facially-constitutional municipal policies. For a discussion of *Canton's* application outside of the failure-to-train context, see *supra* note 118. In accordance with the lower courts, this Article uses "failure to train" as a shorthand reference that includes other facially-constitutional policies.

248. For an example of a case requiring notice or knowledge to show deliberate indifference, see *supra* notes 154-56 and accompanying text.

249. See *Reynolds v. Borough of Avalon*, 799 F. Supp. 442, 445-46 (D.N.J. 1992) (discussing deliberate indifference standard under *Canton* as not requiring "actual knowledge of a previous or ongoing violation"). Unlike *Thelma D. v. Board of Education*, 934 F.2d 929, 932-34 (8th Cir. 1991), which said that the defendant entity could only be held liable for sexual misconduct of which board members knew, the *Reynolds* court held that the municipality could be liable if there were an obvious need for preventative action. *Reynolds*, 799 F. Supp. at 445-46.

250. 799 F. Supp. 442 (D.N.J. 1992).

251. *Id.* at 445-46.

252. *Id.* at 446 n.4. The court noted that the law regarding sexual harassment was an indication of the obviousness of the need for preventive action, that it was clear that harassment was actionable and that EEOC guidelines provided standards for employers to follow in preventing sexual harassment. *Id.*

253. *Id.* at 447.

254. *Id.* at 445-47.

only be premised on a "history of abuse."²⁵⁵ An "obviousness" standard, however, allows a policy of failing to train or discipline in the face of an obvious need for such action to lead to liability.²⁵⁶

The *Farmer* Court explained that the objective nature of the municipal liability deliberate indifference standard follows from the fact that the *Canton* inquiry focuses on the indifference of the government entity, not on an individual official's state of mind.²⁵⁷ Because entity, not individual, liability is at stake, the use of an objective indifference standard should thus obviate the need to identify a specific individual policymaker as a prelude to applying the *Canton* standard.

Recognizing that only a person can have a subjective mental state, lower courts that interpreted *Canton* to impose a subjective

255. *Berry v. City of Detroit*, 25 F.3d 1342, 1354 (6th Cir. 1994), cert. denied, 115 S. Ct. 902 (1995). In *Berry*, the Sixth Circuit said that the municipality could not be liable for failing to train or discipline officers unless evidence showed "a history of widespread abuse that has been ignored by the City." *Id.*

256. *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1327 (7th Cir. 1993); see *Oviatt v. Pearce*, 954 F.2d 1470, 1478 (9th Cir. 1992) (noting that lack of procedures to detect missed arraignments made it virtually certain that some inmates would be erroneously deprived of their liberty and that need for different procedures was so obvious that refusal to take action manifested deliberate indifference to detainees' constitutional rights).

This analysis is consistent with *Canton*, in which the Court held that policymakers would be deliberately indifferent if the need for more or different training was clear and the lack of training was likely to result in a constitutional violation. *Canton v. Herres*, 489 U.S. 378, 390 n.10 (1989). As the court explained in *Young v. City of Augusta*, 59 F.3d 1160, 1172 (11th Cir. 1995), *Canton* and *Farmer* allow the plaintiff to show either that the need for certain training was obvious in light of the officers' duties or that a pattern of violations demonstrated the need for corrective action. *Accord Oponski v. Michaels*, No. CIV.A.94-4452, 1995 WL 732811, at *6 (E.D. Pa. Dec. 8, 1995) (relying on *Farmer* in explaining that question was not whether municipal defendants knew of incorrect arrests due to communication problems but whether "a reasonable policymaker would have noticed").

On the other hand, the district court in *Parastino v. Frame*, No. CIV.A.94-0755, 1995 WL 20827, at *1 (E.D. Pa. Jan. 17, 1995), *aff'd*, 68 F.3d 456 (3d Cir. 1995), erred when it granted a County summary judgment in a case in which the plaintiff claimed that his arrest on a quashed warrant was unconstitutional because there was "no showing that the County knew that its system of placing quashed bench warrants in the same bin as all its other paperwork led to situations like the instant one." *Id.* at *4. In light of *Canton* and *Farmer*, the proper question was not whether the County "knew" its policy caused violations. The proper question was whether the County should have known of an obvious risk of violations. See *Oviatt*, 954 F.2d at 1478 ("The need for different procedures was so obvious that [the sheriff's] adamant refusal to take action amounted to deliberate indifference . . ."); *Oponski*, 1995 WL 732811, at *5 ("In *Farmer*, the Supreme Court recognized that the *Canton* standard is an objective one, which imposes liability on a municipality when policymakers are on actual or constructive notice of the need."). The court in *Barney v. City of Greenville*, 898 F. Supp. 372 (N.D. Miss. 1995), also erred in inexplicably citing *Farmer* for the proposition that a municipality must have "subjective knowledge" of an obvious constitutional harm to be liable. *Id.* at 378.

257. *Farmer v. Brennan*, 511 U.S. 825, 840-41 (1994).

deliberate indifference standard had to identify a person whose state of mind governed.²⁵⁸ As Judge Becker explained in *Simmons v. City of Philadelphia*, a “scienter” requirement “generally connotes some culpable state of mind of an identified individual, as opposed to an attitude diffusely attributable to an abstract social entity.”²⁵⁹ By the same token, the realization that *Canton* determines *entity* liability supports the adoption of objective standards of liability: “[I]ntent simply is not very meaningful when considering a challenge to an institution.”²⁶⁰

The *Farmer* Court’s focus on the indifference of the government entity, not of individual government officials, simplifies matters for courts and litigants. An objective inquiry makes the identification of specific culpable individuals irrelevant.²⁶¹ When an entity’s objective indifference is at stake, there is no need to conduct the often complex and confusing inquiry into who is a municipal policymaker as a prerequisite to each failure-to-train inquiry.²⁶² *Farmer* thus shows that lower courts erred in assuming that failure-to-train cases required a two-part inquiry—one into the identity of the policymaker and one into the policymaker’s deliberate indiffer-

258. See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). In *Fact Concerts*, the Court’s refusal to assess punitive damages against municipalities was based in part on its recognition that municipalities could have no malice. *Id.* at 267-68. For a discussion of appropriateness of punitive damages against municipalities, see *supra* notes 82-89 and accompanying text.

259. *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1061 n.14 (3d Cir. 1991).

260. *Wilson v. Seiter*, 501 U.S. 294, 310 (1991) (White, J., concurring) (discussing Eighth Amendment). Justice Blackmun echoed this point in his *Farmer* concurrence. 511 U.S. at 854-55 (Blackmun, J., concurring); see also Whitman, *supra* note 23, at 251 (stating “emphasis on attitude and purpose . . . is nonsense in suits against defendants who are governments, for it focuses precisely on that element that exists in individuals but not in institutions—on mind. . . . When the defendant is an institution it has no human face”). For a discussion of Justice Blackmun’s concurrence, see *supra* notes 229-32 and accompanying text.

261. See *Farmer*, 511 U.S. at 840-41 (referring to “government entity” without explaining where to look to determine indifference); *Canton*, 489 U.S. at 1204-06 (discussing deliberate indifference of policymakers without identifying who policymakers are). For a discussion of the *Canton* Court’s discussion, see *supra* notes 121-25 and accompanying text.

262. See *Reynolds v. Borough of Avalon*, 799 F. Supp. 442, 445-46 (D.N.J. 1992) (holding jury can determine whether defendant was deliberately indifferent even though court assumes lack of actual knowledge on part of “the mayor and the other high level officials who might arguably be said to be policymakers”). For a discussion of problems caused by having to identify municipal policymakers as a step to assessing municipal liability, see *supra* notes 154-71 and accompanying text.

ence.²⁶³ *Canton* requires only a single inquiry into the municipality's indifference.²⁶⁴

263. See *Simmons*, 947 F.2d at 1060-61 (3d Cir. 1991); *Davis v. Mason County*, 927 F.2d 1473 (9th Cir. 1991). Under the two-step approach, the identification of the policymaker can become the determinative issue in failure-to-train cases. In *Davis*, for instance, the majority and dissent disagreed chiefly on who made the relevant training policies. Compare *id.* at 1480-81 (finding sheriff was the policymaker), with *id.* at 1489-94 (Wallace, C.J., concurring in part and dissenting in part) (stating civil service commission was policymaker). For a discussion of *Davis* and how a court's standard for identifying policymakers can determine a municipality's liability under the two-step approach, see *supra* notes 161-69 and accompanying text.

Judge Becker's *Simmons* opinion erroneously relied on *Pembaur* and the other policymaker cases in defining deliberate indifference in the failure-to-train context. *Simmons*, 947 F.2d at 1062-63. Commentators criticizing the *Simmons* decision argue that Judge Becker's "imposition of a double hurdle on plaintiffs seeking to establish municipal liability misreads the Supreme Court's municipal liability decisions." SCHWARTZ & KIRKLIN, *supra* note 89, at 311. The Court's decisions, they explain, establish two methods of establishing municipal liability: *Pembaur* bases liability on a policymaker's unconstitutional decisions; and *Canton* looks for a policy of inadequate training. *Id.* (citing *Canton*, 489 U.S. at 378; *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986)). They argue that: "In requiring a plaintiff to show a 'culpable state of mind of an identified individual,' Judge Becker rejected the notion that the deliberate indifference may be an 'attitude diffusely attributable to an abstract social entity.'" *Id.* (quoting *Simmons*, 947 F.2d at 1061 n.14) (citation omitted). The *Canton* Court, they say, did not intend "to rule out this circumstance as a basis for imposing liability on the basis of inadequate training." *Id.*

264. *Farmer*, 511 U.S. at 840-41 (suggesting that *Canton* requires an inquiry into the "state of mind of a governmental entity"). The *Canton* opinion sometimes spoke of municipal "fault," and sometimes of the fault of "policymakers." *Canton*, 489 U.S. at 388, 390 n.10. For a discussion of whose deliberate indifference is determinative, see *supra* notes 120-26 and accompanying text.

Some lower courts that have addressed municipal liability in light of *Farmer* have discussed the indifference of the municipality as an entity. See *Young v. City of Augusta*, 59 F.3d 1160 (11th Cir. 1995) (discussing generally what "the municipality" and "City policymakers" know or should know); *Lugenbeel v. Pennsylvania Institutional Health Servs.*, No. 95-CV-1167, 1996 WL 365818, at * 2 (N.D.N.Y. June 24, 1996) (discussing need to show county's deliberate indifference); *Johnson v. City of Philadelphia*, No. CIV.A. 95-5844, 1996 WL 171538, at * 2 (E.D. Pa. Apr. 10, 1996) (discussing need to show deliberate indifference on the part of defendant entity); *Thomas v. District of Columbia*, 887 F. Supp. 1 (D.D.C. 1995) (containing no identification of policymakers in municipal liability discussion); *Parastino v. Frame*, No. 94-0755, 1995 U.S. Dist. LEXIS 374, at * 1 (E.D. Pa. Jan. 17, 1995) (lacking demonstration of indifference on part of unidentified "county officials" and no showing that "the County knew" of effect of its policy); cf. *Hogan v. Franco*, 896 F. Supp. 1313 (N.D.N.Y. 1995) (discussing actions of "policymaking personnel," but requiring showing of indifference by policymaker).

Other courts have stated that liability rests on the indifference of identified policymakers. See, e.g., *Stanback v. Fairman*, No. 93 C 0816, 1994 WL 542781, at * 2 (N.D. Ill. Oct. 3, 1994) (finding plaintiff had sufficiently alleged that identified policymakers knew of practice of housing older and younger detainees together); *Millard v. Town of Wolfeboro*, No. CIV.A.94-38-B, 1994 WL 461700, at *3-4 (D.N.H. Aug. 18, 1994) (stating that municipal liability requires showing that policymaker adopted policy or acquiesced in custom and that policymaker acted with deliberate indifference); *Jackson v. City of Detroit*, 537 N.W.2d 151 (Mich. 1995)

This shift in focus is important because premising municipal liability on the indifference of an identified policymaker can allow a municipality to escape liability if its policymaker is too high-ranking to have reason to know of the challenged conduct or if a state body made the challenged policy.²⁶⁵ *Farmer* should preclude this reasoning. *Farmer* emphasizes that the *Canton* standard determines that “a municipality can be liable for failure to train its employees when the municipality’s failure shows ‘a deliberate indifference to the rights of its inhabitants.’”²⁶⁶ The inquiry looks to the entity’s failure to train and seeks to measure the entity’s indifference.²⁶⁷ Municipal indifference exists “when a municipality disregards ‘obvious’ needs,” making the mental state of an individual policymaker irrelevant.²⁶⁸ While municipal indifference is clear when police officers are untrained and when repeated uses of force go unpunished, the lack of training or discipline is not necessarily the fault of one policymaker.²⁶⁹

Lower courts have recognized that the interaction of various municipal policies can constitute deliberate indifference. *Cox v. District of Columbia*²⁷⁰ provides an excellent example. Cox alleged that the District of Columbia had a policy of dilatory investigation of excessive force complaints, resulting in “delayed discipline which, in practice, is the functional equivalent of no discipline.”²⁷¹ The court agreed that the District’s failure to correct the problem

(determining that municipal liability is based on policymaker’s deliberate indifference, but allowing allegation that “command personnel” were indifferent to survive motion for summary judgment).

265. For a discussion of high-ranking officials and the unlikelihood of their knowing day-to-day incidents, see *supra* note 157 and accompanying text. The dissenting judge in *Davis v. Mason County*, 927 F.2d 1473 (9th Cir.), *cert. denied*, 502 U.S. 899 (1991), for example, argued that the defendant county could not be held liable for a rash of beatings because the state civil service commission, not the county sheriff, established the training policy. *Id.* at 1490-92 (Wallace, J., concurring in part and dissenting in part). For a discussion of Judge Wallace’s approach, see *supra* notes 166-69 and accompanying text.

266. *Farmer*, 511 U.S. at 840 (quoting *Canton*, 489 U.S. at 389) (emphasis added).

267. *Id.* at 841.

268. *Id.* (emphasis added). The Court determined that the *Canton* inquiry looks to the “state of mind of a governmental entity, as distinct from that of a governmental official.” *Id.*

269. *Canton*, 489 U.S. at 389-90 n.10 (establishing municipal deliberate indifference can be shown when need for more or different training is obvious or when municipality fails to remedy pattern of violations).

270. 821 F. Supp. 1 (D.D.C. 1993), *aff’d without opinion*, 40 F.3d 475 (D.C. Cir. 1994).

271. *Id.* at 11.

constituted deliberate indifference.²⁷² The court explained that the police department did not investigate brutality complaints until the Civilian Complaint Review Board (“CCRB”) acted, that the CCRB was ineffective, and that its repeated requests for legislative change and for additional staff and funding went without response. The interactive conduct of the police department, the CCRB, and the District Legislature manifested the District of Columbia’s deliberate indifference.²⁷³

The *Cox* court found municipal indifference based on the interactive conduct of different governing bodies.²⁷⁴ The opinion illustrates a proper way to determine municipal liability after *Farmer*. The *Farmer* Court’s focus on the “municipality’s” indifference and liability suggests that the Court is looking at the entity as a whole, not as an extension of an identified official. This focus on the entity suggests that the Court realizes an entity acts through policies that control, or fail to control, the manner in which different individuals or agencies interact.²⁷⁵ Municipalities are liable when their policies make the need for corrective action obvious by putting those who control the policies on actual or constructive notice of the likelihood of constitutional violations.²⁷⁶

The *Farmer* Court’s focus on the objective indifference of the entity as a whole also reveals why it is improper to allow a municipality to avoid liability by pleading the shortage of funds.²⁷⁷ While

272. *Id.* at 17.

273. See also *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1462 (9th Cir. 1988), *vacated*, 490 U.S. 1087 (1989) (stating deliberate indifference “may be shown by the totality of what employees at the jail did or did not do”); *Brock v. Warren County*, 713 F. Supp. 238, 243 (E.D. Tenn. 1989) (inferring deliberate indifference from county sheriff and commissioners’ failure to act to cure jail heat and ventilation problems).

274. *Cox*, 821 F. Supp. at 19-20.

275. See *Owen v. City of Independence*, 445 U.S. 622, 655 n.39 (1980) (basing liability on officials’ interaction). For a discussion of the *Owen* Court’s reasoning, see *supra* notes 70-81 and accompanying text.

276. See *Oponski v. Michaels*, No. CIV.A.94-4452, 1995 WL 732811, at *6 (E.D. Pa. Dec. 8, 1995) (stating policymaker is “deliberately indifferent who . . . acts or fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known”). In *Oponski*, the plaintiff claimed that his constitutional rights were violated when he was arrested because a bench warrant was not purged as a result of the defendant municipality’s “inadequate system of communicating the payment of costs between the Clerk’s Office and the Sheriff’s Office.” *Id.* at *1. The court discussed *Farmer*’s determination that the *Canton* standard was objective. *Id.* at *6. It then looked to actions and knowledge of both the county clerk and the sheriff in finding that the claim survived a motion for summary judgment. *Id.* at *6-9.

277. For a discussion of lack of funding as a defense to municipal liability, see *supra* notes 172-75 and accompanying text.

the lower courts do not clearly explain what they believe supports their suggestion that a paucity of resources can negate municipal indifference, their understanding appears to be based on a belief that individual fault is at the core of the deliberate indifference inquiry.²⁷⁸ As Justice Blackmun noted in his *Farmer* concurrence, a focus on individual culpability can preclude liability if the harm is due to factors beyond the individual defendant's control.²⁷⁹

It is appropriate to allow a lack-of-funding defense to a specific individual charged with subjective deliberate indifference. An individual official who does not ignore a problem, but who takes all curative steps in his power, has not remained indifferent.²⁸⁰ This defense, however, is inappropriate when assessing municipal liability. *Farmer's* objective indifference standard means that no individual's good faith is at stake. The significance of the focus on "the municipality" is that the entity is charged with a violation. The fact that a certain officer may lack the ability to take action at a given

278. See, e.g., *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1069-71 (3d Cir. 1989) (arguing that cost considerations could be relevant in determining municipal liability). Judge Becker said that municipal liability depended on a policymaker's subjective indifference. *Id.* at 1063-64. He also noted that cost considerations could be relevant in determining municipal liability. *Id.* at 1069-71. He did not otherwise explain his reasons for concluding that "resource allocation" could be a relevant consideration in failure-to-train claims. *Id.* at 1069, 1071. Chief Judge Sloviter argued that Judge Becker had adopted an unduly subjective approach to municipal liability. *Id.* at 1089 (Sloviter, C.J., concurring). She also argued that municipal decisions about resource allocation were not a central factor in determining liability. *Id.* at 1089, 1091-92 (Sloviter, C.J., concurring). For further discussion of *Simmons*, see *supra* notes 129-46 and accompanying text.

The court in *Marshall v. Borough of Ambridge*, 798 F. Supp. 1187 (W.D. Pa. 1992), relied on Judge Becker's opinion in *Simmons* to support its conclusion that financial problems could excuse a failure to train. *Id.* at 1197. For further discussion of *Marshall*, see *supra* notes 172-74 and accompanying text.

279. See *Farmer v. Brennan*, 511 U.S. 825, 855 (1994) (Blackmun, J., concurring) ("Where a legislature refuses to fund a prison adequately, the resulting barbaric conditions should not be immune from constitutional scrutiny simply because no prison official acted culpably.") Similarly, in *Wilson v. Seiter*, 501 U.S. 294 (1991), Justice White criticized the majority's adoption of a deliberate indifference standard for prison conditions claims, fearing that officials would be able to avoid liability by showing that insufficient legislative funding caused the conditions. *Id.* at 311 (White, J., concurring).

280. See *Farmer*, 511 U.S. at 844 ("[P]rison 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."); see also *Helling v. McKinney*, 509 U.S. 25, 25-26 (1993) ("[T]he subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct."). Some courts see the lack of funding defense for an individual as an issue of qualified immunity, also viewing the lack of funding as a defense to liability for damages. For a discussion of those cases, see *supra* note 60 and *infra* note 305 and accompanying text.

time does not excuse the governing entity's failure to act when the need is obvious.

Farmer establishes that the question in municipal liability cases is whether "the municipality disregard[ed] 'obvious' needs."²⁸¹ A municipality disregards obvious needs if it does not take action to combat a condition that obviously risks constitutional harm, even when that action requires allocating funds to a specific job or department. A municipality acts through the interaction of those who control a department and those who fund it.²⁸² The entity, as a whole, has the power to raise and allocate funds and to give officials the power to act.²⁸³ It can always raise additional funding, through

281. *Farmer*, 511 U.S. at 841.

282. For a discussion of the interaction of different levels of municipal government in funding and running a jail, see *supra* notes 176-79 and accompanying text.

283. See *Wilson v. Cook County Bd. of Comm'rs*, 878 F. Supp. 1163, 1170 (N.D. Ill. 1995) (refusing to dismiss plaintiff's claim because plaintiff alleged "that the Board controls the purse strings" and that it failed to provide sheriff with sufficient funds to alleviate problems at jail despite its knowledge that they existed). Cook County makes prison policy through the joint action of its sheriff and fund-allocating board. The board's refusal to fund the jail is itself evidence of municipal indifference. In *Wilson*, Judge Gettleman found that a conditions claim against the Cook County Board survived a motion to dismiss. *Id.* Judge Gettleman explained that the plaintiff did not seek to hold the Board liable for the sheriff's actions but for its refusal to allocate funds: "[Plaintiff] has alleged that the Board is deliberately indifferent to the excessive risk created by the conditions, and has failed to provide sufficient funds to eliminate those risks." *Id.*; see also *Houston v. Sheahan*, 62 F.3d 902, 903 (7th Cir. 1995) (holding defendant could be ordered to stop unconstitutional overcrowding in official-capacity action for injunctive relief, where the "Sheriff and Warden are stand-ins for political bodies they serve," but defendants are not liable for damages).

The Supreme Court has recognized that federal courts may order local entities to secure funding to remedy constitutional violations by ordering property tax increases and enjoining state laws that would prevent the local entity from so doing. *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) ("Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems."). While *Jenkins* was a school desegregation case, the same principles should apply in Eighth Amendment prison litigation. See *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 392 (1992) (noting, in case discussing standards for modifying consent decree, that financial constraints cannot excuse unconstitutional conditions); *Inmates v. Barry*, 844 F.2d 828, 841 (D.C. Cir. 1988) (stating that general equitable principles developed by Supreme Court in school desegregation cases should apply in Eighth Amendment prison conditions litigation).

The Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321 (1996) (amending 18 U.S.C. § 1326), limits injunctive relief in prison conditions cases to that necessary to correct the violation of plaintiffs' federal rights. In some cases, ordering expenditures may meet this standard. See *Winston v. Speybroeck*, No. 3:94CV0150AS, 1996 WL 476662, at * 7 (N.D. Ind. Aug. 2, 1996) (approving consent decree in which defendants agree to build new jail as consistent with PLRA).

taxation if necessary.²⁸⁴ As Justice O'Connor explained in *Canton*, the deliberate indifference standard measures that point at which § 1983 requires municipalities to shift resources to prevent constitutional violations.²⁸⁵

B. *Farmer as a Model for § 1983 Entity Liability Analysis*

Because *Farmer* was a *Bivens* action, only individual defendants' Eighth Amendment liability was at issue.²⁸⁶ Because there was no question of entity liability, the Court focused on the subjective mental state of the named defendants.²⁸⁷ The Court's other Eighth Amendment conditions of confinement decisions also occurred in cases in which individuals were the only defendants.²⁸⁸

Prison conditions cases can also raise questions of municipal liability. If *Farmer* had been an inmate in a county jail, she may well have sought damages from jail officials and from the municipi-

284. See *Mount Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280-81 (1977) (holding school board not entitled to Eleventh Amendment immunity because school board, like municipality, can raise funds independently from state control); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (determining Lincoln County not entitled to Eleventh Amendment immunity due to its political independence from state).

The court in *Harris v. Angelina County*, 31 F.3d 331 (5th Cir. 1994), upheld a cap on the county jail population despite a claim that officials had done everything in their power to alleviate conditions with limited funding. *Id.* at 333-36. Noting that a funding defense was an open question after *Wilson*, the court explained: "Even if a cost defense were recognized, we would find it inapplicable here, since the evidence did not establish that additional funding was unavailable from the taxpayers to address the overcrowding." *Id.*

285. See *City of Canton v. Harris*, 489 U.S. 378, 400 (1989) (O'Connor, J., concurring in part and dissenting in part) (arguing that authors of Ku Klux Klan Act realized "the resources of local government are not inexhaustible. The grave step of shifting those resources to particular areas where constitutional violations are likely to result through the deterrent power of § 1983 should certainly not be taken on the basis of an isolated incident.").

286. See *Farmer*, 511 U.S. at 830 (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)). For a discussion of the fact that liability under § 1983 only extends to persons who act under color of state law, see *supra* note 242 and accompanying text.

287. *Farmer*, 511 U.S. at 830-31.

288. See, e.g., *Helling v. McKinney*, 509 U.S. 25 (1993) (plaintiff was incarcerated in Nevada state institution); *Wilson*, 501 U.S. at 294 (plaintiff was inmate in Ohio state institution); *Rhodes v. Chapman*, 452 U.S. 337 (1981) (plaintiff was prisoner in Ohio correctional facility); *Estelle v. Gamble*, 429 U.S. 97 (1976) (plaintiff was inmate in Texas prison).

States and their agencies are not "persons" amenable to suit under § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). For further discussion of the definition of "persons," see *supra* note 62 and accompanying text. State officials may be sued under § 1983 in their official capacities for injunctive relief. *Will*, 491 U.S. at 71 n.10. They may also be sued in their individual capacities for out-of-pocket damages. *Hafer v. Melo*, 502 U.S. 21 (1991).

pality, or only from the municipality, arguing that a policy or custom of inadequate training or a policy of not classifying inmates caused the attack.²⁸⁹ Such a case implicates both aspects of the *Farmer* decision. *Farmer* holds that the plaintiff must prove the individual defendant's subjective deliberate indifference in order to show that the individual violated the Eighth Amendment.²⁹⁰ The municipality's liability, however, depends on *Canton*.²⁹¹ *Farmer* categorizes *Canton's* deliberate indifference standard as objective.²⁹²

The question becomes whether courts should require a determination that an individual officer was subjectively deliberately indifferent as a prerequisite to imposing municipal liability. They should not.²⁹³ Requiring such a determination forces municipal liability to hinge on an official's subjective state of mind, in direct contravention of *Farmer*. The Supreme Court of Michigan properly reached this conclusion in *Jackson v. City of Detroit*.²⁹⁴ The court held that the plaintiff's claim against the City survived summary judgment even though it found that the individual defendants could not be held liable because they were not subjectively indiffer-

289. For a discussion of cases challenging inmate classification policies, see *supra* note 243 and accompanying text.

290. *Farmer*, 511 U.S. at 838-39.

291. *City of Canton v. Harris*, 489 U.S. 378, 385-92 (1989).

292. *Farmer*, 511 U.S. at 841; see *Hare v. City of Corinth*, 74 F.3d 633, 649 n.4 (5th Cir. 1996) (recognizing different standards of deliberate indifference govern constitutional and municipal liability inquiries).

293. A number of cases do not follow this reasoning, although none argues against it. See *Hardin v. Hayes*, 52 F.3d 934 (11th Cir. 1995) (dismissing claim against city because plaintiff did not show that individual agents met *Farmer's* subjective deliberate indifference standard); *Litz v. City of Allentown*, 896 F. Supp. 1401 (E.D. Pa. 1995) (finding for City because there was no individual liability, despite recognizing that *Farmer* did not change *Canton's* objective test for determining municipal liability); *Clinton v. County of York*, 893 F. Supp. 581 (D.S.C. 1995) (dismissing claim against County); see also *Hare*, 74 F.3d at 649 n.4 (appearing to require that plaintiff show subjective deliberate indifference and establish constitutional violation before reaching municipal liability); *Winston v. Speybroeck*, No. 3:94CV0150AS, 1996 WL 476662, at *6 (N.D. Ind. Aug. 2, 1996) (suggesting that establishing municipal liability for conditions of confinement requires showing officials' subjective deliberate indifference); *Abrams v. Hunter*, 910 F. Supp. 620 (M.D. Fla. 1995) (requiring proof of sheriff's subjective indifference before establishing municipal liability); *Scott v. Abate*, No. CV-93-4589 (CPS), 1995 WL 591306, at *10 n.6 (E.D.N.Y. Sept. 27, 1995) (stating that there is "some debate over whether the Supreme Court intended to draw a material distinction between municipal liability and individual liability").

As explained below, the Supreme Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (per curiam), should not be construed to prohibit municipal liability. For further discussion of *Heller*, see *supra* note 245, *infra* note 302 and accompanying text.

294. 537 N.W.2d 151 (Mich. 1995).

ent as required by *Farmer*.²⁹⁵ The court explained that the deliberate indifference necessary to establish municipal liability under § 1983 was “not coextensive with the ‘deliberate indifference’ necessary to prove an actionable violation of a pretrial detainee’s due process right to adequate medical care. The former requires an objective standard, while the latter requires a subjective one.”²⁹⁶

Following *Farmer* in this manner leads to a proper division of responsibility. An individual defendant will only be liable for damages if the plaintiff can prove subjective culpability, that the defendant failed to act despite a conscious awareness of the risk. The individual defendant can avoid personal liability by showing that he or she did the utmost to avoid harm with the resources available.²⁹⁷ An individual who tries to alleviate harm but is prevented from doing so due to inadequate resources, or similar factors, should not be held individually liable.²⁹⁸ The municipality, however, should be held responsible for unconstitutional conditions.²⁹⁹

295. *Id.* at 156 (“While officials’ actions may have been negligent . . . officers . . . were not deliberately indifferent.”).

296. *Id.* at 157 (quoting *Farmer*, 511 U.S. at 840); accord John Boston et al., *Farmer v. Brennan: Defining Deliberate Indifference Under the Eighth Amendment*, 14 ST. LOUIS U. PUB. L. REV. 83, 89 (1994) (stating that *Farmer*’s holding that there are two deliberate indifference standards means that courts encountering Eighth Amendment issues in cases raising municipal or supervisory liability claims will have to instruct juries “that deliberate indifference means one thing for one set of defendants and something else for other defendants”); see also Mathis v. Fairman, No. 93 C 3336, 1995 WL 769139, at *6-7 (N.D. Ill. Dec. 29, 1995) (discussing possibility of municipal liability even though policymaker appeared not to be “criminally reckless”).

297. A claim of inadequate funding should not excuse an officer unless it can show that no curative, and inexpensive, remedies were available. See *Hale v. Tallapoosa County*, 50 F.3d 1579 (11th Cir. 1995) (stating that determination of jailer’s deliberate indifference asks if monetary constraints frustrated good faith efforts or if solutions within his or her means were recklessly disregarded); *El Tabech v. Gunter*, 922 F. Supp. 244, 264 n.17 (D. Neb. 1996) (blaming legislature is not defense because defendant could consider safety of inmates without receiving legislative allocation of funds to build new prison), *aff’d sub nom. Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996); *Abrams v. Hunter*, 910 F. Supp. 620, 627 (M.D. Fla. 1995) (working toward building new jail does not necessarily absolve individual or county of liability because question is whether official disregarded solutions within his means).

298. The individual defendant can argue both that his or her efforts to alleviate the harm show a lack of subjective deliberate indifference and that qualified immunity from damages is warranted. For a discussion of the lack-of-funding defense, see *supra* note 60 and accompanying text. For a discussion of the link between the individual immunity defense and subjective culpability, see *infra* note 305.

299. See *Flournoy v. Sheahan*, No. 93 C 1983, 1994 WL 605584, at *6 (N.D. Ill. Nov. 2, 1994) (stating that while court was “inclined to agree” that individual officials could not be liable for damages because their ability to act was limited by inadequate funding, plaintiffs still made out official capacity claim against sheriff). Other courts appear to agree with this reasoning. See *Houston v. Sheahan*, 62 F.3d

The municipality's liability should rest on whether the persons or entities that control municipal policies and funding knew, or should have known, of the problem; it should not hinge on any individual's state of mind.³⁰⁰ The municipality should not be able to avoid liability by pleading budgetary constraints because its agents can act to secure funds to remedy constitutional violations.³⁰¹ The objective municipal deliberate indifference inquiry

902, 903 (7th Cir. 1995) (per curiam) (suggesting that injunctive relief could be proper in case alleging inadequate county funding of jail, but that jail officials were not liable for damages because they "cannot be called on to pay damages for the consequences of other persons' decisions"); *Broadus v. Beatty*, No. 93-3226, 1995 WL 230339, at *2 (7th Cir. Apr. 18, 1995) (finding sheriff not liable for jail conditions because he did best he could with outdated facilities and plaintiffs did not pursue theory "that allegations of overcrowding and the like could be construed as a claim that structural inadequacy was the responsibility of the county and resulted in constitutional violations," which "might support naming the county and the commissioners as defendants"); *Lee v. Evans*, No. 92-15658, 1994 WL 651959, at *4 (9th Cir. Nov. 18, 1994) (dismissing claim against official under *Farmer* for not showing intent and noting that plaintiff did not sue jail or county "as he could have").

A finding that the dismissal of a suit against an individual who is not subjectively indifferent due to inadequate funding mandated the dismissal of a suit against the municipality and thus, would allow municipalities to insulate themselves from liability by refusing to provide funding. See *Hale*, 50 F.3d at 1579 (allowing claim against county only after determining subjective indifference of sheriff, who plead inadequate funding). For a discussion of the possibility that municipalities could immunize themselves from liability, see *supra* notes 176-79 and accompanying text. The Supreme Court has stated, however, that funding shortages cannot excuse unconstitutional conditions. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 392 (1992) ("Financial constraints may not be used to justify the creation or perpetuation of constitutional violations.").

300. Accordingly, the Michigan Supreme Court in *Jackson v. City of Detroit*, 537 N.W.2d 151 (Mich. 1995), should not have suggested that the plaintiff would have to prove that the challenged policy of indifference to jail suicides originated with an identified policymaker in order to hold the municipality liable. *Id.* at 157. The court's determination that the plaintiff's allegation that "command personnel" and the police chief knew of the danger survived summary judgment provides support for this proposition. *Id.* at 158 n.15. If the interactive conduct of the persons who controlled jail conditions manifested indifference, the identity of a specific policymaker should be irrelevant.

301. For a discussion of a municipality's ability to raise funds and this ability's effect on liability, see *supra* notes 282-84 and accompanying text.

The possibility of imposing municipal liability means that an inmate in a county jail has a much greater possibility of recovering damages in a § 1983 conditions case than does an inmate in a state facility. States and their agencies cannot be sued for damages under § 1983. State officials may be sued for out-of-pocket damages, but the plaintiff must then satisfy *Farmer's* rigorous subjective standard for proving deliberate indifference.

While it is proper for a court to use the *Farmer* subjective deliberate indifference standard in § 1983 actions seeking damages from state officials, the objective indifference test should govern claims for injunctive relief.

The Eleventh Amendment, applied in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), requires that suits seeking injunctive relief be brought against state officials, not against the state itself. *Will* allows official capacity suits for injunctive

recognizes that the entity acts through the interaction of various agents and that the municipality's liability does not hinge on any individual's fault.³⁰²

relief based on the Eleventh Amendment fiction that "official-capacity actions for prospective relief are not treated as actions against the State." *Id.* at 71 n.10 (relying, in part, on *Ex Parte Young*, 209 U.S. 123 (1908) (finding Eleventh Amendment allows injunctive relief against state official charged with acting unconstitutionally)).

Will's statement that official-capacity suits for injunctive relief do not run against the state stands in stark contrast to the Supreme Court's other § 1983 capacity cases, which emphasize that official capacity suits run against the entity the official represents. *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Brandon v. Holt*, 469 U.S. 464, 471 (1985). Official capacity suits for injunctive relief, as a practical matter, do run against the state and can cost the state money. *Edelman v. Jordan*, 415 U.S. 651, 651-52 (1974).

Because prison conditions are often due to the interaction of various officials, *Wilson v. Seiter*, 501 U.S. 294, 311 (1991) (White, J., concurring), courts should recognize that official-capacity suits for injunctive relief are really suits against the entity the officials represent and use an objective standard of liability. *See Lowrance v. Coughlin*, 862 F. Supp. 1090, 1116 (S.D.N.Y. 1994) (determining there was no need to decide whether to apply *Farmer's* subjective or *Canton's* objective deliberate indifference standard in suit against state officials because court found more demanding subjective standard was met). A state should not be able to avoid liability by pleading lack of funding any more than a municipality can. Some § 1983 prison conditions cases appear to recognize this. *See Ramos v. Lamm*, 639 F.2d 559, 573-74 nn.19-20 (10th Cir. 1980) (finding lack of funding no excuse for depriving inmates of their constitutional rights); *Holt v. Sarver*, 309 F. Supp. 362, 385 (E.D. Ark. 1970) (stating state's duty to eliminate unconstitutional conditions "does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If [the state] is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States."), *aff'd and remanded*, 442 F.2d 304 (8th Cir. 1971); *see also Thomas S. v. Morrow*, 781 F.2d 367, 375 (4th Cir. 1986) (citing *Youngberg v. Romeo*, 457 U.S. 307 (1982) (pointing out that "lack of funds is an absolute defense to an action for damages brought against a professional in his individual capacity[.]" although *Youngberg* Court did not apply that defense to injunctive relief)).

Wilson does not preclude this analysis. The plaintiffs in *Wilson* sued the defendants in both their individual and official capacities. Respondent's Opening Brief, *Wilson v. Seiter*, 501 U.S. 294 (1991) (No. 89-7376). The Supreme Court did not separate the two theories of recovery in its analysis.

This analysis gives federal inmates minimal opportunity for redress of their Eighth Amendment rights and provides support for broadening federal remedies. *See Bandes, supra* note 242, at 342-50; Jeremy Travis, Note, *Rethinking Sovereign Immunity After Bivens*, 57 N.Y.U. L. Rev. 597 (1982) (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (arguing for expanded judicial remedies)).

302. *See also City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) (holding municipality can be held liable only when agent inflicts constitutional harm). The Supreme Court's decision in *Heller* is not to the contrary. First, a proper reading of *Heller* reveals that the case does not preclude an imposition of municipal liability when an individual defendant is exonerated because that individual lacks a culpable state of mind. For further discussion of this view of *Heller*, *see supra* note 245 and accompanying text. Second, under any reading of *Heller*, exoneration of one or two individual defendants should not preclude imposition of municipal liability in a prison conditions case. Because prison conditions result

This ordering of liability in the Eighth Amendment context provides a model for a proper assessment of liability in other areas of § 1983 municipal liability litigation. In a case such as *Simmons*, in which a detainee commits suicide, the individual officers in charge of the detention center are properly liable as individuals only if they were subjectively indifferent to the danger facing the detainees.³⁰³ If an individual guard was not able to check on a detainee because a shortage of staffing caused the guard to be too busy, or if a supervisor could not hire more guards because of budgetary constraints, the guard and supervisor should not be held personally liable. The city, however, should be found responsible. When the city operates a detention center, it is obvious that such a facility must be adequately funded and staffed to protect detainees from harm. The city should be held liable when it, through the interactive conduct of those who operate its programs, does not act to prevent an obvious risk of harm.³⁰⁴

from the interactive conduct of a number of individuals, “[t]here may well be a basis for an agency’s liability other than the conduct of the individual defendants that the jury exonerated.” *de Feliciano v. de Jesus*, 873 F.2d 447, 450 (1st Cir. 1989) (opinion by then-Judge Breyer); *accord* *Gentile v. County of Suffolk*, 926 F.2d 142, 154 (2d Cir. 1991) (finding actions of defendant police officers were not sole basis for County’s liability); *Praprotnik v. City of St. Louis*, 798 F.2d 1168, 1172 n.3 (8th Cir. 1986) (holding City’s liability not derivative solely of named defendants’ conduct), *rev’d on other grounds*, 485 U.S. 112 (1988).

The similarity of the individual culpability and immunity inquiries is another reason why *Heller* should not preclude the result this Article advocates. Some courts see lack of funding as an immunity defense; others see it as a fact that can negate a showing of indifference. For a discussion of the lack of funding defense as an issue of qualified immunity, see *supra* note 60 and *infra* note 305 and accompanying text. *Heller* strongly suggested that an officer’s immunity does not preclude municipal liability. *Heller*, 475 U.S. at 798. A vast number of lower court decisions so hold. See, e.g., *Prue v. City of Syracuse*, 26 F.3d 14, 19 (2d Cir. 1994) (holding that “qualified immunity shields [officials] but municipality remains potentially liable . . . for any unconstitutional policies”); *Watson v. City of Kansas City*, 857 F.2d 690, 697 (10th Cir. 1988) (stating that “there is nothing anomalous about allowing . . . a suit [against municipality] to proceed when immunity shields the individual defendants”); *Palmerin v. City of Riverside*, 794 F.2d 1409, 1414-15 (9th Cir. 1986) (stating “a *Monell* claim is possible where the officers’ acquittal is due to a good faith immunity . . . under section 1983”). Allowing a showing that an officer lacked indifference because he was stymied by inadequate funding to preclude municipal liability would make municipal liability hinge on the happenstance of how a court views the inadequate funding defense.

303. For a discussion of the majority of courts that use a deliberate indifference standard of culpability in Fourteenth Amendment pre-trial detainee cases, see *supra* note 4 and accompanying text.

304. See, e.g., *Anderson v. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985) (awarding damages against city where understaffing resulted in death of prisoner); *Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985) (finding County liable for denying medical treatment to convicted inmates). Both cases were decided before *Heller*, but their reasoning should still apply. See *Kritchevsky*, *supra* note 245, at 443-54.

The same reasoning applies to the inadequate training cases, such as *Canton*. An officer who has not received adequate training may properly escape personal liability if the lack of training prevented him from having the culpable mental state a particular constitutional provision requires. The municipality should still be held liable if the persons or bodies in charge of training failed to train in areas in which the need for training was obvious. *Farmer* emphasizes that the *Canton* deliberate indifference standard is objective, so the municipality should not be able to avoid liability by pointing to an individual agent's lack of subjective culpability. A municipality may not avoid liability because of its agents' "good faith."³⁰⁵

The *Farmer* model for allocating municipal liability is not new. It is the same view of municipal responsibility that the Supreme Court set forth in *Owen v. City of Independence*.³⁰⁶ The *Farmer* Court's focus on the entity as a whole recognizes that municipal action is often a result of the interactive conduct of various individuals. The *Owen* Court explained that one purpose of imposing municipal liability is to prevent "those 'systemic' injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith."³⁰⁷ According to *Owen*, imposing municipal liability without regard to individual culpability properly allocated the costs of the violation among the victim, the officer who took the injurious action, and the "public, as represented by the municipal entity."³⁰⁸

305. *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (determining that "municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983").

While *Owen* said that individual immunity did not bar municipal liability, it is important to note that individual immunity in 1980 looked to individuals' subjective good faith. For a further discussion of the former law on immunity, see *supra* note 69 and accompanying text. *Owen*, then, held that officials' subjective good faith did not preclude municipal liability. Even today, some courts find the determination that an official lacks subjective culpability and the immunity inquiry essentially the same. *Flournoy v. Sheahan*, No. 93 C 1983, 1994 WL 605584, at *6 n.7 (N.D. Ill. Nov. 2, 1994). For a discussion of the inadequate funding and immunity defenses, see *supra* note 60 and accompanying text.

306. 445 U.S. 622, 657 (1980).

307. *Id.* at 652.

308. *Id.* at 657. The *Owen* Court explained that it was not improper to use tax revenue to compensate a plaintiff whose constitutional rights were violated by municipal policy:

After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of gov-

The *Owen* Court took a major step toward achieving these goals by eliminating the possibility that a municipality could claim a qualified immunity defense. The *Farmer* Court takes a second major step by determining that *Canton's* deliberate indifference standard does not allow a municipality to avoid liability by pointing to an individual official's lack of subjective culpability. *Farmer* thus furthers the *Owen* Court's identification of the proper allocation of responsibility in § 1983 municipal liability actions. The objective standard of municipal indifference increases the likelihood that a plaintiff will be compensated for constitutional harms. The subjective standard of deliberate indifference that the Court applies to individual defendants allows individuals who lack subjective indifference to escape liability. The objective standard of municipal liability holds a municipality liable for systemic injuries that result from its officials' interactive conduct.

V. CONCLUSION

In *Owen v. City of Independence*, the case that first explained the contours of municipal liability under § 1983, the Supreme Court carefully distinguished individual from municipal liability.³⁰⁹ While individuals could avail themselves of an immunity defense, the municipality could not claim immunity based on the "good faith" of its agents.³¹⁰ This rule, the Court explained, would allow compensation for injured citizens and provide an incentive for municipal officials to institute procedures to deter constitutional violations, especially "systemic" injuries that result "from the interactive behavior of several government officials, each of whom may be acting in good faith."³¹¹

According to the Court in *Owen*, imposing municipal liability properly allocated the costs of constitutional violations "among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct

ernment borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated. *Id.* at 655; see *Harris v. Angelina County*, 31 F.3d 331, 336 (5th Cir. 1994) (stating municipality could have raised funds to alleviate jail overcrowding from taxpayers). In light of *Owen*, the Seventh Circuit seemed to turn proper standards of municipal liability on their head in stating that the County did not have authority over the training of jail employees and was not liable for violations caused by the employees, because the jail was in the control of the sheriff, "an independently-elected public official." *Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989).

309. *Owen*, 445 U.S. at 622.

310. *Id.* at 638.

311. *Id.* at 652.

caused the injury; and the public, as represented by the municipal entity.”³¹² Individuals could be compensated if “an abuse of governmental authority” harmed them, officials would be protected from personal liability if they acted in “good faith,” and the public would only bear the costs of injuries attributable to official policy.³¹³

In 1989, in *City of Canton v. Harris*,³¹⁴ the Supreme Court held that municipalities could only be held liable for constitutional violations attributable to facially-constitutional policies when the municipal policy manifested “deliberate indifference” to constitutional rights.³¹⁵ This decision caused courts to move away from the *Owen* characterization of responsibility and allowed them to find that municipalities were shielded from liability when municipal officials acted in “good faith.” Interpreting deliberate indifference to establish a subjective recklessness standard, as the Supreme Court had done in Eighth Amendment litigation, many courts assumed that the *Canton* standard was also subjective. Courts personalized the municipal liability inquiry, realizing that an “abstract entity” could not have a subjective mental state. They first identified a person whose mental state governed municipal liability, a policymaker, and then asked if the policymaker was indifferent. Municipal liability hinged on the indifference of an identified policymaker.

The personalization of municipal liability prevented courts from achieving the goals of *Owen*. The focus on individual policymakers could prevent liability for “systemic” harms and the focus on individual culpability meant that an individual’s “good faith” could exonerate the municipality. The personalized model of municipal liability allowed municipalities to claim that inadequate funding excused constitutional violations when individual officials manifested an absence of indifference by doing the best they could with the resources they had.

In *Farmer v. Brennan*, the Supreme Court explained that the municipal liability deliberate indifference standard was objective.³¹⁶ Distinguishing the meaning of deliberate indifference in constitutional and municipal liability litigation, the Court explained that, while the Eighth Amendment required a showing that an individual defendant was subjectively indifferent, the municipal liability stan-

312. *Id.* at 657.

313. *Id.*

314. 489 U.S. 378 (1989).

315. *Id.* at 389.

316. *Farmer v. Brennan*, 511 U.S. 825, 840-41 (1994).

dard was objective.³¹⁷ Supporting this conclusion, the Court explained that “considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official.”³¹⁸ The *Farmer* Court thus explained that the municipal liability inquiry was a search into *entity* liability, not the state of mind of individual officials.³¹⁹

The *Farmer* Court’s careful differentiation between entity and individual liability shows that the personalization of municipal liability is wrong. In looking to the entity, one finds that the interaction of various municipal agents can cause constitutional harm. Municipalities should be liable when the interaction of their policies causes harm, and not be able to immunize themselves from liability by refusing to fund programs when the Constitution requires action.³²⁰ A municipality that does not secure funding to prevent obvious harm should be held liable under § 1983. This is what the *Owen* Court envisioned. *Farmer* thus provides a model for allocating responsibility for constitutional harm between the “three principals” in § 1983 litigation: the victim, the acting officers and the public. It is the model that the Supreme Court first established in *Owen*.

317. *Id.* at 840-43.

318. *Id.*

319. There would have been no problem with using a subjective standard if an individual official’s mental state governed municipal liability.

320. While municipalities have a vast range of discretion in deciding which services to provide, the Constitution imposes a duty to care for persons in government custody. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 198-200 (1989). *Canton* imposes a duty on municipalities to train police officers regarding the constitutional limits of their authority. *Canton*, 489 U.S. at 390 n.10.