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IF THE CONSTABLE BLUNDERS, DOES THE COUNTY PAY?:
LIABILITY UNDER TITLE 42 U.S.C. § 1983

*Andrew Fulkerson**

I. INTRODUCTION

Civil liability of law enforcement officials has grown substantially since the landmark case of *Monroe v. Pape*,¹ in which the United States Supreme Court ruled that police officers could be liable for damages under the Civil Rights Act of 1871.² Civil litigation against law enforcement and other government officials has grown so large, in the words of one commentator, that “suing public officials has become the second most popular indoor sport in the country.”³ In reality, the number of lawsuits filed against law enforcement officers looks smaller when compared to the millions of contacts between law enforcement officers and citizens each day.⁴ But, dramatic exaggeration and hyperbole aside, the fact remains that while civil liability of law enforcement officials was once extremely rare, such civil liability has grown much more common since the 1961 *Monroe*⁵ decision; indeed, it has become a significant source of concern for policy makers and criminal justice administrators.⁶

This modern expansion of civil liability for law enforcement officers and local governments runs headlong into the powers and duties of one of the oldest offices in law enforcement: the constable. This paper will discuss liability for civil rights violations on the part of the constable, as well as, arguably, the principal for which the constable is an agent: namely, local government.

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1. 365 U.S. 167 (1961), *overruled on other grounds by* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 695-96 (1978).

2. 42 U.S.C. § 1983 (2000).

3. R. V. del Carmen, *Civil and Criminal Liabilities of Police Officers*, in *POLICE DEVIANCE* (T. Barker & D.L. Carter eds., 1994); *see also* VICTOR E. KAPPELER, *CRITICAL ISSUES IN POLICE CIVIL LIABILITY* 7 (3d ed. 2001) [hereinafter *CRITICAL ISSUES*].

4. KAPPELER, *supra* note 3, at 7.

5. *Monroe*, 365 U.S. 167.

6. DARRELL L. ROSS, *CIVIL LIABILITY IN CRIMINAL JUSTICE* 3-7 (3d ed. 2003).

II. IS THE ARKANSAS CONSTABULARY OUT OF STEP WITH THE GROWING PROFESSIONALIZATION OF AMERICAN LAW ENFORCEMENT?

One positive change in modern criminal justice is that America has witnessed a growing trend toward professionalization of law enforcement. Some contend that this increase in professionalization is due, at least in part, to the potential civil liability of officers and agencies for harm caused by police misconduct.⁷ The importance of this trend is perhaps best illuminated by examining the nature of a profession. A profession has been defined as including the following elements:

- [1.] The occupation is a full-time and stable job, serving continuing societal needs;
- [2.] The occupation is regarded as a lifelong calling by the practitioners who identify themselves personally with their job subculture;
- [3.] The occupation is organized to control performance standards and recruitment;
- [4.] The occupation requires formal, theoretical education;
- [5.] The occupation has a service orientation in which loyalty to standards of competence and loyalty to clients' needs are paramount;
- [6.] The occupation is granted a great deal of collective autonomy by the society it serves, presumably because the practitioners have proven their high ethical standards and trustworthiness.⁸

Based upon this definition, law enforcement has progressed into a profession in the last quarter of the twentieth century. Many state and local law enforcement agencies have begun to require some level of college education. Of fifty statewide law enforcement agencies, Illinois requires officers to have four years of college; six states—Delaware, Kentucky, Minnesota, New Hampshire, North Dakota, and Texas—require two years of college; and nine states—Idaho, Indiana, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Louisiana, and Wisconsin—require some college.⁹

7. KAPPELER, *supra* note 3, at 11.

8. Allen Millett, *Military Professionalism and Officership in America*, Mershon Center, Briefing Paper Number Two, 2 (1977) (cited in RUSSELL W. GLENN ET AL., *TRAINING THE 21ST CENTURY POLICE OFFICER: REDEFINING POLICE PROFESSIONALISM FOR THE LOS ANGELES POLICE DEPARTMENT* 26 (2003)).

9. Brian A. Reeves & Matthew J. Hickman, *Law Enforcement Management and Administrative Statistics, 2000: Data for Individual State and Local Agencies with 100 or More Officers*, United States Dep't of Justice, Bureau of Justice Statistics, NCJ 203350, v (2004), available at <http://www.ojp.usdoj.gov/bjs/abstract/lemas00.htm>.

The United States Department of Justice reports that in 2002, a total of 53,302 persons completed basic law enforcement training at 626 academies nationwide.¹⁰ This certification follows extensive training, which includes classroom instruction on criminal law and procedure, evidence, investigative practices and techniques, and civil liability issues.¹¹ Law enforcement training also includes practical instruction on the use of force, restraint techniques, and pursuit of suspects.¹² The traditional line officers perform a substantial portion of their duties in traffic enforcement and patrol in a motor vehicle.¹³ In recognition of this nearly inseparable relationship between police officers and the motor vehicle, ninety-nine percent of law enforcement academies provide training in emergency vehicle operation,¹⁴ and ninety-five percent of academies maintain a range for this training.¹⁵

However, the office of constable, at least in the state of Arkansas, has not kept pace with the rest of the law enforcement community. Many individual constables, of course, comport themselves in a competent and professional manner. Of the above six elements of a profession, the constable arguably meets at least part of three of the six elements: constables may view the position as a life-long calling; it does have a service orientation; and it operates autonomously. However, the office of constable lacks the other three elements: it is not full-time and stable; it is not organized to provide for performance standards and recruitment; and it requires no formal, theoretical education.

The total lack of standards or minimal levels of training for constables is in sharp contrast to the general trend of increasing professionalization of law enforcement officers. The constable is a position established by the Arkansas Constitution.¹⁶ The position is unpaid and unregulated. The constable is an officer with little or no support system. While statutes requiring at least minimal training and certification regulate the rest of the law enforcement community, the constable has been ignored.¹⁷ The practice of implementation of minimum standards and regulations of law enforcement is designed to protect the public. The purpose is to ensure public safety at different levels. A well-trained officer is better able to protect the community from criminal activity. Training of law enforcement officials also protects the

10. Matthew J. Hickman, *State and Local Law Enforcement Training Academies*, 2002, United States Dep't of Justice, Bureau of Justice Statistics, NCJ 204030, iii (2005), available at <http://www.ojp.usdoj.gov/bjs/abstract/slleta02.htm>.

11. *Id.* at 9.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 6.

16. ARK. CONST. art. VII, § 47.

17. *See infra* Part III.B.2.

public from abusive or overly zealous officers. These goals of enhancing public safety are completely ignored by the absence of any legal or administrative regulation of the constable in the State of Arkansas.

III. THE CONSTABLE: A HISTORY

The position of constable is one that dates back to medieval England.¹⁸ Long before the creation of the modern concept of a police force in the nineteenth century, the people had the responsibility of providing for their own police protection.¹⁹ The sheriff was the chief officer for each parish and was responsible for the militia and the enforcement of the law.²⁰ Political subdivisions below the shire were also developed.²¹ The system of "tithing" provided the basic unit of justice.²² A tithing was ten households who were responsible for the good behavior of the others.²³ The tithing was organized into a political unit known as a "hundred."²⁴ If someone broke the law, the members of the tithing were to pursue the offender.²⁵ This was known as a "hue and cry."²⁶ If the lawbreaker was caught, it was the constable's job to take the offender before the hundred courts.²⁷ The name comes from the Latin term *comes stabuli*, which means "count or officer of the stable."²⁸ The constables also had duties relating to the militia, which were taken from the sheriffs, along with certain policing duties.²⁹

The English colonists brought the offices of constable and sheriff to America; those offices were well-established in American colonial government at the time of the Revolution.³⁰ As a result, most states had provisions in their respective constitutions for the office of constable.³¹ The constable continued to serve as the basic level of law enforcement in new govern-

18. MICHAEL D. LYMAN, *THE POLICE: AN INTRODUCTION* 66–67 (1999) [hereinafter *THE POLICE*].

19. *Id.*

20. *Id.*

21. JOSEPH J. SENNA & LARRY J. SIEGEL, *INTRODUCTION TO CRIMINAL JUSTICE* 148–49 (9th ed. 2002).

22. *Id.*

23. *Id.*

24. LYMAN, *supra* note 18, at 66–67.

25. *Id.*

26. *Id.*

27. *Id.*

28. *THE OXFORD ENGLISH DICTIONARY* 784 (2d ed. 1989). This definition of the term was prior to its introduction to the English language. *Id.* The term developed from ancient Rome where the constable guarded the stable and arms. *Id.*

29. LYMAN, *supra* note 18, at 66–67.

30. SAMUEL WALKER & CHARLES M. KATZ, *THE POLICE IN AMERICA* 26–27 (4th ed. 2002).

31. *Id.*

ments in the westward expansion of the United States.³² Somewhere along the path of American law enforcement history, the constable became disconnected from the rest of the law enforcement community. The certification and training requirements that were applied to other law enforcement officers were not extended to constables. The funding and support networks provided to police and sheriffs' departments were not provided to constables.³³ In Arkansas, and many other states, if a constable wears a uniform, it is at the personal expense of the constable.³⁴ If the constable has a patrol vehicle, the constable provides it at personal expense.³⁵

A. The Constable in Arkansas

Arkansas law—more particularly, the Arkansas Constitution, the Arkansas Code, and decisions of Arkansas courts—lays out the rights and duties of the constable.

The position of constable is recognized in Arkansas by the Arkansas Constitution.³⁶ The Arkansas Constitution does not define the role and power of the constable but does provide for the election of one constable in each township.³⁷ The Arkansas Code also provides that there shall be a constable elected from each township and that the constable “shall have the qualifications and perform such duties as may be provided by law.”³⁸ The Code establishes the definition of the power and authority of the constable as follows: “Each constable shall be a conservator of the peace in his township and shall suppress all riots, affrays, fights, and unlawful assemblies, and shall keep the peace and cause offenders to be arrested and dealt with according to law.”³⁹

The applicable law also gives constables the right to make warrantless arrests under certain circumstances. “If any offense cognizable before a justice of the peace in his township is committed in his presence, the constable

32. *Id.*

33. An exception to this modern trend is Arizona, which provides a salary for the constable. ARIZ. REV. STAT. ANN. § 11-424.01(A) (Supp. 2005). The salary varies according to the number of registered voters or civil caseload of the county. *See id.* § 11-424.01(B)–(D).

34. Arkansas Code Annotated section 14-14-1205 provides that compensation of constables “shall be fixed by ordinance of the quorum court in each county.” Arkansas Code Annotated section 14-14-1203 provides that expense allowances for county and township officers must be appropriated by the quorum court. Mississippi Code Annotated section 19-19-1(2) requires the county to provide two uniforms to constables.

35. Mississippi Code Annotated section 19-19-1(2) requires the county to provide “some type of motor vehicle identification” and a blue light. This section does not require the county to supply the vehicle.

36. ARK. CONST. art. VII, § 47.

37. *Id.*

38. ARK. CODE ANN. § 14-14-1301(b)(2) (LEXIS Supp. 2005).

39. *Id.* § 16-19-301(a) (LEXIS Repl. 1999).

shall immediately arrest the offender and cause him to be dealt with according to law."⁴⁰ Constables, sheriffs, and coroners are directed to enforce the state laws prohibiting gambling.⁴¹ Constables have the power to serve civil and criminal process.⁴²

The authority of constables goes beyond criminal matters and service of civil process, and it is also found in various other sections of the Arkansas Code relating to agriculture and livestock regulation. Cotton gin records are to be made available for inspection to justices of the peace, prosecutors, sheriffs, constables, or any deputies.⁴³ Constables, along with all other law enforcement officers and operators of ferryboats and toll bridges, may stop and detain vehicles transporting certain livestock.⁴⁴ Constables are to be provided with copies of reports regarding the examination of animals suspected of exposure to infectious diseases.⁴⁵ Constables in cities with a state-supported educational institution with an enrollment of no fewer than fifteen hundred students are prohibited from receiving fees, costs, or other payment related to any criminal prosecution.⁴⁶

The Arkansas Supreme Court has held that constables may pursue those suspected of driving a motor vehicle under the influence of alcohol.⁴⁷ In *Reed v. State*, the court specifically addressed the issue of pursuit beyond the boundaries of the constable's township, but implicit in the decision is the recognition of the power of constables to engage in vehicular pursuits.⁴⁸ The Arkansas courts have also recognized that constables may use force to effect an arrest.⁴⁹ This use-of-force power is limited to situations in which it is necessary to prevent serious physical harm or death to the constable.⁵⁰

As law enforcement officers, constables are allowed to carry firearms in the course of their duties.⁵¹ However, constables are not allowed to carry concealed weapons unless they are certified law enforcement officers or

40. *Id.* § 16-19-301(b). The reference to offenses that are within the jurisdiction of a justice of the peace would limit this power of arrest without a warrant to misdemeanor offenses. *Id.* However, the law at subsection (d) recognizes the power of constables to engage in "fresh pursuit" of one suspected of committing a felony. *Id.* § 16-19-301(d).

41. *Id.* § 5-66-102 (LEXIS Repl. 2005).

42. *Id.* § 16-19-301(c) (LEXIS Repl. 1999).

43. *Id.* § 2-20-205(b) (LEXIS Repl. 1996).

44. ARK. CODE ANN. § 2-35-210(a)(1) (LEXIS Repl. 1996).

45. *Id.* § 2-4-106(2)(A)(i) (LEXIS Repl. 1996). The report is to be delivered to the sheriff and a copy to the nearest town marshal or constable. *Id.*

46. *Id.* § 16-17-114(a)(1), (b) (LEXIS Supp. 2005).

47. *Reed v. State*, 330 Ark. 645, 651, 957 S.W.2d 174, 177 (1997).

48. *Id.* at 176-77, 957 S.W.2d at 650-51.

49. *Whitlock v. Wood*, 193 Ark. 695, 697-98, 101 S.W.2d 950, 951 (1937).

50. *Id.*, 101 S.W.2d at 951.

51. *Op. Ark. Att'y Gen.* 97-076 (1997), available at <http://www.state.ar.us/ag/opinions/docs/97-076.html>.

have otherwise complied with the concealed handguns law.⁵² This restriction has no bearing on the authority of constables to carry a weapon openly, but only upon the power to carry a concealed weapon.

The Arkansas Code, in some sections, makes reference to a constable, or deputy constable, which might invite the inference that constables have the authority to appoint deputy constables.⁵³ However, Arkansas Code Annotated section 16-19-306 (LEXIS Repl. 1999) explicitly states that constables have no authority to appoint deputies.

B. The Constable in Other States

Some states have recognized the incongruity of maintaining this ancient office, lacking in both financial support and regulation, in light of modern trends in law enforcement. That recognition, speaking generally, has led to two legislative responses: (1) shrinking (and sometimes eliminating) the constable's role, or (2) requiring that constables be certified.⁵⁴

1. *Some States Shrink or Eliminate the Constable's Role*

The state of West Virginia abolished the office of constable effective January 1, 1977.⁵⁵ Louisiana has abolished the office of constable in certain parishes.⁵⁶ In Tennessee, constables are law enforcement officers in some counties, and they are little more than process servers in other counties,⁵⁷

52. Arkansas Code Annotated section 12-15-202 (LEXIS Repl. 2003) allows certified law enforcement officers to carry concealed handguns. See also Op. Ark. Att'y Gen. 2002-332 (2002), available at <http://www.state.ar.us/ag/opinions/docs/2002-332.html>, which expressed the view that the fact that constables are exempt from the state's certification requirements for law enforcement officers does not exempt constables from the requirements of Arkansas Code Annotated section 12-15-202 (LEXIS Repl. 2003), which allows certified officers to carry concealed weapons.

53. ARK. CODE ANN. § 5-66-102 (LEXIS Repl. 2005); *Id.* § 2-20-205(b) (LEXIS Repl. 1996); *Id.* § 16-17-114(b)-(c) (LEXIS Supp. 2005). None of these statutes specifically authorize the appointment of a deputy constable, but all make reference to a constable or deputy constable.

54. Some states, on the other hand, do not *require* certification but permit it. For example, Kentucky exempts constables from the certification requirements imposed upon other law enforcement officers. KY. REV. STAT. ANN. § 15.380(5)(c) (LexisNexis Supp. 2005). Also exempted were sheriffs, coroners, jailers, racetrack security officers, and the commissioner of the state police. *Id.* § 15.380(5). The law permits the exempted officials to seek certification, but certification is not mandatory. *Id.*

55. W. VA. CONST. art. VIII, § 15.

56. See LA. REV. STAT. ANN. 13:1872(A) (1999).

57. TENN. CODE ANN. § 8-10-108 (Supp. 2002).

with the office of constable abolished in still other Tennessee counties.⁵⁸ Alabama retains the constable as a state officer, but specifically provides that constables are not entitled to state tort immunity in the conduct of discretionary duties.⁵⁹ In this regard, Alabama law treats constables in the same manner as private, non-governmental security officers.⁶⁰ Private entities that employ off-duty peace officers as security personnel are required to maintain liability insurance to indemnify against loss resulting from the acts of the off-duty peace officer in the course of his private duties.⁶¹

Maryland limits the power of constables to that of serving process for the district court.⁶² Maryland constables are appointed by the chief judge of the district court and may be full-time or part-time employees.⁶³

2. *Some States Require the Certification of Constables*

Other states have made constable certification mandatory. Delaware requires that constables satisfy training requirements for part-time police officers.⁶⁴ Delaware also requires background checks for constables, as well as firearms training.⁶⁵ The state has established a board of examiners who determines whether a constable shall be allowed to carry firearms while on duty.⁶⁶ The firearms training includes appropriate standards for the use of force.⁶⁷ The board of examiners may prohibit a constable from carrying a weapon.⁶⁸ Pennsylvania has created the "Constables' Education and Training Program"⁶⁹ and has required certification of constables and maintenance of liability insurance for constables.⁷⁰ The law prohibits non-certified constables from performing any judicial functions or receiving any fee or expense reimbursement.⁷¹ Pennsylvania also requires that constables be certified before being permitted to carry firearms.⁷² Maine provides for restrict-

58. *Id.* § 8-10-101(c)-(m) (Supp. 2002). To further complicate the status of constables, Tennessee law grants certain counties the power to abolish the office of constable by resolution enacted by the county legislative body. *See id.* § 8-10-101(a)(3) (Supp. 2003).

59. ALA. CODE § 6-5-338(a) (LexisNexis 2005).

60. *Id.* § 6-5-338(b). This immunity exception also applies to off-duty peace officers who are employed by private entities. *Id.* § 6-5-338(c).

61. *Id.* § 6-5-338(c).

62. MD. CODE ANN. CTS. & JUD. PROC. § 2-604(a) (LexisNexis 2002).

63. *See id.* § 2-604(a)-(b).

64. DEL. CODE ANN. tit. 10, § 2703(b) (1999).

65. *Id.* § 2703(e)-(g) (1999 & Supp. 2004).

66. *Id.* § 2703(b) (1999).

67. *Id.* § 2703(e).

68. *Id.*

69. 42 PA. CONS. STAT. ANN. § 2944 (West 2004).

70. *Id.* § 2942(a)-(b) (West Supp. 2005).

71. *Id.* § 2942(a).

72. *Id.* § 2948(b) (West 2004).

ing the power of certain constables to carry a weapon.⁷³ The certificate of appointment of the constable will indicate whether the constable is allowed to carry a weapon, whether concealed or unconcealed.⁷⁴

IV. LIABILITY FOR PUBLIC OFFICIALS

Constables in Arkansas are potentially liable for official actions under both state and federal law. However, they are shielded from certain kinds of liability under the qualified immunity from suit doctrine that is inherent in their office. Constables also are shielded from liability by the standard of “deliberate indifference” that § 1983 civil rights plaintiffs must show in order to prevail.

A. Liability Under Arkansas Law

In Arkansas, constables are law enforcement officers within the meaning of the law.⁷⁵ Constables have the power to serve civil and criminal process,⁷⁶ to make arrests without warrants,⁷⁷ to engage in vehicular pursuits,⁷⁸ and to use force to effect an arrest.⁷⁹ These powers are substantial and significant, yet the constable is not required to receive any training or have any experience before venturing out into the community.⁸⁰ The law requiring training and certification procedures for law enforcement officers exempts elected officials.⁸¹ Thus, the constable, like the sheriff, is not required to be a certified law enforcement officer.⁸²

There is very little Arkansas case law relating to constables' liability for civil damages. However, the limited body of case law does provide general support for constable liability: for instance, *Whitlock v. Wood*⁸³ discusses the law applicable to the use of force by law enforcement officers. A deputy constable, John Wood, Jr., raided an unlawful game of chance and shot a suspect, Whitlock, who walked away and refused to halt as directed by the deputy constable.⁸⁴ Whitlock was seriously injured and sued the con-

73. ME. REV. STAT. ANN. tit. 30-A, § 2673 (1999).

74. *Id.*

75. *Whitlock v. Wood*, 193 Ark. 695, 698–99, 101 S.W.2d 950, 951–52 (1937).

76. ARK. CODE ANN. § 16-19-301(c) (LEXIS Repl. 1999).

77. *Id.* § 16-19-301(b); *see also* *Edgin v. Talley*, 169 Ark. 662, 667–68, 276 S.W. 591, 593 (1925).

78. *Reed v. State*, 330 Ark. 645, 651, 957 S.W.2d 174, 177 (1997).

79. *Id.*, 957 S.W.2d at 177.

80. ARK. CODE ANN. § 12-9-102(1)–(2) (West 2004).

81. *See id.*

82. *See id.*

83. *Whitlock v. Wood*, 193 Ark. 695, 101 S.W.2d 950 (1937).

84. *Id.* at 695–96, 101 S.W.2d at 950.

stable, his deputy, and the two sureties on the constable's bond.⁸⁵ The complaint alleged that the deputy constable unlawfully used excessive force in the apprehension of the misdemeanor suspect.⁸⁶ This case made no distinction between the authority of constables and that of sheriffs, or the responsibility and liability of sheriffs and constables.⁸⁷ In fact, the central issue in *Whitlock* was not whether a constable is liable for injuries resulting from the use of excessive force but whether the fact that the constable failed to sign his bond would excuse his sureties from liability.⁸⁸ The Arkansas Supreme Court in *Whitlock* favorably cited *Edgin v. Talley*⁸⁹ in holding that while a constable has the authority "to keep the peace, to suppress riots, etc., and . . . may carry arms and make arrests, the law superimposes a duty upon a duty—that is, he is required to discharge the primary duty in a lawful and prudent manner."⁹⁰ This suggests that when a constable fails to discharge his duties in a lawful and prudent manner, he loses the protection from liability that ordinarily shields official conduct.

Other states have recognized that constables are cloaked with official immunity as a defense against liability for civil damages. For instance, Texas grants immunity to constables when they act in good faith when serving writs that are valid on their face.⁹¹

B. Liability Under § 1983

The law is well settled that constables are liable for civil wrongs. What is the standard of care applicable to constables? As to state tort claims, Arkansas courts have found liability for law enforcement officers based on simple negligence.⁹² The Arkansas Supreme Court, in *Edgin v. Talley*, followed a simple negligence standard in a case alleging excessive force.⁹³ The court stated that while the deputy sheriff "had the right to carry loaded firearms in the discharge of his official duties, he had no right to use them in a negligent and careless manner, and he is liable for the unjustifiable discharge of his pistol."⁹⁴ However, most civil actions against law enforcement

85. *Id.*, 101 S.W.2d at 950.

86. *Id.*, 101 S.W.2d at 950.

87. *Id.* at 699, 101 S.W.2d at 952.

88. *Id.*, 101 S.W.2d at 952.

89. *Edgin v. Talley*, 169 Ark. 662, 276 S.W. 591 (1925).

90. *Whitlock*, 193 Ark. at 698–99, 101 S.W.2d at 952.

91. *Ball v. Neel*, No. 12-03-00205-CV, 2004 Tex. App. LEXIS 5973, at *7 (Tex. App. June 30, 2004); *Pease v. Principal Residential Mortgage Inc.*, No. 03-02-00491-CV, 2004 Tex. App. LEXIS 4279, at *12 (Tex. App. May 13, 2004); *Richardson v. Parker*, 903 S.W.2d 801, 805 (Tex. App. 1995).

92. *Edgin*, 169 Ark. at 671, 276 S.W. at 594.

93. *Id.*, 276 S.W. at 594.

94. *Id.*, 276 S.W. at 594.

officers are filed under the Civil Rights Act of 1871, which provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.⁹⁵

The only Arkansas cases for civil damages against constables are *Whitlock*,⁹⁶ *McIntosh v. Bullard*,⁹⁷ a false imprisonment case in which the constable was found not liable for the reason that the arrest was based upon an arrest warrant that appeared regular and proper on its face, and *Thompson v. Baker & Hoyle*.⁹⁸ *Thompson* was a suit under § 1983 filed against Baker, a justice of the peace, and Hoyle, a constable.⁹⁹ The plaintiffs were allegedly denied due process of law as a result of a pre-judgment garnishment issued by justice of the peace Baker and served by constable Hoyle.¹⁰⁰ The court ruled that Baker was protected by the common-law immunity granted to judicial officers and that Hoyle was similarly protected by the common-law immunity granted to sheriffs and constables when serving writs that appear to be "fair upon their face."¹⁰¹ The court held that the Civil Rights Act did not abrogate this common-law immunity.¹⁰²

Law enforcement officers have been subject to liability for civil rights violations since *Monroe v. Pape*,¹⁰³ in which the United States Supreme Court held that persons could sue police officers for damages pursuant to 42 U.S.C. § 1983.¹⁰⁴ For a defendant to be liable under § 1983, he must be acting under color of state law.¹⁰⁵ The Supreme Court set out the test for deter-

95. 42 U.S.C. § 1983 (1994).

96. *Whitlock v. Wood*, 193 Ark. 695, 101 S.W.2d 950 (1937).

97. 95 Ark. 227, 129 S.W. 85 (1910).

98. 133 F. Supp. 247 (W.D. Ark. 1955).

99. *Id.* at 248.

100. *Id.* at 249.

101. *Id.* at 253.

102. *Id.*

103. 365 U.S. 167 (1961).

104. *Id.* at 191. The Civil Rights Act of 1871, which was enacted by Congress to provide a federal remedy for persons who were deprived of any rights under federal constitutional or statutory law, was passed in response to serious deprivation of rights by state and local governmental officials against African-Americans following the Civil War. *See id.* at 174-75.

105. *See id.* at 226.

mining whether one acted under color of law in *Lugar v. Edmondson Oil Co.*¹⁰⁶ The *Lugar* test is as follows:

First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.¹⁰⁷

The constable appears to satisfy the first prong of the *Lugar* test. Any deprivation of rights allegedly caused by a constable springs from the “right or privilege” of serving in the capacity of constable.¹⁰⁸ State law creates the office of constable.¹⁰⁹ The Arkansas Court of Appeals has held that the constable is a county official.¹¹⁰ In *Farnsworth v. White County*, a worker’s compensation case, the court specifically held that a constable is a county official and is entitled to workers’ compensation coverage.¹¹¹ The court referred to Title 14, Chapter 14 of the Arkansas Code, which is the County Government Code.¹¹² Subchapter 13 establishes the officers of the county government.¹¹³ This section lists the constable, along with the sheriff, county judge, county clerk, assessor, collector, treasurer, surveyor, and justices of the peace, as the county officers.¹¹⁴ As such, there appears to be little dispute as to whether the constable is a state actor,¹¹⁵ thus satisfying the second prong of the test.

In other jurisdictions, constables have been found to be acting under color of state law when performing arrests. For instance, a federal district court in Pennsylvania found that a constable who assisted with the arrest of a suspected shoplifter was acting under color of law within the scope of §

106. 457 U.S. 922, 937 (1982).

107. *Id.*

108. *Id.*

109. ARK. CONST. art. VII, § 47.

110. *Farnsworth v. White County*, 39 Ark. App. 98, 100, 839 S.W.2d 229 (1992).

111. *Id.* at 100, 839 S.W.2d at 230–31. This case involved a constable who was injured when he tried to arrest a person for unlawful use of a three-wheeler. *Id.* at 99, 839 S.W.2d at 230. The constable claimed that he should be awarded workers’ compensation benefits for his injuries. *Id.* at 98–99, 839 S.W.2d 230.

112. ARK. CODE ANN. §§ 14-14-101–10 (LEXIS Repl. 1998 & Supp. 2005).

113. *Id.* § 14-14-1301(a) (LEXIS Supp. 2005).

114. *Id.* § 14-14-1301(a)–(b). Subsection (b) identifies the justices of the peace and the constables as “quorum court district and township officers.” *Id.* § 14-14-1301(b). Subsection (a) describes the remaining officers as “county officers.” *Id.* § 14-14-1301(a). The court in *Farnsworth* made no distinction between these categories of officers. In any event, all are listed under the general heading of “Officers” in the overall County Government Code. *Farnsworth*, 39 Ark. App. at 100, 839 S.W.2d at 230; see also ARK. CODE ANN. § 14-14-1301.

115. ARK. CODE ANN. § 16-19-301 (LEXIS Repl. 1999).

1983.¹¹⁶ Similarly, a Texas federal district court has found that a constable who serves an arrest warrant is acting under color of state law.¹¹⁷

C. Two Shields That Protect Government: Qualified Immunity and the “Deliberate Indifference” Doctrine

While exposure to civil liability is significant, government officials and employees are shielded from liability for wrongdoing by two substantial legal concepts. First, government officials are protected from civil liability resulting from their actions by various forms of immunity.¹¹⁸ Judges, quasi-judicial officials such as parole board members, legislators, and prosecuting attorneys are protected by absolute immunity.¹¹⁹ These officials may not be sued for damages resulting from their acts and decisions relating to their official duties. Other public officials are protected by the more limited concept of qualified immunity.¹²⁰

Second, government officials will not be held liable in civil rights actions for injuries that may result from mere negligence.¹²¹ As noted above, most modern civil litigation against law enforcement officers is filed as a civil rights claim under § 1983.¹²² The Supreme Court, in *Estelle v. Gamble*,¹²³ first recognized the standard of care to be applied to civil rights litigation as that of “deliberate indifference.”¹²⁴ This has been understood by the Court in *Farmer v. Brennan*¹²⁵ as being less than intentional action by the officer but more than mere negligence.¹²⁶ The discretionary acts of public officials have been protected from liability claims unless the officer, as explained in *Harlow v. Fitzgerald*,¹²⁷ violates “clearly established statutory or

116. See *Weyandt v. Mason’s Stores, Inc.*, 279 F. Supp. 283, 286 n.2 (W.D. Penn. 1968). The court noted that the issue of whether the constable was acting “under color of law” was not disputed by the constable, but the court specifically found that the defendant was so acting. *Id.*

117. *Johnson v. Davenport*, No. 3-98CV2227-R, 2000 U.S. Dist. LEXIS 4078, at *11 (N.D. Tex. Mar. 31, 2000).

118. ROSS, *supra* note 6, at 65.

119. *Id.*

120. *Pierson v. Ray*, 386 U.S. 547, 555 (1978); *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

121. *Farmer v. Brennan*, 511 U.S. 825 (1994).

122. ROSS, *supra* note 6, at 35.

123. 429 U.S. 97 (1976). *Estelle* involved a prisoner petition. *Id.* at 98. The standard of deliberate indifference has also been applied to suits by persons who allege deprivation of rights by police officers. See *City of Canton v. Harris*, 489 U.S. 378, 388–92 (1989).

124. *Estelle*, 429 U.S. at 106.

125. 511 U.S. 825 (1994).

126. *Id.* at 835.

127. 457 U.S. 800 (1982).

constitutional rights of which a reasonable person would have known."¹²⁸ This substantial hurdle will foil many petitioners.

What is the nature of *Harlow v. Fitzgerald*'s requirement that there be a violation of "clearly established" rights in order to create liability? The *Harlow v. Fitzgerald* requirement has been modified by *Hope v. Pelzer*¹²⁹ in which the Supreme Court held that the term "clearly established" rights does not mean that the court must have addressed the same type of actions that are in question.¹³⁰ *Hope* held that the petitioner must show that the officer had "fair warning" that the actions complained of would violate a person's rights.¹³¹ While the petitioner in a civil rights action against a law enforcement officer or other government official still has a heavy burden, it appears that the Court has opened the door to some extent to actions that may result in liability for government officials.¹³² There does not seem to be any reasonable argument that constables are not entitled to qualified immunity. Private firms that contract to provide law enforcement and correctional services have been denied qualified immunity.¹³³ There is no authority to support an argument that constables should not be protected by qualified immunity. In the event that a claimant could overcome this limited form of immunity, then it is clear that a constable would be subject to liability for damages under § 1983.

V. TROUBLE SPOTS: POSSIBLE AREAS OF LIABILITY FOR CONSTABLES

Detailed consideration of the various areas of potential liability for constables and their local governments is beyond the scope of this article. It may, however, be helpful to briefly consider two of the likely situations that expose constables to civil liability in the performance of their duties, as well as the remedies that misfeasance in such situations invites.

A. The Use of Force

The United States Bureau of Justice Statistics has reported that force is used in two percent of arrests.¹³⁴ This force may range from the use of an open hand to deadly force. The United States Supreme Court, in *Graham v.*

128. *Id.* at 818.

129. 536 U.S. 730 (2002).

130. *Id.* at 739-40.

131. *Id.*

132. Leah Chavis, *Qualified Immunity After Hope v. Pelzer: Is "Clearly Established" Any More Clear?*, 26 U. ARK. LITTLE ROCK L. REV. 599-614 (2004).

133. *Richardson v. McKnight*, 521 U.S. 399, 412 (1997).

134. Bureau of Justice Statistics, *Police Use of Force: Collection of National Data*, United States Dep't of Justice, Washington, D.C. (1997) (NCJ-165040).

Connor,¹³⁵ established the test for determining whether a police officer's use of force would be judged according to the "objective reasonableness" standard.¹³⁶ Graham was a diabetic and experienced an insulin reaction.¹³⁷ Officer Connor did not believe that Graham was diabetic and thought he was intoxicated.¹³⁸ Connor used serious physical force against Graham who suffered a broken foot, an injured shoulder, cut wrists, and a bruised forehead.¹³⁹ Graham's friend told Officer Connor that Graham was diabetic and tried to give him orange juice, which Connor refused to allow.¹⁴⁰ The district court granted the officer's motion for directed verdict after evaluating the officer's use of force under an analysis of four factors: (1) whether the force was necessary; (2) the relationship between the need for force and the amount of force used; (3) the extent of the injury; and (4) whether the force was applied in a good-faith effort to restore order or maliciously used with the purpose to cause harm.¹⁴¹

The Supreme Court reversed and held that the district and circuit court did not use the appropriate standard in considering the degree of force.¹⁴² The Court held that the use of force is viewed in the context of a Fourth Amendment seizure.¹⁴³ The Fourth Amendment prohibits unreasonable seizures.¹⁴⁴ Therefore, the degree of force must be reasonable under the circumstances that the officer faced at the time.¹⁴⁵

The Supreme Court, in *Tennessee v. Garner*,¹⁴⁶ had previously established the standard for the use of deadly force against a fleeing suspect.¹⁴⁷ The reasonableness standard of the Fourth Amendment applies to the use of deadly force.¹⁴⁸ The Court found that the use of deadly force against a fleeing suspect whom the officer did not believe to be armed was unreasonable.¹⁴⁹

135. 490 U.S. 386 (1989).

136. *Id.* at 393-94.

137. *Id.* at 388.

138. *Id.* at 389.

139. *Id.* at 390.

140. *Id.* at 389.

141. *Graham*, 490 U.S. at 390.

142. *Id.* at 393-94.

143. *Id.* at 388.

144. *Id.* at 387.

145. *Id.* at 396.

146. 471 U.S. 1 (1985).

147. *Id.* at 7.

148. *Id.*

149. *Id.* at 11. The state relied on a Tennessee statute, which authorized the use of deadly force on any fleeing felon regardless of whether the suspect was armed or dangerous. *Id.* at 5; see also TENN. CODE ANN. § 40-7-108 (1982). The Supreme Court held that this blanket authorization was unreasonable. *Garner*, 471 U.S. at 11.

The development of equipment that is intended to be non-lethal and a substitute for deadly force has led to new areas of potential liability. This equipment includes stun guns, tasers, and various types of aerosol sprays.¹⁵⁰ For instance, use of pepper spray has been evaluated on the basis of the reasonableness standard.¹⁵¹ When evaluating these situations, the court must view the circumstances of the arrest, including the extent of resistance offered by the subject.¹⁵²

B. Vehicular Pursuits

The Supreme Court does not apply the deliberate indifference or the reasonableness standard to vehicular pursuits. The Court has stated that a pursuit is not a "seizure" within the scope of the Fourth Amendment.¹⁵³ In *County of Sacramento v. Lewis*,¹⁵⁴ the Court addressed the standard to be applied in police pursuit cases.¹⁵⁵ The Court observed that no specific amendment touched the issues relevant in police pursuits, but that the plaintiffs could bring a cause of action for alleged violation of substantive due process.¹⁵⁶ The Court did not apply the standard of deliberate indifference to police pursuit cases.¹⁵⁷ In order for deliberate indifference to be appropriate, the actor must have the opportunity to deliberate.¹⁵⁸ The Court referred to *Whitley v. Albers*¹⁵⁹ in which it did not determine that the deliberate indifference standard was appropriate for cases involving use of force in quelling prison riots.¹⁶⁰ Instead, the Court noted that such decisions must be made in haste with very little opportunity for deliberation.¹⁶¹

The Court noted the similarity between the use of force in a prison riot and the decision to pursue a fleeing vehicle.¹⁶² The Court, in *Sacramento*,¹⁶³ held that to be liable in a pursuit, the officer's conduct must "shock the conscience."¹⁶⁴ The Supreme Court concluded that the officer's actions did not

150. ROSS, *supra* note 6, at 151–54.

151. *Wagner v. Bay City*, 227 F.3d 316, 324–26 (5th Cir. 2000); *Adams v. Metiva*, 31 F.3d 375, 385–86 (6th Cir. 1994).

152. *Adams*, 31 F.3d at 385.

153. *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

154. 523 U.S. 833 (1998).

155. *Id.* at 836.

156. *Id.* at 843.

157. *Id.* at 854–55.

158. *Id.* at 853.

159. 475 U.S. 312, 320 (1986).

160. *Id.*

161. *Id.*

162. *Sacramento*, 523 U.S. at 854.

163. *Id.*

164. *Id.*

reach this level and reversed.¹⁶⁵ The officer pursued a motorcyclist who drove rapidly between two deputies' vehicles.¹⁶⁶ Ultimately, the motorcycle driver lost control and crashed.¹⁶⁷ The deputy's vehicle ran into the motorcycle, killing its passenger.¹⁶⁸ The Court noted that the officer did not cause the motorcyclist's high speed but was pursuing in response to the high speed of the motorcycle.¹⁶⁹

In summary, vehicular pursuits are not subject to the reasonableness standard of Fourth Amendment search and seizure cases. Pursuits are not covered by the deliberate indifference standard that applies to many of the law enforcement civil liability cases that are filed. Instead, the officer's conduct must be shocking to the conscience.

C. Remedies

The remedies that may be awarded to a successful petitioner under § 1983 include compensatory damages for actual injuries (such as property damage, physical injury, and emotional distress¹⁷⁰), as well as punitive damages for the reckless disregard of a person's rights or intentional harm.¹⁷¹ Courts may also award declaratory or injunctive relief in appropriate cases.¹⁷² If the petitioner is successful in the claim for relief, the court may award attorney's fees.¹⁷³ The expansion of § 1983 to claims against police officers by the Supreme Court in *Monroe*,¹⁷⁴ along with the authorization for courts to award attorney's fees to be paid to plaintiff's counsel by the defendant, has contributed to the tremendous growth in civil complaints filed in federal courts against law enforcement officers.¹⁷⁵ One study reported that the number of reported United States district court cases filed under § 1983 increased from 46 cases in 1980 to 129 cases in 2000.¹⁷⁶ Among the prevailing plaintiffs included in this study were those who survived a motion for dismissal or summary judgment and those who were successful on a sub-

165. *Id.* at 855.

166. *Id.* at 836–37.

167. *Id.* at 837.

168. *Sacramento*, 523 U.S. at 837.

169. *Id.* at 855.

170. *Carey v. Phipus*, 435 U.S. 247, 248, 254–61 (1978).

171. *Smith v. Wade*, 461 U.S. 30, 46 (1983).

172. *See L. A. v. Lyons*, 461 U.S. 95, 105–07 (1983). The Court refused to grant the requested equitable relief, noting that while the plaintiff may have a cause of action for damages, he did not have standing to request an injunction or declaratory judgment. *Id.* at 105.

173. 42 U.S.C. § 1988 (2000). The Civil Rights Attorney's Fees Awards Act of 1976 allows courts to award attorney's fees to a successful plaintiff but not to the government. *Id.* § 1988(b).

174. *Monroe v. Pape*, 365 U.S. 167, 167 (1961).

175. KAPPELER, *supra* note 3, at 36.

176. *Id.* at 5.

stantive issue.¹⁷⁷ A survey of Texas police chiefs in 2001 found that the average court-awarded judgment against police departments was \$98,000.¹⁷⁸ The same study found that twenty-five percent of cases filed against police resulted in compromise settlements with an average payment to plaintiffs in the amount of \$55,411.¹⁷⁹ These amounts include only awards or payments to plaintiffs and do not take into account any defense costs.¹⁸⁰ The United States Department of Justice reports that of all civil rights cases, except prisoner complaints, the plaintiffs were successful in thirty-four percent of the cases.¹⁸¹ These studies indicate the threat of liability litigation against law enforcement is not without real exposure to an adverse damage award.

VI. GOVERNMENT LIABILITY

Although the potential liability of a *constable* for violation of the civil rights of individuals is relatively settled, the potential liability of a *county* for a constable's actions is less clear. State law creates the office of constable, but the constable functions at the county level. Although states are not subject to § 1983 liability, cities and counties may be liable if the offending action is found to result from the policy or custom of the local government.¹⁸² Section 1983 makes "every person" liable for damages who, under color of law, infringes upon the rights of another.¹⁸³ In *Monroe v. Pape*,¹⁸⁴ the Supreme Court held that police officers could be liable for civil rights violations but provided that municipalities were exempt from liability.¹⁸⁵ But the Court, in *Monell v. Department of Social Services*,¹⁸⁶ reversed its previous holding that local governments were completely immune from § 1983 liability and held that when the policy or custom of the local government allows the harm to occur, the local government should not be shielded from liability.¹⁸⁷

177. *Id.*

178. M.S. Vaughn et al., *Assessing Legal Liabilities in Law Enforcement: Police Chief's Views*, 47 CRIME & DELINQ. 1, 3-27 (2001).

179. *Id.*

180. *Id.*

181. Bureau of Justice Statistics, *Civil Rights Complaints in United States District Courts*, 2000. U.S. Department of Justice, Washington, D.C., 2002 (NCJ-193979).

182. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). States are exempt from federal court jurisdiction pursuant to the Eleventh Amendment. U.S. CONST. amend XI.

183. 42 U.S.C. § 1983 (2000).

184. 365 U.S. 167 (1961).

185. *Id.* at 192.

186. *Monell*, 436 U.S. 658. The Court conducted an extensive review of the legislative history behind the Civil Rights Act of 1871 and concluded that Congress did not intend to protect local governments from liability when their own policy or custom produced the harm. *Id.* at 691-95.

187. *Id.* at 690.

The constable is clearly a county officer.¹⁸⁸ The next step in the analysis requires the determination of whether or not the policy or practice of the county was a cause of the alleged harm.¹⁸⁹ The relationship between the county and the constable—and the specific facts as to how this relationship functions—may be critical to determining whether or not the local governmental entity is liable for the constable's actions.¹⁹⁰ Suppose the policy or custom of a county sheriff's department is to work with local constables, and a deputy sheriff accompanies a constable when the constable executes an arrest warrant in which the constable employs what is alleged to be excessive force. Does the county now face liability for a constitutional tort under § 1983? Is the most prudent policy for a police department or sheriff's department to avoid any relationship with county constables? Should the local law enforcement agency refuse to provide any support to a constable? Should the agency refuse to accept any support from a constable?

There is no post-*Monell* Arkansas case law addressing civil liability of constables that provides any guidance as to this issue of local government liability. The law is clear that the doctrine of *respondeat superior* does not apply to local governments in the context of § 1983 liability.¹⁹¹ Liability on the basis of *respondeat superior* would result in the government being responsible even if the offending behavior was prohibited and unauthorized. Liability resulting from governmental policy or custom under *Monell* is distinguishable from the strict liability of *respondeat superior*. When the government custom or policy causes the harm, there is culpable conduct on the part of the government official. This culpable conduct is absent from the liability that is based solely upon relationships that exist in *respondeat superior*.

A. Governmental Liability for Deliberate Indifference

As noted above, the constable is a county officer. If the county practice is to provide no support or training for constables, does this amount to a policy or custom that will result in county liability if the constable violates a person's civil rights? Cities have been found liable for failure to train officers if they are found to be deliberately indifferent to the rights of the plaintiff.¹⁹² Would a court find that a county was deliberately indifferent to the rights of persons by not providing any training or support for constables within the county? Consider a scenario wherein a constable engaged in a

188. See *Farnsworth v. White County*, 39 Ark. App. 98, 100, 839 S.W.2d 229, 231 (1992).

189. *Monell*, 436 U.S. at 690.

190. *City of Canton v. Harris*, 489 U.S. 378, 388–89 (1989).

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

192. *Harris*, 489 U.S. at 388.

high-speed pursuit of an alleged traffic offender; the pursuit resulted in serious injury to the subject and others, and the county provided no training, support, or funding to the constable. Would this absence of any support or training amount to deliberate indifference?

The United States Supreme Court held, in *City of Canton v. Harris*,¹⁹³ that a city could be liable for failure to train.¹⁹⁴ The Court established the deliberate indifference standard for failure to train cases and reversed and remanded so that the trial court could apply this standard.¹⁹⁵ In *Canton*, a police department shift commander had absolute discretion to determine whether a detainee required medical treatment, and the commanders were provided no medical training beyond basic first-aid training.¹⁹⁶ The plaintiff argued that this degree of training was wholly insufficient to give the commanders the knowledge needed to make medical decisions regarding detainees.¹⁹⁷ The Court held that a jury must evaluate this level of training by determining whether the city exhibited deliberate indifference to the rights of detainees in its policies.¹⁹⁸ The lack of training may be deliberate indifference when the need for the training is obvious.¹⁹⁹

The Supreme Court has held in *Board of County Commissioners v. Brown*²⁰⁰ that a single incidence of inadequate screening in a hiring decision could not constitute deliberate indifference.²⁰¹ In that case, the sheriff had a policy of screening prospective employees and had received a background check on the employee in question.²⁰² The sheriff, however, testified that he did not look very closely at the reports, which revealed several misdemeanor convictions, including assault and battery, resisting arrest, and public intoxication.²⁰³ Although the Supreme Court said this single example of poor judgment in hiring would not constitute deliberate indifference, what if the sheriff had no policy at all regarding hiring and background checks? A court might conclude that the total absence of a policy to govern hiring decisions is deliberate indifference. Similarly, a court could reasonably conclude that the absence of any training or support for officers could render a county

193. 489 U.S. 398 (1989).

194. *Id.* at 388. The Court reversed a lower court finding for the plaintiff because the trial court utilized a gross negligence standard. *Id.* at 392-93. The Supreme Court mandated the use of the deliberate indifference standard. *Id.* at 388.

195. *Id.*

196. *Id.* at 381-82.

197. *Id.* at 382.

198. *Id.* at 388.

199. *Harris*, 489 U.S. at 390.

200. 520 U.S. 397 (1997).

201. *Id.* at 404.

202. *Id.* at 401.

203. *Id.*

liable for any violation of rights caused by an officer. This is particularly true when the need for the training is obvious.²⁰⁴

Supreme Court Justice Brennan, in *City of Oklahoma City v. Tuttle*,²⁰⁵ also stated, in a concurring opinion, that a trial court instruction that a single instance of excessive force, if the force was significant enough, could support a jury inference that the city policy providing training on the use of force was inadequate and improper.²⁰⁶ The Court refused to allow a single instance of excessive force alone to support a finding of deliberate indifference.²⁰⁷ The plaintiff introduced testimony from an expert on police training that the department training program on use of force was grossly inadequate.²⁰⁸ The Court, however, noted that the instruction was improper because it would have allowed a verdict for the plaintiff even without this evidence.²⁰⁹

In *Palmquist v. Selvik*,²¹⁰ the Seventh Circuit affirmed a judgment in favor of a plaintiff but reversed a failure-to-train claim against the city.²¹¹ A city police officer shot and killed a person who exhibited bizarre and out-of-control behavior.²¹² The estate claimed excessive force and failure to train.²¹³ The officers were trained on how to deal with persons who exhibited strange behavior and were trained in the use of force.²¹⁴ The Seventh Circuit Court of Appeals held that the fact that they could have been better trained does not amount to deliberate indifference to the training needs of officers.²¹⁵ The court also cited *Canton v. Harris*,²¹⁶ which requires a connection between the failure to train and the harm.²¹⁷ To constitute deliberate indifference, the policy (in *Palmquist*, the failure to train) must result from a "deliberate or conscious choice."²¹⁸ If the police department had provided no training on responding to such persons, it is likely that the court would have found deliberate indifference. Similarly, if a county provided no training for constables, it is possible that a finding of deliberate indifference could result.

204. See *Harris*, 489 U.S. at 390.

205. 471 U.S. 808 (1985).

206. *Id.* at 832 (Brennan, J., concurring).

207. *Id.* at 823–24 (majority opinion).

208. *Id.* at 812.

209. *Id.* at 821.

210. 111 F.3d 1332, 1334 (7th Cir. 1997).

211. *Id.* at 1343–47.

212. *Id.* at 1334.

213. *Id.*

214. *Id.* at 1345.

215. *Id.*

216. 489 U.S. 378, 391 (1989).

217. *Id.* at 385.

218. *Palmquist v. Selvik*, 111 F.3d 1332, 1346 (7th Cir. 1997) (citing *Erwin v. County of Manitowic*, 872 F.2d 1292, 1298 (7th Cir. 1989); *Harris*, 489 U.S. at 378).

Would this failure-to-train question be answered differently if the law enforcement officer were a constable, not a sheriff's deputy? One relevant difference is the absence of control by a county over a constable. The voters of the township elect the constable. The county is not required by state law to provide any support for the constables within the county. Yet, the county is surely aware of the potential harm that could be caused by untrained constables.

The Court has observed that not all examples of policy or custom are demonstrated by written directives or decisions.²¹⁹ A policy may be found when the city or county has a practice "so permanent and well settled as to constitute a 'custom or usage' with the force of law."²²⁰ A county that has never provided any form of training for constables arguably has established a policy of not offering any training to constables.

Another example of action that has been ruled to be policy or custom, so as to result in *Monell* liability of a city or county, is the practice of serving subpoenas by breaking into private offices.²²¹ In *Pembaur v. City of Cincinnati*,²²² the Court held that a decision by a prosecuting attorney directing officers to break into a private business to serve subpoenas constituted the "policy" of the county.²²³ The Court refused to accept the defense that this was a single occurrence and, thus, not policy.²²⁴ This was a conscious decision made by a county policy-maker.²²⁵ This deliberate choice can result in county liability.

B. Possible Defenses to Governmental Liability

One possible defense is that a county was not aware of any potential problem of constable liability. Courts have held that the absence of prior, similar problems is a factor that the court can consider in determining deliberate indifference.²²⁶ If a county has never had a complaint of civil rights violations or other torts against constables, then the county could argue that there was nothing to place it on notice of any potential problem or of the resulting need for training of constables.

219. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 168 (1970).

220. *Id.* at 167-68 (1970); *see also* *City of St. Louis v. Prapotnik*, 485 U.S. 112, 127 (1988).

221. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

222. *Id.* The deputies chopped down the door of Pembaur's clinic with an axe and brought out two persons who were not the witnesses that were sought by the subpoenas. *Id.* at 473.

223. *Id.* at 484.

224. *Id.*

225. *Id.* at 485.

226. *Id.*; *see also* *Hirsch v. Burke*, 40 F.3d 900, 904-05 (7th Cir. 1994).

A strong counter-argument, however, suggests itself: it is obvious that an untrained constable is a potential danger to the community. Arguably, a jury could find a county that provided no training or support to constables relating to matters such as high-speed vehicular pursuits, firearms training, or the use of force is deliberately indifferent to the safety of the public and is, therefore, responsible for the constitutional torts of constables under § 1983. A plaintiff could thus demonstrate county liability resulting from injuries from a high-speed pursuit, an unlawful detention, or the use of excessive force.

Liability of the local government for acts of law enforcement officers exists only when the decisions that establish policy or custom promote the behavior which is alleged to cause the unlawful deprivation of rights.²²⁷ The Supreme Court has stated that causation must be established by an “affirmative link between the policy and the particular constitutional violation alleged.”²²⁸ Local governments, however, will not be entitled to the good-faith immunity protection that applies to officials of the local government.²²⁹ The Court has recognized that there is a long-standing body of law that distinguishes between governmental functions of municipalities, which are protected by sovereign immunity, and proprietary functions of municipalities for which they are liable.²³⁰

VII. PROPOSALS FOR REFORM

The unfunded and unregulated office of constable in the State of Arkansas is a historical remnant from our English common law heritage. The constable has been left behind in the modernization and professionalization of law enforcement that has occurred in the last century. Apparently, the only reason we still have the office of constable in its present unfunded and unregulated form is that state legislators have not been sufficiently motivated to take the step of modifying the law so as to impose some regulations or restrictions on the office.

Constables are elected officials; they are also exempt from requirements relating to the certification and training of law enforcement officers in the State of Arkansas.²³¹ This exemption may have been directed largely

227. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985).

228. *Id.*

229. *Owen v. City of Independence*, 445 U.S. 622, 652–53 (1980). The court recognized that while there is a need for protection of local governmental officials from liability for discretionary decisions and actions, there is no such need to protect the government itself. *Id.*

230. *Id.* at 644.

231. ARK. CODE ANN. § 12-9-101–14 (West 2004). The Code specifically excludes “officers who are elected by a vote of the people” from the certification process. *See id.* § 12-9-102(2) (defining a “law enforcement officer” as “any appointed law enforcement officer who

toward county sheriffs, but it applies equally to the office of constable.²³² Also excluded are radio operators, dispatchers, and jailers.²³³

There may be some policy distinction between the office of sheriff and the office of constable. Sheriffs have developed from rural law officers who performed substantial line duties to semi-bureaucrats who act in predominantly administrative and supervisory capacities. That is not the case for the constable, who still acts largely alone and without supervision. Thus, the absence of training and certification of constables may result in untrained, unqualified, and unsupervised officers working the roads and highways of the state.

Two proposals for reform are worth considering: (1) the elimination of the office of constable or, alternatively, (2) the requirement of law enforcement training and certification for all constables.

A. Eliminating Constables

One option is to abolish the office of constable. Inasmuch as the Arkansas constitution provides for the election of constables,²³⁴ it would require a constitutional amendment to eliminate the office. Are the historical antecedents and traditions of the office of constable sufficient to justify the continued existence of the office? A compelling argument can be made to support this option to eliminate the office of constable. Constables were necessary when the state was sparsely populated so that there was almost no municipal police protection, and sheriffs had little in the way of staff or funding. The one constable in each township of a county was an important element in the justice system. The changing demographics of the state and the funding now provided to state and local police—compared to the total absence of funding and technological support for constables—has changed the criminal justice system to such an extent that the continuation of the office of constable is not reasonable.

On the other hand, an argument for continuation of the office of constable can be made for the state's more rural areas. Sheriff's departments are often understaffed and, thus, cannot adequately patrol or respond. Constables could be utilized as additional patrol officers. They could also be used

is responsible for the prevention and detection of crime and the enforcement of criminal, traffic, or highway laws of this state, excluding only those officers who are elected by a vote of the people"); *see also* Op. Ark. Att'y Gen. 91-090 (1991).

232. Similarly, Kentucky also exempts constables, sheriffs, and certain other officials from the state certification requirements. *See* KY. REV. STAT. ANN. § 15.380(5) (LexisNexis Supp. 2005).

233. *See* City of Pocahontas v. Huddleston, 309 Ark. 353, 358, 831 S.W.2d 138, 141 (1992).

234. *See* ARK. CONST. art. VII, § 47.

to transport prisoners. Any utilization of constables, however, would be severely limited by the fact that there is no provision for payment to the constable for these services. If they are to provide any coordinated services, they should be under the supervision of the sheriff. As a practical matter, no real supervision and control will occur without financial support. Furthermore, the financial support should also be tied to the supervision.

Are these funds to come from the state? Not likely, in view of its current fiscal condition. If the funds are to come from the county, then why not use the available financial resources to hire additional deputies who would be under the control of the sheriff as well as the statutory requirement of certification? There is no requirement that counties provide any compensation to constables.²³⁵ With no requirement for funding, the likelihood of adequate funding of constables is almost non-existent.

B. Requiring Certification of Constables

If the state is to continue to maintain the office of constable, there is no justification for allowing them to be unregulated. A reasonable measure would be to require certification of constables. The statute exempting law enforcement officers who are “elected by a vote of the people”²³⁶ could be modified by limiting only those officers “elected by a county-wide vote of the people.” This would leave the exemption of sheriffs in place. It could be justified because of the clear difference between an officer elected by all voters of the county and officers elected only by the voters of one township. A compelling argument could also be made to eliminate the elected-official exemption altogether. Elected sheriffs or constables could be required to obtain certification within some reasonable time period after their election.

The scheme employed by Pennsylvania,²³⁷ which mandates certification of constables and acquisition of liability insurance before they are permitted to carry a firearm or to serve judicial writs, is worthy of consideration. However, without some system of reasonable compensation, it is unlikely that any substantial number of constables will seek certification. If the goal of requiring certification is to regulate the office of constable out of existence, then this approach may be successful.

To do nothing and simply leave the system alone—to choose to avoid both elimination and certification of constables—is to continue to allow often untrained and unqualified persons to possess substantial powers to detain and deprive persons of their liberty. The present scheme is also a

235. See *Op. Ark. Att’y Gen.* 2000-101 (2000) (2000 WL 635094).

236. ARK. CODE ANN. § 12-9-102(2).

237. See *supra* notes 68–71.

source of serious liability exposure for counties that should be given close scrutiny by law— and policymakers.

VIII. CONCLUSION

Constables have broad authority in the enforcement of the criminal law and traffic codes. Almost any scenario of potential liability faced by certified law enforcement officers employed by a police department or sheriff's department may also face constables. The constables, however, often operate in this modern era of more technological, more legalistic, and more professional criminal justice environment without government funding, regulation, or support.

If a constable uses unjustified and excessive force against a person, utilizes improper and dangerous restraint techniques, or engages in unacceptably dangerous vehicular pursuit, thus causing injury to a person, where would the civil liability for this harm fall? Certainly the constable may be held accountable, but the county too may face exposure for civil remedies. If a plaintiff could establish that the county was deliberately indifferent to the harm that could be caused by untrained constables, then the county, the real "deep pocket" in any such case, would be at serious risk of a civil judgment. Failure to take any action to offer training to constables may be the most important factor in deciding the issue of deliberate indifference.

Counties should offer training to constables on the appropriate standards of conduct for law enforcement. The legislature should consider abolition or regulation of the office of constable. To do nothing is to be deliberately indifferent to the safety of the citizens of the state.