APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 18-1498, 18-1499, 18-2170 & 18-2177

J.K.J. and M.J.J.,

Plaintiffs-Appellees,

v.

POLK COUNTY AND DARRYL L. CHRISTENSEN,

Defendants-Appellants.

Argued: Dec. 5, 2019
Decided: May 15, 2020

Before: Wood, *Chief Judge*, and Bauer, Easterbrook, Kanne, Rovner, Sykes, Hamilton, Barrett, Brennan, Scudder, and St. Eve, *Circuit Judges*.

OPINION

SCUDDER, *Circuit Judge*. While confined in the Polk County Jail, two female inmates, J.K.J. and M.J.J., endured repeated sexual assaults at the hands of correctional officer Darryl Christensen. The two women brought suit in federal court against Christensen and Polk County. A trial ensued, and the jury heard evidence of Christensen's horrific misconduct over a three-year period. The County's

written policy prohibited sexual contact between inmates and guards but failed to address the prevention and detection of such conduct. Nor did the County provide any meaningful training on the topic. What is more, toward the beginning of the relevant period, the County learned that another guard made predatory sexual advances toward a different female inmate. The trial evidence showed that the County imposed minor discipline on the guard but from there took no institutional response—no review of its policy, no training for guards, no communication with inmates on how to report such abuse, no nothing. In the end, the jury returned verdicts for J.K.J. and M.J.J.

The case against Christensen was open and shut. But a divided panel of this court overturned the jury's verdict against Polk County, determining that the trial evidence failed to meet the standard for municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). We decided to rehear the case en banc and now affirm the jury's verdicts against both Christensen and Polk County. While the standard for municipal liability is demanding—designed to ensure that a municipality like Polk County is liable only for its own constitutional torts and not those of employees like Christensen—the evidence was sufficient to support the verdict against the County.

I

J.K.J. and M.J.J. sued Christensen and Polk County under 42 U.S.C. § 1983, alleging that the defendants violated the Eighth and Fourteenth Amendments by acting with deliberate indifference to

a serious risk of harm to their safety and well-being. They also brought a negligence claim under Wisconsin law against the County. The district court consolidated the cases for trial. The five-day trial ended with the jury finding both defendants liable on all claims, and we recount the facts in the light most favorable to that verdict. See *Martin v. Milwaukee County*, 904 F.3d 544, 547 n.1 (7th Cir. 2018).

A

J.K.J. and M.J.J. suffered from addictions and committed crimes that landed them in the Polk County Jail intermittently between 2011 and 2014. Located in northwest Wisconsin, the institution houses up to 160 inmates, including a small number of women, and employs about 27 correctional officers. Christensen worked for 19 years as one of the guards tasked with protecting the inmates—a duty he severely betrayed.

J.K.J. and M.J.J.'s experiences with Christensen were unique but shared a basic pattern. Christensen began by commenting on their appearances—remarks like "nice ass" and "you're looking good"—with the verbal harassment then escalating to explicit sexual overtures. In time came physical contact, which began with Christensen groping and kissing the women and from there advanced to oral sex and digital penetration and eventually to intercourse. J.K.J. could not pinpoint the total number of times Christensen assaulted her but, by way of example, stated that, during a two-month period in the summer of 2012, he insisted on sexual contact every time he was on duty. For her part, M.J.J. estimated that Christensen

engaged in sexual contact with her 25 to 75 times. These events spanned about three years.

Christensen took steps to conceal his misconduct within the jail. While making inappropriate sexual comments in front of others, he always made sure to take J.K.J. and M.J.J. to hidden areas to engage in the physical contact. Christensen also instructed both women not to tell anyone of the encounters because, if word got out, he would lose his job and family. For the most part, the women heeded his admonishment and kept the abuse to themselves during their incarceration. J.K.J. and M.J.J. explained their silence in terms familiar to many victims of sexual harassment and assault—shame, doubt anyone would believe them, and fear of retaliation.

But the truth eventually came out. Another county's investigator called Polk County to report an allegation that Christensen had sexual contact with an inmate. Polk County responded by commencing an internal investigation, and Christensen resigned upon being confronted. A criminal investigation followed and led the Wisconsin Department of Justice to J.K.J. and M.J.J. After expressing initial reluctance to talk, both women eventually felt safe enough to trust the investigators with their stories. Christensen later pleaded guilty to criminal charges and is now serving a 30-year sentence.

B

Christensen's conduct was not the only evidence of sexual misconduct at the Polk County Jail that the jury heard. In 2012, toward the beginning of Christensen's assaults of J.K.J. and M.J.J., complaints surfaced that correctional officer Allen

Jorgenson had an inappropriate relationship with a female inmate known as N.S. Sergeant Steven Schaefer brought the complaints to Captain Scott Nargis, the day-to-day head (effectively the warden) of the jail. Schaefer reported that Jorgenson had touched N.S. on her waist and rear end, adding that the complaints did not come as a surprise because "[w]e have all heard complaints about [Jorgenson's] inappropriate comments to both inmates and staff."

Captain Nargis responded by partnering with Deputy Sheriff Steven Moe to investigate the contentions. Although Jorgenson and N.S. denied any wrongdoing, Nargis and Moe believed lines had been crossed. Indeed, the investigation revealed that Jorgenson not only flirted with female inmates, but also focused video cameras on the female housing pod for an inordinate amount of time, and fostered an inappropriate relationship with N.S. But Moe testified that he initially did not believe Jorgenson had a sexual relationship with N.S.

Based on those findings, Moe and Captain Nargis decided that the right response was to issue a written reprimand to Jorgenson. As part of doing so they assured Jorgenson that the reprimand was not a "major deal" and he could move on from it. "After having confronted Allen," Moe testified, "we felt that it was important that we recognize and support Allen's prior work history. He was a good employee. He was a go-to employee. We appreciated his efforts and his work, so we wanted to salvage him as an employee."

But the issue reawakened when N.S. sent Captain Nargis a letter, dated January 19, 2012, explaining that she had lied in denying the allegations about

Jorgenson. At J.K.J. and M.J.J.'s trial, the district court admitted N.S.'s letter not for its truth, but for the non-hearsay purpose of informing the jury of allegations of sexual misconduct that Polk County received during the relevant period.

N.S. began her letter by saying "I'm sorry for lying" and "I would like to tell the truth about the allegations made against Allen Jorgenson" because "[t]here are many things [Jorgenson] has said & done that have been inappropriate in a sexual manner towards me" and other inmates. Before detailing her own account, N.S. emphasized that "I did not tell the truth [earlier] because [Jorgenson] has told me to keep quiet & said he didn't wanna get in trouble." From there N.S. described the following misconduct that "started during my last stay here from 10-27-10 til 7-6-11 & is continuing through my incarceration now":

- Jorgenson "always makes comments about seeing us in the shower. He always calls it [a] 'nice show.'"
- He has asked me "what the color of the day was"—a question about the color of "my underclothes."
- "He has told me he wants me to ride topless in his boat, [and] he has wanted me to lift my shirt for him while I've been here [in the jail] both times."
- "Many times he's leaned over the cart to look down my shirt."
- "Recently he has started touching me." "Everyone knows he's doing these things" and "[w]hen he walks me back from the nurses office, visiting anywhere he shoves me &

pushes me" and "very recently … he grabbed me around my waist & kept his hand there til the K-Pod door opened then he slapped my butt."

- "[W]hen giving me meds, he'll look to see if the camera is on us. If not he comes around the cart & touches my back & butt as I go back in. One time the camera was on our direction, he said dam[n], I was gonna go in for the kill. Whatever that meant."

N.S. closed her letter by underscoring that "another reason I did not tell the truth [in the initial investigation] is because I don't want problems with [Jorgenson] or any of the other jailers who will be mad @ me for confirming these accusations." She also explained that she was not candid with her fellow inmates either because "I didn't want Allen [Jorgenson] in trouble or mad @ me, making it hell for me here."

Upon receiving N.S.'s letter, Deputy Sheriff Moe and Captain Nargis reopened the prior investigation to take a fresh look at Jorgenson's conduct. Sergeant Schaefer also got involved, spoke with N.S. to verify her report, and concluded that she may have been telling the truth at that point. Moe, too, acknowledged at trial that, upon receiving N.S.'s letter, he found it "more likely" that Jorgenson had inappropriately or even illegally touched her.

From there, however, Polk County chose not to revisit its prior disciplinary decision and determined that Jorgenson's conduct still merited only the prior written reprimand. The jail took no further action in response to N.S.'s new allegations. Jorgenson later

resigned after an unrelated investigation regarding his female *co-workers*.

Sexual harassment had appeared in the jail in other ways too. Christensen testified that he witnessed at least two other jailers, including Allen Jorgenson, make sexual comments to inmates. And then there was the issue of "tier talk," a term that Captain Nargis agreed reflected "not necessarily flattering talk amongst co-workers in the tier." By way of example, Captain Nargis confirmed hearing that Christensen had made inappropriate sexual comments about women in general and, on one occasion, about an inmate's breasts. Nargis even acknowledged that "on occasion" he too participated in tier talk, in an effort to be viewed as part of the group and a trusted leader of the officers.

C

What Polk County had done (and not done) to prevent the sexual abuse of inmates was a key focus at trial. The County established written policies against the sexual harassment and assault of inmates. Policy I-100 of the jail's Policy and Procedures Manual listed inmates' rights and stated that they were never to be subjected to "verbal, physical, emotional, psychological or sexual harassment" by staff. Any harassing officer was "subject to disciplinary charges and/or termination."

Another of the Manual's provisions, Policy C-202, stated that jail employees were prohibited from fraternizing with inmates, including "[b]eing in an intimate social or physical relationship with a prisoner." In July 2012, Polk County updated the Manual to include some language from the Prison

Rape Elimination Act, a federal statute enacted in 2003 to deter the sexual assault of prisoners. The new language instructed that any staff member or inmate "who knows or reasonably suspects" sexual misconduct was to inform the "Jail Administrator" or, if the complainant was an inmate, she could inform a staff member, and went on to describe how such reports would be handled. The section noted that "Wisconsin State Statutes make it a criminal offense for correctional staff members to have sexual intercourse or contact with an individual confined in a correctional institution." See Wis. Stat. § 940.225(2)(h).

The 12-page Inmate's Handbook also mentioned sexual misconduct, providing: "[e]very inmate has the right to be safe from sexual abuse and harassment. No one has the right to pressure you to engage in sexual acts. If you are being pressured[,] threatened, or extorted for sex, you should report this to staff immediately." As the plaintiffs' expert would later describe it, however, this information appeared in "very small font; one paragraph in the middle not even headlined, not even with a title on it." Inmates received the Handbook during the intake process and were told to read it. At no point, though, did the jail provide the inmates with any further information on how to report sexual misconduct.

Aside from these written policies, Polk County Jail staff received no training (in any sense of the word) focused on the sexual harassment or assault of female inmates. Few though they are, the details are important. Consider Polk County's program that required officers to read a specified policy each day

from the jail's Policy and Procedures Manual and then to initial a piece of paper and write the policy's title as proof they did so. For his part, Christensen told the jury that most of the time he just went through the motions of writing down a policy's title and signing without reviewing anything. Even more, the trial record contained no evidence showing that Captain Nargis or anyone from the County dedicated any portion of any live training session to reviewing the jail's written policies or underscoring the necessity of reporting any known or suspected sexual misconduct.

Any in-person training that occurred was hidden among the jail's general training and completely silent on preventing and detecting the sexual assault of female inmates. There was, for example, a county-wide (but not jail-specific) training on sexual harassment that addressed how employees should maintain proper co-worker relationships but which Sergeant Schaefer clarified was "not anything regarding inmates." The jury also heard evidence about the jailers' training on the vague topic of maintaining distance from inmates, with no testimony to suggest that training ever touched the topic of sexual assault. Sergeant Schaefer, who helped oversee the training of new officers, expressly admitted that much. He recalled being taught in "jail school" that he should not "become too close" with inmates or share personal information with them, though he explicitly denied any memory of being told that it was improper for jail officers to have sexual relationships with inmates. Those vague cautions were repeated to him during on-the-job training in the Polk County Jail. And when Sergeant Schaefer trained others, he gave the same admonishments. While Schaefer agreed that

having sex with an inmate would qualify as being "too familiar," he did not testify that he ever addressed this topic in any way, including in any training session.

Beyond learning that training on sexual abuse was nearly nonexistent, the jury heard affirmative evidence revealing the County's dismissive attitude about preventing and detecting it. The prime example came in the "tizzy email." On February 21, 2014, near the end of Christensen's abuse of J.K.J. and M.J.J., Captain Nargis sent an email to many staff members summarizing the contents of a training held the day before, which included the Prison Rape Elimination Act as one of its several topics. Nargis wrote that it "[s]eems that everyone is in a tizzy to train their staff on PREA." Nargis testified that he used the word "tizzy" to mean "that there's a bit of a scramble for, in this particular case, time and attention that seemed to be misplaced." His email went on to state that, although "[t]here is no requirement for [the jail] to be compliant with everything that [PREA] calls for," the training would "hit the basics."

For their part, J.K.J. and M.J.J. presented evidence on the inadequacy of Polk County's policies and training. They did so through the testimony of Jeffrey Eiser, an expert on jail operations. Eiser explained that Congress enacted PREA in response to an "evident" and "prevalent" problem with sexual assault and abuse in jails. He added that PREA's threefold objectives are "to prevent sexual abuse and harassment, to detect it, and then to respond to it." But Eiser's review of Polk County's policies left him of the conviction that the jail had sufficiently covered only the third base—responding to sexual abuse

complaints—but otherwise inadequately addressed prevention and detection.

Eiser did not stop there. He then offered concrete examples of ways Polk County could improve its policies. To prevent abuse, a policy could make clear that the institution operates under a zero-tolerance policy on sexual abuse and harassment. It likewise could designate a PREA coordinator, train staff on what to look for and how to report abuse as well as how to make inmates feel comfortable coming forward, take added care with job assignments within the facility, and ensure that all inmates understand their right to be free from sexual abuse and harassment. Similarly, Eiser testified that, to detect sexual misconduct, a policy could make sure that the inmates understand what abuse entails, since they may come from life experiences that have blurred the lines of abnormal and normal relationships. Eiser added that a sound policy also would provide a safe, confidential way for inmates to report abuse (through, for example, the use of a locked dropbox), instead of putting inmates in the position of having to hand a grievance to an officer who may be friends with the abuser. Polk County's policy lacked all of these features.

D

The jury returned a verdict in favor of J.K.J. and M.J.J. on their claims against both Christensen and Polk County. The case proceeded to the damages phase, and the jury then heard testimony about the impact the defendants' conduct has had on the women's lives. The jury translated that evidence into compensatory damages awards of $2 million each for J.K.J. and M.J.J. The jury further determined that

Christensen's conduct warranted his paying punitive damages of $3.75 million to each woman.

Both defendants challenged the jury's verdicts in post-trial motions. They moved under Rule 59 for a new trial based on errors that they contended the district court made. Polk County also moved under Rule 50 for judgment as a matter of law, arguing that the trial evidence was legally insufficient to prove J.K.J. and M.J.J.'s § 1983 claims and that it was immune from liability on the state-law negligence claim. The district court agreed on the latter point and dismissed the negligence claim, but otherwise left intact the jury's verdicts on the constitutional claims and denied the request for a new trial.

Having presided over the trial, Judge Conley determined that the evidence sufficed to allow the jury to find from the "tier talk" alone that "jail officials not only turned a blind eye, and perhaps even fostered, a culture where inappropriate sexual comments were accepted as the norm." Highlighting the showing J.K.J. and M.J.J. made of both Captain Nargis's learning in 2012 of Allen Jorgenson's sexual misconduct and his dismissive handling of PREA training in February 2014, Judge Conley explained that the jury had ample evidence from which to conclude that the County "downplayed the importance of preventing sexual assault and harassment within the jail." Considered in its entirety, Judge Conley continued, the evidence supported the jury's finding by a preponderance of the evidence that "if the County had provided adequate notice and training to correctional officers *and* inmates on what constitutes sexual harassment and abuse, and how to report it,

plaintiffs [J.K.J. and M.J.J.] may not have been sexually assaulted and harassed" from 2011 to 2014.

This appeal followed.

II

Christensen gives us no good reason to upset the jury's verdict against him. To establish that his conduct violated their Eighth Amendment rights, J.K.J. and M.J.J. had to prove that Christensen acted with deliberate indifference to an excessive risk to their health or safety. See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Sinn v. Lemmon*, 911 F.3d 412, 419 (7th Cir. 2018). It was more than reasonable for the jury to conclude that the trial evidence met that standard. To say that the sexual assaults he committed against J.K.J. and M.J.J. objectively imposed serious risk to their safety would be an understatement. And the evidence was equally sufficient to show that Christensen knew of that danger. Indeed, he admitted at trial that he knew he was putting the plaintiffs at risk and that his conduct not only violated prison policy but was criminal.

Christensen's only defense was to try to somehow persuade the jury that J.K.J. and M.J.J. consented to the sexual relations. The effort failed and now on appeal he contends that the district court erred in not giving the jury a special instruction on his consent defense. Our review of the trial transcript shows that the district court completely and accurately instructed the jury on the elements of the Eighth Amendment claim. No further explanation was necessary to tell the jury how to consider the consent issue. If the jury had bought Christensen's story that J.K.J. and M.J.J. were willing participants (and, for that matter, even

capable of being willing participants under the circumstances), it would have found that the women had not met their evidentiary burdens of proving that he acted with deliberate indifference to their safety and well-being. But the jury reached no such conclusion. The instructions were sufficient.

Christensen's last challenge is to the damages awards. He finds them problematic because the jury gave the same amounts to both women. To be sure, the sexual abuse had unique effects on J.K.J. and M.J.J., who each came to Polk County Jail from distinct lives and suffered their own personal tragedies. But that does not mean that they necessitated different compensatory damages amounts, particularly given the psychology expert's recommendation of identical courses of treatment for both women. Nor was the jury's punitive damages award so great as to be unreasonable or outside the bounds of due process.

The judgment against Christensen is easily affirmed.

III

A

We now turn to the more difficult question of Polk County's liability. The County raises a few issues on appeal but only one merits discussion—whether the trial evidence was sufficient to sustain the jury's verdict. Polk County is not automatically on the hook for Christensen's unconstitutional acts just because it employed him. Under the familiar holding of *Monell v. Department of Social Services*, local governments like Polk County can be held responsible for constitutional violations only when they themselves cause the deprivation of rights. 436 U.S. 658, 691-92 (1978).

Time and again the Supreme Court has reinforced the strict prohibition against allowing principles of vicarious liability to establish municipal liability under § 1983. See *id.* at 694-95; see also *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997) (collecting cases and reinforcing that the doctrine of *respondeat superior* does not apply under § 1983).

Monell liability is difficult to establish precisely because of the care the law has taken to avoid holding a municipality responsible for an employee's misconduct. A primary guardrail is the threshold requirement of a plaintiff showing that a municipal policy or custom caused the constitutional injury. See *Monell*, 436 U.S. at 690-91. "Locating a 'policy,'" the Supreme Court has emphasized, "ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Bryan County*, 520 U.S. at 403-04; see also *Glisson v. Indiana Dep't of Corrs.*, 849 F.3d 372, 381 (7th Cir. 2017) ("The critical question under *Monell* remains this: is the action about which the plaintiff is complaining one of the institution itself, or is it merely one undertaken by a subordinate actor?"). A municipal action can take the form of an express policy (embodied, for example, in a policy statement, regulation, or decision officially adopted by municipal decisionmakers), an informal but established municipal custom, or even the action of a policymaker authorized to act for the municipality. See *Glisson*, 849 F.3d at 379.

More is required before *Monell* liability can attach, however. "The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Bryan County*, 520 U.S. at 404. The plaintiff, in short, "must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id.*; see also *Monell*, 436 U.S. at 694 (explaining that only when a municipality's policy or custom "inflicts the injury" is the entity responsible under § 1983).

The most straightforward *Monell* claims are those in which a plaintiff alleges that an affirmative municipal action is itself unconstitutional. See *Bryan County*, 520 U.S. at 404-05. In those cases, inferences of culpability and causation are easy, for they follow directly from the municipality's intentional decision to adopt the unconstitutional policy or custom or to take particular action. See *id.* at 405. Consider, for example, a city with a policy authorizing its employees to take some unconstitutional act in connection with traffic stops after midnight. Deliberate conduct is easily inferred from the intentional adoption of the offending policy. And if a victim of the unconstitutional act emerges as a *Monell* plaintiff, there will be little doubt that it was the city's express instruction—not the employee's independent choice—that caused the injury.

Here, however, J.K.J. and M.J.J. do not claim that Polk County took affirmative action to harm them. To the contrary, their theory of *Monell* liability roots itself

in inaction—in gaps in the County's sexual abuse policy and its failure to properly train the jailers in the face of obvious and known risks to female inmates. These failures to act, J.K.J. and M.J.J. contend, were deliberate and together caused their constitutional injuries. The Supreme Court has recognized that *Monell* liability can arise from such decisions because a "city's 'policy of inaction' in light of notice that its program will cause constitutional violations 'is the functional equivalent of a decision by the city itself to violate the Constitution.'" *Connick v. Thompson*, 563 U.S. 61, 61-62 (2011) (quoting *City of Canton v. Harris*, 489 U.S. 378, 395 (1989) (O'Connor, J., concurring in part and dissenting in part)); see also *Glisson*, 849 F.3d at 382 ("[I]n situations that call for procedures, rules or regulations, the failure to make policy itself may be actionable.").

But the path to *Monell* liability based on inaction is steeper because, unlike in a case of affirmative municipal action, a failure to do something could be inadvertent and the connection between inaction and a resulting injury is more tenuous. For these reasons, "[w]here a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Bryan County,* 520 U.S. at 405.

Rigorous though these standards may be, they are not insurmountable. The question before us is whether the evidence presented to the jury was legally sufficient to support the verdict against Polk County.

The law affords great respect to jury verdicts. As a court of review, our role is limited to policing the evidentiary threshold necessary as a legal matter to meet *Monell*'s demands. In doing so, we do not reweigh evidence, assess the credibility of any trial witness, or otherwise attempt to usurp the jury's role as factfinder. See *Ruiz-Cortez v. City of Chicago*, 931 F.3d 592, 601 (7th Cir. 2019) ("In our Rule 50 review, we give the nonmovant 'the benefit of every inference' while refraining from weighing for ourselves the credibility of evidence and testimony."). To the contrary, we must affirm unless there is "no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party." *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 926 (7th Cir. 2004).

Against this standard of review, and ever mindful of *Monell*'s exacting liability requirements, we turn to the evidence J.K.J. and M.J.J. put before the jury here.

B

All agree that Polk County's written policies categorically prohibited sexual contact with inmates and required responses to alleged violations. But J.K.J. and M.J.J. presented evidence that the policy contained material gaps. The jury heard expert testimony from Jeffrey Eiser about the importance of a policy that does not wait for reports of sexual abuse to trigger an institutional response, but instead contains measures both to prevent the wrongdoing in the first instance and to detect it if it does occur. Eiser spotlighted for the jury that Polk County's policy, although addressing incident response, fell far short on prevention and detection.

Eiser then explained that any number of policy measures could have filled the gaps at little or no cost to Polk County. Consider the need to detect sexual abuse. The importance of a safe and confidential reporting channel—even something as simple as a lockbox available to inmates—cannot be overstated. Under the County's policy, an inmate seeking to report abuse is left to inform one of 27 employees in a small jail that she suffered a sexual assault at the hands of his coworker. Given the perceived comradery among the male guards and acceptance of sexual harassment at the jail's highest levels (inferred perhaps foremost from the "tier talk"), the jury could have found that this was not a viable reporting option and indeed reflected a meaningful policy gap. Put most simply, the jury could have credited Eiser's expert testimony as part of finding that Polk County's policy deficiency affirmatively deterred the reporting and detection of sexual abuse of female inmates.

The policy gaps only widen when the focus turns to the County's sexual abuse training. Training is important because it can educate and sensitize guards as well as shape and reinforce institutional values, bringing to life words that otherwise exist only on paper. The trial evidence showed that the County's training on preventing and detecting the sexual harassment and abuse of inmates was all but nonexistent. The training consisted almost exclusively of informing guards of the easy and evident—that the jail's policies prohibited sexual contact with inmates. The only training even addressing the sexual assault of inmates by guards came in a single session on the Prison Rape Elimination Act in 2014, well after much of Darryl Christensen's abuse of J.K.J. and M.J.J. had

occurred, and which he did not even attend. And even then the jury—ever mindful of Captain Nargis's dismissive "tizzy email"—could have found that the County itself hardly took the PREA training seriously.

What was missing stands out. The jury heard no evidence of the County informing guards of the inherent vulnerability the confinement setting presents to female inmates, educating jailers on the symptoms of an inmate suffering from the trauma of abuse, requiring officers to report each other's misconduct, or taking any time to otherwise instruct guards on matters of prevention and detection, whatever form that might have taken.

The trial evidence makes the bottom line plain: the jury could have found that Polk County's sexual abuse prevention program was entirely lacking. The policy stated nothing but the obvious—do not sexually abuse inmates. The County then exacerbated the gap by failing to use training as the means of making the policy prohibition a reality (or, at the very least, mitigating risk) within the institution. The jury could have tallied these gaps as part of finding the conscious, deliberate municipal inaction upon which to rest *Monell* liability.

C

Identifying municipal action—or, as it were, inaction—is only part of the requisite inquiry under *Monell*. The Supreme Court has made plain that a failure to act amounts to municipal action for *Monell* purposes only if the County has notice that its program will cause constitutional violations. See *Connick*, 563 U.S. at 61-62. Demonstrating that notice is essential to an ultimate finding and requires a

"known or obvious" risk that constitutional violations will occur. *Bryan County*, 520 U.S. at 410.

In many *Monell* cases notice requires proof of a prior pattern of similar constitutional violations. See *id.* at 62. This case presents no such pattern. The district court declined to instruct the jury on the theory because it found insufficient evidence of previous instances of sexual assault known to the County. In so concluding, however, the district court recognized that J.K.J. and M.J.J. had available another path to show Polk County had the requisite notice.

The alternative path to *Monell* liability comes from a door the Supreme Court opened in *City of Canton v. Harris*, 489 U.S. 378 (1989). The Court observed that there may, as here, be circumstances in which "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights" that a factfinder could find deliberate indifference to the need for training. *Id.* at 390. "In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury." *Id.* Put another way, a risk of constitutional violations can be so high and the need for training so obvious that the municipality's failure to act can reflect deliberate indifference and allow an inference of institutional culpability, even in the absence of a similar prior constitutional violation.

The Court did not leave the liability point in any way abstract. To the contrary, it gave the express example of "city policymakers [who] know to a moral

certainty that their police officers will be required to arrest fleeing felons." *Id.* at 390 n.10. "The city," the Court continued, "has armed its officers with firearms, in part to allow them to accomplish the task." *Id.* The Court concluded that under those circumstances, "the need to train officers in the constitutional limitations on the use of deadly force can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." *Id.* (internal citation omitted).

Drawing upon this precise example from *City of Canton*, the Court has since reinforced that this doorway to *Monell* liability remains ajar. In *Bryan County*, the Court confirmed that *City of Canton* "did not foreclose the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability." 520 F.3d at 409. The Court explained that "in a narrow range of circumstances," deliberate indifference could be found when the violation of rights is a "highly predictable consequence" of a failure to provide officers what they need to confront "recurring" situations. *Id.* And even more recently, in *Connick v. Thompson*, the Court renewed its prior observations that *City of Canton* "sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." 563 U.S. at 64.

Though the Supreme Court has yet to confront a case that presents a viable *Monell* claim based on a municipality's failure to act in absence of a pattern, our court has done so twice. Our en banc decision in *Glisson v. Indiana Department of Corrections* relied upon *City of Canton* to hold that an institution could be liable for failing to adopt protocols for the coordinated and comprehensive treatment of chronically ill inmates. See 849 F.3d at 382. The inaction came at a time when the institution "had notice of the problems posed by a total lack of coordination," but then "despite that knowledge, did nothing for more than seven years to address that risk." *Id.* In reasoning fully applicable here, we concluded that a jury could find that the prison knew for certain that its health providers "would be confronted with patients with chronic illnesses, and that the need to establish protocols for the coordinated care of chronic illnesses is obvious," just like it is obvious that police officers would encounter situations where they would need protocols on the use of excessive force. *Id.*

And in *Woodward v. Correctional Medical Services of Illinois, Inc.*, we upheld a jury's *Monell* verdict against a jail's healthcare provider for an inmate's suicide. See 368 F.3d at 929. The training on suicide prevention—a requirement under the Eighth Amendment—was so inadequate and so widely ignored that the contractor was on notice that a constitutional violation was a "highly predictable consequence of [its] failure to act." *Id*. at 929 (citing *Bryan County*, 520 U.S. at 409). The trial evidence allowed the jury to infer that policymakers "noticed what was going on and by failing to do anything must

have encouraged or at least condoned" the misconduct that caused the inmate's death. *Id.* at 927. It did not matter that no one had been hurt before, as the law allowed no "one free suicide" pass. *Id.* at 929.

These teachings from the Supreme Court and our court make plain that *Monell* liability based on a failure to act, at its core, follows from a showing of constitutional violations caused by a municipality's deliberate indifference to the risk of such violations. Sometimes the notice will come from a pattern of past similar violations; other times it will come from evidence of a risk so obvious that it compels municipal action. But at all times and in all *Monell* cases based on this theory, the Supreme Court has directed the focus on the presence and proof of "a known or obvious" risk.

D

The jury had ample evidence to find that Polk County's policy failures—both the prevention and detection gaps in its written policies and the absence of training—occurred in the face of an obvious *and* known risk that its male guards would sexually assault female inmates.

Start with the County's affirmative obligation to protect its inmates: "[W]hen the State takes a person into its custody and holds [her] there against [her] will, the Constitution imposes upon it a corresponding duty to assume some responsibility for [her] safety and general well-being." *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). Just as the healthcare contractor in *Woodward* shouldered a constitutional duty to protect inmates from suicide, Polk County bore the constitutional responsibility to

protect its inmates from sexual assault. This requirement comes from the Eighth Amendment, because "[b]eing violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society." *Farmer*, 511 U.S. at 834.

Now consider the delicate setting for J.K.J. and M.J.J. They were confined in circumstances where they depended on male guards for nearly everything in their lives—their safety as well as their access to food, medical care, recreation, and even contact with family members. With this authority and control for the guards came power and, in turn, access and opportunity to abuse it. It is difficult to conceive of any setting where the power dynamic could be more imbalanced than that between a male guard and a female inmate. The jury knew that from common sense—the reality was as obvious as obvious could be—and they heard the point reinforced and underscored through the testimony of J.K.J., M.J.J., and their expert, Jeffrey Eiser. As J.K.J. aptly explained to the jury, "there's a male figure standing in front of me in a uniform with a badge that has authority to do whatever he wants to me." The confinement setting is a tinderbox for sexual abuse.

But there was more. J.K.J. and M.J.J. presented evidence that the County was aware of sexual misconduct happening within its jail, rendering the risk to female inmates far from hypothetical. The jury learned that Captain Nargis knew of sexual comments male guards made about female inmates. This was especially consequential because Nargis was responsible for creating and implementing the jail's

policies and standards, and his actions therefore could be attributed to the County for the purpose of *Monell* liability. See *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 468 (7th Cir. 2001) ("The question is whether the promulgator, or the actor, as the case may be—in other words, the decisionmaker—was at the apex of authority for the action in question."); see also *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) (employing similar reasoning). Captain Nargis even admitted to himself participating in "tier talk," jailhouse chatter that the jury easily could have found amounted to sexually inappropriate banter—in a word, harassment. The tier talk bespoke volumes about the jail's culture—the exact point the district court underscored as part of rejecting Polk County's Rule 50 motion challenging the jury's verdict. A reasonable jury could have viewed the jail's denigrating culture as confirming the undeniable risk that a guard would grow too comfortable, lose his better angels, and step over the clear line marked in Polk County's written policies.

If the County had looked the other way until this point, the notice became undeniable when Captain Nargis learned of Allen Jorgenson's sexual misconduct against inmate N.S. Recall the timing. Nargis learned of Jorgenson's reported wrongdoing no later than January 2012. It was then that N.S. wrote her letter explaining the predatory and escalating nature of Jorgenson's sexual pursuit of her within the jail. Recall, too, the details: N.S. informed Nargis that Jorgenson's conduct began with watching her (and other female inmates) shower, grew to requests to expose her body for him, and in time intensified to

forcibly touching her in a sexual manner—all the while ordering her to "keep quiet."

A reasonable jury could have viewed the County's learning of Jorgenson's sexual exploitation of N.S. as sounding an institutional alarm, making it "highly predictable," if not certain, that a male guard would sexually assault a female inmate if the County did not act. *Bryan County*, 520 U.S. at 409. By that point the risk was not only obvious, but blatantly so. To be certain, the accusations of Jorgenson's reprehensible conduct fell short of rape. But it would be naive in the extreme to dismiss the misconduct as no more than boorish behavior or, more to it, providing no incremental notice of an obvious risk.

The jury was not compelled to see Jorgenson's conduct as jailhouse horseplay, as guards somehow just being guards, or anything of the sort. The evidence allowed the opposite conclusion: the jury was entitled to conclude that, separate and apart from whatever discipline should befall Jorgenson, the County had a plain example of predatory sexual behavior staring it in the face. It took no imagination for the jury to see parallels between Jorgenson's escalating actions, cut short as they were, and Christensen's early abuse of J.K.J. and M.J.J. See *Cash v. County of Erie*, 654 F.3d 324, 337 (2d Cir. 2011) (upholding a *Monell* jury verdict because "knowledge that an established practice has proved insufficient to deter lesser [sexual] misconduct can be found to serve [as] notice that the practice is also insufficient to deter more egregious misconduct"). That Jorgenson's grooming of N.S. did not end with rape is no liability shield; it was good fortune. See

Woodward, 368 F.3d at 929 ("That no one in the past committed suicide simply shows that [the jail's healthcare contractor] was fortunate, not that it wasn't deliberately indifferent.").

And with red lights flashing, Polk County chose the one unavailable option—doing nothing. It did not change its sexual abuse policy, institute a training, inquire of female inmates, or even call a staff meeting. With the writing on the wall, Polk County deliberately chose to stand still, or at least a reasonable jury could have so concluded.

Having taken no action despite the obvious and known risk of sexual assaults in its jail, Polk County could not claim a lack of notice, much less surprise, upon learning that Christensen sexually assaulted J.K.J. and M.J.J. The County's written policies were lacking and its training on the topic was barely existent. Even if the County somehow harbored a different perspective, that view became untenable upon learning of Jorgenson's misconduct. The jury could have viewed the allegations of Jorgenson's wrongdoing as exposing as false any belief the County may have had that its barebones written policy and training were enough to protect its female inmates from sexual abuse. The County's inaction following knowledge that the existing program was not working—Jorgenson's sexual misconduct underscored that reality—was sufficient to demonstrate deliberate indifference. Or, as the Supreme Court put the same point in *City of Canton*, the necessity to act, whether by different training or new preventative measures, was "so obvious" and "the [existing] inadequacy so likely to result in a violation of constitutional rights"

that a deliberate choice to stay the course could be seen as a policy for which Polk County bears legal responsibility. 489 U.S. at 390. We likewise reasoned in *Glisson* that "the key is whether there is a conscious decision not to take action" and the record allowed a reasonable jury to so find because "the existence of the INDOC Guidelines [addressing the coordination of medical care], with which Corizon [as the prison's healthcare provider] was admittedly familiar, is evidence that could persuade a trier of fact that Corizon consciously chose the approach that it took"—"not to adopt the recommended polices—not for Glisson, not for anyone." 849 F.3d at 380, 381.

All of this is doubly true when coupled with other evidence of Polk County's deliberate indifference to sexual abuse. Remember that the County's investigation of Jorgenson ended with the considered conclusion that a reprimand was adequate discipline. But even the reprimand came with jail officials assuring Jorgenson that the censure was "not a big deal." The jury could have viewed this slap on the wrist as confirming the jail's broken culture, as explaining why not only the "tier talk" was allowed to go on—with Captain Nargis himself participating in it as a way of fitting in and earning the confidence of the guards under his supervision—but also why Nargis's "tizzy email" evinced such a dismissive attitude toward sexual abuse training. See *Cash*, 654 F.3d at 338 (holding the jury could infer deliberate indifference to the risk of inmate sexual assault because the jail's issuance of a one-page memorandum was a "token response" to a prior instance of lesser sexual misconduct).

Viewing this evidence all together, the jury could have found that Polk County did little to reinforce the dignity and respect owed female (and indeed all) inmates and instead seemed to enable a culture that condoned the sexual objectification of the women in its custody. Through this lens, Christensen's repeated sexual assaults of J.K.J. and M.J.J. were not the result of a "single instance of flawed conduct" but rather "based on repeated failures to ensure [the inmates'] safety … as well as a culture that permitted and condoned violations of policies that were designed to protect inmates." *Woodward*, 368 F.3d at 929. Risk that started as obvious (from the confinement setting and power dynamic between male guards and female inmates) was fully on display (following the Jorgenson incident) within an institution that scoffed at PREA, denigrated female inmates, and devoted not a word of its policies or a minute of any training session to concrete measures to prevent, detect, and respond to sexual assault. The jury stood on solid evidentiary ground seeing the County's dormancy as more than oversight, but instead as deliberate inaction.

We recognize that policies can always be more robust, and training can always be more thorough. PREA is not a constitutional standard, and jails are not required to adopt it. Our federal structure leaves the choices to state and local authorities.

Our conclusion is more limited: the risks to female inmates in the confinement setting are obvious—indeed, PREA owes its very existence to that reality—and N.S.'s report of Jorgenson's misconduct reinforced for Polk County that the risks were real and acute in the jail. Faced with that notice, the County had a legal

obligation to act—to take reasonable steps to reduce the obvious and known risks of assaults on inmates. See *Farmer*, 511 U.S. at 844-45; *Ortiz v. Jordan*, 562 U.S. 180, 190 (2011) (reinforcing *Farmer*'s requirement of a reasonable response). Just as a municipality cannot issue firearms to new police academy graduates, wish them Godspeed on the streets, and hope the new officers exercise sound judgment when deciding whether circumstances warrant the use of lethal force—the precise example the Supreme Court provided in *City of Canton*—Polk County could not, knowing all that it did about the risk within its jailhouse walls, dispatch male guards to stand watch over its female inmates equipped with nothing more than a piece of paper with a flat instruction not to abuse those under their care. The jury had enough to conclude that Polk County deliberately chose a path of inaction when that option was off the table.

E

Much of the same evidence proving Polk County deliberately indifferent to the constitutional consequences of its inaction likewise illustrates that its indifference was the moving force behind J.K.J. and M.J.J.'s injuries. "The high degree of predictability" that constitutes notice, the Supreme Court has emphasized, "may also support an inference of causation—that the municipality's indifference led directly to the very consequence that was so predictable." *Bryan County*, 520 U.S. at 409-10. Having established that the jury could conclude that the risk of constitutional injury—here, the sexual assaults—was obvious, it took but a small inferential

step for the jury to find causation. And inferences were required, for finding causation is not a mechanical exercise like working a math problem and getting an answer, but instead requires jurors to view evidence in its totality, draw on their life experiences and common sense, and then reach reasonable conclusions about the effects of particular action *and* inaction.

The circumstantial evidence paved multiple roads for the jury to travel to find that Polk County's inaction caused J.K.J. and M.J.J.'s constitutional injuries. The assaults did not end until Christensen was reported, giving rise to an eminently reasonable inference that if the County had put in place some of Eiser's proposed policies and training to prevent but especially detect sexual abuse, Christensen's conduct would have been exposed sooner, perhaps by one of his fellow guards. Or it may have been reported by another inmate or even by the victims themselves. J.K.J. and M.J.J. testified that they did not feel comfortable reporting the abuse while they were still within the jail. N.S. similarly waited before revealing the full extent of Jorgenson's conduct because she worried he would make it "hell" for her there. If Polk County had different policies or training, its culture would have changed, including its dismissive and flippant attitude toward sexual assault, and these women or someone else may have felt able to report the abuse at some point during the three-year period of Christensen's conduct.

Because any of these inferences from the evidence would have been reasonable, the jury was entitled to conclude that if Polk County had taken action in response to the glaring risk that its female inmates'

health and safety were in danger, J.K.J. and M.J.J.'s assaults would have stopped sooner, or never happened at all.

The County presses a different view. It sees a guard's sexual abuse of an inmate as so patently wrong and so plainly prohibited by Wisconsin law and the jail's policy that no amount of training and no enhancements to the institution's code of conduct could have made any difference. And this is especially so, the County urges, given the lengths to which Christensen went to hide his conduct. Put most bluntly, no amount of training, no policy, no monitoring—nothing, literally nothing—could have prevented or detected what he did to J.K.J. and M.J.J., or so the County would have it.

The County's narrow fixation on Christensen exposes its error. *Monell* liability did not hinge on predictions about whether Christensen would have brought himself to stop abusing J.K.J. and M.J.J. Maybe more robust policies could have fostered a zero-tolerance culture in which Christensen would not have felt free to openly harass female inmates, thereby opening the door to his escalating abuse. Or they could have caused Christensen to curb his conduct because of a greater risk of detection—whether from closer monitoring, more frequent guard rotations, or a policy preventing male officers from being alone with female inmates. But maybe not.

The point need not detain us because the evidence allowed the jury to conclude that the County's acting to institute more robust policies—foremost addressing prevention and detection—and then training on those policies would have resulted in another correctional

officer, an inmate, or even J.K.J. and M.J.J. taking some step to stop Christensen's sexual assaults.

The evidence did not require the jury to accept as inevitable that Christensen's conduct was unpreventable, undetectable, and incapable of giving rise to *Monell* liability. Admittedly, "[p]redicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder." *City of Canton*, 489 U.S. at 391. Nor was the jury compelled to conclude that the sexual abuse suffered by J.K.J. and M.J.J. had one and only one cause. See *Whitlock v. Brueggemann*, 682 F.3d 567, 583 (7th Cir. 2012) ("[T]here is no rule demanding that every case have only one proximate cause."). The law allowed the jury to consider the evidence in its entirety, use its common sense, and draw inferences as part of deciding for itself. Indeed, the Supreme Court envisioned precisely that approach in *City of Canton*, observing that the causation inquiry often will be complicated but emphasizing that "judge and jury, doing their respective jobs, will be adequate to the task." 489 U.S. at 391.

* * *

Darryl Christensen's long-term abuse of J.K.J. and M.J.J. more than justified the jury's verdict against him. And the jury was furnished with sufficient evidence to hold Polk County liable not on the basis of Christensen's horrific acts but rather the County's own deliberate choice to stand idly by while the female inmates under its care were exposed to an unmistakable risk that they would be sexually assaulted—a choice that was the moving force behind

the harm inflicted on J.K.J. and M.J.J. The jury so concluded, and we AFFIRM.

HAMILTON, *Circuit Judge*, concurring. I join Judge Scudder's opinion for the court. In light of comments in the dissenting opinions, it is worth emphasizing that the *Monell* claims against the county are based on much more than whether guards knew right from wrong or knew that it was a crime to have sex with inmates. The *Monell* claims are also based on the county's failure to monitor its guards and its failure to provide effective channels for complaints so as to discourage such abuse.

To illustrate the point, consider an analogy involving only greed, rather than lust and a guard's horrific abuse of power over inmates. Any bank will train its tellers that they should not steal and that theft is a crime. All tellers know that whether they receive the training or not. Suppose, though, that a bank's managers fail to conduct regular audits of tellers' cash drawers. Most tellers are honest despite the lack of oversight, but one gives in to temptation. Managers later discover that the one teller has been stealing money for years. The risk of embezzlement, even by tellers who know the law and the rules, is obvious. So is the need for audits. The risk and need are so obvious that the bank's stockholders could easily find that its managers (i.e., its policymakers) were not merely negligent but deliberately indifferent (i.e., reckless) toward this obvious and known risk, even if only one teller gave in to the temptation. The same logic applies here to Christensen, who repeatedly gave in to the temptation to abuse his power over inmates.

EASTERBROOK, *Circuit Judge*, dissenting in part. I agree with the majority that the verdict against Christensen is sound and with Judge Brennan that the verdict against Polk County is not. Because this appeal has occasioned so much ink, and my assessment differs somewhat from that of my colleagues, I have concluded that it would be helpful to state briefly why I find the claim against the County lacking.

The majority recognizes that the County's stated policy—no sexual contact between guards and inmates—satisfies the Constitution. It faults the County for failing to train guards about that policy. Yet the Constitution does not require training. See *Connick v. Thompson*, 563 U.S. 51 (2011). Nor does the Constitution require every municipality to implement current understandings of best practices, such as the Prison Rape Elimination Act of 2003, 34 U.S.C. §§ 30301-09 (PREA). The duty is to avoid unconstitutional policies. We are supposed to assess the validity of the policies—that is to say, the policymakers' decisions—not how well subordinates implement those policies.

Connick is the only decision in which the Justices assessed on the merits a contention that a unit of government violated the Constitution by inadequate training that failed to avert one particular bad outcome. It rejected the claim. The reasons the Court gave are true of the Jail as well. Christensen is the one and only rapist among the guards; no prior, similar incidents notified the County about looming problems. And as soon as supervisors learned of Christensen's misconduct, the County ended his employment and

put him in prison himself. See slip op. 4. This could well have avoided liability for an employer under Title VII of the Civil Rights Act of 1964, a statute that unlike 42 U.S.C. §1983 allows vicarious liability. See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. Boca Raton*, 524 U.S. 775 (1998). Liability under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), is supposed to be harder and depend on the validity of the policy.

One major reason why *Connick* (and every other decision by the Supreme Court in which failure to train was advanced as a theory of liability) found no municipal liability is that the Court sees knowledge as the proper goal of training. *Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989), observed:

> [C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v. Garner*, 471 U.S. 1 (1985), can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

In other words, a policy such as "comply with the Fourth Amendment" is useless to non-lawyers without information about what compliance entails. Is it lawful to shoot a fleeing felon? If the answer depends on ongoing danger, how much danger justifies deadly force? A city that stops with "obey the Constitution" lacks a genuine policy.

Contrast that with Polk County. One statewide rule, reflected in a criminal law, forbids sexual intercourse or contact between guards and prisoners. Wis. Stat. §940.225(2)(h). The Jail reinforces this by forbidding "an intimate social or physical relationship with a prisoner". Another of the Jail's policies says:

> under no circumstances will any inmate be the object of verbal, physical, emotional, psychological, or sexual harassment by facility staff. Any officer engaged in such actions is subject to disciplinary charges and/or termination.

I can see a need for explication about "emotional" or "psychological" harassment, but anyone can understand the rule against intimate physical relations between guards and inmates. The Jail made sure that every guard knew about this rule. What training is required to get guards to grasp it? The problem is not a want of *comprehension* (as in *Canton*'s hypothetical) but a want of *compliance*. Yet subordinate employees' failure to comply with a valid policy is not a ground of liability against a municipality.

The difference between comprehension and compliance is vital to understanding when training is required. Plaintiffs do not argue that training is essential to guards' comprehension. It ought to follow that the County is not liable.

I could imagine the possibility of liability—under a theory that a policy is irrelevant if it is nothing but a paper tiger—when evidence shows that training makes all the difference between a policy that works and a policy that does not. But plaintiffs have not

made such an argument. Consider two possibilities that might have been relevant if the goal were to expand liability beyond anything the Supreme Court has yet recognized.

First, was Polk County Jail rife with sexual crimes committed by guards? Plaintiffs concede that the answer is no. They acknowledge that there had not been an instance of improper sexual contact before Christensen. Plaintiffs also acknowledge that the Polk County Jail was no worse on related subjects than other institutions, some of which used the training programs that the Jail did not. Plaintiffs' expert testified that the Jail had a "good" record overall. My colleagues in the majority refer to "the jail's broken culture" (slip op. 28) but do not compare the Jail with the results achieved by other institutions that require guards to spend more time in training. If training does not improve outcomes, its absence cannot spoil an otherwise valid policy.

Second, does the social science literature, or any expert evidence in this record, show that more training achieves better compliance with simple rules such as "no intimate contact between guards and inmates"? The plaintiffs did not offer any such evidence, their expert conceded that there is none, and my search through scholarly sources did not turn any up. Unless evidence shows that more training markedly decreases the prevalence of sexual misconduct by guards (or by employees at private firms), liability based on the lack of such training is just vicarious liability by another name.

Law schools must offer courses in legal ethics, because education can be vital to understand complex

doctrines such as the attorney-client privilege and the rules against conflict of interest. But law schools do not try to "train" law students not to steal from clients' trust funds or rape people who come to them in search of advice. Implementing rules against theft and rape does not depend on imparting *information* to would-be lawyers, so training is not how to achieve compliance.

Threats of criminal prosecution or losing one's livelihood offer better prospects of deterring malicious conduct. Polk County threatened guards with both kinds of punishment, and it carried through against Christensen. Those steps show vividly that the Jail does not tolerate sexual abuse of prisoners—that the policy is not just a cynical attempt to deflect liability. I do not see anything in the Constitution that prevents a county from electing deterrence and incapacitation as the means of enforcing its policies.

A belief that people can be trained (or perhaps conditioned) not to commit crimes underlies the rehabilitation model of criminal punishment. But many years of scholarly study failed to produce support for that model, which has been abandoned. Today punishment for the purpose of rehabilitation is forbidden, at least in the national courts. See 18 U.S.C. §3582(a); *Tapia v. United States*, 564 U.S. 319 (2011). Faith in the power of training to reduce crime is no more appropriate when applied to suits under §1983.

In sum, plaintiffs have not tried to show that the rule against guards' intimate contact with prisoners is hard to understand (in general, or for the Jail's guards in particular). That leaves nothing for a jury to consider. The suit fails for legal reasons.

Evidence that earlier violations of the Jail's policy were tolerated by slaps on the wrist would be better proof that the "real policy" differed from the written one, but only if the toleration were attributable to the County rather than to subordinates. If policymakers create a valid rule that is sabotaged by persons lower in the hierarchy, liability is supposed to fall on those persons rather than the governmental entity. That is how *Monell* differs from respondeat superior.

At all events, in a case based on a theory of singleincident liability, which is how my colleagues treat this suit, evidence about laxity concerning less-serious matters is irrelevant. Consider *Connick* once again: The Justices recognized that the prosecutor's office in Orleans Parish had violated the *Brady* doctrine repeatedly but held that this did not show a toleration of wrongdoing. If that was not enough in *Connick*, the Jail's failure to control lewd talk or do more in response to one guard's sexual harassment is categorically insufficient to make the County liable for a different guard's rapes.

The question under *Monell* is not whether the County could have done better at inducing compliance with its rules. With the benefit of hindsight, that's always possible. The question is whether the County had a constitutional policy. If *Monell* is to be overruled, and vicarious liability established, that should be done forthrightly (and by the Supreme Court), rather than via the roundabout route the majority has devised.

BRENNAN, *Circuit Judge*, with whom BAUER and SYKES, *Circuit Judges*, join, dissenting in part.

The majority opinion holds a municipal employer liable under § 1983 for a failure to train and a failure to supplement policies because its employee did what those policies and training expressly forbade him to do.

Liability is based on the single-incident theory hypothesized in *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 n.10 (1989). The "rare" and "narrow circumstances" under which that theory applies do not fit here. *Connick v. Thompson*, 563 U.S. 51, 63, 64 (2011). Nor does this case meet the stringent fault and causation requirements set by the Supreme Court to prove § 1983 liability.

The majority opinion upholds a jury verdict finding a county liable for a jail guard's repeated rapes of two inmates. It does so without any evidence that Polk County actually and directly caused the plaintiffs' terrible injuries, and no affirmative link between the County's policies and the guard's crimes.

It is undisputed that these horrible crimes were perpetrated without the County's knowledge. It is also undisputed that no pattern of similar violations put the County on notice of a need for specific training that would have prevented these sexual assaults. Yet the majority opinion concludes the same evidence that failed to show notice under pattern liability shows notice under single incident liability, as well as causation.

This court's decision stands alone, unaided by precedent. The Supreme Court has never ruled that a *Monell* claim based on a municipality's failure to act is

viable in the absence of a pattern. No federal appellate court has extended the single-incident exception to the sexual assault context. Nor has a federal appellate court applied that exception when the employee's compliance with the municipality's policy and training would have prevented the injuries. And no federal appellate court has held that specialized training is required for an employee to know that rape is wrong.

Because the legally deficient constitutional claim against the County never should have gone to the jury, I respectfully dissent in part.[1]

I. Background

The facts as I understand them are described below, recounting the evidence in a light most favorable to the verdict against the County, *Martin v. Marinez*, 934 F.3d 594, 596 (7th Cir. 2019), and noting disagreement with how some facts are set forth in the majority opinion.

M.J.J. and J.K.J. were female inmates at Polk County Jail at various times between 2011 and 2014, and guard Darryl Christensen admits he covertly and repeatedly sexually assaulted them. Plaintiffs suffered serious injustices and traumatic injuries because of Christensen. The question is whether Polk County bears legal responsibility for Christensen's actions.

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[1] The majority opinion is correct that Christensen's appeal fails, and this dissent is limited to the question of the County's liability.

A. Trial Evidence

Plaintiffs made four principal allegations against the County at trial: (1) the jail's sexual assault policies and training were inadequate; (2) the jail tolerated sexually offensive comments by guards; (3) a former guard's alleged misconduct shows the jail's sexual assault policy was deficient; and (4) the jail underutilized recommendations under the Prison Rape Elimination Act, 34 U.S.C. §§ 30301-09. After considering the evidence in support of these allegations, the jury reached a verdict against the County.

1. *Policies and training*

The jury considered several County policies prohibiting sexual contact between guards and inmates. Two stand out. Policy I-100 forbids any mistreatment or harassment of inmates, explains inmates' rights, and instructs staff that it is never acceptable for "any inmate [to] be the object of verbal, physical, emotional, psychological, or sexual harassment by facility staff." The policy continues, "[a]ny officer engaged in such actions is subject to disciplinary charges and/or termination." Similarly, policy C-202 prohibits any "intimate social or physical relationship with a prisoner." That policy also informs jail staff that sexual contact with any inmate is a criminal offense under Wisconsin law and any officer that suspects such conduct has a duty to report it. *See* Wis. Stat. § 940.225(2)(h) (categorizing sexual contact and sexual intercourse by a correctional staff member with an inmate as a Class C felony).

In language consistent with these policies, inmates are provided a handbook upon arrival at the jail that says:

> Every inmate has the right to be safe from sexual abuse and harassment. No one has the right to pressure you to engage in sexual acts. If you are being pressured threatened, or extorted for sex, you should report this to staff immediately.

Plaintiffs' opinion witness on prison training standards, Jeffrey Eiser, testified that the jail's policies prohibited sexual contact between inmates and guards. Eiser also corroborated that the County trained Christensen that sexual contact with inmates was a felony and against jail policy. Christensen said the same. At trial he acknowledged the jail trained him that sexual contact with inmates is against jail policies and a felony. Specifically, Christensen testified:

- He knew his assaults violated jail policy;
- He was trained his assaults were a crime;
- He knew he was putting plaintiffs at risk;
- He never forgot that sex with inmates was a crime; and
- He did not require more training to know his assaults were a crime.

The jail's onboarding and continuing education programs also instruct employees that sexual contact with prisoners is a crime and never permitted. The Wisconsin Department of Corrections annually approved these programs, requiring: (1) eight to ten weeks of "field training," during which a new corrections officer shadows an experienced officer to

learn jail policies and procedures; (2) completion of a 160-hour jail training program to become a certified corrections officer; (3) 24 hours of continuing education each year to be recertified; and (4) daily training, which includes specific training on the jail's prohibition against fraternizing with inmates.

The majority opinion expresses concern that "the trial record … contained no evidence showing that … anyone from the County dedicated any portion of any training session to reviewing the jail's written policies." Majority op. at p. 9. But Sergeant Steven Schaefer of the Polk County's Sheriff's department, who worked at the jail from 2002 until 2015, testified that "[o]ne of the methods of training within [the] jail was to have jail staff review policies on a routine basis." "[T]raining on policies related to improper sexual relations or improper relationships with inmates," Schaefer continued, were part of that "routine training," including policies I-100 and C-202. Despite Schaefer's testimony to the contrary, plaintiffs' counsel told the jury during closing argument: "You heard Sergeant Schaefer say, 'We never trained on it. We never trained on it. We never trained on it.'" Plaintiffs' counsel continued that misrepresentation in their appeal brief which declares: "Sergeant Steven Schaefer also testified to never receiving any training regarding sexual assault"; and Schaefer "agreed that [he] received no training on sexual assault at any time." Appellees' Br. at 13.

In addition to the training above, Schaefer testified "[correctional officers] were all required to attend" countywide training on sexual harassment,

and he provided the training to new employees from time to time. This training, according to Schaefer, instructed guards on the jail's numerous prohibitions on conduct between staff and inmates, including improper comments, becoming too close or too familiar, sharing personal information, sexual relationships, and sexual assaults. Schaefer agreed that improper relationships between inmates and guards was "something that the jail as a whole took very seriously." Consistent with that concern, Schaefer testified that "Christensen had dishonored and disgraced everything the sheriff's department was about" and that Christensen's behavior was "a betrayal of the [jail's] ethical standards."

The majority opinion describes the County's training as "vague cautions" and "nearly nonexistent." Majority op. at p. 10. It states the jury heard evidence about jailers' training on maintaining distance from inmates, but "no testimony to suggest that training touched the topic of sexual assault" and that Schaefer "expressly admitted that much." *Id*. It also states that Schaefer "denied any memory of being told that it was improper for jail officers to have sexual relationships with inmates." *Id*.

Schaefer testified differently than that. He stated when he trained new jail officers, he trained them not to engage in too familiar relationships with inmates, and that "too familiar" would include an officer having sex with an inmate. He also agreed the jail's training included training on policies about "improper sexual relations or improper relationships with inmates." Schaefer also attested he received training on Polk County Jail's policies including C-202 (fraternization

with inmates) and specifically those provisions prohibiting physical relationships with prisoners.

2. *Inappropriate speech*

Plaintiffs alleged that jail staff routinely made sexually inappropriate comments about female inmates. They pointed to Captain Scott Nargis, who oversaw daily operations of the jail. During Nargis's adverse examination at trial, plaintiffs' counsel asked if he ever "engaged in tier talk which is not necessarily flattering talk amongst co-workers," and Nargis responded "yes." Nargis also agreed that he participated in tier talk "on occasion" to establish trust among subordinate officers. When Nargis admitted to "tier talk," he did so within plaintiffs' definition ("not necessarily flattering talk"). Plaintiffs did not present evidence that tier talk connoted "sexual talk," that Nargis's "tier talk" was sexually explicit, or that Nargis made comments sexual in nature with, about, or around inmates or guards. The only reference at trial to "tier talk" occurred during plaintiffs' cross-examination of Nargis.[2]

The majority opinion accepts plaintiffs' new, sexuallycharged definition of "tier talk." Majority op. at p. 19 (finding that "tier talk" implied "acceptance of sexual harassment at the jail's highest levels").[3] While

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[2] Plaintiffs' counsel in their appeal brief were less than candid with this court when they wrote: "Captain Nargis routinely engaged in sexually explicit 'tier talk.'" Appellees' Br. at 14.

[3] The district court's order on the County's Rule 50 motion also assumes "tier talk" had a sexual implication despite the lack of any trial evidence or definition that "tier talk" included a sexual component. *See* Opinion and Order at 8-9, *J.K.J. v. Polk Cty.*, No. 15-CV-428 (W.D. Wis. Feb. 5, 2018), ECF No. 279.

this court views the facts in the light most favorable to the jury's verdict, it need not draw unreasonable inferences, *see Tindle v. Pulte Home Corp.*, 607 F.3d 494, 496 (7th Cir. 2010), or define terms differently than they were used at trial.

The evidence at trial of sexually inappropriate remarks by jail staff was as follows: (1) J.K.J. testified two officers overheard Christensen making flirtatious comments to inmates; (2) Christensen testified he overheard three guards make sexual comments to inmates; and (3) Nargis testified that over a twelve-year period Christensen made one sexually inappropriate comment and "it could have happened" that Christensen made another.

The specifics of these comments are as follows: The flirtatious comments overheard by J.K.J. and Christensen were unreported, unspecific, and undated. Neither J.K.J. nor Christensen offered details on the alleged comments or the timeframe in which they occurred, and there was no evidence the County had notice of these comments. Nargis testified that during Christensen's twelve-year employment, he did not recall but "it could have happened" that Christensen commented on a female's "rear end." Nargis also recalled being told that Christensen once remarked about an inmate's breasts. The majority opinion extrapolates from these two instances when it states: "Captain Nargis confirmed hearing that Christensen had made inappropriate sexual comments about women in general." Majority op. at p. 7.

3. *Investigation of former guard*

No one disputes that Christensen's assaults were unprecedented and hidden from jail officials. Apart from Christensen, the jail's history contains only one other allegation of sexual contact between a jail guard and an inmate: another inmate saw guard Allen Jorgeson put his arm around inmate N.S.'s waist and "pat her on the butt." This occurred in 2012, two years before Christensen's assaults were discovered.[4] Schaefer reported these allegations to Nargis, who in turn questioned Jorgenson and N.S. individually. Each denied any improper relationship or contact. Despite these denials, Nargis requested the assistance of Chief Deputy Sheriff Steven Moe to further investigate Jorgenson.

The findings of that investigation revealed that another inmate believed Jorgenson and N.S. had an "inappropriate relationship" but "no physical relationship," and that Jorgenson allegedly misused a jail camera to focus on female inmates longer than necessary. Nargis and Moe did not limit their investigation to internal inquiries, reaching out to former inmates as part of their review. Because of inconsistent witness accounts, including N.S.'s denial, Nargis and Moe could not confirm that Jorgenson engaged in any sexual contact with N.S. They did conclude that Jorgenson's affiliation with N.S. violated jail policy. As a result, Jorgenson was issued a written reprimand. Up until this point, N.S. continued to deny Jorgenson acted improperly.

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[4] Christensen's assaults began in 2011, and the County first learned of them on October 29, 2014.

Days after Jorgenson's reprimand, N.S. recanted her denials in a letter to Nargis. N.S.'s letter stated that Jorgenson made sexually harassing gestures and indecent remarks, and said Jorgenson put his arm around N.S.'s waist and touched her "back and butt." As a result of this letter Nargis and Moe reopened the investigation "to take a whole fresh look at the situation." After this second review, Nargis and Moe again could not confirm N.S.'s allegations and decided the reprimand of Jorgenson remained the proper level of discipline. At trial, no evidence was submitted that Nargis or Moe erred in the Jorgenson investigation or performed their inquiries in bad faith.

Jorgenson made sexually inappropriate comments to female coworkers, which the County does not dispute. When staff first notified jail authorities of Jorgenson's behavior towards coworkers, an investigation ensued, leading to Jorgenson's resignation. It is undisputed that Jorgenson's comments to staff went unreported until the N.S. investigation. It is also undisputed that in the nine years preceding trial, 14,100 inmates came though the jail, and the Jorgenson circumstance was the only known allegation of an improper relationship between a guard and an inmate.

The majority opinion recounts N.S.'s letter in detail. The letter was admitted, however, only for the limited, non-hearsay purpose of notice. The letter could not be considered on its merits, which the majority opinion appears to do. Majority op. at pp. 26-27 ("That Jorgenson's grooming of N.S. did not end with rape is no liability shield; it was good fortune.").

On Schaefer's testimony about Jorgenson, the majority opinion states "Schaefer reported that Jorgensen had touched N.S. on her waist and rear end, adding that the complaints did not come as a surprise because '[w]e have all heard complaints about [Jorgenson's] inappropriate comments to both inmates and staff.'" Majority op. at p. 4. But Schaefer's quoted testimony spoke of improper comments, not improper touching. As to those comments, Schaefer could not recall an example of Jorgenson making an improper comment to an inmate. Schaefer also testified that none of the Jorgenson comments to staff or inmates that he knew of rose to a level requiring discipline.

4. *Prison Rape Elimination Act (PREA)*

PREA played a large role in plaintiffs' case. They argued the jail failed to implement its policy recommendations, showing a lack of concern for preventing and detecting sexual assaults. Plaintiffs claimed Nargis openly "denigrated … PREA standards." For this assertion, plaintiffs cited a 2014 email from Nargis to jail staff which stated:

> Seems to be that everyone is in a tizzy to train their staff on PREA. There is no requirement for use [sic] to be compliant with everything that the law calls for, but nevertheless it is federal law. So we'll hit the basics of PREA training.

At trial plaintiffs called this the "tizzy" email. Plaintiffs argued Nargis's choice of the word "tizzy" was "mocking" of PREA and "indicat[ed] that he disliked PREA." Plaintiffs also claimed the email never discussed any specific PREA measures, but merely restated the jail's current anti-sexual assault

policies. Plaintiffs argued the "tizzy" email proves that Nargis and the jail "consciously disregarded" PREA standards and thus disregarded the risk of sexual assaults at the jail.

Plaintiffs' opinion witness Eiser grounded his testimony on PREA's recommendations, opining that the jail's sexual assault policies and training were inadequate because they did not fully adopt several components of PREA. Eiser also testified there is no empirical data that compliance with PREA yields better results. And he conceded that PREA-compliance is not mandatory for county jails in Wisconsin, and that its standards are better viewed as "best practices." Eiser agreed the County had a good record on sexual assaults—even factoring in Jorgenson's misconduct—because of the lack of incidents of sexual contact between guards and inmates, much less criminal sexual assaults like Christensen's.

Plaintiffs agreed that state law, not PREA, governs county jails in Wisconsin, but they offered no evidence that the jail's sexual assault policies or training fell below state legal or administrative standards. As for compliance with state law, the County presented evidence that the Wisconsin Department of Corrections annually reviews the jail's policies, including its policy prohibiting fraternization with inmates. In each year of plaintiffs' incarcerations, that Department found the jail to be in full compliance with all applicable Wisconsin statutes and regulations. Language addressing PREA was added to the jail's anti-fraternization policy in 2012, with an accompanying PREA training in 2014.

II. Municipal Liability and the Law of *Monell*

Municipal liability under § 1983 as set by the Supreme Court has traveled a winding route. But that route has a constant beacon to courts: each case examines what federal power may be exercised over state and municipal governments and considers the Court's desire to harmonize § 1983 with the structural limits of federalism. These precedents are dispositive here and warrant detailed review before their application. They prescribe a different outcome than reached by my colleagues in the majority.

The first is *Rizzo v. Goode*, 423 U.S. 362, 365-66 (1976), in which the Court struck down a district court order requiring police training reforms for violating federalism principles. The Court held "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners … showing their authorization or approval of such misconduct." *Id.* at 371. The Court also dismissed plaintiffs' argument that "even without a showing of direct responsibility for the actions of a small percentage of the police force," the local government's failure to act in the face of a pattern is actionable. *Id.* at 375-76. The Court distinguished the mere failure to act in the face of a pattern of incidents from "active conduct," rejecting the argument that a pattern alone creates a "constitutional duty" to develop preventative procedures to deter speculative abuses. *Id.* at 372, 375-76, 378. The Court also rejected "invocation of the word 'pattern' in a case where … the defendants are not causally linked to it." *Id.* at 375-76.

Federalism, the Court made clear in *Rizzo*, governed its holding. *Id*. at 377-80. The district court's injunctive relief, the Court ruled, had "departed from the[] precepts" of federalism "[w]hen it injected itself … into the internal disciplinary affairs of this state agency." *Id*. at 380. "[T]he principles of federalism," the Court admonished, "play such an important part in governing the relationship between federal courts and state governments … ." *Id*. And those principles apply when relief is sought against local governments. *Id*.

Rizzo formulated the heightened causation requirement between a policy and a constitutional violation now integral to all § 1983 claims. *See Polk Cty. v. Dodson*, 454 U.S. 312, 326 (1981) (citing *Rizzo*, 423 U.S. at 370-77, for the proposition that an official policy "must be the moving force" of the constitutional violation). It also constrained federal courts from "second-guessing municipal employee-training programs" to avoid "implicat[ing] serious questions of federalism." *Canton*, 489 U.S. at 392 (citing *Rizzo*, 423 U.S. at 378-80).

In *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978), the Court adopted *Rizzo's* federalism-influenced requirements and set parameters for establishing municipal liability. In *Monell*, the Court considered "[w]hether local governmental officials and/or local independent school boards are 'persons' within the meaning of 42 U.S.C. § 1983." *Id*. at 662. Based on "[a] fresh analysis of the debate on the Civil Rights Act of 1871,"*id*. at 665, the Court held that the Act "compell[ed] the conclusion that Congress did intend municipalities and other

local government units to be included among those persons to whom § 1983 applies." *Id.* at 690. So local governments could properly be sued as "persons" within the meaning of § 1983.

Although *Monell* exposed municipalities to § 1983 lawsuits, the Court circumscribed how that statute applied to them. In particular, the Court limited claims against municipalities in two ways by holding that liability under § 1983 cannot be predicated on a theory of *respondeat superior*, and that a municipality's own policy or custom must be the "moving force" behind the constitutional violation. *Id.* 691-92. The Court interpreted the statute's use of the verbs "subject[s], or causes to be subjected" as requiring a municipality's direct involvement, as opposed to liability on a vicarious basis. *Id.* at 692. Thus, the court ruled that the "mere right to control without any control or direction being exercised" cannot support § 1983 liability. *Id.* (citing *Rizzo*, 423 U.S. at 370-71). For those reasons, a local government is liable under § 1983 only "when execution of a government's policy or custom … inflicts the injury." *Id.* at 694. The policy or custom must be the "moving force" behind, or actual cause of, the constitutional injury. *Id.*

The municipality in *Monell* officially adopted an unconstitutional policy, so the municipality itself "unquestionably" caused the constitutional violation. *Id.* at 690, 694-95. *Monell* left unanswered whether plaintiffs could establish municipal liability by alleging unofficial policies, especially those of municipal inaction or inadequate training, such as here. Over three decades the Court has filled in those

blanks. Each time the Court has set the requirements to establish municipal liability for failure to train, liability has become more difficult to find. These decisions always steer clear of *respondeat superior*. Underlying those decisions, and the requirements they impose, are the federalism principles articulated in *Rizzo* and the Court's intent to harmonize § 1983 with those principles.

First of the municipal training cases was *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). In *Tuttle*, seven Justices rejected an instruction that permitted the jury to infer liability attributable to inadequate training from a single incident of unconstitutional activity by a non-policymaking employee. *Id*. at 821 (plurality opinion) ("We think this inference unwarranted … [because it] allows a § 1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker."); *id*. at 830 (Brennan, J., concurring in part and concurring in the judgment) ("Under the instruction in question, the jury could have found the city liable solely because [the officer]'s actions on the night in question were so excessive and out of the ordinary. A jury finding of liability based on this theory would unduly threaten petitioner's immunity from *respondeat superior* liability.").

Four years later, the Court further shaped the contours of inadequate training liability in *Canton*. There, the plaintiff sued the city for failing to adequately train its police when to summon medical care for injured detainees. 489 U.S. at 381. On the question of fault, the Court held that a claim of inadequate training triggers municipal liability "only

where the failure to train amounts to deliberate indifference to the rights of persons with whom [municipal employees] come into contact." *Id.* at 388. A municipality can be liable under § 1983 "[o]nly where a failure to train reflects a 'deliberate' or 'conscious' choice" not to fully train employees. *Id.* at 389. Such a deliberate choice could be shown when "in light of the duties assigned to specific officers or employees the need for more or different training is *so obvious*, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390 (emphasis added).

Canton offered two examples of what "so obvious" means. First, police may "so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers." *Id.* at 390 n.10.[5] In the second example, the Court left open the possibility—now known as the "single-incident theory"—that a pattern of similar violations might not be necessary to show deliberate

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[5] Expounding on this principle, and foreshadowing the Court's holdings in *Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 407-08 (1997), and *Connick v. Thompson*, 563 U.S. 51, 62 (2011), Justice O'Connor wrote in concurrence: "[M]unicipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations … ." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 397 (1989) (O'Connor, J., concurring in part and dissenting in part). "Allowing an inadequate training claim" without proof of a pattern "to go to the jury based upon a single incident," Justice O'Connor continued, "would only invite jury nullification of *Monell*." *Id.* at 399.

indifference. To prevail under this theory, a plaintiff must prove that municipal "policymakers know to a moral certainty" that its employees will confront a given situation and fail to train for it. *Id*.

To illustrate a single incident scenario, the Court posed the hypothetical of a city that arms its police force with guns and deploys those officers into the public without training. As the Court explained, given the known frequency with which police encounter fleeing felons plus the "predictability that an officer will lack specific tools to handle those situations," "the need to train officers in the constitutional limitations on the use of deadly force … can be said to be 'so obvious' that the failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." *Id*. at 390 n.10; *see also Connick*, 563 U.S. at 63 (explaining same) (quoting *Bryan Cty*., 520 U.S. at 409).

But in either scenario, a plaintiff cannot establish that a municipality acted with deliberate indifference for failing to train employees for rare or unforeseen events. Relying on *Rizzo*, the Court in *Canton* stressed the need for a rigorous fault standard because:

> [A] lesser standard of fault would result in *de facto respondeat superior* liability on municipalities … . It would also engage federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism.

Id. at 392 (citing *Rizzo*, 423 U.S. at 378-80).

As for causation, *Canton* cautioned that just because "a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *Id.* at 390-91 (citations omitted). "And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable." *Id.* at 391. "Neither will it suffice," the Court stated, "to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct." *Id.* Only when a plaintiff "prove[s] that the deficiency in training actually caused the [employee]'s indifference" can liability attach. *Id.* Even more, "the identified deficiency in a city's training program must be closely related to the ultimate injury." *Id.* at 391.

In *Canton*, the Court gave reasons for this stringent causation standard. A failure-to-train claim "could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal." *Id.* And "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." *Id.* at 392 (quoting *Tuttle*, 471 U.S. at 823 (plurality opinion)).

Eight years later, the Court imported *Canton*'s failure-totrain principles into the hiring context in *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397

(1997). There a deputy sheriff who caused the plaintiff's injury had received no training in proper pursuit and arrest techniques. *Id.* at 400-02. The Court addressed whether the county's decision to hire the offending deputy sheriff triggered liability under *Monell*: "Where a plaintiff claims … the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Id.* at 405 (citing *Canton* 489 U.S. at 391-92, and *Tuttle*, 471 U.S. at 824 (plurality opinion)). And "[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability." *Id.* at 415.

"*Canton* makes clear," the Court explained in *Bryan County*, that "deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* at 410 (internal quotation marks omitted). A "plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a *particular* constitutional or statutory right will follow the decision." *Id.* at 411 (emphasis added). In other words, the deprivation of a federally protected right must be the "plainly obvious consequence" of the municipality's decision. *Id.* *Bryan County* instructs courts to focus on the particular constitutional violation that occurred, not constitutional violations in general.

Subject to this particularity requirement, *Bryan County* identified three ways a municipality could be liable for inadequate training. First, "[i]f a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for." *Id*. at 407. Second, "the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the 'moving force' behind the plaintiff's injury." *Id*. at 407-08. And third, the single- incident theory as laid out in *Canton*, 489 U.S. at 390 n.10: in a "narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." *Bryan Cty.*, 520 U.S. at 409. In this third scenario, liability hinges on the likelihood that "a violation of a specific constitutional or statutory right" will recur and "the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights." *Id*. at 409.

Finally, we come to *Connick v. Thompson*, 563 U.S. 51 (2011). There, the plaintiff spent 18 years in prison, including 14 years on death row, because an assistant district attorney willfully suppressed blood evidence that exculpated plaintiff. *Id*. at 55-56. The plaintiff alleged that violation was caused by the district attorney's deliberate indifference to an obvious need to train prosecutors to avoid violations of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), to disclose evidence favorable to the defense. The jury agreed,

awarding plaintiff $14 million in damages, and the district court added more than $1 million in attorney's fees and costs. 563 U.S. at 57.

The Supreme Court reversed the jury verdict in *Connick*. In fact, in each of the post-*Monell* cases discussed—*Tuttle*, *Canton*, *Bryan County*, and *Connick*—the Court reversed a jury verdict for the plaintiff.

Connick reflects the Court's most recent and most exhaustive assessment of inadequate training liability. Because such a claim treads so closely to vicarious liability, the Court admonished: "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Id*. at 61 (citing *Tuttle*, 471 U.S. at 822-23). The Court recognized two types of inadequate training claims: those that require a pattern of similar constitutional violations, and those that may succeed without a pattern under single-incident theory. *Id*. at 71-72.

Per *Connick*, to prevail under a pattern theory a plaintiff must prove "[a] pattern of similar constitutional violations by untrained employees." *Id*. at 62. "[C]ontemporaneous or subsequent conduct cannot establish a pattern of violations that would provide 'notice to the cit[y] and the opportunity to conform to constitutional dictates … .'" *Id*. at 63 n.7 (quoting *Canton*, 489 U.S. at 395). A pattern of constitutional violations means prior violations "similar to" the "specific" violation suffered by the plaintiff. *Id*. at 62-63, 63 n.7, 67. In *Connick*, despite at least four prior *Brady* violations in the same district attorney's office, and that up to four prosecutors may

have been responsible for the nondisclosure of favorable evidence that exculpated plaintiff, the Court held that the plaintiff had failed to establish a pattern of similar violations.

Because the plaintiff in *Connick* could not rely on a pattern of similar *Brady* violations, the Court addressed whether he could prevail under the "single-incident" theory hypothesized in *Canton*. *Id.* at 63-71. In *Connick*, the Court set three requirements to establish liability under *Canton's* single-incident hypothetical:

First, single-incident liability applies only when dealing with "untrained employees." *Id.* at 61-62, 67; *see also id.* at 91 (Ginsburg, J., dissenting) (agreeing with majority on this requirement).

Second, once it is established that the offending employee was untrained, a plaintiff alleging single-incident liability must prove "police officers have no knowledge at all" of the required constitutional standards. *Id.* at 67. That means "in the absence of training," there must be "no way for novice officers to obtain the legal knowledge they require." *Id.* A plaintiff meets this requirement when there is "no reason to assume" the officer is "familiar with the constitutional constraints" of the prohibited conduct. *Id.* at 64. That a policy has "gray areas," the Court cautioned, does not mean an employee "will so obviously make wrong decisions that failing to train them amounts to 'a decision by the city itself to violate the Constitution.'" *Id.* at 71 (quoting *Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part)). In those situations, a plaintiff must show it was "highly predictable" that employees would be

confounded by those gray areas and make incorrect decisions as a result. *Id*.

Third, an absence of formal or specialized training does not show deliberate indifference because "failure-to-train liability is concerned with the substance of the training, not the particular instructional format." *Id*. at 68. Put more simply, under the single-incident theory there is not inquiry into the subtleties of training. Instead, the key question to qualify under *Canton*'s hypothetical is whether the municipal employee is "equipped with the tools to interpret and apply legal principles." *Id*. at 64; *Bryan County*, 520 U.S. at 409. The question is not whether better or more training might have prevented the violation.

"[S]howing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability." *Connick*, 563 U.S. at 68; *see also id*. at 73-74 (Scalia, J., concurring) (rejecting liability "under the rubric of failure to train simply because the municipality does not have a professional educational program covering the specific violation in sufficient depth"). Said another way, "'proving that an injury or accident could have been avoided if an employee had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct' will not suffice." *Id*. (quoting *Canton*, 489 U.S. at 391).

Applying these three requirements, the Court in *Connick* contrasted *Canton's* hypothetical with an attorney asked to make a *Brady* determination. In the absence of a pattern of similar *Brady* violations, a district attorney "is entitled to rely" on prosecutors' law school or bar exam training, ethical obligations,

and on-the-job experience, to deal with *Brady* decisions. *Id*. at 66-67. "In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the 'obvious consequence' of failing to provide prosecutors with formal in-house training about how to obey the law." *Id*. at 66. The Court therefore concluded in *Connick* that "this case does not fall within the narrow range of 'singleincident' liability hypothesized in *Canton*." *Id*. at 71-72.

These precedents control the consideration of this case. The Supreme Court has never held a municipality liable for a failure to act in the absence of a pattern of prior similar violations. *See* Majority op. at p. 22 (recognizing same). This case does not present such a claim either, for the reasons that follow.

III. Theories of Liability

The majority opinion holds the County employer liable for the crimes of its employee Christensen under the single-incident theory hypothesized in *Canton*, specifically for failure to train and for failure to supplement County policies. Majority op. at 18-23. Those holdings rest on three conclusions:

1. In the absence of a pattern of prior similar sexual assaults at the jail, the rapes of J.K.J. and M.J.J. by Christensen pose one of those "rare" and "narrow range of circumstances" (*Connick*, 563 U.S. at 64, 71-72) the Court hypothesized in *Canton*'s footnote 10, in which the need for training in constitutional requirements is "so obvious *ex ante*" (*Id*. at 72) (concurrence). Majority op. at pp. 20-30.

2. The jail's omission of sexual assault prevention and detection measures in its written policies

amounted to unconstitutional inaction under *Monell*. Majority op. at pp. 18-20.

3. The failure to train about sexual assault prevention and detection measures, or the omission of such measures from written policies, caused plaintiff's injuries. Majority op. at pp. 30-33.

In reaching these conclusions, the majority opinion departs from the Supreme Court's requirements in *Canton*, *Bryan County*, and *Connick* and oversteps the culpability and causation rules governing § 1983 claims, resulting in *respondeat superior* liability, an outcome forbidden since *Monell*.

A. Failure to Train

1. *Single-incident theory*

For a failure-to-train claim the standard of municipal fault is deliberate indifference. *Connick*, 563 U.S. at 61 (labeling this "a stringent standard of fault"); *Canton*, 489 U.S. at 388-89. Only when a municipality has "actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights" may the municipality be deemed deliberately indifferent for retaining that program. *Connick*, 563 U.S. at 61. "Without *notice* that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Id.* at 62 (emphasis added).

The Court has recognized two ways to establish notice. The first requires a prior pattern of similar constitutional violations to prove deliberate indifference, the second does not. *See Connick*, 563

U.S. at 62-63. Per *Connick*, the second—the "single-incident theory"—is distinct from and serves as an exception to the pattern theory. *Id*. at 62-63; 71-72. These two theories share the same objective of discerning whether "the need for further training" was "so obvious." *Canton*, 489 U.S. at 390 n.10. *Bryan County* phrased this question as whether "a municipal actor disregarded a known or obvious consequence of his action." 520 U.S. at 410 (describing *Canton's* standard of fault); *see also Connick*, 563 U.S. at 61 (quoting same). Either way, the key term is "obvious." *See Farmer v. Brennan*, 511 U.S. 825, 841 (1994) (describing *Canton*'s application of deliberate indifference as an "obviousness test").

Under the pattern theory, the obviousness of a risk is determined from "[a] pattern of similar constitutional violations by untrained employees." *Connick*, 563 U.S. at 62. Under the single-incident theory, the question is whether the risk is "obvious in the abstract." *Bryan County*, 520 U.S. at 410 (applying *Canton's* standard of fault) (internal quotation marks omitted). The majority opinion says "[t]he Court did not leave the [single-incident] liability point in any way abstract." Majority op. at p. 21. The Court in *Bryan County* said the opposite. When evaluating "the risk from a particular glaring omission in a training regimen" the question is whether the risk is "obvious in the abstract." *Bryan County*, 520 U.S. at 410 (internal quotation marks omitted). Under either theory an objective test is applied. *Farmer*, 511 U.S. at 841 ("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.").

The majority opinion recognizes that this case does not present a pattern of misconduct which gave notice to the County that its training program would cause constitutional violations. Majority op. at p. 20. Nevertheless, it concludes the need to supplement the County's sexual assault training was "so obvious" that the failure to do so amounted to deliberate indifference under *Canton's* single-incident theory. Majority op. at p. 27. I respectfully part ways with my colleagues in the majority that the requirements to establish single-incident liability have been met here.

As noted above, to illustrate "so obvious" notice of a need for training under the single-incident theory, *Canton* hypothesized a city deploying armed officers, untrained on the constitutional limits of the use of deadly force, to capture fleeing felons. 489 U.S. at 390 n.10. In *Connick*, the Court distilled *Canton's* hypothetical into three single-incident liability requirements. None of these are met here.

First, single-incident liability applies only when dealing with "untrained employees." *Connick*, 563 U.S. at 61-62, 67; *id*. at 91 (Ginsburg, J., dissenting) (agreeing with the majority that failure-to-train liability attaches "only when the failure" involves "untrained employees"). It is undisputed that the jail trained Christensen that sexual contact with inmates was against jail policies and a felony, so this prerequisite is not met.

To meet *Connick*'s second requirement there must be "no reason to assume" the County's jail guards were "familiar with the constitutional constraints" of the prohibited conduct. *Connick*, 563 U.S. at 64. But Christensen testified to five ways he was familiar with

the policy prohibiting sexual contact: (1) he knew his conduct violated jail policy; (2) he was trained his conduct was a crime; (3) he knew he was putting plaintiffs at risk; (4) he never forgot that sex with inmates was a crime; and (5) he did not require more training to know his conduct was a crime. Unlike the nuanced and compound legal standards imposed by deadly force limits (*Canton*) and *Brady*'s evidentiary obligations (*Connick*), even the majority opinion recognizes this requirement cannot be met, as it characterizes the jail's zero-tolerance abuse policy as "categorical[]," a "clear line," as well as an "obvious" and "easy and evident" constitutional parameter. Majority op. at pp. 18-19, 25. The record does not show that County guards, let alone Christensen, had "no knowledge at all" of the relevant constitutional standard. *Connick*, 563 U.S. at 67.

On this second requirement, plaintiffs must prove the County's jail guards "ha[d] no knowledge at all" of the relevant constitutional standard, *id.* at 67, here, a blanket prohibition against sexual assault. That means a court must find there is "no way for novice [guards] to obtain the legal knowledge they require" unless they are trained. *Id.* at 64. The majority opinion concludes that without training "male guards would sexually assault female inmates." Majority op. at p. 24. This conclusion assumes that jails present an "opportunity to abuse" and male guards will "obvious[ly]" exploit that opportunity unless trained otherwise. *Id.* As the majority opinion puts it: "It is difficult to conceive of any setting where the power dynamic could be more imbalanced than that between a male guard and female inmate," so it is "obvious as

obvious could be" that male guards will "sexual[ly] abuse" female inmates. *Id.*[6]

An opportunity in which abuse may be committed does not establish deliberate indifference. At most it establishes negligence, which "will not suffice" to establish § 1983 liability. *Bryan County*, 520 U.S. at 407. The record does not support the assumption that, unless trained to refrain from sexual assaults, every male guard at Polk County Jail posed a risk to the bodily integrity of female inmates. Nor can it be assumed that absent training, male guards would have "obviously" violated behavioral norms and commit sex crimes.[7] For these reasons, *Connick*'s second requirement also is not met.

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[6] The majority opinion's conclusion that the "power dynamic" of confinement places municipalities on notice of the risk of sexual assaults is unlikely to prove workable for district courts. If the unalterable nature of confinement places municipalities on perpetual notice sufficient to establish § 1983 liability, how do courts determine if a municipality failed to act in the face of that obviousness?

[7] The majority opinion's conclusion of obviousness also rests on a theory rejected by other federal appellate courts. *Whitson v. Stone Cty. Jail*, 602 F.3d 920, 927 (8th Cir. 2010) ("We … could scarcely hold as a matter of course that every male guard is a risk to the bodily integrity of a female inmate whenever the two are left alone. Absent evidence to the contrary, we assume that jailers will not violate models of social decorum or otherwise commit a punishable offense."); *Barney v. Pulsipher*, 143 F.3d 1299, 1310-11 (10th Cir. 1998) (refusing to find that the defendants knew of a substantial risk of assault based on the proposition that every male guard is a risk to the bodily integrity of a female inmate whenever the two are left alone because in the record there was no evidence of sexual misconduct in the offending jailer's background nor was there evidence of previous incidents of sexual misconduct by jailers generally); *Hovater v. Robinson*, 1

Third, "failure-to-train liability is concerned with the substance of the training, not the particular instructional format." *Id*. at 68. Under *Connick*, this poses the question whether Christensen was "equipped with the tools to interpret and apply legal principles." *Id*. at 64. The majority opinion frames the applicable principle as "do not sexually abuse inmates," calling it an "easy and evident" constraint. Majority op. at pp. 19-20. Christensen thought so too, testifying he knew his assaults were crimes that put plaintiffs at risk, and that more training would not have altered that knowledge. Despite Christensen's avowals, the majority opinion holds the County liable for Christensen's conduct because its sexual assault training failed to educate and sensitize guards to the following:

- the dignity and respect owed female inmates;
- the inherent vulnerability the confinement setting presents to female inmates;
- the symptoms of an inmate suffering from the trauma of abuse;
- report[ing] each other's misconduct; and
- matters of prevention and detection.

Majority op. at pp. 19-20, 28.

This scrutiny of existing policies and training goes too far, violating the third requirement of *Connick*. The single-incident liability inquiry under *Connick* stops after the question of whether Christensen knew his conduct was a crime. It does not ask whether better

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F.3d 1063, 1066-68 (10th Cir. 1993) ("[T]here is no evidence in the present case of an obvious risk that male detention officers will sexually assault female inmates if they are left alone.").

or more training might have prevented his crimes. On this exact question the Court in *Connick* stated: "'[P]rov[ing] that an injury … could have been avoided if an [employee] had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct' will not suffice." *Id*. at 68 (quoting *Canton*, 489 U.S. at 391). *See also Connick*, 563 U.S. at 73-74 (Scalia, J., concurring) (rejecting liability "under the rubric of failure to train simply because the municipality does not have a professional educational program covering the specific violation in sufficient depth"); *id*. at 78 (Scalia, J., concurring) ("[A] bad-faith, knowing violation, could not possibly be attributed to lack of training. …")

This third requirement ends where it does for good reasons. As the Court ruled in *Canton*, a municipality cannot act with deliberate indifference for failing to train employees for rare or unforeseen events. A less than rigorous fault standard "result[s] in *de facto respondeat superior* liability on municipalities—a result we rejected in *Monell*." *Canton*, 489 U.S. at 392 (citing *Monell*, 436 U.S. at 693-94; *Rizzo*, 423 U.S. at 378-80). That result also intrudes upon the federalism interests that the *Monell* failure-to-train cases strongly reinforce. In *Canton*, the Court noted how "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." *Id*. at 392 (quoting *Tuttle*, 471 U.S. at 823 (plurality opinion)). While the education and sensitization steps the majority opinion lists fit into that category, the stringent fault requirements of *Canton* do not demand them.

None of the three requirements in *Connick* are met here to satisfy *Canton*'s single-incident hypothetical.

The single-incident theory fails here for two other reasons. *Bryan County* requires a "direct causal link" link between Christensen's crimes and an ineffective training regimen. 520 U.S. at 404. *See also Tuttle*, 471 U.S. at 823 (requiring "affirmative link"); *Rizzo*, 423 U.S. at 371 (same). The record here shows no such link. Before the discovery of Christensen's crimes, there were no prior instances of similar sexual assaults; Eiser agreed the jail, including the Jorgenson incident, had a "good" record on sexual assaults. And Eiser testified that no empirical data shows compliance with PREA would have yielded a better result. These same facts, however, persuade a majority of my colleagues that the need for more or better sexual assault training was "so obvious." To the contrary, the record shows the County's training "equipped [Christensen] with the tools" to understand its uncomplicated zero-tolerance assault policy, *Connick*'s third requirement. 563 U.S. at 64. Christensen chose repeatedly to disregard that policy and, hiding his actions, assault the plaintiffs.

To establish single incident liability, a plaintiff also must prove that municipal "policymakers know to a moral certainty" that its employees will confront a given situation and fail to train for it. *Canton*, 489 U.S. at 390 n.10. Here, the County had not previously faced the circumstance of a guard raping inmates. Even so, the jail had a zero-tolerance sexual assault policy and trained its guards on it. In *Connick*, the Court ruled that "[a] district attorney is entitled to rely on

prosecutors' professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations." 563 U.S. at 67. *Connick* also requires similarity among violations. *See id*. at 62-63. Following *Connick*'s reasoning, the County was also entitled to rely on its policies and training given the absence of any sexual assaults similar to Christensen's at the jail. *See* Majority op. at p. 26. ("To be certain, the accusations of Jorgenson's reprehensible conduct fell short of rape.").

2. *The "Obvious" Contradiction*

All agree this case turns on notice. The majority opinion states at p. 20: "The Supreme Court has made plain that a failure to act amounts to municipal action for *Monell* purposes only if the County has notice that its program will cause constitutional violations. See *Connick*, 563 U.S. at 61-62." *Canton* in footnote 10 provides that the need to train officers on constitutional limits "can be said to be 'so obvious' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." 489 U.S. at 390 n.10. The evidence the majority opinion relies on to conclude notice falls outside the sphere of single-incident liability.

The majority opinion concludes repeatedly and with certainty that the jail posed an obvious risk that male guards would sexually assault female inmates. Majority op. at p. 24 ("obvious *and* known risk"), *id*. ("the reality was as obvious as obvious can be"), *id*. at p. 27 ("obvious and known risk of sexual assaults in its jail"), and *id*. at p. 30 ("the risk of constitutional

injury—here, the sexual assaults—was obvious"). In support of this conclusion it reviews "evidence that the County was aware of sexual misconduct happening within its jail." *Id*. at p. 25. That notice evidence falls into four categories: (1) Nargis's tier talk (*Id*. at pp. 19, 25, and 28); (2) the "tizzy" email (*id*. at pp. 19 and 28); (3) infrequent, undated, and mostly unreported inappropriate comments by four guards over a twelve-year period (*id*. at p. 25); and (4) information gleaned from the Jorgenson investigation (*id*. at pp. 25-28). On this evidence the majority opinion holds that the County disregarded obvious notice of risk and the need for "different policies or training" and "more robust policies." *Id*. at pp. 31-32.

But in its consideration of and conclusion based on this evidence, the majority opinion embraces a contradiction. The identical four categories of evidence served as plaintiffs' evidence of notice in the district court. As in every appeal, we are limited by the record. The district court expressly ruled "that plaintiffs failed to put forth sufficient evidence to support finding a pattern of constitutional violations known to policymakers." Opinion and Order at 7, *J.K.J. v. Polk Cty.*, No. 15- CV-428, 2018 WL 708390 (W.D. Wis. Feb. 5, 2018), ECF No. 279. And plaintiffs have not challenged that holding on appeal. Appellees' Br. at 45 n.10 ("Plaintiffs do not argue on appeal that deliberate indifference is established here due to a pattern of similar past incidents.").

These four categories of evidence fail as "so obvious" notice under a pattern theory, as found by the district court. Nevertheless, in the majority opinion the same four categories provide "so obvious" notice

under a single-incident theory. The majority opinion turns the single-incident theory on its head, using the same facts to produce the opposite conclusion. On this same record, the need for more training and better policies is simultaneously "not at all obvious" and "so obvious." The lack of a pattern deprived the County of notice of a need, but the same evidence now provides notice of such a need. For example, the majority opinion allows Jorgenson's misconduct to provide "incremental notice of an obvious risk." Majority op. at p. 26. Unexplained is why—if four categories of evidence did not provide that notice, as the district court held—one category could.[8]

If the response is that the "so obvious" notice necessary for single-incident liability differs from the "so obvious" notice for pattern liability, no authority so provides. Nor would it. The same evidence is not being considered as of different times, or in a different sense. Pattern and single incident theories of liability differ in their requirements, but they share the identical objective of notice. Under either theory, a municipality's policymakers must have notice of omissions before being deemed deliberately indifferent. *Connick*, 563 U.S. at 61-62; *Bryan Cty.*, 520 U.S. at 410; *Canton*, 489 U.S. at 390 n.10. Evidence that falls short under one theory falls short under the other as well.

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[8] Also unexplained is how notice of an "obvious risk" could be "incremental." Incremental denotes gradual, or progressive, the opposite of a "so obvious" need necessary for deliberate indifference under a "single incident" theory. *Canton*, 489 U.S. at 390 n.10.

Do not construe my dissent as concluding that the four categories of evidence listed above are always irrelevant. Those categories would be relevant under other avenues of liability, such as implied policy or pattern theories. But the single-incident theory requires that the need for training be obvious without consideration of prior violations. *See Connick*, 563 U.S. at 63 n.7 (rejecting contemporaneous or subsequent evidence to prove notice). When evaluating "the risk from a particular glaring omission in a training regimen" the question is whether the risk is "obvious in the abstract." *Bryan County*, 520 U.S. at 410 (internal quotation marks omitted). That is for good reason. Single incident liability exists for a limited circumstance in which a municipality faced no prior instances of similar constitutional violations. *See Connick*, 563 U.S. at 64 (explaining that with the single-incident exception "[t]he Court [in *Canton*] sought not to foreclose the possibility, however rare, … that a city could be liable under § 1983 without proof of a preexisting pattern of violations"). The single-incident theory is a way to show liability, *without* evidence of past constitutional violations. Here, the district court concluded that those same categories of evidence failed to provide notice under a pattern theory, and an implied policy theory of liability is not before us. So the four categories cannot be considered here.

There is only one way out of this contradiction. If notice is no longer required, what remains is liability without notice: *respondeat superior*. *Monell* and Supreme Court precedents forbid that result. Because the "so obvious" standard from the *Canton* footnote 10

hypothetical cannot be satisfied here, the plaintiffs' constitutional claim is legally deficient.

B. Failure to Supplement Policies

The second basis on which the majority opinion concludes liability—that a failure to supplement County policies amounted to unconstitutional inaction under *Monell*—also relies on *Canton's* single-incident theory. For a number of reasons, that approach cannot be squared with the Court's admonitions in *Canton*, *Bryan County*, and *Connick* either.

Canton's single-incident hypothetical expressly considers only "the need to train" officers. 489 U.S. at 390 n.10. The Court has never extended single-incident liability outside failure to train. *See Connick*, 563 U.S. at 64 (limiting single-incident theory to "the obvious need for specific … training"); *Bryan County*, 520 U.S. at 410 (limiting single-incident theory to "a particular glaring omission in a training regimen"). The claim at issue involves something different—purported gaps in the County's sexual assault express policies—not failure to train.

As just noted, the majority opinion's unconstitutional inaction holding relies exclusively on the same four categories of evidence that failed to provide "obvious" notice of a need for more action. *Cf. Connick*, 563 U.S. at 61, 63, 71 (requiring "obvious" notice to establish single-incident liability); *Bryan County*, 520 U.S. at 410 (same); *Canton*, 489 U.S. at 390 n.10 (requiring "so obvious" and "plainly obvious" notice). So appears the contradiction: the same evidence the district court found did not provide notice, a finding left unchallenged on appeal, gives notice in the majority opinion of a need for more

action. The need for additional policies is simultaneously "not at all obvious" and "so obvious."

The majority opinion concludes that the County's zero-tolerance sexual assault policies contained "material gaps" because those policies did not include information about preventing and detecting sexual assaults. Majority op. at pp. 18-19. To prove deliberate indifference, plaintiffs must show it was "highly predictable" that, absent supplements to its zero-tolerance assault policies, male Polk County Jail guards would inflict the particular constitutional injuries suffered by plaintiffs. *Bryan Cty.,* 520 U.S. at 411. This means plaintiffs must show that those guards lacked the tools to know that sexual assault is a crime and violated County policies. *See id*. But as explained above, there were no prior instances of rape at the jail and plaintiffs' own opinion witness agreed the jail had a "good" record on sexual assaults. As with all of its guards, the County gave Christensen the tools to stop himself; he chose not to.

The majority opinion instead grounds fault solely on three generalized risks:

- That "[t]he confinement setting is a tinderbox for sexual abuse."
- That *any* "guard would grow too comfortable, lose his better angels, and step over the clear line marked in Polk County's written policies."
- That it was "'highly predictable,' if not certain, that *a male guard* would sexually assault a female inmate if the County did not act."

Majority op. at pp. 24-26 (emphases added).[9] Absent from these generalizations is any mention of how purported gaps in County policies amounted to deliberate indifference. Left unexplained is specifically how the decision to rely on policies that, until Christensen, produced "good" results on the particular risk of sexual assaults amounted to deliberate indifference. It cannot be said a situation that has never occurred is likely to recur. *See Bryan County*, 520 U.S. at 409 (basing predictability on "[t]he likelihood that the situation will recur").

The deliberate indifference standard in *Canton* has an important corollary. Under the single incident theory, *Canton* requires employers "know to a moral certainty" that their employees will face a "difficult choice of the sort that training or supervision will make less difficult." *Walker v. City of New York*, 974 F.2d 293, 297 (2d Cir. 1992) (citing *Canton*, 489 U.S. at 390 n.10). Case law has referred to this as the "difficult decision" or "difficult choice" requirement.

However phrased, it is not a "difficult choice" or a "difficult decision" for a guard not to rape an inmate. Such a decision is mandated by the law, written policies and training here, as well as any moral code. Just so, Christensen had no "difficult choice." He was instructed by the written policies, training, and the law not to sexually assault, but he willfully and surreptitiously ignored that training and instruction. For all these reasons, this case does not fit within the

[9] If such a generalized risk suffices to trigger notice here, the same generalized risk could apply for jail fights, medical attention, and other aspects of confinement.

narrow and rare single-incident exception to the pattern requirement for municipal liability.

C. Causation

To recover from the County under § 1983, plaintiffs also must prove "a direct causal link between the municipal action and the deprivation of federal rights." *Bryan County*, 520 U.S. at 404. A municipality cannot be liable "unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights." *Id.* at 415. Even if training or a policy omission was in some manner deficient, "the identified deficiency … must be closely related to the ultimate injury" such that "the deficiency … actually caused the police officers' indifference." *Canton*, 489 U.S. at 391. Said slightly differently, "a municipality can be liable under § 1983 only where its policies are the moving force behind the constitutional violation." *Id.* at 389 (citations, internal brackets, and quotation marks omitted). These causation requirements are "stringent" and "rigorous" to prevent expansions of constitutional tort liability and the use of federal courts to restructure municipal institutions. *See Bryan County*, 520 U.S. at 415 (holding a lesser causation standard embroils "serious federalism concerns" and permits "municipal liability [to] collapse[] into *respondeat superior* liability.").

This case presents a glaring causation problem: When Christensen assaulted the plaintiffs, he knowingly and willfully acted in defiance of his training and County policies. No evidence shows that Christensen decided to assault plaintiffs for any reason related to inadequate training or policies. The majority opinion cites no "affirmative link" between

the occurrence of Christensen's crimes and the County's alleged inaction. *Tuttle*, 471 U.S. at 823 (plurality opinion) ("At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged."); *Rizzo*, 423 U.S. at 371 (rejecting liability because "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy"). Without an affirmative link, the causation requirement is not met.

The majority opinion rests its conclusion of causation on the obviousness of a risk: "'The high degree of predictability' that constitutes notice … 'may also support an inference of causation …'" Majority op. at p. 30 (citing *Bryan County*, 520 U.S. at 409-10). Because the risk of constitutional injury was obvious, the majority opinion decides, only a "small inferential step" therefrom is necessary to find causation. Majority op. at p. 30. But there must be a foundation from which to take that step. That is missing here.

First, *Connick* emphasizes the notice a municipality's policymakers must have of the omissions in their training program causing municipal employees to violate a citizen's constitutional rights before the municipality may be deemed deliberately indifferent. 563 U.S. at 61-62. "Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Id*. at 62.

But the district court ruled, and it is unchallenged on appeal, that the misconduct evidence did not

constitute a pattern of constitutional violations. The lack of a pattern deprived the County of notice of a need for additional training and policies. Nevertheless, the majority opinion relies on that same evidence to conclude obviousness and notice. But it cannot be both ways; notice of a risk cannot simultaneously be not present and present. Respect for the district court's finding on an issue not appealed should control, and not form the foundation for a conclusion of causation.

Second is the type of causation found. Certainly, the absence of supplemental training and policies may increase the likelihood that a guard might assault an inmate. The inquiry here, though, is whether male Polk County Jail guards posed a risk to female inmates such that reliance on the County's existing policies and training would result in guard-on-inmate rape. *Bryan County*, 520 U.S. at 411. The district court did not perform this "legal inquiry," *id.*, for failure to train or unconstitutional inaction liability, and what remains is just a conclusion of potential causation.

But liability under § 1983 requires *actual* causation of an injury. *Bryan County*, 520 U.S. at 404-05; *Canton*, 489 U.S. at 389; *Monell*, 436 U.S. at 692 (holding the "mere right to control without any control or direction having been exercised" will not support § 1983 liability (citing *Rizzo*, 423 U.S. at 370-71)); *Rizzo*, 423 U.S. at 372, 375-76, 378 (distinguishing the mere failure to act from "active conduct"). "Proving that an injury or accident could have been avoided if an employee had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct will not suffice." *Connick*, 563 U.S. at

68 (quoting *Canton*, 489 U.S. at 391 (internal quotation marks and brackets omitted)). The question is not whether the inaction potentially caused plaintiffs' injuries; it is whether the inaction "actually" (*Canton*, 489 U.S. at 391) and "directly" (*Bryan County*, 520 U.S. at 415) caused the injuries. Here, no evidence shows that County inaction actually and directly caused plaintiffs' injuries.

Third, the majority opinion permits a finding of liability in jail and prison settings based not on proof of causation, but a presumption of negligence. Male jail guards have exclusive "authority and control" over "nearly everything in [inmates'] lives." Majority op. at p. 24. "With this authority and control … c[o]me[s] power and, in turn, access opportunity to abuse it." *Id*. Under this "delicate setting," "the risk of constitutional injury" "was as obvious as obvious could be." *Id*. at pp. 23, 28. "The jury knew that from common sense[,]" so "it took but a small inferential step for the jury to find causation." *Id*. at 28.

Far from *Monell's* "rigorous" causation requirements, the majority opinion's reasoning echoes *res ipsa loquitur*, presuming negligence from Christensen's crimes. *See Tuttle*, 471 U.S. at 831 n.6 (Brennan, J., concurring) (admonishing application of *res ipsa loquitur* doctrine in municipal liability claims). *Res ipsa loquitur* applies when "the facts of the occurrence warrant the inference of negligence" and "the defendant [has] *exclusive control* of all the things used in an operation which *might probably have* caused injury." *Jesionowski v. Bos. & M. R. R.*, 329 U.S. 452, 456 (1947) (emphases added) (citation and quotation marks omitted). Compare the elements

of *res ipsa loquitur* with the majority opinion's reasoning: The jail's "authority and control" through "male guards" over "nearly everything in [inmates'] lives," supports an inference of causation. Majority op. at p. 24. Instead of causation or deliberate indifference, negligence is presumed. *Monell* requires more: deliberate indifference and moving force causation, not "simple or even heightened negligence." *Bryan County*, 520 U.S. at 407.

Plaintiffs' appalling injuries were not caused by a lack of specific training and policy language about sexual assault prevention and detection. They were caused by a miscreant guard's hidden, willful, and criminal defiance. There is no evidence that Christensen made the decision to assault plaintiffs for any reason related to inadequate training or policies. For example, no evidence shows that Christensen calculatedly exploited training and policy gaps. Nor does any evidence show that such gaps emboldened, let alone caused, Christensen to commit rapes. The record shows that when Christensen assaulted plaintiffs he knew he was acting contrary to his training and in violation of County policies. From this undisputed evidence, any reasonable fact finder would have to conclude that Christensen's bad-faith conduct, in conflicting with his employer's policies and training, caused plaintiffs' injuries. Christensen, not the County, was the "moving force" that caused plaintiffs' injuries. *Monell*, 436 U.S. at 691-92.

IV. Federalism

The majority opinion encroaches on the federalism principles that the Supreme Court's *Monell* cases hold so essential.

Monell's policy requirement was intended to balance § 1983's remedial purpose with the principle that the power exercised by federal courts must not be so broad as to upend the delicate balance of powers among federal, state, and local governments. *See* Michael J. Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability under Section 1983*, 62 S. Cal. L. Rev. 539 (1989). The majority opinion upsets that balance. It extends federal civil liability by allowing a federal statute to dictate municipal liability, impermissibly infringing on state and local independence and self-governance. It also defines notice of constitutional violations so broadly that liability may now arise in any confinement setting, without limit.

The Supreme Court has emphasized the important federalism interests implicated by municipal liability cases involving failure to train, like this one. Allowing § 1983 cases to advance against municipalities for failure to train or inaction "on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities—a result [] rejected in *Monell*." *Canton*, 489 U.S. at 392 (citation omitted). "This is an exercise … federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism." *Canton*, 489 U.S. at 392 (citing *Rizzo*, 423 U.S. at 378-80).

The Court sounded the same warning in *Bryan County*:

> Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat*

> *superior* liability. As [] recognized in *Monell* and [] repeatedly reaffirmed [since], Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights. A failure to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing … requirements that States have themselves elected not to impose.

520 U.S. at 415 (citing *Canton*, 489 U.S. at 392).

Connick raised the same cautionary flag: "[Section 1983] does not provide plaintiffs or courts *carte blanche* to micromanage local governments throughout the United States." 536 U.S. at 68. While Justice Scalia joined the *Connick* opinion in full, his concurrence explained that the dissent's "theory of deliberate indifference would repeal the law of *Monell*." 536 U.S. at 73 (Scalia, J., concurring):

> [W]e do not have *de facto respondeat superior* liability, for each such violation under the rubric of failure to train simply because the municipality does not have a professional educational program covering the specific violation in sufficient depth. …
>
> These restrictions are indispensable because without them, failure to train would become a talismanic incantation producing municipal liability in virtually every instance where a person has had his or her constitutional rights violated by a city employee—which is what *Monell* rejects. Worse, it would engage

> the federal courts in an endless exercise of second-guessing municipal employee-training programs, thereby diminishing the autonomy of state and local governments.

Id at 73-74 (quotes, citations, and footnotes omitted).

This case presents the infringement warned of in *Canton*, *Bryan County*, and *Connick* by allowing a federal statute to dictate a municipality's liability without proof of fault or causation.

The majority opinion declares the County was deficient in preventing and detecting sexual assaults. This standard is drawn directly from the trial testimony of plaintiff's opinion witness, Eiser, that the jail had inadequately addressed the prevention and detection of sexual assaults of inmates. Eiser testified PREA "set[s] the standard for jails very clearly." According to Eiser, the PREA standard has three components: prevention, detection, and training. The prevention and detection components are lifted directly from the text of PREA.[10] The changes he recommended to allow for easier reporting of sexual assaults—including the lockbox for inmate complaints mentioned in the majority opinion—are all teachings of PREA. Eiser further testified the jail had addressed only one of the PREA components in its policy, and what should occur if a facility cannot meet all the PREA components.

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[10] At 34 U.S.C. § 30302 PREA provides: **"**The purposes of this chapter are to—(6) increase the accountability of prison officials who fail to *detect, prevent*, reduce, and punish prison rape." (emphasis added).

Per the majority opinion "PREA is not a constitutional standard, and jails are not required to adopt it." Majority op. at p. 29. Yet, it concludes that the county's liability rests on Eiser's testimony that the municipality failed to prevent and detect the sexual assaults by a guard of two inmates. Strikingly, an opinion witness who advanced a standard the majority opinion says is not required now sets the fault standard in this circuit, even though that witness agreed the County had a "good" record on sexual assaults.

What type of action must municipalities take to satisfy this new standard and avoid liability? The majority opinion says "reasonable steps to reduce the obvious and known risks of assaults on inmates." *Id.* at p. 29. But what those reasonable steps should be requires notice, which the County did not have. Recall, the district court concluded that the four categories of evidence, including the Jorgenson incident, did not collectively make a risk of rape known to the County. Per the majority opinion, the only direction given to courts and municipal policymakers on those reasonable steps are the detection and protection measures of PREA. If Wisconsin municipal jails should be held to the PREA standard, that decision should be made by the people of Wisconsin through their legislature, or by the Wisconsin Department of Corrections through administrative rulemaking. Instead, PREA's adoption effectively comes by way of this court.

This case presents another federalism concern: One of the mechanisms by which the majority opinion concludes the jail was on notice of policy and training

gaps applies to all confinement settings. As the Court explained in *Bryan County*, establishing that a municipality acted with "deliberate indifference … require[es] proof that a municipal actor disregarded a known or obvious consequence of his action." *Id*. at 410 (internal quotation marks omitted). The Court specifically rejected fault based on generalized risk. *Id*. But the majority opinion permits fault based on such a generalized risk by defining "obvious" so expansively as to render the term effectively without meaning.

Because the majority finds the risk of sexual assault is "obvious" in all confinement settings involving male guards and female inmates, Majority op. at p. 24, and inaction in the face of that "obvious" risk establishes deliberate indifference, any municipality in the Seventh Circuit operating a confinement setting with male guards and female inmates may now be subject to liability and federal oversight if it does not enact new policies or training. This formulation, founded on an incurable standard of notice, is unworkable. Regardless of what steps a municipality takes, it is on notice of the risk of sexual assaults so long as male guards supervise female inmates in a confinement setting. And even if a municipality enacts policies to prevent sexual assaults and trains employees on those policies (like Polk County), it is deliberately indifferent unless it enacts additional policies and training programs.

This formulation also gives no guidance to district courts or municipal policymakers as to what training is or is not required to avoid a constitutional deprivation. This creates liability potentially

unlimited in scope; if it has limits, those contours are ill-defined, and certain to confound and divide courts and policymakers. And in creating potentially unlimited liability, this court disregards each of the warnings and cautions on this topic passed to us from the Supreme Court and repeated above.

For these reasons, our law interpreting § 1983 should follow the Court's lead and avoid intrusion into an area of traditional state authority such as this. *See, e.g., Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 50 (2008) (holding the "federalism canon … obliges us to construe [a statute]'s exemption narrowly"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (refusing to interpret a statute "[t]o displace traditional state regulation" unless Congress's intent to do so was clear from the statute (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991)); *Gregory*, 501 U.S. at 468 ("By its terms, the Fourteenth Amendment contemplates interference with state authority: 'No State shall … deny to any person within its jurisdiction the equal protection of the laws.' … But this Court has never held that the Amendment may be applied in complete disregard for a State's constitutional powers." (quoting U.S. Const. amend. XIV § 1)).

The majority opinion heralds federal involvement in what historically has been an area of state and local decision-making. Subsidiarity should be respected, especially with the Supreme Court repeatedly and specifically noting important federalism interests in precisely this type of case.

V. Rule 50 and the Jury Verdict

Courts are the gatekeepers for the questions a jury may properly answer. In permitting a jury to determine whether a municipality is liable under § 1983, courts are constrained by the Supreme Court cases relayed above in II., the parameters of failure to train liability as explained in III., and the federalism principles noted in IV.

Federal Rule of Civil Procedure 50 sets the standard and procedure courts are to employ in this role. "Judgment as a matter of law is proper 'if a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.'" *Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761 (7th Cir. 2015) (quoting Fed. R. Civ. P. 50(a)(1)).

This court reviews de novo a district court's ruling on a post-trial motion for judgment as a matter of law under Rule 50. *Andy Mohr Truck Center, Inc. v. Volvo Trucks N.A.*, 869 F.3d 598, 602 (7th Cir. 2017) (citation omitted). The evidence is viewed in the light most favorable to the verdict. *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 822 (7th Cir. 2016). This standard applies regardless of whether the verdict under review was for the plaintiff or the defendant and regardless of the case's underlying legal issues. *Schandelmeier-Bartels v. Chicago Park Dist.*, 634 F.3d 372, 376 (7th Cir. 2011).

The showing required for judgment as a matter of law under Rule 50 has been equated with a grant of summary judgment under Federal Rule of Civil Procedure 56. The Advisory Committee Note to the 1991 amendments to Rule 50 explains that, in part, those amendments are intended to call attention to

the similarity between judgment as a matter of law under Rule 50 and summary judgment under Rule 56. The Supreme Court has also "noted that the 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard … ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986); *see also Miller v. Fisher*, 381 F. App'x 594, 596 (7th Cir. 2010) ("The standard [for reviewing a Rule 50 motion] mirrors our appellate analysis of a motion for summary judgment.").

When considering whether a claim survives a motion for judgment as a matter of law, courts decide whether the claim is legally sufficient. *See* Fed. R. Civ. P. 50(a)(1) (stating a judge may grant judgment as a matter of law if the movant shows "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue"). This question differs from the factual finding asked of and made by a jury. District courts must determine the controlling law and exercise "responsibility to assure the fidelity of [their] judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment." Fed. R. Civ. P. 50 advisory committee's note to 1991 amendment (citation omitted). That note provides good guidance: "In ruling on such a [Rule 50] motion, the court should disregard any jury determination for which there is no legally sufficient evidentiary basis enabling a reasonable jury to make it." *Id.*

The constitutional claim against the County never should have reached the jury. Summary judgment should have been granted to the County because the

claim was legally deficient, as shown above.[11] The legal deficiency of the claim, more than the lack of evidence, should have led to its demise. If summary judgment had not been granted on the claim, judgment as a matter of law should have been granted to the County.

If this court had reversed the district court's denial of the County's motion for judgment as a matter of law, it certainly would not have "taken a case from the jury." Rather, it would have exercised its proper role by deciding that the jury never should have considered the claim against the County in the first place. Putting to the side the understandable sympathy factor—the desire to make someone pay for the assaults these plaintiffs endured—the County should not be held liable on plaintiffs' legally deficient constitutional claim. Liability standards exist to govern behavior. Every tort case has a standard for fault and for causation. The court's role is to preclude a finding of liability if there is no legal basis and no causal link to hold the defendant at fault. Otherwise courts fail to ensure that the law is properly applied. A jury's verdict must be respected, but the jury can only be posed a question the law allows. This jury was asked a question it should not have been.

This case presents the downside of the mantra "let a questionable claim go to the jury." A claim that should have been denied at summary judgment, or resolved after the evidence was presented, or even post-trial, took on inertia. Rule 50 exists to prevent

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[11] The County moved for summary judgment on plaintiffs' § 1983 claims on this issue (Dist. Ct. D.E. 54), which the district court denied. (Dist. Ct. D.E. 160 at 30).

that. The Supreme Court and federal appellate courts consistently overturn verdicts that rest on incorrect legal grounds. As noted above, the Court's failure-to-train decisions that control here each reversed a jury verdict for the plaintiff: *Tuttle*, 415 U.S. at 813*; Canton*, 489 U.S. at 391; *Bryan Cty*., 520 U.S. at 400; and *Connick*, 563 U.S. at 57.

In addition to these reversals, in the last twenty years this court has overturned jury verdicts, for plaintiffs and for defendants, in at least twelve cases when a prisoner inmate sued under § 1983.[12] In about

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[12] *Martin v. Milwaukee Cty.*, 904 F.3d 544 (7th Cir. 2018) (reversed jury verdict for plaintiff on a prison sexual assault claim because rape not within scope of employment); *Ruiz-Cortez v. City of Chicago*, 931 F.3d 592 (7th Cir. 2019) (vacated jury verdict for defendant on a *Brady* violation claim, ordered a new trial on that claim, and affirmed summary judgment for town on *Monell* claim); *Nelson v. City of Chicago*, 810 F.3d 1061 (7th Cir. 2016) (reversed jury verdict for plaintiff on an unlawful search and seizure claim and ordered a new trial); *Barber v. City of Chicago*, 725 F.3d 702 (7th Cir. 2013) (reversed jury verdict for defendant on claims of arrest without probable cause and excessive force and ordered a new trial); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513 (7th Cir. 2012) (reversed jury verdict for defendants on a claim of excessive force and remanded to enter judgment for plaintiff); *Duran v. Town of Cicero*, 653 F.3d 632 (7th Cir. 2011) (reversed denial of defendant's new trial motion on claims of excessive force, false arrest, and equal protection violations against police officers and town); *Fox v. Hayes*, 600 F.3d 819 (7th Cir. 2010) (reversed jury verdict for plaintiffs due process claim after plaintiffs won on false arrest, malicious prosecution, violation of due process, and state law claims because plaintiff's state law theory was the same as violation of due process claim); *Watkins v. Kasper*, 599 F.3d 791 (7th Cir. 2010) (reversed jury verdict for incarcerated plaintiff's exercise of free speech claim because inmate's speech was inconsistent with legitimate penological interests); *Thomas v. Cook Cty. Sheriff's*

the same time frame this court has twice overturned a jury's finding of an unconstitutional policy in *Monell* cases. *See Thomas v. Cook Cty. Sheriff's Dept.*, 604 F.3d 293, 298 (7th Cir. 2010) (concluding insufficient evidence existed to hold sheriff liable because causal connection between his policies and death was tenuous in light of jury's finding that individual correctional officers deliberately disregarded plaintiff's medical needs); *Palmquist v. Selvik*, 111 F.3d 1332, 1347 (7th Cir. 1997) (holding municipality was not deliberately indifferent for failure to train because the lack of training was not sufficiently obvious and any inadequacy was not sufficiently likely to result in a constitutional violation). Because the constitutional claim against the County had no legal basis, judgment as a matter of law should have been granted.

VI. Other Case Law

The majority opinion expands municipal liability under § 1983 beyond the boundaries established by federal appellate courts, including that of this circuit:

Dep't, 604 F.3d 293 (7th Cir. 2009) (reversed jury verdict for plaintiff's wrongful death action against sheriff under *Monell* and remanded to enter judgment in sheriff's favor); *Campbell v. Miller*, 499 F.3d 711 (7th Cir. 2007) (reversed jury verdict for defendant officer because no jury could find his public strip search of the plaintiff in a driveway was reasonable); *Riccardo v. Rausch*, 375 F.3d 521 (7th Cir. 2004) (reversed jury verdict for incarcerated plaintiff on a failure to protect claim); *Campbell v. Peters*, 256 F.3d 695 (7th Cir. 2001) (reversed jury verdict for incarcerated prisoner on qualified immunity grounds).

- No federal appellate court has ever extended the single-incident exception to the sexual assault context;
- No federal appellate court has ever extended the single-incident exception when the employee's compliance with the municipality's policy and training would have prevented the injuries; and
- Specialized training is not required to know that rape is wrong.

A. Single-Incident Liability for Sexual Assaults

The other federal appellate courts to have ruled on this issue have rejected the "so obvious" single-incident exception in the sexual assault context:[13]

Eighth Circuit: *Parrish v. Ball*, 594 F.3d 993, 999 (8th Cir. 2010) (rejecting plaintiff's single-incident theory because "tell[ing] officers to not sexually assault detainees [] is not so obvious that not doing so would result in an officer actually sexually assaulting a female detainee"); *S.J. v. Kansas City Missouri Pub. Sch. Dist.*, 294 F.3d 1025, 1029 (8th Cir. 2002) (rejecting plaintiff's single-incident claim after finding there is no patently obvious need for public schools or principals to train volunteers not to commit sexual abuse); *Andrews v. Fowler*, 98 F.3d 1069, 1077 (8th Cir. 1996) (rejecting plaintiff's single-incident theory after determining there is no "patently obvious need

[13] The majority opinion is also at odds with this court's order in *Johnson v. Cook Cty.*, 526 F. App'x 692 (7th Cir. 2013), in which this court rejected single- incident liability and affirmed the dismissal of an inmate's *Monell* claim after the inmate was sexually assaulted by a Cook County Jail employee. *Id.* at 697.

for the city to specifically train officers not to rape young women").

Ninth Circuit: *Flores v. Cty. of Los Angeles*, 758 F.3d 1154, 1160 (9th Cir. 2014) (rejecting plaintiff's single-incident theory of liability because "[t]here is [] every reason to assume that police academy applicants are familiar with the criminal prohibition on sexual assault, as everyone is presumed to know the law").

Tenth Circuit: *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 774 (10th Cir. 2013) (rejecting plaintiff's single-incident claim because "[s]pecific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior" (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1308 (10th Cir. 1998)); *Barney v. Pulsipher*, 143 F.3d at 1308 ("[T]his case does not fall within the narrow range of circumstances justifying a finding of deliberate indifference absent a pattern of violations … [because] we are not persuaded that a plainly obvious consequence of a deficient training program would be the sexual assault of inmates.").

Eleventh Circuit: *Floyd v. Waiters*, 133 F.3d 786, 796 (11th Cir. 1998), *vacated on other grounds by* 525 U.S. 802 (1998), *reinstated by* 171 F.3d 1264 (11th Cir. 1999) (board of education was "entitled to rely on the common sense of its" security guards not to sexually harass and rape underage girls.).

The only federal appellate case arguably to the contrary may be *Cash v. Cty. of Erie*, 654 F.3d 324, 337-38 (2d Cir. 2011). But *Cash* does not apply a single-incident theory analysis or even cite to *Canton's*

single-incident hypothetical. *Cash* itself states it is not a failure-to-train case: "the deliberate indifference concern in this case … is not with a failure to train prison guards to distinguish between permissible and impermissible sexual contact with prisoners. Nor is it with providing sufficient supervision to ensure that guards make correct choices in this respect." *Id*. at 336. *Cash* also based its conclusion of liability on a generalized risk rather than a particularized inquiry (violating *Bryan County*, 520 U.S. at 410-13), and it ignored the requirement of similar prior violations (violating *Connick*, 563 U.S. at 62-63).

A failure to supervise case, *Cash* holds: "[K]nowledge that an established practice has proved insufficient to deter lesser [sexual] misconduct can be found to serve notice that the practice is also insufficient to deter more egregious misconduct." 654 F.3d at 337. *See* Majority op. at p. 26 (quoting same). But that holding offers no help. Here, unlike *Cash*, the district court ruled that plaintiffs' pattern evidence of lesser misconduct failed to show notice of an obvious need for revised policies and training. Plaintiffs did not appeal that ruling. And unlike the majority opinion here, *Cash* does not deem it obvious that without training male guards will rape female inmates. To the extent the majority opinion may read *Cash* differently, district courts in the Second Circuit have not followed suit.[14]

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[14] Recall, to prove deliberate indifference under the single-incident theory of liability, *Canton* requires employers "know to a moral certainty" that their employees will face a "difficult choice of the sort that training or supervision will make less difficult." *Walker v. City of New York*, 974 F.2d 293, 297 (2d Cir.

B. Failure to Comply with Policies and Training

A federal appellate court also has never extended the single-incident exception when the employee's compliance with the municipality's policy and training would have prevented the injuries:

Fifth Circuit: *Pena v. City of Rio Grande City*, 879 F.3d 613, 624 (5th Cir. 2018) (determining single incident theory should be limited to "cases in which the government actor was provided no training whatsoever"); *Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 377-78, 385-86 (5th Cir. 2005) (concluding single-incident exception did not apply when training occurred).

1992). District courts in the Second Circuit after *Cash* have not concluded that sexual assault qualifies as a "difficult decision." *See*, *e.g.*, *R.A. v. City of New York*, 206 F. Supp. 3d 799, 803 (E.D.N.Y. 2016) ("The complaints against Defendant … show a conscious decision by Defendant … to commit sexual assault, which does not present a 'difficult choice' [that] further training would prevent." (quoting *Walker*, 974 F.2d at 297 (citations omitted)); *Noonan v. City of New York*, 2015 WL 3948836, at *4 (S.D.N.Y. June 26, 2015) (decision to commit a sexual assault cannot reasonably be seen as posing the type of "difficult choice" contemplated by the Second Circuit in *Walker*.); *Doe v. City of New York*, 2013 WL 796014, at *4 (S.D.N.Y. Mar. 4, 2013) ("Plaintiff has not plausibly alleged that either [officer]'s decision to rape her or [second officer]'s decision to aid and abet that rape was a 'difficult choice of the sort that training or supervision will make less difficult.'" (quoting *Walker*, 974 F.2d at 298)); *Castilla v. City of New York*, 2012 WL 5510910, at *6 (S.D.N.Y. Nov. 14, 2012) ("It beggars common sense to posit that [the officer] faced a difficult choice as to whether or not to coerce sex from [plaintiff] and that training would have alleviated that conundrum.").

Ninth Circuit: *Jason v. Tanner*, 938 F.3d 191, 199 (5th Cir. 2019) (rejecting single-incident theory because prison had trained about sling-blade misuse, "albeit training that didn't prevent th[e] attack," and "this was the first and only sling-blade attack in a presumably otherwise incident-free program").

Tenth Circuit: *Waller v. City & Cty. of Denver*, 932 F.3d 1277, 1288 (10th Cir. 2019) (rejecting single-incident theory because "[t]his case does not involve technical knowledge or ambiguous 'gray areas' in the law that would make it 'highly predictable' that a deputy sheriff … would need 'additional specified training' to … put [him] on notice that [he] may not violently assault a restrained detainee"); *Keith v. Koerner*, 843 F.3d 833, 839-40 (10th Cir. 2016) (rejecting failure-to-train liability because jailer received training about the impropriety of and potential consequences for engaging in sexual misconduct); *Schneider*, 717 F.3d at 774 (10th Cir. 2013) (rejecting failure-totrain liability where the offending officer "was, in fact, instructed against relationships with women he met on duty. …"); *Porro v. Barnes*, 624 F.3d 1322, 1328-29 (10th Cir. 2010) (county jail's policy of training jailers to use stun guns and failure to enforce federal policy that banned use of stun guns on immigration detainees did not demonstrate deliberate indifference).

On first glance, the only federal appellate court case on the other side of this question might be *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997), in which a divided panel reversed summary judgment granted to a city on an excessive force claim and held that failure to train officers how to deal with armed and mentally

ill persons fits within the *Canton* single-incident exception. *Id.* at 844. But in *Allen* the officer was trained to do the *wrong* thing, not left untrained. *Id.* Unlike *Allen*, no one disputes that had Christensen followed his training or the jail's policies, the injuries to plaintiffs never would have occurred.

These cases instruct that single-incident liability should not be extended to cases involving a rogue officer not complying with uncomplicated and constitutionally sound policies and training. Christensen admitted at trial that the County trained him on the illegality of sexual contact between guards and inmates. Christensen also admitted he did not require more training to know his conduct was a crime. Even plaintiff's opinion witness Eiser conceded at trial that no proof exists that better or more training could have dissuaded Christensen from his predatory and assaultive behavior.

C. No Need for Specialized Training

The third requirement from *Connick* is that the degree of training received by municipal employees is not relevant to establishing liability under *Canton*'s single-incident hypothetical. 563 U.S. at 68. Per *Connick*, courts should be "concerned with the substance of the training, not the particular instructional format." *Id.* To rule to the contrary would "provide plaintiffs or courts *carte blanche* to micromanage local governments." *Id.* This would "'engage the federal courts in an endless exercise of second-guessing municipal employee-training programs,' thereby diminishing the autonomy of state and local governments." *Connick*, 536 U.S. at 75

(Scalia, J. concurring) (quoting *Canton*, 489 U.S. at 392).

Applying *Connick*, the inquiry is whether the Polk County Jail trained its guards not to commit sexual assault, not the amount or particulars of that training. *Connick*, 563 U.S. at 68. Nevertheless, the majority opinion is replete with conclusions on the nature, quantity, and timing of the training: what language was and was not included in Polk County's written policies; what topics were and were not discussed in training sessions; when the training did and did not occur; and how the training should have been done, in contrast to how it was done.[15] The majority opinion

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[15] Majority op. at p. 2 ("Nor did the County provide any meaningful training on the topic [of sexual assault]."), *id.* (finding relevant that no further training occurred after Jorgenson incident); *id.* at p. 9 ("no training (in any sense of the word) focused on the sexual harassment or assault"); *id.* at pp. 10-11 (quoting email that training would "hit the basics" but no requirement jail would be compliant with everything PREA calls for); *id.* at p. 10 (finding relevant what topics Sergeant Schaefer did and did not train officers on); *id.* at p. 11 (noting plaintiffs' evidence on "inadequacy of Polk County's policies and training"); *id.* (recounting Eiser's testimony on insufficiency of training); *id.* at p. 19 ("[T]he County's training on preventing and detecting the sexual harassment and abuse of inmates was all but nonexistent"); *id.* ("The training consisted almost exclusively of informing guards of the easy and evident.") *id.* (noting single session on PREA); *id.* at p. 20 (stating jury could have found jail's "sexual abuse prevention program was entirely lacking"); *id.* (stating County "exacerbated the gap by failing to use training as the means of making the policy prohibition a reality"); *id.* at p. 27 (identifying failure to institute a training session after Jorgenson incident); *id.* at p. 31 (stating County should have "put in place some of Eiser's proposed policies and training to prevent but especially detect sexual abuse"); *id.* ("If Polk County had different

equates its conclusion of insufficient training with no training. But that decides the amount, type, and frequency of training. After *Connick*, 563 U.S. at 68, that is not the court's inquiry.

The County's policies and training—that guards are not to sexually assault inmates—admits of no nuance, separating it from the deadly force training of *Canton* and the *Brady* prosecutorial obligations of *Connick*. The training here is imperative and declarative: a jailer may not have sexual contact with an inmate, and if the jailer does, the jailer will be fired and prosecuted for a felony under Wisconsin law. That is not a gray area, confounding correctional officials, nor did Christensen so testify. In fact, he admitted exactly the opposite: he knew what he was doing was criminal, and that no more training would have altered that. Christensen, not the County, committed the legally and morally violative decisions here.

Federal appellate courts to have addressed this issue have held that specialized training is not required for an employee to know that sexual assault is wrong:

Eighth Circuit: *McGuire v. Cooper*, 952 F.3d 918, 2020 WL 1069461 at *3 (8th Cir. 2020) (concluding reasonable supervisor would not know that a failure to specifically train a deputy not to sexually assault a woman would cause that deputy to engage in that behavior); *Parrish*, 594 F.3d at 999 ("[W]e do not believe that there is a patently obvious need to train an officer not to sexually assault women."); *Andrews*,

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policies or training, … these women or someone else may have felt able to report the abuse … .").

98 F.3d at 1077 ("In light of the regular law enforcement duties of a police officer, we cannot conclude that there was a patently obvious need for the city to specifically train officers not to rape young women.").

Ninth Circuit: *Flores*, 758 F.3d at 1160 ("We agree with our sister circuits that '[i]n light of the regular law enforcement duties of a police officer' there is not 'a patently obvious need for the city [ ] specifically [to] train officers not to rape young women.'" (quoting *Andrews*, 98 F.3d at 1077)).

Tenth Circuit: *Schneider*, 717 F.3d at 773-74 (rejecting failure-to-train liability because "[s]pecific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior" (quoting *Barney*, 143 F.3d at 1308)); *Barney*, 143 F.3d at 1308 (same).

Eleventh Circuit: *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 490 (11th Cir. 1997) (reversing jury verdict against town and rejecting failure-to-train liability because it is obvious that a police officer should not "barter arrests for sexual favors").

The majority opinion's expansion of § 1983 liability becomes even more apparent when one considers how many of the decisions listed above would have come out the opposite way under the majority opinion's rule.

D. Seventh Circuit

For support the majority opinion cites to two decisions of this court: *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917 (7th Cir. 2004), and *Glisson*

v. Indiana Dep't of Corr., 849 F.3d 372 (7th Cir. 2017) (en banc). Neither assists here.

In *Woodward*, this court affirmed a judgment under *Monell* when a contractor repeatedly failed to act in the face of known violations. 368 F.3d at 930. But unlike here, in *Woodward* the contractor violated an express policy and willfully ignored its own policies. 368 F.3d at 926. *Woodward* was not a failure-to-train case, and it did not grapple with the requirements of *Canton* and *Connick*; indeed, it mentions neither case. *Woodward* also found "a direct link" between the policy at issue and the constitutional deprivation, an inmate's suicide. 368 F.3d at 929. That requirement comes from *Bryan County*. 520 U.S. at 404. As noted above such a link is absent here.

The majority opinion also cites *Glisson* as a pathway for J.K.J. and M.J.J. to make their case to a jury. *Glisson* held that an inmate healthcare provider could be liable under § 1983 for failing to establish any protocol for the coordinated care of inmates with chronic illnesses. 849 F.3d at 380. But *Glisson* involved a failure to enact a policy, not a failure to train employees. *Id.* at 382. In *Glisson*, this court concluded that the contractor had deliberately chosen not to have *any* policy as to the coordination of care, even though the contractor had actual knowledge that would result in deprivation of rights. *Id.* at 382. That is not the case here. No one disputes the jail had express zero-tolerance sexual assault policies and trained its guards about those policies. And, actual knowledge of sexual assaults is absent here. Even more, to align with *Glisson*, sexual assaults by male

guards would have to be as obvious as not coordinating care for sick people, which was not shown here.

VII. Conclusion

A lone correctional officer covertly committed terrible sexual assaults against two jail inmates. That employee is now behind bars for 30 years and has millions of dollars of civil judgments against him. At issue is whether his public employer is also liable for those crimes.

Under the majority opinion, a single subordinate employee may secretly override municipal policy and create a new policy under which that public employer is accountable. That is vicarious liability, a collapse into *respondeat superior* against which the Supreme Court has repeatedly warned for 60 years. By stepping out and recognizing fault and causation on these facts, this decision departs from Supreme Court precedents, imports a negligence standard into the law of deliberate indifference, permits federal encroachment into an area of traditional state authority, and splits with other federal circuits. On these facts and under the controlling law, the employee, not the employer, should be held responsible for these plaintiffs' injuries. Therefore, I respectfully dissent in part.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 18-1498, 18-1499, 18-2170 & 18-2177

J.K.J. and M.J.J.,

Plaintiffs-Appellees,

v.

POLK COUNTY AND DARRYL L. CHRISTENSEN,

Defendants-Appellants.

Argued: Nov. 9, 2018
Decided: June 26, 2019

Before: Bauer, Brennan,
and Scudder, *Circuit Judges*.

OPINION

BRENNAN, *Circuit Judge*. Darryl Christensen, a Polk County, Wisconsin Jail corrections officer, sexually assaulted plaintiffs J.K.J. and M.J.J. over three years during their incarcerations. Plaintiffs sued Christensen and the county under 42 U.S.C. § 1983, alleging Eighth and Fourteenth Amendment claims, in addition to a state law negligence claim against the county. After trial, the jury found Christensen and the county liable for J.K.J. and M.J.J.'s injuries and awarded each $2 million in

compensatory damages. The jury also levied punitive damages against Christensen, awarding $3,750,000 to each plaintiff. Both defendants moved for new trials, and the county also moved for judgment as a matter of law. The district court denied those requests and defendants now appeal the judgments entered against them.

We see no reason to disturb the jury's verdict against Christensen and so affirm the denial of his request for a new trial. His assaults were predatory and knowingly criminal. But to impose liability against the county for Christensen's crimes, there must be evidence of an offending county policy, culpability, and causation. These are demanding standards. Christensen's acts were reprehensible, but the evidence shows no connection between the assaults and any county policy. We therefore reverse and remand for entry of judgment in favor of the county.

I. BACKGROUND

A. *Christensen's Sexual Assaults*

M.J.J. and J.K.J. were inmates at Polk County Jail at various times between 2011 and 2014. Christensen admits he engaged in sexual acts with the women individually. To hide his offenses, Christensen planned his encounters to occur when no one was present and in locations where he controlled access. He also urged plaintiffs not to discuss or report his sexual advances because he would lose his job and family if caught. Plaintiffs complied with Christensen's secrecy directive and his assaults were kept hidden from jail officials.

Polk County authorities discovered Christensen's assaults against M.J.J. and J.K.J. after a former inmate reported her own sexual encounters with Christensen to an investigator in a neighboring county. When notified of the former inmate's allegations, county authorities initiated an internal investigation and confronted Christensen, who immediately resigned. The investigation continued, which led to the discovery of Christensen's abuse of plaintiffs, and ultimately to his prosecution. He eventually pleaded guilty to several counts of sexual assault and is serving a 30-year prison sentence.

B. ***Trial Evidence***

Plaintiffs sued the county and Christensen in separate actions and the cases were consolidated for jury trial. Plaintiffs alleged that defendants were deliberately indifferent to a serious risk of sexual assault in violation of their Eighth and Fourteenth Amendment rights, and that the county violated state law by negligently supervising Christensen.

At trial, Christensen admitted his offenses but challenged the harms plaintiffs suffered. He argued plaintiffs consented to his overtures and that their encounters were the product of "voluntary attraction." Although not stated directly, his position implied that any award of damages should correspond to plaintiffs' level of consent. Plaintiffs denied consenting to Christensen's advances and offered expert testimony showing their mental trauma from his assaults.

Against the county, plaintiffs made four principal allegations: (1) the jail's sexual assault policies and training were inadequate; (2) the jail customarily tolerated sexually offensive comments by guards; (3)

the investigation of a former guard revealed the jail's sexual assault policy was inadequate and that the jail minimized sexual abuse; and (4) the jail failed to widely implement recommendations under the Prison Rape Elimination Act (PREA), 34 U.S.C. §§ 30301-09. The sum of these allegations, plaintiffs argued, prove the county was deliberately indifferent to a known risk of sexual assault by jail staff. The county disagreed, arguing that the trial evidence did not support the jury's liability finding and damages awards. These claims were heavily contested, and we recount the evidence noting those facts the county disputed. Although we summarize the trial evidence, on appeal we view the facts in the light most favorable to the jury's verdict. *See Lindsey v. Macias*, 907 F.3d 517, 518 n.1 (7th Cir. 2018).

1. *Policies and training*

Plaintiffs alleged the jail had no policy either to prevent or detect sexual assaults, and that its policies on sexual misconduct were "practically nonexistent." At trial, the county produced several policies prohibiting sexual contact between guards and inmates, and two stand out.

Policy I-100 forbids any mistreatment or harassment of inmates, explaining inmates' rights and informing them that it is never acceptable for "any inmate [to] be the object of verbal, physical, emotional, psychological, or sexual harassment by facility staff." The policy continues, "[a]ny officer engaged in such actions is subject to disciplinary charges and/or termination." Inmates are also provided a handbook when booked into the jail that says:

> Every inmate has the right to be safe from sexual abuse and harassment. No one has the right to pressure you to engage in sexual acts. If you are being pressured threatened, or extorted for sex, you should report this to staff immediately.

Likewise, Policy C-202 prohibits any "intimate social or physical relationship with a prisoner." It also informs jail staff that sexual contact with any inmate is a criminal offense under Wisconsin law, and any officer that suspects such conduct has a duty to report it. *See* Wis. Stat. § 940.225(2)(h) (categorizing sexual contact and sexual intercourse by a correctional staff member with an inmate as a Class C felony).

Plaintiffs also claimed the county never trained officers to avoid sexual assaults. But the jail's onboarding and continuing education programs instruct employees that sexual contact with prisoners is a crime and never permitted. The Wisconsin Department of Corrections (DOC) approved these programs annually, requiring: (1) eight to ten weeks of "field training," during which a new corrections officer shadows an experienced officer to learn jail policies and procedures; (2) completion of a 160-hour jail training program to become a certified corrections officer; (3) 24 hours of continuing education each year to be recertified; and (4) daily training, which includes specific training on the jail's prohibition against fraternizing with inmates.

At trial, Christensen acknowledged the jail trained him that sexual contact with inmates is a felony and against jail policies. Specifically, Christensen testified:

- He knew his conduct violated jail policy;
- He was trained his conduct was a crime;
- He knew he was putting plaintiffs at risk;
- He never forgot that sex with inmates was a crime; and
- He agreed he did not require more training to know his conduct was a crime.

Plaintiffs' expert witness on prison training standards, Jeffrey Eiser, testified that the jail's policies prohibited sexual contact between inmates and guards. Eiser also corroborated that the county trained Christensen that sexual contact with inmates was a felony and against jail policy.

To support their contention that the jail never trained its staff, plaintiffs relied on two witnesses. The first, Lynelle Manning, was a jailer with the county for about 20 months. Manning testified that although she was never officially certified as a correctional officer, she received "formal training" by the jail and shadowed a senior officer for weeks. She also received and read the jail's policy and inmate booking manuals, which contain the jail's prohibition of sexual contact between guards and inmates. Manning also testified that during her employment she never heard sexually charged conversations between jail staff and inmates.

Plaintiffs' second witness, Sergeant Steven Schaefer of the county's sheriff's department, worked at the jail from 2002 until 2015. Schaefer testified "we were all required to attend" countywide training on sexual harassment. He provided the training to new employees from time to time. According to Schaefer, that training instructed on the jail's numerous prohibitions between staff and inmates, including

improper comments, becoming too close or too familiar, sharing personal information, and sexual relationships. He also agreed that improper relationships between inmates and guards were "something that the jail as a whole took very seriously." Notwithstanding Schaefer's testimony, plaintiffs' counsel told the jury during closing argument: "You heard Sergeant Schaefer say, 'We never trained on it. We never trained on it. We never trained on it.'"

2. *Inappropriate speech*

Next, plaintiffs alleged that jail staff routinely made sexually inappropriate comments about female inmates without repercussions.

According to plaintiffs, Captain Scott Nargis, who oversaw daily operations of the jail, was the reason that sexually offensive speech was accepted at the jail. During adverse examination, plaintiffs' counsel asked Nargis if he ever "engaged in tier talk which is not necessarily flattering talk amongst co-workers"; Nargis answered "yes." Nargis also agreed that he participated in tier talk "on occasion" to establish trust among subordinate officers. Plaintiffs never asked Nargis on the witness stand if he himself made sexual comments. Nor did plaintiffs present evidence that tier talk connoted "sexual talk," that Nargis's "tier talk" was sexually explicit, or that Nargis made comments sexual in nature with, about, or around inmates or guards.

Evidence to suggest Nargis knew about offensive comments by jail staff was scarce and unclear as to timing. Nargis testified that during Christensen's twelve-year employment, he once heard Christensen

comment on a female's "rear end." He did not recall whether that comment was made about an inmate. Nargis also recalled being told that Christensen once remarked about an inmate's breasts.

Evidence of inappropriate sexual comments by other jail staff was also sparse and unspecific. J.K.J. testified she believed two other corrections officers once overheard Christensen making flirtatious comments to inmates. Christensen also testified to overhearing a jail guard, Allen Jorgenson, and two other guards make suggestive comments to inmates. But J.K.J. and Christensen offered no specifics on the alleged comments, and there was no evidence these incidents were reported to the county or any jail supervisor.

3. *Investigation of former guard*

At trial, plaintiffs introduced one other allegation of sexual contact between a jail guard, Jorgenson, and an inmate, N.S.: another inmate saw Jorgeson put his arm around N.S.'s waist and "pat her on the butt." This occurred in 2012, two years before the discovery of Christensen's violations.[1] Sergeant Steven Schaefer reported these allegations to Nargis, who in turn questioned Jorgenson and N.S. individually. Each denied any improper relationship or contact. Despite these denials, Nargis requested the assistance of chief deputy sheriff Steven Moe to further investigate Jorgenson.

To plaintiffs, the Jorgenson investigation proves the county "minimized" and ignored allegations of a

[1] Although Christensen's assaults began in 2011, the county first learned of his assaults on October 29, 2014.

guard assaulting an inmate. At trial, the jury considered the findings of the Jorgenson investigation, including Jorgenson's interactions with N.S. Another inmate believed Jorgenson and N.S. had an "inappropriate relationship" but "no physical relationship." It was also reported that Jorgenson misused a jail camera to focus on inmates longer than necessary. In addition to an internal investigation, Nargis and Moe reached out to former inmates as part of their review. Because of inconsistent witness accounts, Nargis and Moe could not confirm that Jorgenson engaged in any sexual contact with N.S. Still, Nargis and Moe concluded that Jorgenson's affiliation with N.S. violated jail policy. As a result, Jorgenson was issued a written reprimand for "foster[ing] a friendship relationship" by giving "undue, unfair, or simply too much attention" to N.S., who continued to deny any improper actions or relationship up to the point of Jorgenson's reprimand.

After Jorgenson was written up, N.S. recanted her denials in a letter to Nargis. In response, Nargis and Moe reopened the investigation "to take a whole fresh look at the situation." N.S.'s letter detailed that Jorgensen made sexually harassing gestures and crude and indecent remarks, and asserted allegations of Jorgeson putting his arm around N.S.'s waist and touching her "back and butt." After this second review, Nargis and Moe could not confirm these allegations and decided the reprimand remained the appropriate level of discipline. At trial, no evidence was submitted that Nargis or Moe erred in the Jorgenson investigation or performed their inquiries in bad faith. In closing, plaintiffs' counsel argued to the jury that the "jail knew that one of their trusted friends was

committing sexual assault against at least one inmate, N.S." but considered it "no big deal."

Jorgenson also made inappropriate remarks, of which inmates and staff were aware. But there was no evidence Jorgenson's improper comments were reported to Nargis, Moe, or any county policymaker before the N.S. investigations. On that point, the county argued the N.S. allegations prompted complaints by various female coworkers, who claimed Jorgenson made inappropriate comments to them as well. Those coworker complaints led to a human resources investigation that resulted in Jorgenson resigning.

4. *Prison Rape Elimination Act (PREA)*

The county's sexual assault policies were inadequate to prevent and detect assaults, and the county deliberately avoided opportunities to reduce sexual assault risks, according to plaintiffs. Both arguments were based on the county's purported underutilization of policy recommendations from PREA.

Again, plaintiffs zeroed in on Nargis. They claimed the jail intentionally shunned PREA because Nargis openly "denigrated … PREA standards," citing a 2014 email from Nargis to jail staff about PREA training:

> Seems to be that everyone is in a tizzy to train their staff on PREA. There is no requirement for use [sic] to be compliant with everything that the law calls for, but nevertheless it is federal law. So we'll hit the basics of PREA training.

At trial, plaintiffs termed this "the tizzy email." To plaintiffs, Nargis's choice of the word "tizzy" was "mocking" PREA and "indicat[ed] that he disliked PREA." They also claimed the email never discussed any specific PREA measures. Rather, it merely restated the jail's current antisexual assault policies. Plaintiffs argued "the tizzy email" proves that Nargis and the jail "consciously disregarded" PREA standards, and by extension, disregarded the risk of sexual assaults at the jail.

Plaintiffs' expert Eiser opined that the jail's sexual assault policies and training were inadequate because they did not fully adopt certain components of PREA. Eiser conceded compliance with PREA is not mandatory for county jails in Wisconsin, and that PREA standards are better viewed as optional "best practices." Eiser also testified there is no empirical data that compliance with the proposed best practices would yield a better result. Plaintiffs agree that state law, not PREA, governs county jails in Wisconsin, but did not offer evidence that the jail's sexual assault policies or training fell below state legal or administrative standards.

As for compliance with state law, the county argued the DOC annually reviews the jail's policies, including its policy prohibiting fraternization with inmates. In each year of plaintiffs' incarcerations, the DOC found the jail to be in full compliance with all applicable Wisconsin statutes and regulations. Language addressing PREA was added to the jail's anti-fraternization policy in 2012, with an accompanying PREA training in 2014. The county also noted that in the past nine years, during which the jail

housed 14,100 inmates, Jorgenson's circumstance was the only known improper relationship between a guard and an inmate.

C. *Verdict and Post-Verdict Motions*

The district court bifurcated the trial into liability and damages phases. At the close of the liability phase, during the jury instruction conference, the court found the evidence failed to show a pattern of constitutional violations known to county policymakers. As a result, the court excluded this basis of liability from the jury instructions, leaving plaintiffs to argue that the "risk of the inadequacy of the training, supervision, and/or adoption of policies [was] plainly obvious." The court also rejected a jury instruction as to whether plaintiffs consented to Christensen's sexual contact and thus reduced plaintiffs' harm.

After a five-day trial, the jury found for plaintiffs on all claims and awarded each plaintiff $2 million in compensatory damages against the county and Christensen. The jury also awarded $3,750,000 to each plaintiff in punitive damages against Christensen.

After the verdict, Christensen moved for a new trial under Fed. R. Civ. P. 59. Christensen argued there was insufficient proof that he harmed plaintiffs or was aware of the substantial risk of harm his actions imposed. The district court rejected these arguments, relying on plaintiffs' testimony that they never consented to Christensen's advances.

The county also moved for judgment as a matter of law under Rule 50(b) and for a new trial under Rule 59. This resulted in partial yet hollow success for the

county—the district court granted judgment to the county on plaintiffs' state law negligence claims, but denied the county judgment on plaintiffs' § 1983 claims, as well as a new trial.

The district court rejected the county's contention that plaintiffs failed to prove it was culpable for and the cause of Christensen's violations, as required for liability under *Monell v. New York City Dep't of Soc. Servs*, 436 U.S. 658 (1978). Although the court noted the evidence against the county was "not overwhelming," it concluded three subjects supported the verdict: (1) jail supervisor Nargis "generally acknowledged his awareness of tier talk" at the jail; (2) Nargis was aware of sexual comments by correctional officers to inmates and female employees through the Jorgenson investigation, in addition to two comments made by Christensen; and (3) the county held only one PREA training session. For the district court, this was sufficient evidence for the jury to find "that Nargis and others within the [county] … acted with deliberate indifference to the need for better training, supervision and policies." So the verdict against the county remained intact.[2]

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[2] On plaintiffs' state law claims of negligent training and supervision, the district court concluded the county was entitled to immunity under WIS. STAT. § 893.80(4). Opinion and Order at 3-6, *J.K.J. v. Polk Cty.*, No. 15-CV-428 (W.D. Wis. Feb. 5, 2018), ECF No. 279. Plaintiffs do not appeal this decision, nor do they appeal the district court's liability phase ruling that plaintiffs failed to offer proof of a pattern of prior constitutional violations known to policymakers.

II. DISCUSSION

The county and Christensen both argue the district court improperly denied them judgment as a matter of law or a new trial under Rules 50 and 59. At the outset, we note Christensen never filed a post-verdict motion for judgment as a matter of law under Rule 50. Without such a motion, he forfeited his request for judgment under that rule, and our review is limited to his request for a new trial under Rule 59. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400-01, 404-05 (2006); *accord Collins v. Lochard*, 792 F.3d 828, 831 (7th Cir. 2015).

A district court may enter judgment as a matter of law under Rule 50 when it "finds that a reasonable jury would not have a legally sufficient evidentiary basis" to support its verdict. Fed. R .Civ. P. 50(a)(1); *see also* Rule 50(b). We review the denial of a Rule 50 motion de novo and proceed "on the basis of the evidence the jury actually had before it." *Houskins v. Sheahan*, 549 F.3d 480, 493 (7th Cir. 2008) (internal citation omitted) (denying *Monell* claim). We will overturn a jury verdict if it is clear plaintiffs failed to present enough evidence to support their claims. *Id.* (citing *Filipovich v. K & R Express Sys., Inc.*, 391 F.3d 859, 863 (7th Cir. 2004)). "Our job is to assure that the jury had a legally sufficient evidentiary basis for its verdict." *Filipovich*, 391 F.3d at 863.

Under Rule 59, a district court may order a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). A new trial is appropriate if the jury's verdict is against the manifest weight of the evidence or if the trial was in some way

unfair to the moving party. *Martinez v. City of Chicago*, 900 F.3d 838, 844 (7th Cir. 2018) (citation and quotation marks omitted). We will not disturb a district court's Rule 59 decision except under exceptional circumstances showing a clear abuse of discretion. *Id*.

First, we consider whether the district court improperly refused to grant the county's motion for judgment as a matter of law. Later, we turn to Christensen's claim that he is entitled to a new trial.

A. *The County*

The county argues *Monell* precludes the jury's finding of § 1983 liability against it. Under *Monell*, "a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue." *City of Canton, Ohio v. Harris,* 489 U.S. 378, 385 (1989) (emphasis in original); *see also Connick v. Thompson*, 563 U.S. 51, 60 (2011) ("[U]nder § 1983, local governments are responsible only for their *own* illegal acts." (emphasis in original)). Thus, a municipality cannot be held liable under § 1983 solely because one of its agents or employees may have violated an individual's constitutional right. *Monell*, 436 U.S. at 691, 694 (rejecting § 1983 liability predicated on theory of *respondeat superior*). Instead, a municipality's own policy or custom must have caused the constitutional violation. *Id.*; *Glisson v. Indiana Dep't of Corr.*, 849 F.3d 372, 379 (7th Cir. 2017) (en banc) ("The central question is always whether an official policy … caused the constitutional violation.").

To establish municipal liability under *Monell*, a plaintiff must prove three things. First is the existence

of an unconstitutional policy. This can be done by showing either: (a) an express policy that, when enforced, causes a constitutional deprivation; (b) a widespread practice that, although not authorized by written law or express policy, is so permanent and well settled as to constitute a custom or usage with the force of law; or (c) that the constitutional injury was caused by a person with final decision policymaking authority. *Spiegel v. McClintic*, 916 F.3d 611, 617 (7th Cir. 2019). Second is that the municipality is culpable, which means the municipality's policymakers were deliberately indifferent to a known or obvious risk that a policy or custom would lead to constitutional violations. *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 407, 410 (1997) (citing *Canton*, 489 U.S. at 388). Third, the municipality's policy must "directly cause[] a deprivation of federal rights." *Id*. at 415. In other words, the county's own actions must be the "moving force" behind plaintiff's injuries. *Id.* at 404.

An unconstitutional policy can include implicit policies, or a gap in expressed policies. *Daniel v. Cook Cty.*, 833 F.3d 728, 734 (7th Cir. 2016) (citations omitted). Either way, plaintiffs must prove an actual policy is at issue, not a random event. *See Calhoun v. Ramsey*, 408 F.3d 375, 380 (7th Cir. 2005). Here, plaintiffs alternate between arguing Christensen's violations were the byproduct of an implicit policy, reflected in the jail's alleged widespread practice and custom of "allow[ing] and encourag[ing] inappropriate sexual behavior," and purported gaps in the county's

express sexual assault policies, reflected in the absence of PREA measures.[3]

At trial, plaintiffs advanced a number of theories of the county's liability under *Monell*. We start with plaintiffs' claim that the county was deliberately indifferent to a known and obvious risk that its express policies would lead to, and in fact caused, Christensen's assaults. Then, we consider whether plaintiffs' general allegations against the county amount to an implicit policy, i.e., a widespread practice or custom, that permits sexual misconduct by jail staff; and if so, whether the county's deliberate indifference to that policy caused Christensen's assaults. Next, we examine plaintiffs' contention that the county was deliberately indifferent to the need for more training and supervision, causing plaintiffs' injuries. After that, we address whether Christensen's constitutional violations were a highly predictable consequence of the jail's failure to train its staff allowing for single-incident liability. Last, we consider the sufficiency of the evidence in light of the county's motion for judgment as a matter of law, which the district court denied.

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[3] The district court concluded Nargis was a policymaking official. The county challenges this finding. An "official policy" is the predicate for municipal liability under *Monell*. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). But even if Nargis's acts are said to represent the county's official policy, the evidence still fails to show a connection between the assaults and any county policy, much less any policy attributed to Nargis. Because it does not affect the outcome of this case, we need not resolve the question whether Nargis possessed the requisite policymaking authority to establish an official policy within the meaning of *Monell*.

1. *Express policies*

The express terms of the jail's sexual assault policies (I-100 and C-202, described above) are not constitutionally suspect, per plaintiffs. Instead, they challenge alleged gaps or omissions in those policies. Plaintiffs contend the policies do not provide adequate measures to prevent and detect sexual assault—namely, measures suggested by PREA. "[T]he absence of a policy might reflect a decision to act unconstitutionally, but the Supreme Court has repeatedly told us to be cautious about drawing that inference." *Calhoun*, 408 F.3d at 380 (citing *Bryan Cty.*, 520 U.S. at 409 and *Canton*, 489 U.S. at 388).

On this theory, the county's culpability hinges on whether it was deliberately indifferent to an obvious need to update or enhance its sexual assault policies. Liability could be established by showing the county adhered to a policy that it knew, or should have known, failed to prevent assaults by jail staff. But plaintiffs supplied no evidence of policy violations putting the county on notice of a sexual assault problem to resolve or act upon. *Cf. Woodward v. Correctional Med. Servs. of Ill., Inc.*, 368 F.3d 917, 930 (7th Cir. 2004) (affirming judgment under *Monell* where evidence showed contractor violated the defendant's express policies and repeatedly failed to act in the face of known violations). Even plaintiffs' expert, Eiser, conceded the Jorgenson incident did not downgrade the jail's good record on this front.

To try to address this lack of evidence, on appeal plaintiffs interline a proposition in *Glisson* with bracketed materials: "the existence of the [PREA] Guidelines, with which [Nargis] was admittedly

familiar, is evidence that could persuade a trier of fact that [Polk County] consciously chose the approach that it took." Brief of Plaintiffs-Appellees at 33, *J.K.J. v. Polk Cty*., Nos. 18-1498 and 18-2170 (7th Cir. Oct. 3, 2018), quoting *Glisson*, 849 F.3d at 380. But *Glisson* concerned whether a defendant "had a policy to eschew any way of coordinating [health] care." *Id*. at 381. Here, the county enforced, rather than avoided, written policies prohibiting any form of sexual contact. Plaintiffs' *Glisson* "parallel" ignores that municipal fault still must be established. Without knowledge of an obvious risk, plaintiffs' argument is unavailing.

Plaintiffs fare no better blaming the county for underuse of PREA. Their argument implies PREA binds states to implement and enforce its guidelines. But PREA, a federal statute, imposes no such obligations on county-run jails. *See* 34 U.S.C. §§ 30301-09. Wisconsin law governs the county's sexual assault policies, and its prohibition of sexual contact between guards and inmates is absolute. Wis. Stat. § 940.225(2)(h); *see also Ramos v. Hamblin*, 840 F.3d 442, 444 (7th Cir. 2016) (noting Wisconsin DOC rules corresponding with PREA make the prevention of prison rape a "priority concern"). Likewise, the county's policies prohibit such contact, and the county showed that its policies fully complied with all applicable Wisconsin statutes and regulations. Wisconsin may elect to adopt or fully comply with PREA standards. *See* 34 U.S.C. § 30307(e)(2)(A). But where Wisconsin has not incorporated components of PREA into its laws and regulations, it is beyond the role of federal courts to render those components a constitutional requirement. *See Bryan Cty.*, 520 U.S. at 415 (admonishing that "[a] failure to apply

stringent culpability and causation requirements raises serious federalism concerns" and "risks constitutionalizing" requirements states have not chosen to impose).

"[D]eliberate indifference is a stringent standard of fault," and not even a showing of heightened negligence will suffice to establish liability. *Bryan Cty.*, 520 U.S. at 407, 410. Proof is required that a county policymaker disregarded a known or obvious consequence of his action or inaction. *Id.* at 410; *see also Connick*, 563 U.S. at 61 (citation omitted). Here, PREA might have been relevant to show a conspicuous flaw in the county's policies, but the record shows no evidence of such a flaw. When Christensen assaulted plaintiffs, the jail had no history of sexual assaults and operated under zero-tolerance sexual assault policies. Eiser's ratification of the jail's "good record" before the jail learned of Christensen's sexual assaults shows that the jail reasonably relied on the effectiveness of its express policies. In the absence of other evidence, we conclude no rational jury could infer that the jail's express policies were obviously deficient, that the county was or should have been aware that jail policies were inadequate, that assaults were imminent, or that PREA sets the norm.

As for causation, plaintiffs offered no facts at trial from which the jury could conclude that a gap in the county's express sexual assault policies caused their injuries. *See Bryan Cty.*, 520 U.S. at 406 (observing that challenges to a facially valid municipal policy "present much more difficult problems of proof"). Nor on appeal do plaintiffs point to any such facts. The Supreme Court demands that courts "carefully test

the link between the policymaker's inadequate decision and the particular injury alleged." *Id*. at 410. After examining the express policies here, we cannot conclude the county was culpable for, or its sexual assault policies caused, Christensen's assaults.

2. *Implicit policy*

The county's *real* policy was to ignore its policies, according to plaintiffs, as shown by Nargis's admission of tier talk, the tizzy email, inappropriate staff comments, and the Jorgenson investigation. Plaintiffs contend the sum of these improprieties resulted in a widespread practice of allowing and encouraging sexual misconduct.

Nargis was a focal point of plaintiffs' implicit policy claim, beginning with the allegation that he promoted a "toxic culture" by participating in tier talk and acceding to offensive remarks by jail staff. In our de novo review of the record, however, this allegation lacks support. The only reference at trial to "tier talk" occurred during plaintiffs' examination of Nargis. And when Nargis admitted to "tier talk," he did so only within plaintiffs' limited definition ("not necessarily flattering talk"). Plaintiffs failed to include that their definition encompassed a sexual subtext. Rather, plaintiffs grafted a sexual connotation onto the term after trial in response to the county's appeal.[4] The record also contains no evidence that Nargis's tier talk

[4] The district court's order on the county's Rule 50 motion also assumes "tier talk" had a sexual implication despite the lack of any trial evidence or definitional reference that "tier talk" included a sexual component. *See* Opinion and Order at 8-9, *J.K.J. v. Polk Cty.*, No. 15-CV-428 (W.D. Wis. Feb. 5, 2018), ECF No. 279.

was sexually explicit, profane, or insensitive. Despite this evidentiary void, plaintiffs mischaracterize the record in their response on appeal: "Captain Nargis routinely engaged in sexually explicit 'tier talk.'"[5]

Our dissenting colleague concludes that a reasonable jury could find that Nargis's tier talk was sexual in nature. But we believe this inference relies on plaintiffs' post-trial rebranding of the phrase. Although we view the facts in the light most favorable to the jury's verdict, we are not required to draw unreasonable inferences. *Tindle v. Pulte Home Corp.*, 607 F.3d 494, 496 (7th Cir. 2010). Only reasonable inferences may be considered. *See Hermes v. Hein*, 742 F.2d 350, 353 (7th Cir. 1984). At trial, in questioning other witnesses about indecent remarks, plaintiffs routinely and frequently used concrete and specific terms such as "sexual comments," "inappropriate comments," and "sexual harassment." None of these defined terms were used when plaintiffs questioned Nargis about tier talk. We therefore cannot assume that Nargis's admission of "not necessarily flattering talk" means "sexual talk." Instead, we take plaintiffs at their word that "tier talk" means what they told

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[5] Appellees' Br. at 14. This was not the only mischaracterization in that brief. Steven Schaefer testified that all jail officers were required to attend countywide training on sexual harassment, which included the jail's prohibition of sexual assaults. At times, Schaefer even gave the training. But plaintiffs' appeal brief declares: (1) "Sergeant Steven Schaefer also testified to never receiving any training regarding sexual assault"; and (2) Manning and Schaefer "unanimously agreed that they received no training on sexual assault at any time." Appellees' Br. at 13. Counsel for plaintiffs said the same during closing arguments.

Nargis it means. That Nargis conceded to nondescript tier talk does not prove that he promoted a "toxic culture." Nor does it prove the county ignored relevant policies.

The claim based on the "tizzy email" that Nargis mocked and disliked PREA also does not help plaintiffs. Even if we assume Nargis on one occasion discredited PREA, this does not constitute a policy of permitting sexual assaults. Nor can we infer that a supervisor's one-time use of a condescending noun ("tizzy") establishes a conscious disregard for measures to prevent sexual assaults.

As for inappropriate remarks by staff, plaintiffs introduced the following evidence: (1) J.K.J. testified two officers overheard Christensen making flirtatious comments to inmates; (2) Christensen testified he overheard three guards make suggestive remarks to inmates; and (3) Nargis knew of two inappropriate remarks made by Christensen over a twelve-year period.[6] We consider whether this proof reflected an implicit policy under the applicable law.

Monell claims based on an unconstitutional implicit policy require proof of a "widespread" practice. *See Bryan Cty.*, 520 U.S. at 404; *see also Monell*, 436 U.S. at 692 (defining a widespread practice as one that is "persistent," "permanent," and "well settled"). "[P]roof of isolated acts of misconduct will not suffice; a series of violations must be presented to lay the

[6] Sergeant Schaefer testified that Jorgenson made one "or maybe two" inappropriate comments to him over a nine-year period. Because Schaefer did not believe the comments rose to a level warranting discipline, however, he neither reported them to management nor explained the nature of those comments at trial.

premise of deliberate indifference." *Palmer v. Marion Cty.*, 327 F.3d 588, 596 (7th Cir. 2003) (citation omitted) ("A series of violations is necessary"; two incidents in one year is not enough). The offensive comments overheard by J.K.J. and Christensen are unclear; no evidence was adduced as to exactly what was said, the context of the remarks, or when they were said. Nor were these comments reported to Nargis or any other jail supervisors. These two allegations of unreported and undefined remarks (outside of those later learned during the Jorgenson investigation) here are insufficient to show a widespread custom or practice. *See Doe v. Vigo Cty., Indiana*, 905 F.3d 1038, 1045 (7th Cir. 2018) (holding three incidents of sexual contact, two instances of inappropriate remarks, two allegations of sexual harassment, and one example of cornering an employee for sex, taken together, failed to establish a widespread county practice).[7] Likewise, Nargis's

[7] On a number of occasions this court has considered the quantity and frequency of violations required to qualify as a "widespread" pattern or practice in a correctional facility. *See Pittman ex rel. Hamilton v. Cty. of Madison, Ill.*, 746 F.3d 766, 780 (7th Cir. 2014) (36 suicide attempts and three successful suicides in five-year period does not evidence that the jail's suicide prevention policies are inadequate); *Walker v. Sheahan*, 526 F.3d 973, 977 (7th Cir. 2008) (783 excessive force complaints at jail over a 5-year period, none of which resulted in an indictment, does not support inference of a widespread practice of excessive force); *Klebanowski v. Sheahan*, 540 F.3d 633, 638 (7th Cir. 2008) (the recovery of 14 shanks after two gang attacks, one of which involved a stabbing by a shank, is insufficient to establish the existence of a widespread practice of allowing gang members to keep weapons in their jail cells); *Grieveson v. Anderson*, 538 F.3d 763, 774 (7th Cir. 2008) ("One broad, vague statement about an occurrence affecting other inmates in a

personal knowledge of two inappropriate remarks by Christensen over twelve years falls short of indicating a widespread unconstitutional practice. *See Palmer*, 327 F.3d at 596 (concluding personal knowledge of two incidents of misconduct by officers in a period of one year is insufficient to indicate a widespread practice). Given the law's requirements, including as to quantity and to frequency, we do not conclude these suggestive and inappropriate remarks amounted to a "widespread practice" so as to constitute an unconstitutional implicit policy.

Next, plaintiffs contend the Jorgenson investigation gave the county sufficient notice that its sexual assault policies were deficient. The allegations of Jorgenson's improper contact—including putting his arm around an inmate's waist, and patting her backside—while on the same spectrum of sexual harassment and assault as Christensen's conduct, are not of the same degree as Christensen's repeated and coercive sexual abuse. *See Vigo Cty.*, 905 F.3d at 1045 (distinguishing between sexual harassment and the trauma of sexual assault).

Nevertheless, the record shows the jail responded equally to these two incidents. After two investigations, the jail found it "probably more likely" Jorgensen engaged in "inappropriate touching," but it was unable to confirm the allegations. *See id.* at 1047

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detention facility does not support the inference of a 'widespread' custom."); *Estate of Moreland v. Dieter*, 395 F.3d 747, 759-60 (7th Cir. 2005) ("[Three incidents of improper use of pepper spray] do not amount to 'a widespread practice' that is 'permanent and well settled' so as to constitute an unconstitutional custom or policy about which the sheriff was deliberately indifferent.").

(holding no breach of duty to plaintiff where "the County investigated but could not substantiate one vague complaint against Gray, and it warned him for making sexualized comments to a coworker"). Unverified allegations of inappropriate touching of and humiliating comments toward one inmate over a nine-year period[8] falls short of establishing a widespread practice or custom. *See id.* at 1046-47 ("A business is not alerted to the possibility that an employee might rape a member of the public by having faced the occasional, but unfortunate, predicament of employee sexual harassment, including groping."). We also note, once more, that plaintiffs' expert agreed the jail had a good record on this topic, including when considering the Jorgenson incident.

The evidence gleaned from Jorgenson's human resources investigation runs into the same problems. The county does not dispute Jorgenson's comments to female coworkers were inappropriate. And plaintiffs do not dispute those comments went unreported until the N.S. investigation. Even if the county was somehow responsible for Jorgenson's boorishness, it was not deliberately indifferent to whether the problem continued. When staff notified the county of Jorgenson's behavior, an investigation ensued, showing the county's diligence, and Jorgenson resigned. *See Vigo Cty.*, 905 F.3d at 1046 ("[A]ccepting resignations in lieu of firings [does not] reflect[]the County's deliberate indifference.").

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[8] Plaintiffs' expert, Eiser, reviewed the jail's records from 2008 to the date of plaintiffs' trial in 2017.

Our recent decision in *Vigo County* is instructive on the quantum of proof necessary to establish a county's custom or practice of failing to prevent or respond to its employees' sexual misconduct. In that case, the plaintiff, Doe, volunteered at a park where Vigo County's employee, David Gray, worked. Doe alleged Gray locked her in the park's restroom area and forced her to perform oral sex and digitally penetrated her vagina. *Vigo Cty.*, 905 F.3d at 1041. Gray was charged with rape, criminal confinement, and official misconduct, and he was convicted of the latter two offenses. *Id.*

Doe sued Vigo County, alleging it failed to take seriously or to address a risk of sexual violence posed by its employees. *Id.* at 1044-45. The record contained no evidence of any county employee having forced another to engage in a sexual act or having confined an individual to harm her. *Id.* at 1045. Instead, the record revealed "[s]ome involved sexual misconduct, but none resulted in coerced sexual activity, nor does the record suggest that employee misconduct occasioned impunity." *Id.* at 1045.[9] This court held

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[9] In *Vigo County*, this court held the following offenses by county employees, among others, were "not enough to establish a custom or practice giving rise to Doe's injuries": (1) a jail guard was prosecuted for having sexual contact with an inmate at the county jail; (2) the county recorder pleaded guilty to battery for groping an employee; (3) a parks mechanic was accused of inappropriately cornering one coworker, telling another that he wanted to have sex with her, and placing his hands on the latter's breast and down her pants; (4) another parks employee was fired for treating coworkers poorly and making an "off-color" comment to another employee; and (5) a civil complaint was filed accusing a highway department supervisor of sexual harassment. 905 F.3d at 1045. Specific to the public park where plaintiff was assaulted,

that "a handful of incidents of misconduct by employees of Vigo County" over the past 20 years, "is not enough to establish a custom or practice that gave rise to Doe's injuries, nor can it support a finding of indifference on the part of Vigo County officials." *Id*.

Like *Vigo County*, in this trial plaintiffs failed to put forth evidence of any jail employee engaging in criminal acts like Christensen. The other allegations plaintiffs recount, though contemptible, are different from the trauma plaintiffs experienced. *See id*. And because plaintiffs rely on indirect proof of a widespread practice, they "must introduce evidence demonstrating that the unlawful practice was so pervasive that acquiescence on the part of policymakers was apparent and amounted to a policy decision." *Dixon v. Cook Cty.*, 819 F.3d 343, 348 (7th Cir. 2016) (citation omitted). Nargis's tier talk, the tizzy email, rare and unreported staff comments, and the Jorgenson investigation do not amount to evidence of persistent or pervasive sexual misconduct so obvious as to imply acquiescence of county

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evidence showed that her attacker, Gray: (1) acted inappropriately to a park visitor's wife; and (2) received a reprimand for inappropriate comments made to a coworker. *Id*.

Our dissenting colleague sees these previous incidents dispersed "throughout the county," but we see them differently. Four involved employees from the same county parks department, and two involved the same park and the same employee who assaulted the plaintiff in that case. The decision also references that a parks department employee other than Gray physically accosted one employee and sexually assaulted another. Despite all of these incidents, this court held that the plaintiff failed to show Vigo County's deliberate indifference toward sexual misconduct. *Id*. at 1046.

policymakers. Above all, plaintiffs offered no evidence county officials knew or should have known that any of its practices or customs would allow or encourage—much less cause—Christensen to commit the abhorrent acts which happened to plaintiffs.

Because the trial evidence contains no facts that plausibly suggest a widespread practice of sexual assaults or acquiescence to sexual conduct at Polk County Jail, the record does not support a finding that the county maintained an implicit policy that that served as the cause of their injuries.

3. *Failure-to-train*

Plaintiffs' third liability theory is that the county's training "was entirely deficient and independently established deliberate indifference." This failure-to-train theory runs into difficulties. On the evidence presented at trial, it allows a jury to conclude liability outside the correct legal framework, and it relies on inferences expressly rejected by the Supreme Court. Further, the trial record does not show a direct causal link between the alleged failure to train and their injuries as required by *Monell* and its related case law.

On appeal of a jury verdict, we afford a generous standard of review to avoid supplanting our view of the credibility or the weight of the evidence for that of the jury. *Massey v. Blue Cross-Blue Shield of Illinois*, 226 F.3d 922, 925-26 (7th Cir. 2000) (affirming judgment as a matter of law overturning verdict in plaintiff's favor because evidence failed to support the jury's finding of discrimination). But juries are not free to disregard governing legal standards. On the question of municipal liability, *Monell* and its limits

control the calls juries are allowed to make, including for failure-to-train claims. *See,* e.g., *Canton*, 489 U.S. at 399 (O'Connor, J., concurring in part and dissenting in part) ("Allowing an inadequate training claim such as this one to go to the jury based upon a single incident would only invite jury nullification of *Monell*.").

A failure-to-train claim fails without a pattern of similar violations, unless that claim "fall[s] within the narrow range of 'single-incident liability' hypothesized in *Canton*." *Connick*, 563 U.S. at 71-72 ("[A] pattern of violations [is] necessary to prove deliberate indifference in § 1983 actions alleging failure to train."); *see also Canton*, 489 U.S. at 390 n.10. "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick*, 563 U.S. at 61 (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 822-23 (1985) (plurality opinion) ("[A] policy of 'inadequate training'" is "far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*."). Here, plaintiffs agreed there is no pattern of similar violations at the jail to establish deliberate indifference.[10] In so doing, they deny proof of a fundamental element of failure-to-train liability.

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[10] *See* Appellees' Br. at 45 n.10 ("Plaintiffs do not argue on appeal that deliberate indifference is established here due to a pattern of similar past incidents."). Also, the district court held "that plaintiffs failed to put forth sufficient evidence to support finding a pattern of constitutional violations known to policy-makers." Opinion and Order at 7, *J.K.J. v. Polk Cty.*, No. 15-CV-428 (W.D. Wis. Feb. 5, 2018), ECF No. 279.

The degree of culpability in failure-to-train cases must amount to deliberate indifference. *Connick*, 563 U.S. at 63. Although plaintiffs do not contend they proved a pattern of similar violations, they claim "myriad evidence" of inadequate training supported a finding of deliberate indifference. *See*, e.g., *id.* at 62. But plaintiffs' contention here requires reliance on the same chain of inferences rejected in *Connick*. In *Connick*, the Court analyzed whether failure-to-train liability could be imposed on a district attorney's office for a rogue prosecutor's deliberate violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The Court declined to conclude four prior *Brady* violations was a pattern of similar violations. *Connick*, 563 U.S. at 54, 62-63. Without such a pattern, the plaintiff could not prove that the district attorney had actual or constructive notice of, and was therefore deliberately indifferent to, a need for more or different *Brady* training. *Id.* at 59, 61-63, 72. As a result, the district court's $14 million judgment against the district attorney was overturned. *Id.* at 72.

Here, we consider whether failure-to-train liability may be imposed on the county for a rogue guard's deliberate violation of jail policy, county training, and Wisconsin law. We follow *Connick's* approach, which required incidents "similar to the violation at issue" to "put [a policymaker] on notice that specific training was necessary to avoid this constitutional violation." *Id.* at 62. "Without notice that a course of training is deficient in a particular respect"—here, the prevention of sexual assaults—"decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Id.* at 62-63.

Under *Connick*, we conclude the evidence before the jury could not, standing alone, have prompted notice that more or different training was necessary to prevent similarly appalling violations. Jorgensen's alleged actions and behavior were wrong and degrading. Yet these twice investigated but unverified allegations, including placing his hands around N.S.'s waist and touching her backside, along with Jorgenson's other reproachable conduct, do not prompt notice that specific training was necessary to avoid Christensen's repeated sexual assaults.

Because the trial evidence contained no instances or pattern of comparable actions, the county cannot be said to have adhered to an approach that it knew or should have known failed to prevent similar violations. *Connick*, 563 U.S. at 62; *Bryan Cty.*, 520 U.S. at 409. A failure-to-supervise claim fails for the same reasons. The record does not establish a likelihood of the type of harm plaintiffs suffered to have obligated the county to prevent its occurrence. *See Vigo Cty.*, 905 F.3d at 1046 (holding same).

The dissent concludes three "primary points" prompted notice that more training was required: (1) Nargis's tier talk; (2) information gleaned from the Jorgenson investigation; and (3) irregular examples of inappropriate remarks by certain guards over a twelve-year period. But as offensive as they are, none of these points involved the clandestine and conscienceshocking repeated sexual assaults of inmates. To demonstrate deliberate indifference to the risk of constitutional violations, *Connick* requires "[a] pattern of *similar* constitutional violations by *untrained* employees." *Connick*, 563 U.S. at 62

(emphases added). The record shows no pattern of violations similar to Christensen's conduct, and importantly, no dispute that Christensen was trained that his conduct was illegal.[11] In fact, at trial Christensen admitted he did not require more training to know his conduct was a crime.[12] For these reasons, we respectfully part ways with our dissenting colleague's failure-to-train evaluation.

To be sure, "[i]f a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for." *Bryan Cty.*, 520 U.S. at 407. To show the county ignored such notice, plaintiffs must produce evidence "of a series of constitutional violations from which deliberate indifference can be inferred." *Estate of Novack ex rel. Turbin v. Cty. of Wood*, 226 F.3d 525, 531 (7th Cir. 2000); *see also Hahn v. Walsh*, 762 F.3d 617, 637 (7th Cir. 2014) (holding plaintiffs failed to "show[] that there was a 'series of unconstitutional acts from which it may be inferred that the [sheriff] knew [correctional center] officers were violating the constitutional rights of [correctional center] inmates and did nothing") (quoting *Estate of Novack*, 226 F.3d at 531). In failure-to-train cases, the constitutional

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[11] *See* Transcript of Jury Trial at 63-64, *J.K.J. v. Polk Cty.*, No. 15-CV-428 (W.D. Wis. Feb. 1, 2017), ECF No. 258 (testimony of Christensen): "Q: Now, did you tell Chief Deputy Moe, gee, I didn't think I did anything wrong because you didn't train me? A: No sir."

[12] *See* Transcript of Jury Trial at 64, *J.K.J. v. Polk Cty.*, No. 15-CV-428 (W.D. Wis. Feb. 1, 2017), ECF No. 258 (testimony of Christensen): "Q: You didn't try to tell the circuit court that you did it because you didn't have training and you forgot that it was a crime. You didn't use that as a defense, did you sir? A: No, sir."

violations must be "similar to the violation at issue," *Connick*, 563 U.S. at 63; here, sexual assaults.

Yet Christensen's assaults on plaintiffs were both hidden and unprecedented. Testifying on these facts, plaintiffs' prison training expert agreed the county had a good record—even factoring in Jorgenson's misconduct—because of the lack of incidents of sexual contact between guards and inmates, let alone coercive assaults like Christensen's. *Cf. Woodward*, 368 F.3d at 926 (involving systemic failure to enforce a jail suicide-prevention program). There was no series of sexual assaults at the jail from which the county was aware its sexual assault training was inadequate, and chose to do nothing in the face of such knowledge. *See Hahn*, 762 F.3d at 637 (holding seven inmate deaths in jail from different causes than decedent's "do not show that [sheriff] was aware of any risk posed by [his] policies or that [sheriff] failed to take appropriate steps to protect [decedent]"). Nor does the trial evidence show "continued adherence" to training resulting in flaws exposed by repeated wrongdoing. *Bryan Cty.*, 520 U.S. at 407. *Connick* presents stringent fault standards for a failure-to-train claim, and admonishes that unless an exception applies, failure-to-train liability is available only when "a pattern of similar violations" establishes a "policy of inaction." *Connick*, 563 U.S. at 72.[13]

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[13] The dissent suggests that under *Glisson* "the key" in evaluating a failure-to-train claim "is whether there is a conscious decision not to take action," irrespective of whether the record reflected examples of similar constitutional violations. *See Glisson*, 849 F.3d at 381. But *Glisson* involved a failure to enact a policy, not a failure to train employees. *Id.* at 382 (holding an inmate healthcare provider could be liable under § 1983 for

Even if the trial record showed sufficient evidence the county failed to train, that record still must contain proof of causation. When evaluating *Monell* claims, the Supreme Court has instructed courts to adhere to "rigorous" causation requirements. *Bryan Cty.*, 520 U.S. at 415.

The trial evidence showed that the "moving force," *id.* at 404, behind the assaults on plaintiffs was not a failure to give jail guards additional training. Rather, it was a predatory employee—who does not merit the term "guard"—who furtively abused his power and preyed upon inmates. From the witness stand, Christensen confessed his behavior was irrepressible: he admitted he was trained his actions were criminal and violated jail policy; he agreed he did not require more training to know his assaults were a crime; he knew he was placing plaintiffs at risk; and he operated under the delusion that his conduct was welcome, consensual, and a product of "mutual voluntary attraction." When juxtaposing these facts with the absence of any similar violations at the jail, Christensen—not a failure to train—was the moving force behind the deprivation of plaintiffs' federal rights.

At trial and on appeal, plaintiffs have offered no more than conclusory assertions that Christensen's lack of training caused their injuries. The trial record also does not reveal an affirmative link between a failure to train and plaintiffs' injuries. The dissent identifies this gap—"[w]hat was missing"— and cites

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failing to establish any protocol for the coordinated care of inmates with chronic illnesses).

the need for more training on "the inherent vulnerability" of the confinement setting, as well as the harm caused by sexual abuse. "But showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability." *Connick*, 563 U.S. at 68. "Proving that an injury or accident could have been avoided if an employee had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct will not suffice." *Id*. (internal brackets and quotation marks omitted). "In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." *Canton*, 489 U.S. at 392 (citing *Tuttle*, 471 U.S. at 823 (plurality opinion)). Even plaintiffs' expert on prison training standards, Eiser, conceded no proof exists that better or more training could have dissuaded Christensen from his predatory behavior and established causation.[14]

Our dissenting colleague warns of the risk of sexual attacks at jails "employing male guards to supervise female inmates." But *Connick* requires more than "the broader context" of male guards supervising female inmates to establish causation. It does not follow that all male guards will "so obviously make wrong decisions that failing to train them amounts to 'a decision by the [county] itself to violate the

[14] *See* Transcript of Jury Trial at 47-48, *J.K.J. v. Polk Cty.*, No. 15-CV-428 (W.D. Wis. Feb. 1, 2017), ECF No. 264.

Constitution.'" *Connick*, 563 U.S. at 71 (quoting *Canton*, 489 U.S. at 395). *Connick* sets the bar higher:

> To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was 'highly predictable' that the prosecutors in his office would be confounded by those gray areas and make incorrect *Brady* decisions as a result. In fact, Thompson had to show that it was *so* predictable that failing to train the prosecutors amounted to *conscious disregard* for defendants' *Brady* rights.

Connick, 563 U.S. at 71 (citing *Bryan Cty.,* 520 U.S. at 409, and *Canton*, 489 U.S. at 389) (emphases in original). This trial evidence does not clear that bar, and there are no gray areas to the zero-tolerance policy in question. A finding of liability on a failure-to-train theory here cannot be reconciled with the reasoning of *Connick*, and would rest more on good policy prescriptions than proof of municipal fault and causation. And whether noteworthy recommendations for jail training are legal requirements is something for the people of Wisconsin and their elected officials to decide, rather than our court in this context.

4. *Single-incident theory*

In the absence of a pattern of similar assault violations, another liability theory is that the county failed to train its guards in light of foreseeable sexual assaults. "In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy

for purposes of § 1983.*"* *Connick*, 563 U.S. at 61; *see also Canton*, 489 U.S. at 390 n.10. *Canton* left open the possibility that a plaintiff might succeed in a failure-to-train claim without showing a pattern of constitutional violations. *See Connick*, 563 U.S. at 63, 71-72 (describing as "single-incident liability"). The Supreme Court "hypothesized" in *Canton* that "a violation of federal rights may be a highly predictable consequence" for failing to train police officers about constitutional limits on the use of deadly force. *Id*. at 63-64, 71-72. In *Canton*, the Court required that "for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury." 489 U.S. at 391.

The single-incident theory of liability described in *Canton* "assumes … no knowledge at all" of the required constitutional standards. *Connick*, 563 U.S. at 67. Without specific training, explained the Court, a police officer would not be "equipped with the tools to interpret and apply legal principles." *Id*. at 64. In *Connick*, the Court contrasted this hypothetical with an attorney asked to make a *Brady* determination. In that situation, and in the absence of a pattern of similar *Brady* violations, a district attorney "is entitled to rely" on prosecutors' law school or bar exam training, ethical obligations, and on-the-job experience, to deal with *Brady* decisions. *Id*. at 66-67 ("A licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same 'highly predictable' constitutional danger as *Canton's* untrained officer."). "In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the 'obvious consequence' of failing

to provide prosecutors with formal in-house training about how to obey the law." *Id.* at 66. Accordingly, the failure of Connick's office to alert its prosecutors of all reasonably conceivable legal duties did not subject it to failure-to-train liability, even if "additional training would have been helpful." *Id.* at 68.

Here, the proof at trial does not fit within *Canton's* single-incident hypothetical. First, we cannot assume "no knowledge at all," because Christensen was trained and knew that his actions were criminal. Given this knowledge and training, Christensen's assaults—in which he was a lone and surreptitious actor—were not a "highly predictable consequence" (*Bryan Cty.*, 520 U.S. at 409) of the county's sexual assault policies. Second, unlike the nuanced and compound legal standards contemplated in *Canton* (involving constitutional limits on the use of deadly force) and *Connick* (involving evidentiary disclosure obligations), the legal standard here involved a direct, non-discretionary rule: no sexual contact with inmates. Third, the record shows the county's guards—including Christensen—were trained on their legal and professional obligations to avoid the constitutional violation at issue, sexual relationships with inmates. Christensen was thus "equipped with the tools" to obey the law, as *Canton* requires. *Connick*, 563 U.S. at 64. On this record, we decline to find single-incident liability.

5. *Sufficiency of the evidence*

Judgment as a matter of law should not be granted unless the evidence, viewed in the light most favorable to the jury's verdict, shows that no rational jury could return a verdict against the moving party.

Woodward, 368 F.3d at 926. Although the district court found sufficient evidence to sustain the verdict in Nargis's "awareness of tier talk," facts culled from the Jorgenson investigation, and the single county-sponsored PREA training session, ultimately we disagree.

In our de novo review, plaintiffs failed to present enough evidence to support their claims. *Houskins*, 549 F.3d at 493. The facts do not show Christensen "was highly likely to inflict the *particular* injury suffered by the plaintiff[s]." *Bryan Cty.*, 520 U.S. at 412 (emphasis in original). The trial record offers no support that the same or similar constitutional injuries were foreseeable. So far as the record reveals, the county had no reason to believe, before the events giving rise to this case, that its training or supervision of Christensen was inadequate. Besides, there is no evidence of a pattern of constitutional violations making it "known or obvious" that additional training or enhanced policies were necessary. *Id.* at 407, 410; *see also Connick*, 563 U.S. at 61. The trial record does not contain evidence from which a rational jury could find the county knew of, but was deliberately indifferent to, a risk that inmates' constitutional rights would be violated.

Even if the record contained evidence of culpability, plaintiffs needed to show a direct causal connection between a county policy, practice, or custom and their injuries. *Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 675 (7th Cir. 2012) ("[I]n other words that the policy or custom was the moving force behind the constitutional violation."). Given the absence of causation evidence, the record can only be

read that Christensen—not any county policy or failure to train—was the moving force behind plaintiffs' injuries. To hold otherwise under these facts would pin Christensen's acts on the county and allow for vicarious liability, contrary to *Monell*.

The requirements for imposing liability upon the county for Christensen's acts are "rigorous." *Bryan Cty.*, 520 U.S. at 406, 415. Although we do not overturn a jury verdict lightly, we must assure the jury had a legally sufficient evidentiary basis for its verdict. *Filipovich*, 391 F.3d at 863 (reversing verdict awarding back pay and punitive damages because employee failed to present legally sufficient evidence of age discrimination). It is clear to us, *see Houskins*, 549 F.3d at 493, that the trial evidence fails to satisfy the necessary elements under *Monell*, *Canton*, and *Connick* of an imputable policy, culpability, and causation. In the end, these cases (and their related authorities) control the calls a jury is allowed to make. We therefore reverse the verdict against the county and remand for the entry of judgment as a matter of law in favor of the county. Because we reverse the district court's denial of the county's Rule 50(b) motion, we need not reach the county's Rule 59(a) motion.

As noted earlier, Christensen waived his appeal for judgment as a matter of law under Rule 50. So next we address whether Christensen is entitled to a new trial under Rule 59.

B. *Christensen*

Christensen appeals the jury verdict against him on three grounds. First, he claims plaintiffs failed to show that he was at fault for his actions. Second, he

alleges the jury instructions misstated the law by allowing a finding of liability without proof of harm or causation. Third, he challenges the jury's determination of damages.

1. *Christensen's fault*

To establish an Eighth Amendment violation against prison officials, "an inmate must show that a defendant was deliberately indifferent to an excessive risk to inmate health or safety." *Sinn v. Lemmon*, 911 F.3d 412, 419 (7th Cir. 2018) (citations omitted). This includes two elements: "the harm to which the prisoner was exposed must be an objectively serious one"; and judged subjectively, the prison official "must have actual, and not merely constructive, knowledge of the risk." *Id.* (quoting *Gevas v. McLaughlin*, 798 F.3d 475, 480 (7th Cir. 2015)). The first element is easily established here: sexual assault against an inmate is always serious. The second element requires the official to "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.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). Immunity protects officials who act at the "hazy border" between the lawful and the forbidden. *Riccardo v. Rausch*, 375 F.3d 521, 526 (7th Cir. 2004) (citation omitted).

Christensen contends he did not know his sexual relationships posed harm to anyone other than himself. As Christensen sees it, he was the only person who stood to lose anything (his job, his family, and his freedom) because of his behavior. These claims are as disingenuous as they are unpersuasive. There is no hazy border of the forbidden here: state law and jail

policy unequivocally prohibit any sexual contact with inmates and afford no discretion on the matter. Christensen testified he knew his conduct violated county policies, he would be criminally prosecuted if caught, and his actions were "not positive" for plaintiffs. These facts support the jury's finding that Christensen knew about a substantial risk of harm to plaintiffs and disregarded that risk.

Rule 59 allows for a new trial if the jury's verdict is against the manifest weight of the evidence or if the trial was in some way unfair to the moving party. *Martinez*, 900 F.3d at 844. Christensen quibbles that he never confessed to knowing his actions were wrong, but only that his actions were "not positive." But the law requires only facts supporting a known inference of wrongdoing, not an outright confession of misconduct. Here, a reasonable jury could and did find that Christensen knew a substantial risk of harm shadowed his actions and that he deliberately disregarded that risk. The district court did not abuse its discretion in refusing to grant a new trial on this ground.

2. *Jury instructions*

Christensen next argues the district court refused to instruct the jury on causation and harm, which he believes deprived him of his ability to argue consent as a defense. Because plaintiffs allegedly consented to his sexual advances, he contends the jury should have been instructed to consider whether he actually caused harm to plaintiffs.

After the second day of trial, the court proposed the following instruction on harm and consent:

> If you determine that consent has a bearing on your determination of harm, you may consider the following in deciding whether plaintiffs' sexual contacts with defendant Christensen were consensual: the power disparity between prisoners and correctional officers and how that disparity may create a coercive environment. Ultimately, the determination of whether there was consent, and the broader question of whether there was harm, is for you to determine.

Order on Jury Instructions at 4-5, *J.K.J. v. Polk Cty.*, No. 3:15-CV-428 (W.D. Wis. January 31, 2017), ECF No. 238.

The next day during the jury instruction conference for the liability phase, the district court became skeptical, however, that a harm instruction was required. When the court questioned how a reasonable jury could conclude Christensen's conduct was not harmful, Christensen's counsel replied that a harm instruction "goes to consent and whether this was something that ultimately caused the harm being alleged." Christensen's counsel also argued the question of harm "is a close call" and "one for the jury." The court was not persuaded and shifted the harm element from the liability phase to the damages phase; reasoning this was "a compromise" between its skepticism and Christensen's request. Then, after the jury found Christensen liable to plaintiffs, the court asked whether Christensen planned to argue that his conduct was not harmful during the damages phase. Christensen's counsel replied: "No, Your Honor."

In denying Christensen's motion for a new trial, the district court concluded that he had not preserved his objections to the removal of a harm instruction in either trial phase. We agree Christensen waived his right to appeal for a harm instruction during the damages phase. *See United States v. Kirklin*, 727 F.3d 711, 716 (7th Cir. 2013) ("[C]ounsel's affirmative statement that he had no objection to the proposed jury instruction constitutes waiver of the ability to raise this claim on appeal.") (citation internal brackets omitted).

But Christensen did not waive his objection during the liability phase. Twice Christensen requested a harm instruction during the liability phase. Twice he explained that a harm instruction implicates questions of causation and a defense of consent. These statements sufficiently alerted the court to his request and his argument, allowing us on appeal to reach the merits of this claim.

We review Christensen's challenge to the liability phase instructions in two steps. In step one, "[w]e review de novo whether jury instructions accurately summarize the law, but give the district court substantial discretion to formulate the instructions provided that the instructions represent a complete and correct statement of the law." *United States v. Daniel*, 749 F.3d 608, 613 (7th Cir. 2014) (citation omitted). If the instructions are legally accurate, in step two we review the district court's phrasing of the instructions for abuse of discretion. *Id.* We construe jury instructions "in their entirety and not in artificial isolation," reviewing whether the jury "had understanding of the issues and its duty to determine

those issues." *Happel v. Walmart Stores, Inc.*, 602 F.3d 820, 827 (7th Cir. 2010) (citation omitted).

Here, the instructions read:

> To succeed on plaintiff's Eighth and Fourteenth Amendment Claim against defendant Christensen, plaintiff must prove each of the following things by a preponderance of the evidence:
>
> > (1) plaintiff was incarcerated under conditions that posed a substantial risk of serious harm to her health or safety; and
> >
> > (2) defendant was deliberately indifferent to plaintiff's health or safety.
>
> With respect to the claim against defendant Christensen the term "deliberately indifferent" means that he actually knew of a substantial risk of harm and that he consciously disregarded this risk through his actions.

Closing Instructions at 3, *J.K.J. v. Polk Cty.*, No. 3:15-CV-428 (W.D. Wis. February 2, 2017), ECF No. 243.

These instructions align with our court's precedent regarding deliberate indifference liability. *See Sinn*, 911 F.3d at 419 (evaluating deliberate indifference standard as applied to prison guards); *Riccardo*, 375 F.3d at 525 (same). Because the instructions accurately summarize the applicable law, we look to whether the district court's phrasing of the instructions constituted an abuse of discretion. "We will reverse at this second step only if it appears both that the jury was misled and that the instructions

prejudiced the defendant." *United States v. Dickerson*, 705 F.3d 683, 688 (7th Cir. 2013) (citation and internal quotations omitted).

In Christensen's view, the instructions were misleading because without an instruction on causation, harm, and consent, they reflected an "inadequate understanding of the law." We disagree. The instructions listed the essential elements of deliberate indifference, instructed the jury on plaintiffs' burden to prove these elements, and provided guidance on the meaning of a key term within these elements. Above all, the phrasing of the instructions was uncomplicated and substantively accurate. So Christensen has failed to show abuse of discretion on this point.

Christensen next contends the instructions were "seriously prejudicial" because they "resulted in a finding of liability without any consideration" of whether he caused plaintiffs any harm. But this inaccurately conflates causation and consent. Like any prison guard, Christensen was prohibited from having sex with inmates; plaintiffs' constitutional claims are based on this prohibition. Christensen admits to committing these offenses. Plaintiffs' alleged consent does not make Christensen any less of a cause. To claim otherwise assumes consent voids causation, which it does not.

For their part, plaintiffs testified they did not consent to Christensen's advances. Plaintiffs' expert testified as to the serious mental health trauma plaintiffs suffered, and opined on the amount of damages from their injuries. Christensen offered no rebuttal. The jury's verdict suggests it believed

plaintiffs and their expert over Christensen, and "[w]e will not reweigh the evidence, or substitute our credibility assessments for that of the jury." *Pearson v. Welborn*, 471 F.3d 732, 738 (7th Cir. 2006). Because the omission of a harm or a causation jury instruction was neither misleading nor prejudicial, we conclude the district court did not abuse its discretion on this point.

3. *Damages*

Last, we consider the soundness of the jury's determination of damages against Christensen, beginning with the compensatory damages award. Christensen argues the district court should have granted a new trial because the jury awarded identical compensatory damages to each plaintiff, so the verdicts "lack a rational relationship with the evidence contained in the record."

"We review challenges to the propriety of a compensatory damages award for abuse of discretion." *Kapelanski v. Johnson*, 390 F.3d 525, 532 (7th Cir. 2004). To support his claim, Christensen invokes *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir.1989), in which our court affirmed the district court's award of a new trial on the issue of damages (with the option of remittitur) because the compensatory damages award did not bear a "reasonable relation to actual injury sustained." *Id*. at 848.

Cygnar does not help Christensen. In that case, a jury awarded $55,000 to each plaintiff among thirteen plaintiffs. *Id*. at 833. Christensen asserts we affirmed the grant of a new trial in *Cygnar* solely because the jury gave identical awards to each plaintiff. Not so: we affirmed a new trial in *Cygnar* because the jury gave

the same award per plaintiff despite the plaintiffs' "sharp variances" in the amount of economic harm suffered among them. *Id.* at 848. In other words, because the awards in *Cygnar* did not account for obvious differences in harm between plaintiffs individually, we ruled that they did not bear a reasonable relation to the actual injuries sustained.

In contrast, plaintiffs here relied on expert testimony to assert identical economic harms (psychological treatment costs) for the similar noneconomic harms suffered of repeated sexual assaults by Christensen. Christensen counters plaintiffs suffered different pre- and post-assault mental health concerns, and he engaged in sexual contact with each plaintiff with varying degrees of regularity. These "inconsistencies," Christensen argues, precluded the jury from awarding an identical sum to J.K.J and M.J.J.

Christensen fails to explain how plaintiffs' mental health issues and the frequency of his assaults, which plaintiffs endured over years, necessarily translates into different damages awards. He also fails to show the jury's awards were not "in line with other awards in similar cases," in support of his position. *See Cygnar*, 865 F.2d at 848. So the district court did not abuse its discretion when it denied a new trial on the question of compensatory damages.

Christensen also contends the jury's punitive damages awards bear no relation to plaintiffs' harms, necessitating a new trial. But he only asserts "awards of punitive damages cannot be unfettered from due process requirements," and fails to connect that proposition to this case.

We review challenges to punitive damages de novo when constitutional issues are raised. *Gracia v. SigmaTron Int'l, Inc.*, 842 F.3d 1010, 1022 (7th Cir. 2016) (citations omitted). If no constitutional issue is raised, our review of punitive damages is for abuse of discretion. *Id.* (citation omitted). Whether Christensen challenges the punitive damages award on constitutional or non-constitutional grounds, the outcome is the same.

The Supreme Court has set forth three guideposts to assess a punitive damage award: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the award in this case and the penalties imposed in comparable cases. *Id.* at 1023 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996)).

First, we have no difficulty concluding that a reasonable jury could find Christensen's behavior was particularly reprehensible. On guidepost two, "[t]he constitutional limit on punitive damages depends on the reprehensibility of the defendant's conduct and the ratio between compensatory and punitive damages." *Beard v. Wexford Health Sources, Inc.*, 900 F.3d 951, 955 (7th Cir. 2018). "[T]he more reprehensible a defendant's conduct and the more easily a defendant can conceal violations, the higher the punitive damages." *Id.* at 953. These awards show the jury found Christensen's conduct to be especially blameworthy. Even so, the ratio between the punitive and compensatory damages awards was less than two-to-one, which is less than the four-to-one ratio "that

might be close to the line," of constitutional impropriety. *BMW of N. Am.*, 517 U.S. at 581 (citation omitted). And under guidepost three, Christensen has not offered any cases as comparators.

The district court applied these measures to the jury's verdict and concluded the punitive awards were reasonable and comported with due process requirements. We agree and see no reason to disturb either of the jury awards assessed against Christensen.

III. CONCLUSION

Based on this reasoning, we REVERSE the jury verdict against the county and REMAND the case to the district court to enter judgment as a matter of law for the county. The district court's denial of Christensen's motion for a new trial is AFFIRMED.

SCUDDER, *Circuit Judge*, dissenting in part. Two realities combine to make this case very difficult—the respect the law affords jury verdicts and the demanding standard for municipal liability under 42 U.S.C. § 1983 and *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978). While the majority opinion marshals the best reasons for reversing the district court's judgment against Polk County, I respectfully dissent from that portion of the opinion. When viewing the evidence in the light most favorable to the jury's verdict, I agree with District Judge Conley that a reasonable jury could have found that Polk County acted with deliberate indifference to the need for more training and monitoring to prevent the sexual assault of female inmates by male guards and in doing so caused the injuries suffered by plaintiffs J.K.J. and M.J.J.

I

Monell unquestionably sets a high bar for municipal liability. A municipality may be liable under § 1983 only "if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quoting *Monell*, 436 U.S. at 692). The majority is right that the evidence does not support the imposition of *Monell* liability on the view that the county had an express or implicit policy authorizing the sexual assault of inmates. Nor is this a case where any sort of county policy could be found on the basis of a pattern of past incidents of sexual assaults of female inmates by male guards.

But those are not the only avenues available for *Monell* liability. The Supreme Court has left room for liability premised on a municipality's failure to train its employees when "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [county] can reasonably be said to have been deliberately indifferent to the need." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 (1989); see also *Board of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 407 (1997) (explaining that "a plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences") (quoting *Canton*, 489 U.S. at 388).

On these principles, a county's inaction, including its failure to provide adequate training, can amount to "the functional equivalent of a decision by the [county] itself to violate the Constitution," when the county has notice that its program will cause constitutional violations. *Connick*, 563 U.S. at 61-62 (quoting *Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part)); see also *Glisson v. Indiana Dep't of Corr.*, 849 F.3d 372, 381 (7th Cir. 2017) (observing that the "key is whether there is a conscious decision not to take action"). These "rigorous standards of culpability and causation" safeguard against a municipality being held liable "solely for the actions of its employees." *Bryan County*, 520 U.S. at 405.

But rigorous does not mean impossible, and J.K.J. and M.J.J. sought to carry their burden of proving Polk County's deliberate indifference to the need for more training and monitoring by focusing the jury on three primary points: the county's sparse training on its policies prohibiting the sexual abuse of inmates, a jail culture that denigrated women, and the county's deficient response to the 2012 incident involving guard Allen Jorgenson and a female inmate. Each point warrants careful consideration, with the controlling question being whether *any rational jury* could have concluded that the combined evidence supports a finding of liability against the county. Setting aside a jury verdict on the basis of insufficient evidence is serious business. See *Woodward v. Corr. Med. Servs. of Illinois, Inc.*, 368 F.3d 917, 926 (7th Cir. 2004).

A

Polk County's Policies and Sexual Assault Training: All agree that Polk County's written policies categorically prohibit sexual contact with inmates. But so too should everyone agree that policies cannot exist on paper alone. It is not enough in this context to print the policy in a handbook, distribute it to all jail guards, and tell them to follow it. Training is critical precisely because it reinforces that strict adherence to the policy is required and indeed what most matters. And this is especially so in the context of a county employing male guards to supervise female inmates—a circumstance that is perhaps more the norm than the exception around the country, but which inheres with meaningful risk. It takes little foresight to envision an instance where a

guard grows too comfortable, loses his better angels, and steps over the clear line marked in Polk County's written policies.

The trial evidence showed that Polk County's training on preventing the sexual harassment and abuse of inmates was sparing at best. The training consisted almost exclusively of informing guards of the easy and obvious—that the jail's policies prohibited sexual contact with inmates. What was missing stands out. The jury heard no evidence of guards being informed of the inherent vulnerability the confinement setting presents to female inmates. Nor was there evidence of the county either explaining the serious harm that can befall an inmate sexually abused by a guard or taking steps to train guards to hold each other accountable to the county's bright-line prohibition on any intimate contact with inmates. The record shows that the only training dedicated to preventing the sexual assault of inmates by guards came in a single session on the Prison Rape Elimination Act in 2014—well after much of Darryl Christensen's abuse of J.K.J. and M.J.J. had occurred.

At an even broader level there was no evidence that the county included the female inmates themselves in its efforts to prevent sexual abuse. The jury, for example, heard no account of the county ensuring or reinforcing that inmates had access to a safe and confidential channel through which to report inappropriate sexual conduct by jail guards.

Do not overread these observations as somehow prescribing what the county had to do to avoid liability. The observations serve only to show that the county's training was so thin that its inadequacy could

have informed the jury's ultimate finding of deliberate indifference.

The Culture of the Polk County Jail: At trial the jury learned that Captain Scott Nargis was aware of sexual comments made by male guards about and towards female inmates. Nargis testified that he heard Christensen comment on a female's "rear end," while also learning from others that Christensen had made inappropriate comments about an inmate's breasts. Captain Nargis further testified that he himself occasionally participated in so-called "tier talk"—consisting of "not necessarily flattering talk amongst co-workers." While the majority concludes that the tier talk of which Nargis was aware was not sexual in nature, there is no way to view the testimony about tier talk as compelling the jury to reach that conclusion. Rather, the record shows that Nargis recalled instances in which the banter among the guards included sexual comments about females within the facility, including at least one female inmate. At the very least, a reasonable jury could have found that the jail's administrators did little to reinforce the dignity and respect owed female (and indeed all) inmates and instead seemed to enable a culture that condoned the sexual objectification of female inmates by male guards. Judge Conley saw the evidence much the same way in denying the county's post-trial motions for judgment as a matter of law and a new trial.

Unfortunately, there is more. The record shows that the jail's culture extended beyond tier talk, as evidenced by the allegations and resulting investigation of another guard, Allen Jorgenson.

Polk County's (Non) Response to the Jorgenson Incident: In early 2012 jail administrators received a complaint that Jorgenson had engaged in sexual contact—"inappropriate touching" to be exact—with a female inmate. The allegations also included concerns that Jorgenson used security cameras to fixate on female inmates and told inmates to expose themselves to him. Captain Nargis also learned that jail staff, as part of screening outgoing inmate mail, had reported seeing multiple references to Jorgenson's inappropriate behavior toward female inmates and staff.

Captain Nargis and Chief Deputy Steven Moe responded by conducting an investigation and concluding that Jorgenson had violated the jail's policies and deserved a written reprimand. The investigation confirmed that Jorgenson used security cameras on multiple occasions to focus on female inmates longer than necessary and flirted with female inmates generally. Though unable at first to substantiate that Jorgenson engaged in sexual contact with the inmate in question (in no small part due to the inmate's denial that any sexual contact had occurred), Nargis and Moe nonetheless found that Jorgenson pursued an improper personal relationship with the inmate.

More then came to light when the inmate submitted a letter recanting her prior denial of sexual contact with Jorgenson. The incidents described in the letter were detailed and specific, to say nothing of disturbing, and served to put Nargis and Moe on notice of allegations of repeated predatory behavior by Jorgenson. The inmate recounted much more than

petty flirtation, reporting that "[t]here are many things he [Jorgenson] has said and done that have been inappropriate in a sexual manner towards me," including, for example, telling me "he has wanted me to lift my shirt," "seeing us in the shower" and calling it a "nice show," touching my "back and butt," "lean[ing] over the [work] cart to look down my shirt," saying "he wants me to ride topless in his boat," and instructing me to "keep quiet."

The letter prompted Nargis and Moe to take a fresh look at the matter. Sergeant Steven Schaefer spoke with the inmate to verify her report and concluded that she may have been telling the truth at that point. At trial Moe acknowledged that, after the jail received the letter, he found it "more likely" that Jorgenson had engaged in inappropriate or even illegal touching of the inmate. In the end, however, the county left in place its original reprimand of Jorgenson, only then to see him resign a short time later when female coworkers complained that he had made inappropriate comments towards them.

The majority opinion risks the misimpression that Jorgenson's conduct was isolated to putting his arm around an inmate and patting her backside. The inmate's letter put the county on notice of much more, or at least a reasonable jury could have so concluded. By its terms, the letter conveyed detailed allegations of repeated sexual misconduct, including physical touching, by Jorgenson. While the majority might be right to observe that the jury heard no direct evidence demonstrating that Captain Nargis or Chief Deputy Moe undertook their investigation in bad faith, that observation answers the wrong question. The jury was

entitled to conclude that, separate and apart from whatever discipline was owed Jorgenson, the county had a plain example of predatory sexual behavior staring it in the face.

A broader takeaway was available to the jury on this evidence: apart from reprimanding Jorgenson, the county took no action to reinforce its sexual assault policies with all other male guards. The county did not, for example, seek to learn why its policies aimed at protecting inmates from sexual assault and harassment were going unheeded or whether its culture—including the sexual commentary about and towards female inmates—contributed to Jorgenson's actions. Nor did the county hold a formal training session, or even a short informal meeting, to remind guards of the clear and absolute prohibition on any and all sexual contact with inmates. Indeed, Sergeant Schaefer testified that, after the Jorgenson incident, the guards received no training regarding inappropriate sexual conduct towards inmates. The jury likewise heard no evidence of the county taking any steps to monitor its male guards' compliance with its policies.

To be sure, Polk County was not required to take any one of these particular measures. See *Glisson*, 849 F.3d at 380. And it emphatically is not our place to instruct a municipality on how to implement its sexual assault policies. The essential observation—the conclusion available to the jury—is much more limited: the Jorgenson incident informed the county that a guard had engaged in prohibited sexual conduct towards female inmates. With that information in

hand, the one option unavailable to Polk County was the one it chose—doing nothing.

The majority relies extensively on our recent decision in *Doe v. Vigo County, Indiana*, 905 F.3d 1038 (7th Cir. 2018) to make the point that notice of a handful of prior incidents of misconduct by employees does not support a finding of a municipality's deliberate indifference to coerced sexual activity. I see the cases as light years apart. There the record showed one incident of sexual assault committed in a public park by a park maintenance employee against a female volunteer, as well as notice of past misconduct by county employees working in a range of largely dissimilar positions throughout the county, including as a highway supervisor, county recorder, and jail guard. *Id.* at 1041, 1045. This evidence fell well short of establishing *Monell* liability against Vigo County. See *id.* at 1045-46.

Here, though, the jury confronted the altogether different setting of a jail and the conduct of male guards toward female inmates. And here, but not in *Vigo County*, the jury heard evidence that Polk County, before learning of Christensen's egregious wrongdoing, received clear notice of serious and repeated sexual misconduct carried out within the same jail by an employee in precisely the same position as Christensen.

The context here matters for yet another reason. The county's decision to do nothing in response to the Jorgenson incident occurred against the backdrop of its affirmative duty to protect those inmates entrusted to its custody. See *Estate of Perry v. Wenzel*, 872 F.3d 439, 453 (7th Cir. 2017) ("[W]hen the State takes a

person into its custody and holds [her] there against [her] will, the Constitution imposes upon it a corresponding duty to assume some responsibility for [her] safety and general well-being.") (quoting *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989)). In light of this duty, and with knowledge that its policies aimed at preventing the sexual harassment and abuse of female inmates by guards were being disregarded, Polk County could not stand still. It was required to ensure that "a well-recognized risk for a defined class of prisoners not be deliberately left to happenstance." *Glisson*, 849 F.3d at 382. A rational jury could have found that the county fell short of doing so. Even more specifically, the jury could have concluded that Polk County was aware that its mere proscriptions on sexual contact between guards and inmates had proved insufficient at preventing the sexual exploitation of at least one female inmate by a male guard. Deciding to do nothing once it had that information, a rational jury could have found, reflected deliberate indifference on the county's part. See *Canton*, 489 U.S. at 390.

B

The much harder question is the one that comes next under *Monell*—causation and, specifically, whether Polk County's deliberate indifference was the "moving force" behind the repeated and undetected sexual assault of J.K.J. and M.J.J. by Christensen. *Monell*, 436 U.S. at 694. That standard, the Supreme Court has underscored, is demanding and requires proof of "a direct causal link between the municipal action and the deprivation of federal rights." *Brown*, 520 U.S. at 404.

At trial J.K.J. and M.J.J. faced the difficult reality that Christensen, despite knowing his conduct was a crime and violated the jail's policies, repeatedly raped and sexually assaulted them anyway. And, as the majority is right to emphasize, Christensen also went to lengths to conceal his conduct. These facts make it tempting to view the plaintiffs' injuries as the result of a lone bad actor's knowing decision to disregard the law and the county's policies.

The evidence permits another view, though. Christensen's actions cannot be separated from the broader context in which they occurred: J.K.J. and M.J.J.—female inmates in Polk County's custody—faced a very real risk of sexual assault by guards. Wisconsin law recognizes that risk by making it a crime for a guard to engage in any sexual contact with an inmate in any circumstance. See Wis. Stat. § 940.225(2)(h). For their part, Polk County jail administrators likewise recognized the clear risk of inmates being sexually assaulted. More to the point, following the Jorgenson investigation, Polk County knew the risk was far from hypothetical. To the contrary, the Jorgenson incident showed the county that the existence of a written policy prohibiting sexual contact between guards and inmates was insufficient to prevent the sexual harassment and abuse of inmates by guards.

And this is precisely where the jury could have determined the county fell short. It neither conducted meaningful training aimed at preventing and detecting sexual assault nor monitored its employees' compliance with its policies. On this evidence, a rational jury could have found that the plaintiffs'

injuries were the "highly predictable consequence" of the deliberate path of inaction that the county pursued by not providing more training or monitoring to prevent the sexual assault of female inmates. *Connick*, 563 U.S. at 64 (quoting *Brown*, 520 U.S. at 409).

II

What worries me about today's decision is that, as a very practical matter, municipalities may conclude that there is not much to be done to stop a rogue guard from engaging in secretive and heinous conduct in violation of a bright-line policy prohibiting sexual contact with inmates. That view would be as mistaken as it is dangerous, for cities and counties have a meaningful responsibility and role to play in preventing the sexual abuse of inmates in their custody by the guards they employ. That promise comes from the Eighth Amendment. While not every incident of abuse will be preventable, a jail's decisionmakers are not free to choose—through their deliberate decisions on enforcement and training related to the jail's policies—to leave unaddressed a known and material risk of sexual assault to inmates under the jail's care.

Each of these observations follows from the evidence before the jury and, in this way, can be seen as embodied in the jury's verdict against Polk County. I would leave that verdict in place and therefore respectfully dissent from the court's decision to the contrary.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 18-1498, 18-1499, 18-2170 & 18-2177

J.K.J. and M.J.J.,
Plaintiffs-Appellees,
v.
POLK COUNTY AND DARRYL L. CHRISTENSEN,
Defendants-Appellants.

Filed: Sept. 16, 2019

ORDER

The petition for rehearing en banc is **GRANTED**. The opinion and judgment entered by the panel are **VACATED**. Oral argument will be heard on a date to be set by further order.

Appendix D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

Nos. 15-cv-428-wmc, 15-cv-433-wmc

J.K.J.,

Plaintiff,

v.

POLK COUNTY and DARRYL L. CHRISTENSEN,

Defendants.

and

M.J.J.,

Plaintiff,

v.

POLK COUNTY AND DARRYL L. CHRISTENSEN,

Defendants.

Filed: Feb. 5, 2018

OPINION & ORDER

These two cases proceeded to a consolidated jury trial on plaintiffs J.K.J. and M.J.J.'s respective claims that a former Polk County Jailer, defendant Darryl L. Christensen, sexually assaulted them while they were incarcerated in the Polk County Jail and that defendant Polk County acted with deliberate indifference to the serious risk of sexual assault of

inmates by jail employees, both in violation of the Eighth Amendment of the United States Constitution. Plaintiffs also asserted state law negligence claims against the County. The jury found in plaintiffs' favor on all claims ('428 dkt. #246; '433 dkt. #247) and awarded each plaintiff $2,000,000 in compensatory damages against both defendants, as well as $3,750,000 in punitive damages against Christensen ('428 dkt. #250; '433 dkt. #251).

Before the court are a number of post-trial motions. The County seeks judgment as a matter of law under Federal Rule of Civil Procedure 50(b) with respect to plaintiffs' state law negligence claims on the basis of immunity under Wis. Stat. § 893.80. ('428 dkt. #245; '433 dkt. #246.) In addition, the County and Christensen each filed motions for judgment as a matter of law or, in the alternative, for a new trial under Rule 59 with respect to the jury's findings of liability on plaintiffs' Eighth Amendment claims. (County's Mot. ('428 dkt. #268; '433 dkt. #269); Christensen's Mot. ('428 dkt. #272; '433 dkt. #273).) The court agrees with the County that plaintiffs' negligence claims turn on discretionary duties, for which the County is immune. Since the jury also found the County violated plaintiffs' constitutional rights, entry of judgment against plaintiffs on their negligence claims is largely a Pyrrhic victory. Except for those negligence claims, however, both defendants' motions will be denied in their entirety for the reasons that follow. Finally, at the direction of the court, plaintiffs' counsel submitted their request for attorneys' fees and costs under 42 U.S.C. § 1988, and defendants offered no opposition to the requested amount. Finding plaintiffs' request reasonable and

well-documented, the court will award the fees and costs set forth below.

OPINION

This court may grant judgment to a non-prevailing party as a matter of law under Fed. R. Civ. P. 50(a) where there is no "legally sufficient evidentiary basis" to uphold the jury's verdict on that issue. In reviewing a Rule 50 motion, the court will "examine the evidence presented, combined with any reasonably drawn inferences, and determine whether the combination sufficiently supports the verdict when viewed in the light most favorable to the non-moving party"—the plaintiffs. *E.E.O.C. v. AutoZone, Inc.*, 707 F.3d 824, 835 (7th Cir. 2013). Alternatively, although the difference is a nuanced one, the court may grant defendants motion for a new trial under Fed. R. Civ. P. 59(a) "only if the jury's verdict is against the manifest weight of the evidence." *King v. Harrington*, 447 F.3d 531, 534 (7th Cir. 2006) (citing *ABM Marking, Inc. v. Zanasi Fratelli, S.R.L.*, 353 F.3d 541, 545 (7th Cir. 2003)). To meet this standard, defendants must demonstrate that no rational jury could have rendered a verdict against them. *See King*, 447 F.3d at 534 (citing *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 926 (7th Cir. 2004)). In making this evaluation, the court must again view the evidence in a light most favorable to plaintiffs, leaving issues of credibility and weight of evidence to the jury. *King*, 447 F.3d at 534. "The court must sustain the verdict where a 'reasonable basis' exists in the record to support the outcome." *Id.* (quoting *Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir. 2004)).

I. Defendant Polk County's Motion for Judgment as a Matter of Law on State Law Negligence Claim

Defendant Polk County contends that it is entitled to immunity on plaintiffs' state law claims of negligent training and supervision. Specifically, the County argues that the conduct underlying these claims was discretionary in nature, falling within the immunity provision of Wisconsin Statute § 893.80(4). That provision provides in pertinent part:

> (4) No suit may be brought against any . . . governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such . . . subdivision or agency . . . or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

Wis. Stat. § 893.80(4).

Courts have generally construed quasi-judicial and quasi-legislative functions as "activities that involve the exercise of 'discretion.'" *Scot v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 16, 262 Wis. 2d 127, 663 N.W.2d 715; *see also Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶ 21, 253 Wis. 2d 323, 646 N.W. 2d 314 (holding generally that Wis. Stat. § 893.80(4) provides immunity for "any act that involves the exercise of discretion and judgment"). In contrast to an act that involves discretion and judgment, a ministerial duty is a duty that is:

> absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.

Lister v. Bd. of Regents of Univ. Wis. Sys., 72 Wis. 2d 282, 301, 240 N.W.2d 610, 622 (1976).

In opposition to defendant's motion, plaintiffs contend that the County is not entitled to immunity because the "known and compelling danger exception applies." (Pl.'s Opp'n (dkt. #267) 2 (citing *Cords v. Anderson*, 80 Wis. 2d 525, 259 N.W.2d 672 (1977)).)[1] In *Cords*, the plaintiffs were injured when they fell into a deep gorge while hiking at night on a hazardous portion of a trail in Parfrey's Glen, a state-owned nature preserve. After reviewing the facts involved in plaintiffs' fall and injuries, the court concluded "that the duty to either place warning signs or advise superiors of the conditions is, on the facts here, a duty so clear and so absolute that it falls within the definition of a ministerial duty." *Id.*at 542, 249 N.W.2d at 680.

Critically, in *Cords*, not only was the danger known and clear, but the required response to that danger was equally certain. As the Wisconsin Supreme Court explained in a case cited by plaintiffs, "[t]o qualify as ministerial, the time, mode, and occasion for *performance* of the duty must be so certain that discretion is essentially eliminated." *Lodl*, 2002

[1] Unless otherwise noted, the docket entries are to Case No. 15-cv-428.

WI 71, at ¶ 40 (emphasis added) (reversing application of known and compelling danger exception after finding decision to control traffic manually was discretionary); *see also Voss ex rel. Harrison v. Elkhorn Area Sch. Dist.*, 2006 WI App 234, ¶ 20, 297 Wis. 2d 389, 724 N.W.2d 420 (applying known and compelling danger exception where "only option was to put an end to" student exercise of wearing "fatal vision goggles"); *Pries v. McMillon*, 2010 WI 63, ¶ 34, 326 Wis. 2d 37 784 N.W.2d 648 (applying ministerial duty exception to Wis. Stat. § 893.80(4) where the "language in the written instructions . . . has the requisite specificity and definition of the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion").

In finding a constitutional violation by the County here, the jury necessarily determined that "one or more of [the County's] policy-making officials knew of a substantial risk of harm, and that the official or officials consciously disregarded this risk by failing to take reasonable measures to deal with it." (Closing Instr. (dkt. #243) 4.) However, the appropriate response to that danger still required the exercise of discretion, thus bringing it within the scope of § 893.80(4) and outside of the boundaries of the known and compelling danger exception. In their opposition brief, plaintiffs contend that the need for different and additional training was clear, but the concept of "different and additional" training, unlike the requirement to train at all -- or to erect warning signs or stop a discrete, dangerous activity or follow explicit instructions—necessarily required the exercise of discretion. For this reason, the court will grant the County's motion for judgment as a matter of law,

finding the County entitled to immunity for plaintiffs' negligence claims under Wis. Stat. § 893.80(4).[2]

II. Defendants' Motions for Judgment as a Matter of Law on Eighth Amendment Claims

Defendants filed separate motions for judgment as a matter of law or for a new trial on plaintiffs' Eighth Amendment claims, although their motions raise overlapping arguments. As such, the court will address the motions together, addressing each argument separately.

A. County's Deliberate Indifference

In challenging the jury's finding of deliberate indifference, the County *first* argues that plaintiffs failed to show that it had the requisite knowledge. Specifically, the County argues that plaintiffs failed to offer proof of a pattern of prior constitutional violations. As plaintiffs point out in response, the court *agreed* with defendants that plaintiffs failed to put forth sufficient evidence to support finding a pattern of constitutional violations known to policy-makers, and as a result, the court both precluded plaintiffs from so arguing and excluded this basis of liability from the jury instructions, leaving plaintiffs to argue only that the "risk of the inadequacy of the training, supervision, and/or adoption of policies [was]

---

[2] Of course, as evidence mounts of the substantial risks of these assaults in jail and prison settings, *and* a consensus builds as to the *minimum* training and supervision necessary to manage those risks, government entities may eventually lose this immunity. Moreover, as noted earlier, the practical effect of this holding is immaterial in light of the jury's award of damages to plaintiffs for the same injuries based on the County's violation of their constitutional rights.

plainly obvious." (Trial Tr. (dkt. #259) 5-9 (final jury instruction conference, explaining change, removing pattern language); Closing Instr. (dkt. #243) 4-5 (describing knowledge of risk component of deliberate indifference claim).)

Second, in a challenge more rooted in the actual record, the County argues that plaintiffs failed to prove that the substantial risk of harm and the inadequacy of the training, supervision and/or adoption of policies were "plainly obvious." The jury was instructed that to find deliberate indifference, plaintiffs must prove that a substantial risk of harm from inadequate training, supervisor or policies was plainly obvious to one or more of the County's policy-making officials. (Closing Instr. (dkt. #243) 4-5.) Plaintiffs submitted evidence consistent with that burden at summary judgment and again at trial by showing that Jail Captain Scott Nargis was aware of sexual comments by correctional officers to inmates and other female employees as a result of investigating Christensen as far back as 2002 and investigating another former correctional officer Art Jorgensen in 2012. Plaintiffs argued, and the jury apparently found, this knowledge placed Nargis on notice as to the need for further or different training, as well as for implementation of PREA-like training, notice and supervision policies. Moreover, Nargis generally acknowledged his awareness of "tier talk," from which a reasonable jury could conclude that the jail officials turned a blind eye, and perhaps even fostered, a culture where inappropriate sexual comments were accepted as the norm. Finally, the jury heard testimony and received evidence about the Jail's February 2014 PREA training—the only PREA

specific training offered to jail employees—from which the jury reasonably could conclude that the administration downplayed the importance of preventing sexual assault and harassment within the jail. Although not overwhelming evidence, this circumstantial evidence forms a legally sufficient evidentiary basis for the jury's finding it was more probable than not that Nargis and others within the County Jail administration had knowledge of the substantial risks of sexual assaults of jailers on inmates, but acted with deliberate indifference to the need for better training, supervision and policies.

Third, the County challenges the jury's finding that its deliberate indifference *caused* plaintiffs' injuries. Here, too, the court finds that there was a legally sufficient evidence basis to support the jury's finding it more probable than not that if the County had provided adequate notice and training to correctional officers *and* inmates on what constitutes sexual harassment and abuse, and how to report it, plaintiffs may not have been sexually assaulted and harassed, or at minimum that adequate supervision policies would have prevented Christensen from feeling emboldened enough to repeatedly make lewd comments over the jail intercom about female inmate's attire, much less leave his post in the jail's bubble to assault inmates sexually. Furthermore, the jury reasonably could have concluded that increased or different supervision may have thwarted Christensen's rampant acts of sexual abuse. Indeed, as described by the victims, it seems quite likely that the sheer audacity of Christensen's repeated acts, done with actual power over their daily lives and with apparent impunity, would have overcome any hope

that filing a complaint would have produced a positive outcome.

Fourth and finally, the County complains that the jury verdict "turns *Monell* into a standard of *respondeat superior* liability." (County's Opening Br. (dkt. #269) 23.) To the contrary, the jury instructions on plaintiffs' claims of liability against the County were entirely consistent with the standard under *Monell*. Because the court finds a legally sufficient evidentiary basis for the jury's findings as to each of the deliberate indifference and *Monell* elements, the court rejects any suggestion that the jurors applied a less rigorous standard in rendering their verdict.

B. Christensen's Deliberate Indifference

Defendant Christensen also challenges the jury's finding of liability on plaintiffs' deliberate indifference claims asserted against him based on a lack of evidence to support the subjective prong of that claim. Specifically, Christensen contends that there was insufficient evidence from which a reasonable jury could find that he was subjectively aware of the substantial risk of harm to plaintiffs. Consistent with the law, the jury was instructed that to find that Christensen was "deliberately indifferent," they must find that "he actually knew of a substantial risk of harm *and* that he consciously disregarded this risk through his actions." (Closing Instr. (dkt. #243) 3.) *See also Perez v. Fenoglio*, 792 F.3d 768, 777 (7th Cir. 2015) ("The deliberate indifference standard reflects a mental state somewhere between the culpability poles of negligence and purpose, and is thus properly equated with reckless disregard.").

In support of his motion, Christensen contends that the following trial testimony falls short of admitting this element of the claim:

> Q. You knew, sir, didn't you, that you were putting both [plaintiffs] at risk by doing this, didn't you?
>
> A. Yes, sir.
>
> Q. And the risk of harm, correct?
>
> A. I don't—what are you referring to as harm?
>
> Q. That it was not positive for them, correct?
>
> A. Correct.

(Trial Tr. (dkt. #258) 51-52.)

The problems with this argument are myriad. As an initial matter, a reasonable jury would have *construed* these concessions as admissions, particularly after judging Christensen's credibility on the stand. Even more important, plaintiffs were not obligated to elicit an unqualified admission by Christensen for the jury to find the subjective element satisfied. Indeed, such an admission—even the concession quoted above—is sadly rare. Regardless, along with conceding that his actions were "not positive" for plaintiffs, he further acknowledged that his sexual contacts with inmates were for his own personal gratification and while having unsupervised power over the victims as their jailer. (*Id.* at 63; *see also* Trial Tr. (dkt. #262) 40-43.) Most importantly, plaintiffs *themselves* testified that they did not consent or welcome Christensen's sexual contact, thus providing additional support for a finding that Christensen knew of the harm his actions could cause. (Trial Tr. (dkt. #262) 75-78, 139-48.) As courts have

explained, "[w]here no legitimate law enforcement or penological purpose can be inferred from the defendant's alleged conduct, the abuse itself may, in some circumstances, be sufficient evidence of a culpable state of mind." *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997). Here, the court finds much more was put into evidence to support the jury's finding that Christensen actually knew of a substantial risk of harm posed by his actions.[3]

C. Treatment of Injury Requirement

Both defendants challenge the court's decision to find as a matter of law that Christensen's sexual assaults caused plaintiffs' injury. To begin, this challenge disregards the fact that all parties largely ignored the issue of injury, and the related question of consent, in their respective pretrial filings despite the court's raising its concern both before and during trial. In particular, during the final conference on the instructions in the first phase of trial, the court pressed this very issue with counsel for Christensen, asking "whether there is really any reasonable argument about harm with respect to the claim against Mr. Christensen." (Trial Tr. (dkt. #264) 119.) In response, his counsel argued that this "is still is a close call and I think it's one for the jury," noting that

[3] Defendants' reference to one of the victims having engaged in "voluntary" sexual acts with Christensen after being released from jail as evidence that the contacts between that victim and Christensen while she was an inmate and he a jailer fails to acknowledge what both their testimony proved was by then a complicated relationship at best, and at worst a twisted one. Regardless, the jury had ample evidence to weigh the importance of these later encounters on whether Christensen knew of the risk of harm his actions as jailer were having on his victims.

the injury element relates to the issue of consent. (*Id.* at 123.) As a compromise, the court opted to remove the element from the first phase of trial, and include the requirement in the second phase should the jury answer the other liability special verdict questions in plaintiffs' favor. (*Id.*) Neither party objected to the court's decision to move this injury element to the second phase of trial.

After considering the jury's verdict on the first phase of trial and the trial plan for the second phase of trial, the court directly asked whether *either* defendant was planning on pursuing an argument based on a lack of injury or harm:

> THE COURT: . . . And that brings me to my second concern and that is I just want to confirm, is the County going to actually argue that there was no harm here by Mr. Christensen's conduct?
>
> MR. CRANLEY [Counsel for County]: I don't think so, no.
>
> THE COURT: Is that really something you want to argue to this jury at this stage?
>
> MS. MILLS [Counsel for Christensen]: No, Your Honor.
>
> THE COURT: All right. So I'm not going to give the harm instruction. It just seems pointless. And I appreciate the defense counsels' candor. By virtue of their verdict it's clear they found harm, even though that was not expressly asked as to the constitutional claim against Mr. Christensen, which brings me then to the two instructions.

(Trial Tr. ('428 dkt. #265) 10-11.)

In short, *neither* defendant preserved an objection to the removal of the injury element from the jury instructions in the first phase of the trial, nor to the court's ultimate removal of that element from the second phase, and for an obvious reason: there was never any real argument that the victims here were injured by Christensen's sexual assaults or by the County's deliberate indifference to their substantial risk of harm, assuming the jury found that both the assaults and the indifference had been proven. Moreover, defendants' counsel were savvy enough to realize that arguing otherwise might so inflame the jury that is could impact the size of its damage award. Regardless, defendants both consented to the court's proposal to move the injury element in the claims against them to the second phase of trial and to the ultimate decision to take that issue away from the jury altogether.[4]

[4] Even if the objection had been preserved, the court reasonably concluded that no reasonable jury could find that plaintiffs were not injured given plaintiffs' testimony about the harm caused by Christensen's actions, and the jury's earlier finding that Christensen and the County acted with deliberate indifference to the substantial risk of that harm as confirmed by the jury's sizable compensatory jury award, largely based on evidence of their own need for ongoing mental health treatment. *See Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012) ("Sexual offenses forcible or not are unlikely to cause so little harm as to be adjudged de minimis, that is, too trivial to justify the provision of a legal remedy. They tend rather to cause significant distress and often lasting psychological harm.").

D. PREA Focus

As it did in its summary judgment and other pretrial submissions, the County again challenges the court's treatment of the Prison Rape Elimination Act, 42 U.S.C. § 15601 *et seq*. While there is no private right of action under PREA, as the court explained in its opinion and order denying defendant's motion in limine, "PREA is still relevant in establishing a recognized standard for the prevention of sexual assaults in the correctional setting, or at least plaintiffs are free to provide expert testimony to that effect and so argue." (1/20/17 Op. & Order (dkt. #210) 19.) In so ruling, moreover, the court expressly invited the County to offer a jury instruction "explaining what PREA is, that it is not mandatory and that a violation of PREA is not sufficient to prove liability against the County, as well as the possible relevance of PREA standards to the issues before them." (*Id.*) Consistent with this ruling, the court ultimately instructed the jury:

> Finally, you have heard evidence about whether the County's conduct was consistent with various standards including Wisconsin Regulations of County Jails and the Prison Rape Elimination Act or "PREA". While you may consider any of these standards in your deliberations, keep in mind that the question you are being asked to decide is whether the County was deliberately indifferent to plaintiffs' constitutional rights, not whether the County failed to comply with Wisconsin regulations, PREA or any other set of standards. In particular, PREA standards,

> adopted in 2012, are not mandatory for county jails, nor is the failure to comply by itself a basis to find the County liable.

(Trial Tr. (dkt. #259) 19-20.) The court sees no error in the instruction or in the jury's possible consideration of the County's failure to embrace PREA in the face of known risks in deciding whether it acted with deliberate indifference to plaintiffs' constitutional rights, any more than there was error in allowing the County to argue that its reliance on compliance with other Wisconsin County standards or initial, statewide training of jailers undermined plaintiffs' claims that the County's administrators acted with deliberate indifference of the risk of rogue jailers to inmate's under their supervision.

E. Jorgenson Evidence

The County next contends that the court erred in allowing testimony and other evidence of alleged sexual misconduct by another officer Art Jorgenson. While the court agreed with the County that there was insufficient evidence of a pattern of constitutional violations—and the court removed that language from the notice instruction as described above (*see infra* Opinion § II.A)—evidence of Jorgenson's misconduct (coupled with other evidence of the use of sexually explicit language on the part of officers and other jail personnel with and about inmates) was nonetheless relevant to whether the risk of substantial harm was so obvious as to place the County on notice for purposes of plaintiffs' *Monell* claim, or at least a reasonable jury could so find. Contrary to the County's argument, Jorgenson need not have engaged in the *same* conduct as Christensen for this evidence to be

relevant. Specifically, evidence that he touched inmates in a sexual nature, including touching an inmate on the bottom, was relevant to whether there was a sexualized culture in the jail, as well as the larger question of the County's awareness of a substantial risk of harm. Finally, even if this evidence was somehow *unfairly* prejudicial, the County has not articulated—and the court cannot find—a reason to hold that the probative value of Jorgenson's past misconduct is "substantially outweighed" by unfair prejudice as required for exclusion under Federal Rule of Evidence 403. *See United States v. Boros*, 668 F.3d 901, 909 (7th Cir. 2012) ("Recognizing that most relevant evidence is, by its very nature, prejudicial, we have emphasized that evidence must be unfairly prejudicial to require exclusion." (internal citations and quotation marks omitted)).

III. DAMAGE CHALLENGES

A. Compensatory Award

Defendants raise two challenges with respect to the jury's award of compensatory damages. *First*, the County contends that the court erred in not posing two special verdict questions on compensatory damages and not requiring some sort of allocation of damages between Christensen and the County. As the court previously explained, this challenge flies in the face of the Seventh Circuit's guidance in *Thomas v. Cook County Sheriff's Department*, 604 F.3d 293 (7th Cir. 2010). (*See* Trial Tr. (dkt. #266) 17-20.) In *Thomas*, the court found error with a special verdict form that asked the jury to "enter damages for both denial of medical care (against the individual defendants) and policy and practice (against the County and the

Sheriff), both of which resulted in the same injury." *Id.* at 311. As the *Thomas* court explained, "because the defendants were jointly and severally liable, [] allocating damages between the parties for the single indivisible injury alleged in this case was improper." *Id.* (citing *Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812, 821 (7th Cir.1994). The County's attempt to distinguish its request from that at issue in *Thomas* is entirely unpersuasive. Here, the County sought a special verdict form asking for separate damages awards for the *same* injury, just as in *Thomas*. Having failed both at trial and in its post-trial submissions to point to any evidence that would differentiate injuries caused by Christensen with those caused by the County's failure to stop them, the County's request for the submission of a special verdict form asking for separate compensation damage awards against each defendant has no more merit than it did at trial.

Second, Christensen argues that the award of identical compensatory damages to each plaintiff "lack a rational relationship with the evidence contained in the record." (Christensen's Opening Br. (dkt. #273) 21.) In support of this argument, Christensen directs the court to *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989), in which the Seventh Circuit affirmed the district court's award of a new trial on the issue of damages with the option of remittitur, finding that the compensatory damages award did not bear a "reasonable relation to actual injury sustained." *Id.* at 848. In *Cygnar*, as here, the jury awarded the same amount of compensatory damages to each of the plaintiffs, but the Seventh Circuit did not rely on that fact in granting a new trial. Rather, as the district

court explained, the "sharp variances among [the plaintiffs] in any asserted economic harm" suggests the jury awarded the same damages because the "entire award must have been based on 'intangible' harm." *Id.* In other words, as the Seventh Circuit agreed, there was nothing inherently suspect about the jury's award of the same damages amount to each of the plaintiffs.

Still, Christensen presses that "[b]ecause the amount awarded to each Plaintiff as compensatory damages is identical, despite the distinct and unique facts each Plaintiff's claim and alleged damages," identical awards here lack a rational explanation. (Christensen's Opening Br. (dkt. #273) 21.) While Christensen provides a meandering and lengthy overview of each plaintiffs' testimony of their personal history, defendant fails to explain why those differences would necessarily translate into different damages awards. Indeed, the plaintiffs' own testimony and that of their expert provides a legally sufficient evidentiary basis for the jury's identical awards, and like the plaintiffs in *Cygnar*, is best explained by the jury having to undertake the difficult task of assigning a monetary value to psychological damages that, as was testified, will likely require both plaintiffs to undergo years of mental health therapy. As such, the court rejects this basis for a new trial as well.

B. Punitive Award

The jury similarly awarded both plaintiffs punitive damages against defendant Christensen on the basis that the evidence does not support a finding of an "evil motive," and the awards lack a "reasonable relationship" to the harm suffered. (Christensen's

Opening Br. (dkt. #273) 23-29.) As for the *first* argument, there was more than ample evidence to find an evil intent and motive on Christensen's part, but such a finding is not required for an award of punitive damages. Rather, as the jury was instructed, a finding of "reckless disregard of plaintiff's rights" forms a sufficient basis for an award:

> You may assess punitive damages only if you find that his conduct was malicious or in reckless disregard of plaintiff's rights. Conduct is malicious if it is accompanied by ill will or spite, or is done for the purpose of injuring plaintiff. Conduct is in reckless disregard of plaintiff's rights if, under the circumstances, it reflects complete indifference to plaintiff's safety or rights.

(Damages Instr. (dkt. #248) 2.) *See also Erwin v. Cty. of Manitowoc*, 872 F.2d 1292, 1299 (7th Cir. 1989) ("A jury may award punitive damages against persons in § 1983 actions when it finds conduct motivated by evil intent or involving reckless or callous indifference to the federally-protected rights of others." (citing *Smith v. Wade*, 461 U.S. 30, 45-49 (1983)).

Here, the same evidence supporting the jury's finding of deliberate indifference on the part of Christensen provides ample support for a finding of reckless disregard of plaintiffs' rights. In fact, the evidence was overwhelming that Christensen took advantage of his disproportionate position of power as a jailer and plaintiffs' position as prisoners to sexually assault them for his own gratification. A reasonable jury could—and, indeed, did—credit plaintiffs' testimony that they neither consented nor otherwise

welcomed Christensen's sexual conduct. As such, the court finds a legally sufficient evidentiary basis for the jury's decision to award punitive damages.

Christensen's *second* challenge has even less merit. In reviewing the reasonableness of the amount of the punitive damages award, the court is directed to consider the following three guideposts:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). As described above, a reasonable jury could find that Christensen's conduct was exceptionally reprehensible, having engaged in repeated sexual assaults of plaintiffs over a significant period of time, without any apparent recognition of the power dynamic at play or their lack of consent, all for his own personal gratification.

As for the second guidepost, the ratio between the punitive damages award and the compensatory damages award is less than 2 to 1. While "few awards exceeding a single-digit ration between punitive and compensatory damages will satisfy due process," *State Farm*, 538 U.S. at 425, the 2:1 ratio here certainly supports a finding of a reasonable relationship between the punitive and compensatory awards. *See BMW*, 517 U.S. at 581 ("[E]ven though a punitive

damages award of more than 4 times the amount of compensatory damages might be close to the line, it did not cross the line into the area of constitutional impropriety.") (internal citations and quotation marks omitted).

Finally, with respect to the third guidepost—considering awards in similar cases—Christensen fails to direct the court to *any* cases reflecting punitive damages award significantly less than that awarded here. The court's own review reveals that the award is at least *comparable* to those recently awarded by a jury in a similar sexual assault cases under § 1983. *See Martin v. Cty. of Milwaukee*, No. 14-CV-200-JPS, 2017 WL 4326512, at *4 (E.D. Wis. Sept. 28, 2017) (denying defendant's Rule 59 motion challenging punitive damages of $5 million). Accordingly, the jury's awards were reasonable and comport with due process requirements.

IV. Award of Attorneys' Fees and Costs

Finally, following the jury's verdict in plaintiffs' favor, the court directed plaintiffs' counsel to submit its request for an award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988(b), which they did. Plaintiffs seek reimbursement of actual fees totaling $470,695.00 and costs totaling $69,127.62. (Bannink Decl. (dkt. #261) ¶¶ 6, 7.) Plaintiffs' request is well-documented. The submitted time entries are detailed and reflect reasonable amounts of time for case-related activities. (*Id.*, Ex. C (dkt. #261-3). Moreover, the hourly rates reflect counsel's market rates, ranging from $100 to $325, and also appear to be reasonable. (*Id.*, Exs. F, G (dkt. ##261-6, 261-7).) Plaintiffs' costs are also all related to these cases and

again appear reasonable. (*Id.*, Ex. D (dkt. #261-4).) While the court invited defendants' response to plaintiffs' counsel's request (2/3/17 Order (dkt. #249)), neither defendants submitted a response, apparently conceding the reasonableness of plaintiffs' requests. For all these reasons, the court will award plaintiffs attorneys' fees and costs in the amount of $539,822.62.

ORDER

IS IT ORDERED that:

1) Defendant Polk County's motion for judgment as a matter of law on plaintiffs' state law negligence claim on basis of governmental immunity ('428 dkt. #245; '433 dkt. #246) is GRANTED. Judgment is entered in Polk County's favor on plaintiffs' state law negligence claims.

2) Defendant Polk County's motion for judgment as a matter of law or in the alternative for a new trial ('428 dkt. #268; '433 dkt. #269) is DENIED.

3) Defendant Darryl L. Christensen's motion for new trial ('428 dkt. #272; '433 dkt. #273) is DENIED.

4) Plaintiffs are awarded collectively $539,822.62 in total attorneys' fees and costs for both cases pursuant to 42 U.S.C. § 1988(b) to be allocated equitably as plaintiffs and their counsel shall agree.

5) The clerk of court is directed to enter judgments in each case consistent with this order and the jury's verdicts.

Entered this 5th day of February, 2018.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge

Appendix E

RELEVANT STATUTES

Wis. Stat. § 940.225

1) First degree sexual assault. Whoever does any of the following is guilty of a Class B felony:

(a) Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person.

(b) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.

(c) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(2) Second degree sexual assault. Whoever does any of the following is guilty of a Class C felony:

(a) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(b) Has sexual contact or sexual intercourse with another person without consent of that person and causes injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care for the victim.

(c) Has sexual contact or sexual intercourse with a person who suffers from a mental illness or

deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition.

(cm) Has sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.

(d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious.

(f) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without the consent of that person.

(g) Is an employee of a facility or program under s. 940.295(2)(b), (c), (h) or (k) and has sexual contact or sexual intercourse with a person who is a patient or resident of the facility or program.

(h) Has sexual contact or sexual intercourse with an individual who is confined in a correctional institution if the actor is a correctional staff member. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

(i) Has sexual contact or sexual intercourse with an individual who is on probation, parole, or extended supervision if the actor is a probation, parole, or extended supervision agent who supervises the individual, either directly or through a subordinate, in his or her capacity as a probation, parole, or extended supervision agent or who has influenced or has attempted to influence another probation, parole, or extended supervision agent's supervision of the individual. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

(j) Is a licensee, employee, or nonclient resident of an entity, as defined in s. 48.685(1)(b) or 50.065(1)(c), and has sexual contact or sexual intercourse with a client of the entity.

(3) Third degree sexual assault.

(a) Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class G felony.

(b) Whoever has sexual contact in the manner described in sub. (5)(b)2. or 3. with a person without the consent of that person is guilty of a Class G felony.

(3m) Fourth degree sexual assault. Except as provided in sub. (3), whoever has sexual contact with a person without the consent of that person is guilty of a Class A misdemeanor.

(4) Consent."Consent", as used in this section, means words or overt actions by a person who is

competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g), (h), and (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11(2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(5) Definitions. In this section:

(abm) "Client" means an individual who receives direct care or treatment services from an entity.

(acm) "Correctional institution" means a jail or correctional facility, as defined in s. 961.01(12m), a juvenile correctional facility, as defined in s. 938.02(10p), or a juvenile detention facility, as defined in s. 938.02(10r).

(ad) "Correctional staff member" means an individual who works at a correctional institution, including a volunteer.

(ag) "Inpatient facility" has the meaning designated in s. 51.01(10).

(ai) "Intoxicant" means any alcohol beverage, hazardous inhalant, controlled substance, controlled substance analog, or other drug, or any combination thereof.

(ak) "Nonclient resident" means an individual who resides, or is expected to reside, at an entity, who is not a client of the entity, and who has, or is expected to have, regular, direct contact with the clients of the entity.

(am) "Patient" means any person who does any of the following:

1. Receives care or treatment from a facility or program under s. 940.295(2)(b), (c), (h) or (k), from an employee of a facility or program or from a person providing services under contract with a facility or program.

2. Arrives at a facility or program under s. 940.295(2)(b), (c), (h) or (k) for the purpose of receiving care or treatment from a facility or program under s. 940.295(2)(b), (c), (h) or (k), from an employee of a facility or program under s. 940.295(2)(b), (c), (h) or (k), or from a person providing services under contract with a facility or program under s. 940.295(2)(b), (c), (h) or (k).

(ar) "Resident" means any person who resides in a facility under s. 940.295(2)(b), (c), (h) or (k).

(b) "Sexual contact" means any of the following:

1. Any of the following types of intentional touching, whether direct or through clothing, if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching

contains the elements of actual or attempted battery under s. 940.19(1):

a. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.

b. Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person.

2. Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

3. For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

(c) “Sexual intercourse" includes the meaning assigned under s. 939.22(36) as well as

cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

(d) "State treatment facility" has the meaning designated in s. 51.01(15).

(6) Marriage not a bar to prosecution. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.

(7) Death of victim. This section applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse.