DRAFT

June 14, 2002

[Updated 6/3/11]

PATTERN JURY INSTRUCTIONS FOR CASES OF EXCESSIVE FORCE IN VIOLATION OF THE FOURTH, EIGHTH AND FOURTEENTH AMENDMENTS

FOR THE DISTRICT COURTS OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

This is a draft of proposed Pattern Jury Instructions for Excessive Force cases prepared by Judge Hornby's chambers. We invite feedback and suggestions on any aspect of these instructions. Although we believe that these pattern instructions will be helpful in crafting a jury charge, it bears emphasis that this version is simply a proposal. Neither the Court of Appeals nor any District Court within the circuit has in any way approved the use of these instructions.

ATTERN JURY INSTRUCTIONS
FOR CASES OF
EXCESSIVE FORCE IN VIOLATION OF THE
FOURTH, EIGHTH AND FOURTEENTH AMENDMENTS

1.1 Excessive Force in Violation of the Fourth Amendment[1]

[Updated: 1/24/11]

Pattern Jury Instruction

A. LIABILITY

Federal law[2] provides that [plaintiff] may recover damages if [defendant],[3] acting under color of law, deprived [him/her] of a right guaranteed by the Constitution.[4] The right at stake here is the right to be free from the use of excessive force. [The parties have agreed that [defendant] acted "under color" of law. The only issue for you, therefore, is the issue of excessive force.] You are not to determine the legality of the [*e.g.*, subsequent arrest].

(1) Definition of Excessive Force

Every person has the constitutional right not to be subjected to unreasonable or excessive force by a law enforcement officer. On the other hand, in [making an investigatory traffic stop, making an arrest, etc.] an officer has the right to use such force as a reasonable officer would believe is necessary under the circumstances to [complete the investigatory traffic stop, effectuate what a reasonable officer would believe to be a lawful arrest,[5] etc.]. Whether or not the force used was unnecessary, unreasonable or excessively violent is an issue for you to decide on the basis of that degree of force that a reasonable and prudent law enforcement officer would have applied under the same circumstances disclosed in this case. The test of reasonableness requires careful attention to the facts and circumstances including, but not limited to, the severity of the [crime the officer was investigating, crime for which the arrest was made, etc.]; whether [plaintiff] posed an immediate threat to the safety of the officer or others; whether [he/she] was actively resisting the [investigatory traffic stop, arrest, etc.]; and the severity of any injury to [him/her].[6]

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. With respect to a claim of excessive force, the standard of reasonableness at that moment applies. Not every push or shove, even if it may later seem unnecessary, violates the Constitution. The determination of reasonableness must allow for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation.

The "reasonableness" inquiry is an objective one. The question is whether an officer's actions are "objectively reasonable" in light of all the facts and circumstances confronting [him/her], without regard to [his/her] underlying intent or motivation. Evil intentions will not make a constitutional violation out of an objectively reasonable use of force; and good intentions will not make an unreasonable use of force proper.

(2) Elements of the Plaintiff's Claim

In order to prove [his/her] claim of unconstitutionally excessive force, [plaintiff] must prove by a preponderance of the evidence the following:

That [defendant] intentionally, rather than negligently, used unconstitutionally excessive force as I have defined it. However, it is not necessary to find that [defendant] had any specific purpose or desire to deprive [plaintiff] of [his/her] constitutional rights in order to find in favor of [plaintiff]. [Plaintiff] must prove only that the *action* was deliberate, not that the *consequence* was intended. Mere negligence, however, is not sufficient. [Plaintiff] is entitled to relief if [defendant] intentionally acted in a manner that resulted in[7] a violation of [plaintiff]'s constitutional rights.[8]

---

[1] This instruction is only appropriate for use in cases governed by the Fourth Amendment. In excessive force cases, the applicable legal standard is determined "by identifying the specific constitutional right allegedly infringed by the challenged application of force." Graham v. Connor, 490 U.S. 386, 394 (1989). "[*A*]*ll* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." Id. at 395; accord Aponte Matos v. Toledo-Davila, 135 F.3d 182, 191 (1st Cir. 1998). "A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" Graham, 490 U.S. at 395 n.10 (citations omitted). Furthermore, it is not enough that the claim of excessive force "arises in the context of an arrest or investigatory stop" (i.e., injury to a bystander during a high speed chase); the allegedly excessive force must result from "an intentional acquisition of physical control" by the police. Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 795 & n.8 (1st Cir. 1990).

The Eighth Amendment (which prohibits "the unnecessary and wanton infliction of pain") governs claims of excessive force arising after a person has been convicted and while the person is in government custody. Hudson v. McMillian, 503 U.S. 1, 5 (1992); see also Davis v. Rennie, 264 F.3d 86, 98 n.9 (1st Cir. 2001) ("A convicted prisoner may bring a claim for use of excessive force under the Eighth Amendment" (citing Hudson, 503 U.S. at 4)). See Instructions 2.1 and 2.2 for Eighth Amendment excessive force claims.

Although there is a split among the circuits as to which constitutional provision applies "beyond the point where arrest ends and pretrial detention begins," it is "clear that the Due Process Clause [of the Fourteenth Amendment] protects a pretrial detainee from the use of excessive force that amounts to punishment." Graham v. O'Connor, 490 U.S. at 395 n.10. See Instruction 3.1 for Fourteenth Amendment excessive force claims.

[2] Although the notes accompanying these instructions generally cite § 1983 caselaw, these instructions should also be usable in excessive force cases against federal actors based on Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). See Graham v. Connor, 490 U.S. 386, 394 n.9 (1989) (while discussing the role of the Fourth Amendment in a § 1983 excessive force case, the Court noted that "[t]he same analysis applies to excessive force claims brought against federal law enforcement and correctional officials under [Bivens]"), cited in Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cir. 2001) ("The analysis of a qualified immunity defense is identical for actions brought under § 1983 and Bivens."); see also Butz v. Economou, 438 U.S. 478, 496-505 (1978), cited in Wright v. Park, 5 F.3d 586, 591 (1st Cir. 1993) ("[A]bsent a specific statutory provision to the contrary, there is no principled basis for according state actors sued under 42 U.S.C. § 1983 a different degree of immunity than would be accorded federal actors sued for an identical abridgement of rights under Bivens."); Laswell v. Brown, 683 F.2d 261, 268 n.11 (8th Cir. 1982) ("The Butz case looked to 42 U.S.C. § 1983 cases to determine the correct nature of immunity of officials in suits based on Bivens. The same approach is appropriate with regard to the issue of whether respondeat superior is available in Bivens actions." (internal citation omitted)).

(continued next page)

[3] This instruction is drafted for cases where the plaintiff claims that the defendant personally inflicted the excessive force. An officer also has a Fourth Amendment duty "to intervene in appropriate circumstances to protect an arrestee from the excessive use of force by his fellow officers." Wilson v. Town of Mendon, 294 F.3d 1, 6, 14 (1st Cir. 2002) (citing Gaudreault v. Municipality of Salem, Mass., 923 F.2d 203, 207 n.3 (1st Cir. 1990)); Torres-Rivera v. O'Neill-Cancel, 406 F.3d 43, 51-52 (1st Cir. 2005); see also Davis v. Rennie, 264 F.3d 86, 114 (1st Cir. 2001) (citing Byrd v. Brishke, 466 F.2d 6, 11 (7th Cir. 1972)). "An officer who is present and fails to intervene to prevent other law enforcement officers from infringing the constitutional rights of citizens is liable under § 1983 if that officer had reason to know: (1) that excessive force was being used, (2) that a citizen has been unjustifiably arrested, or (3) that any constitutional violation has been committed by a law enforcement official; *and* the officer had a realistic opportunity to intervene to prevent the harm from occurring." Yang v. Hardin, 37 F.3d 282, 285 (7th Cir. 1994) (citing Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994); accord Byrd v. Clark, 783 F.2d 1002, 1006-07 (11th Cir. 1986), abrogation on other grounds recognized by Nolin v. Isbell, 207 F.3d 1253, 1255-56 (11th Cir. 2000)). However, despite the earlier language in Byrd v. Brishke (the first case to recognize such a duty), the failure to intervene must be intentional, as the due process clause (under which the Fourth Amendment is applied against state actors) and thus § 1983 are not implicated by mere negligent conduct. Daniels v. Williams, 474 U.S. 327, 328, 330 (1986); Yang, 37 F.3d at 285 n.1; Rascom v. Hardiman, 803 F.2d 269, 273 (7th Cir. 1986). For excerpts from an instruction, see Torres-Rivera, 406 F.3d at 47-48.

[4] An action for damages for violation of the Fourth Amendment is necessarily based on 42 U.S.C. § 1983, Graham v. Connor, 490 U.S. 386, 393-94 (1989), and § 1983 does not allow recovery on *respondeat superior* theories of liability. Voutour v. Vitale, 761 F.2d 812, 819 (1st Cir. 1985) ("The Supreme Court has firmly rejected *respondeat superior* as a basis for section 1983 liability of supervisory officials or municipalities." (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691, 694 n.58 (1978))).

As a general rule, in order for a supervisor to be liable for a subordinate's excessive force, there must be "an 'affirmative link' between the conduct of the supervisor and that of the employee." Voutour, 761 F.2d at 820 (citing Rizzo v. Goode, 423 U.S. 362, 371 (1976)); accord Aponte Matos, 135 F.3d at 192. The "affirmative link must amount to 'supervisory encouragement, condonation or acquiescence, or gross negligence amounting to deliberate indifference.'" Aponte Matos, 135 F.3d at 192 (citing Lipsett v. University of P.R., 864 F.2d 881, 902 (1st Cir. 1988)). Furthermore, this "affirmative link" must be substantiated with "'proof that the supervisor's conduct led inexorably to the constitutional violation.'" Seekamp v. Michaud, 109 F.3d 802, 808 (1st Cir. 1997) (quoting Hegarty v. Somerset County, 53 F.3d 1367, 1380 (1st Cir. 1995)).

This general rule actually encompasses two different types of supervisory liability, the liability of municipalities and the liability of individual supervisors, each of which is governed by a different definition of the type of "affirmative link" that is necessary. A municipal defendant is only liable if its policies or customs "evidence[ ] a 'deliberate indifference' to the rights of its inhabitants," and "are the moving force [behind] the constitutional violation." City of Canton, Ohio v. Harris, 489 U.S. 378, 389 (1989); see also Monell, 436 U.S. at 690 ("Local governing bodies . . . can be sued directly under § 1983 . . . where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." (footnotes omitted)). A municipality's policies and customs include not only formal, affirmative policies, but also inaction, such as a failure to properly train its police officers. City of Canton, 489 U.S. at 388-89; Town of Mendon, 294 F.3d at 6.

The liability of individual supervisors differs from that of municipalities in two respects. First, an individual supervisor may be liable not only for deliberate indifference to the rights of others, but also for reckless or callous indifference. Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562 & n.8 (1st Cir. 1989). Second, an individual supervisor is liable for his or her acts or omissions; there is no need to demonstrate that those acts or omissions constituted a policy, pattern or custom. Id. at 566-67.

In either a municipal liability case or an individual supervisory liability case, it will be necessary to alter the language in the jury charge to reflect the particular nature of supervisory liability under § 1983. It is advisable to refer specifically to the "affirmative link" requirement, but such language is not strictly necessary. If worded appropriately, it may be sufficient to use standard proximate cause language. See id. at 569 (approving instruction that "informed the jury that there needed to be a causal connection between the acts or omissions of the supervisors and the unconstitutional activities of the officers," even though it

(continued next page)

did not use 'affirmative link' language). But "[w]ithout a finding of a constitutional violation on the part of a municipal employee, there cannot be a finding of section 1983 damages liability on the part of the municipality." Town of Mendon, 294 F.3d at 7.

In no event may a plaintiff sue a state directly under § 1983; such claims are barred by the Eleventh Amendment. Day v. Mass. Air Nat'l Guard, 167 F.3d 678, 686 (1st Cir. 1999) (citing Alabama v. Pugh, 438 U.S. 781, 782 (1978)).

[5] Historically citizens had a common law right to resist an unlawful arrest. United States v. Di Re, 332 U.S. 581, 594 (1948); John Bad Elk v. United States, 177 U.S. 529, 534-35 (1900). See also Hausman v. Tredinnick, 432 F. Supp. 1160, 1162 (E.D. Pa. 1977) (citing Basista v. Weir, 340 F.2d 74, 82 & n.7 (3d Cir. 1965)). However, most states have statutorily abrogated the right to resist an unlawful arrest (so long as the amount of force being used by the officer is reasonable, i.e., not excessive). See, e.g., 17-A M.R.S.A. §§ 107-08 (2003). An officer can use reasonable force to effectuate a lawful arrest, but it is unclear if the use of any force in effectuating an arrest that a reasonable officer would know to be unlawful is *per se* excessive. Compare Schiller v. Strangis, 540 F. Supp. 605, 617 (D. Mass. 1982) ("In the circumstances of this case, the use of any force by [the officer] was excessive since the arrest and the searches were themselves unlawful.") with Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 921-22 (9th Cir. 2001) (use of force may be reasonable even in the absence of probable cause).

[6] Objective reasonableness is the standard. Graham v. Connor, 490 U.S. 386, 388 (1989); Isom v. Town of Warren, R.I., 360 F.3d 7, 10 (1st Cir. 2004). The factors that test reasonableness come from Graham, 490 U.S. at 396-97, and Bastien v. Goddard, 279 F.3d 10, 14-16 (1st Cir. 2002), where the First Circuit held that serious injury is *not* a prerequisite to an excessive force claim, but that it is a factor that may be considered. Since the totality of the circumstances govern, it is appropriate to consider officials' actions leading up to the use of force. Young v. City of Providence, 404 F.3d 4, 22 (1st Cir. 2005). See also Jennings v. Jones, 499 F.3d 2, 12 (1st Cir. 2007) ("a factor in determining excessive force is whether . . . 'the degree of force was proportional to what was appropriate under the circumstances.'") Although the First Circuit has suggested that expert testimony is often necessary for a jury to determine what constitutes reasonable force, see Isom v. Town of Warren, 360 F.3d 7, 12 (1st Cir. 2004) (concluding that no evidence was presented at trial from which a jury could find that the use of pepper spay under the circumstances was objectively unreasonable), the court made clear in Jennings that "some cases may be susceptible to a common sense determination by the jury." Jennings, 499 F.3d at 15.

[7] "[Q]uestions of proximate cause are generally best left to the jury." Young, 404 F.3d at 23.

[8] The instruction does not include a qualified immunity component. In Saucier v. Katz, 533 U.S. 194, 204-09 (2001), abrogated on other grounds by Pearson v. Callahan, 129 S. Ct. 808, 810 (2009), the United States Supreme Court held that the objective reasonableness inquiry of the Fourth Amendment, see Graham v. Connor, 490 U.S. 386 (1989), does not merge with the qualified immunity analysis under Anderson v. Creighton, 483 U.S. 635 (1987). Nevertheless, the First Circuit has said that: "Qualified immunity, which is a question of law, is an issue that is appropriately decided by the court during the early stages of the proceedings and should not be decided by the jury." Tatro v. Kervin, 41 F.3d 9, 15 (1st Cir. 1994). Although that pronouncement sounds definitive, the Tatro court went on to say in the next paragraph: "In any event, if a court does feel obligated to give the defendant[] the benefit of qualified immunity at the final stage of the trial, or, more appropriately, if it needs to resolve factual issues related to qualified immunity, it must do so without using potentially misleading language. . . ." Id. (citation omitted). That language suggests that at most an instruction might ask for specific findings from the jury such that the court can determine whether qualified immunity should apply. The Supreme Court has confirmed that qualified immunity remains available as a defense at trial:

> A qualified immunity defense, of course, does not vanish when a district court declines to rule on the plea summarily. The plea remains available to the defending officials at trial; but at that stage, the defense must be evaluated in light of the character and quality of the evidence received in court. . . .
>
> "[O]nce trial has been had," however, "the availability of official immunity should be determined by the trial record, not the pleadings nor the summary judgment record." After trial, if defendants continue to urge qualified immunity, the decisive question, ordinarily,

(continued next page)

> is whether the evidence favoring the party seeking relief is legally sufficient to overcome the defense.

Ortiz v. Jordan, ___ U.S. ___, 131 S. Ct. 884, 889 (2011) (citations omitted).

The First Circuit has consistently supported the principle of requiring the court to defer to the fact finder for the resolution of any "factual dispute underlying the qualified immunity defense." Kelley v. LaForce, 288 F.3d 1, 7 n.2 (1st Cir. 2002). In St. Hilaire v. City of Laconia, 71 F.3d 20 (1st. Cir. 1995), the court said:

> [I]f there is a factual dispute, "that factual dispute must be resolved by a fact finder." The precise question of whether the judge may intercede and play that fact-finder role appears not to have been clearly decided by the Supreme Court. Some courts, consonant with the Seventh Amendment, have preserved the fact finding function of the jury through special interrogatories to the jury as to the disputes of fact, reserving the ultimate law question to the judge.

Id. at 24 n.1 (citations omitted) (quoting Prokey v Watkins, 942 F.2d 67, 73 (1st Cir. 1991); accord Finnegan v. Fountain, 915 F.2d 817, 821, 823-24 (2d Cir. 1990), rejected on other grounds by, Saucier, 533 U.S. at 204-05. Later, in Ringuette v. City of Fall River, 146 F.3d 1 (1st Cir. 1998), the court noted:

> Something of a "black hole" exists in the law as to how to resolve factual disputes pertaining to qualified immunity when they cannot be resolved on summary judgment prior to trial. To avoid duplication, judges have sometimes deferred a decision until the trial testimony was in or even submitted the factual issues to the jury. In all events, the district judge's procedure here [making factual determinations based upon evidence presented to the jury], which is not challenged on appeal, seems to us to have been eminently sensible.

Id. at 6 (citations omitted). Most recently, in reviewing a district court's grant of immunity on judgment as a matter of law, the First Circuit adopted "the principle that we take facts in the light most favorable to the verdict." Jennings v. Jones, 499 F.3d at 9. In support of this principle, Jennings cites Henderson v. DeRobertis, 940 F.2d 1055, 1057 (7th Cir. 1991) ("We must view all the evidence and inferences in the light most favorable to [plaintiffs], who prevailed with the jury; any conflicts in the evidence must be resolved in favor of those [plaintiffs] and every permissible inference must be drawn in their favor."). Id. at 10.

2.1 Excessive Force in Violation of the Eighth Amendment: Injury to an Inmate by a Corrections Officer[1]

[Updated: 4/1/10]

Pattern Jury Instruction

A. LIABILITY

Federal law[2] provides that [plaintiff] may recover damages if [defendant],[3] acting under color of law, deprived [him/her] of a right guaranteed by the Constitution. The right at stake here is the right to be free from cruel and unusual punishment. [The parties have agreed that [defendant] acted "under color" of law. The only issue for you, therefore, is whether [defendant] subjected [plaintiff] to cruel and unusual punishment.]

(1) Definition of Cruel and Unusual Punishment

Inmates are protected from cruel and unusual punishment under the Eighth Amendment of the United States Constitution. In order to prove a violation under the Eighth Amendment, [plaintiff] must show that [defendant] unnecessarily and wantonly inflicted pain on [him/her].[4] A use of force against a prison inmate that was applied in a good faith effort to maintain or restore discipline is not "unnecessary and wanton," but force applied maliciously or sadistically to cause harm is unnecessary and wanton.

(2) Elements of Plaintiff's Claim[5]

In order to prove [his/her] claim, [plaintiff] must prove by a preponderance of the evidence the following:

> First, that [defendant] used force against [him/her] maliciously and sadistically, for the purpose of causing harm;[6] and
>
> Second, that [plaintiff] suffered some pain as a result of [defendant]'s use of force.

To act "maliciously" means intentionally to do a wrongful act without just cause or excuse, with the intent to inflict injury or under circumstances that show an evil intent.

To act "sadistically" means to engage in extreme or excessive cruelty or to take delight in acting cruelly.[7]

Some of the things you may want to consider in determining whether [defendant] unnecessarily and wantonly inflicted pain on [plaintiff] include: (1) the extent of the injury suffered, (2) the need for the application of force, (3) the relationship between the need for force and the amount of force used, (4) the threat reasonably perceived by [defendant], and (5) any efforts made to temper the severity of a forceful response. You should give prison officials deference in their adoption and execution of policies and

practices that in their good faith judgment are needed to preserve internal order and discipline and to maintain internal security in the prison.

---

[1] The Eighth Amendment only applies in cases involving penal detention. Substantive due process standards and restrictions apply in cases involving involuntarily committed mental patients. Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982); Davis v. Rennie, 264 F.3d 86, 97-98 (1st Cir. 2001). The Supreme Court has not yet decided whether the Fourth or Fourteenth Amendments apply "beyond the point where arrest ends and pretrial detention begins," but "[i]t is clear . . . that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." Graham v. Connor, 490 U.S. 386, 395 n.10 (1989); see also Davis, 264 F.3d at 101-02 (citing cases where other courts have adopted or rejected the use of the Fourth Amendment "objectively reasonable" standard in pretrial detention and involuntary commitment situations); Brady v. Dill, 187 F.3d 104, 110 n.5 (1st Cir. 1999) (recognizing that this question is still open). The First Circuit has added that through the due process clause, pretrial detainees have protection "at least as great as the Eighth Amendment protections available to a convicted prisoner." Calderón-Ortiz v. Laboy-Alvarado, 300 F.3d 60, 64 (1st Cir. 2002) (quoting City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983)). Other excessive force claims, where there has been no search, seizure, or detention, are also governed by the substantive due process standard. Cummings v. McIntire, 271 F.3d 341, 344 (1st Cir. 2001) ("The dispositive question in such an analysis is whether the challenged conduct was so extreme as to 'shock the conscience.'") (citing County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998)).

[2] Although the notes accompanying these instructions generally cite § 1983 caselaw, these instructions should also be usable in excessive force cases against federal actors based on Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). See Graham v. Connor, 490 U.S. 386, 394 n.9 (1989) (while discussing the role of the Fourth Amendment in a § 1983 excessive force case, the Court noted that "[t]he same analysis applies to excessive force claims brought against federal law enforcement and correctional officials under [Bivens]"), cited in Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cir. 2001) ("The analysis of a qualified immunity defense is identical for actions brought under § 1983 and Bivens."); see also Butz v. Economou, 438 U.S. 478, 496-505 (1978), cited in Wright v. Park, 5 F.3d 586, 591 (1st Cir. 1993) ("[A]bsent a specific statutory provision to the contrary, there is no principled basis for according state actors sued under 42 U.S.C. § 1983 a different degree of immunity than would be accorded federal actors sued for an identical abridgement of rights under Bivens."); Laswell v. Brown, 683 F.2d 261, 268 n.11 (8th Cir. 1982) ("The Butz case looked to 42 U.S.C. § 1983 cases to determine the correct nature of immunity of officials in suits based on Bivens. The same approach is appropriate with regard to the issue of whether respondeat superior is available in Bivens actions." (internal citation omitted)).

[3] This instruction is drafted for cases where the plaintiff claims that the defendant personally inflicted the excessive force. A defendant may also be held liable "for his failure to intervene in appropriate circumstances to protect an arrestee from the excessive use of force by his fellow officers." Wilson v. Town of Mendon, 294 F.3d 1, 6 (1st Cir. 2002). But an action for damages for violation of the Fourth Amendment is necessarily based on 42 U.S.C. § 1983, see Graham v. Connor, 490 U.S. 386, 393-94 (1989), and § 1983 does not allow recovery on *respondeat superior* theories of liability. Voutour v. Vitale, 761 F.2d 812, 819 (1st Cir. 1985) ("The Supreme Court has firmly rejected *respondeat superior* as a basis for section 1983 liability of supervisory officials or municipalities." (citing Monell v. Department of Soc. Servs., 436 U.S. 658, 691, 694 n.58 (1978))).

As a general rule, in order for a supervisor to be liable for a subordinate's excessive force, there must be "an 'affirmative link' between the conduct of the supervisor and that of the employee." Voutour, 761 F.2d at 820 (citing Rizzo v. Goode, 423 U.S. 362, 371 (1976)); accord Aponte Matos, 135 F.3d at 192. The "affirmative link must amount to 'supervisory encouragement, condonation or acquiescence, or gross negligence amounting to deliberate indifference.'" Aponte Matos, 135 F.3d at 192 (citing Lipsett v. University of P.R., 864 F.2d 881, 902 (1st Cir. 1988)). Furthermore, this "affirmative link" must be substantiated with "'proof that the supervisor's conduct led inexorably to the constitutional violation.'" Seekamp v. Michaud, 109 F.3d 802, 808 (1st Cir. 1997) (quoting Hegarty v. Somerset County, 53 F.3d 1367, 1380 (1st Cir. 1995)).

This general rule actually encompasses two different types of supervisory liability, the liability of municipalities and the liability of individual supervisors, each of which is governed by a different definition *(continued next page)*

of the type of "affirmative link" that is necessary. A municipal defendant is only liable if its policies or customs "evidence[] a 'deliberate indifference' to the rights of its inhabitants," and "are the moving force behind the constitutional violation." City of Canton, Ohio v. Harris, 489 U.S. 378, 389 (1989); see also Monell, 436 U.S. at 690 ("Local governing bodies . . . can be sued directly under § 1983 . . . where . . . the action that is alleged to be unconstitutional implements, or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." (footnotes omitted)). A municipality's policies and customs include not only formal, affirmative policies, but also inaction, such as a failure to properly train its police officers. City of Canton, 489 U.S. at 388-89; Town of Mendon, 294 F.3d at 6.

The liability of individual supervisors differs from that of municipalities in two respects. First, an individual supervisor may be liable not only for deliberate indifference to the rights of others, but also for reckless or callous indifference. Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562 & n.8 (1st Cir. 1989). Second, an individual supervisor is liable for his or her acts or omissions; there is no need to demonstrate that those acts or omissions constituted a policy, pattern or custom. Id. at 566-67.

In either a municipal liability case or an individual supervisory liability case, it will be necessary to alter the language in the jury charge to reflect the particular nature of supervisory liability under § 1983. It is advisable to refer specifically to the "affirmative link" requirement, but such language is not strictly necessary. If worded appropriately, it may be sufficient to use standard proximate cause language. See id. at 569 (approving instruction that "informed the jury that there needed to be a causal connection between the acts or omissions of the supervisors and the unconstitutional activities of the officers," even though it did not use 'affirmative link' language). But "[w]ithout a finding of a constitutional violation on the part of a municipal employee, there cannot be a finding of section 1983 damages liability on the part of the municipality." Town of Mendon, 294 F.3d at 7.

In no event may a plaintiff sue a state directly under § 1983; such claims are barred by the Eleventh Amendment. Day v. Mass. Air Nat'l Guard, 167 F.3d 678, 686 (1st Cir. 1999) (citing Alabama v. Pugh, 438 U.S. 781, 782 (1978)).

[4] The Supreme Court sometimes uses the term "pain" and sometimes the term "harm." Probably in most cases any distinction between the two is academic. Our best reading of the cases, however, is that actual infliction of *pain* is a necessary precondition to recovery; the defendant's *intent*, however, must be to cause "harm," which is arguably broader than or different from "pain." See Wilson v. Seiter, 501 U.S. 294, 297, 302 (1991) ("only the 'unnecessary *and wanton* infliction of pain' implicates the Eighth Amendment"; "wantonness consisted of acting 'maliciously and sadistically for the very purpose of causing harm.'"); accord Hudson v. McMillian, 503 U.S. 1, 5-7 (1992); Whitley v. Albers, 475 U.S. 312, 319-21 (1986). The First Circuit has not addressed any distinction between the terms. See, e.g., Skinner v. Cunningham, 430 F.3d 483, 488 (1st Cir. 2005). The Eighth Circuit seems clear that infliction of *pain* is a precondition to recovery. Cowans v. Wyrick, 862 F.2d 697, 699, 700 (8th Cir. 1988) ("pain, misery, anguish or similar harm"); see also Bolin v. Black, 875 F.2d 1343, 1349-50 (8th Cir. 1989).

[5] This instruction does not include a qualified immunity component. See Instruction 1.1 Note 8 for a discussion of the jury's role in answering the question of qualified immunity.

[6] This instruction is based upon Hudson v. McMillian, 503 U.S. 1, 6-7 (1992), extending the "'unnecessary and wanton infliction of pain' standard to all allegations of excessive force." The First Circuit arguably still treats prison riots as distinct, see Torres-Viera v. Laboy-Alvarado, 311 F.3d 105, 107 (1st Cir. 2002), but Hudson seems quite clear in stating that the analysis is the same "whenever guards use force to keep order . . . [w]hether the prison disturbance is a riot or a lesser disruption." 503 U.S. at 6.

Hudson shifted the "core judicial inquiry" from the extent of the injury to the nature of the force. 503 U.S. at 7. Hudson held that the absence of serious injury does not foreclose recovery, but it is "one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation, 'or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." Id. at 7 (quoting Whitley v. Albers, 475 U.S. at 321). On the other hand, a *de minimis* use of force is not covered unless it is "'repugnant to the conscience of mankind.'" Id. at 9-10 (quoting Whitley v. Albers, 475 U.S. at 327). But see Wilkins v. Gaddy, 130 S. Ct. 1175, 1176 (2010) (District court erred in giving decisive weight to de minimis nature of inmate's injuries in dismissing case).

Hudson drew a bright line between excessive force claims and conditions of confinement claims

(continued next page)

with respect to the types of injury and *mens rea* required. In a conditions of confinement claim the plaintiff must have suffered a "significant injury," while an excessive force plaintiff need not have. Hudson, 503 U.S. at 8-9. On the other hand, an excessive force plaintiff must prove that a guard acted "maliciously and sadistically to cause harm," while a conditions of confinement plaintiff need only establish that a guard acted with "deliberate indifference." Id. at 7-8. However, it may not always be clear whether a particular claim is for excessive force or conditions of confinement. For example, in Hope v. Pelzer, 536 U.S. 730, 737-38 (2002), a case involving Alabama's practice of punishing prisoners by handcuffing them to a hitching post for a prolonged period of time, the Court used the second test without explaining why the challenged conduct should be considered a condition of confinement rather than the use of excessive force. Moreover, this distinction is not necessarily valid beyond the issues of *mens rea* and proof of harm. In Porter v. Nussle, 534 U.S. 516, 522-23 (2002), the Court affirmed the utility of the distinction as drawn in Hudson, but declined to differentiate between the two types of claims with respect to the exhaustion of administrative remedies requirement of 42 U.S.C. § 1997e(a) (1994 ed., Supp. V).

[7] See Howard v. Barnett, 21 F.3d 868, 872 (8th Cir. 1994) ("one acts 'sadistically' by engaging in extreme or excessive cruelty or by delighting in cruelty").

2.2 Excessive Force in Violation of the Eighth Amendment: Liability of Corrections Officer for Injury by Other Inmates[1]

[Updated: 3/29/11]

Pattern Jury Instruction

A. LIABILITY

Federal law[2] provides that [plaintiff] may recover damages if [defendant], acting under color of law, deprived [him/her] of a right guaranteed by the Constitution. The right at stake here is the right to be free from cruel and unusual punishment. [The parties have agreed that [defendant] acted "under color" of law. The only issue for you, therefore, is whether [defendant] subjected [plaintiff] to cruel and unusual punishment.]

(1) Definition of Cruel and Unusual Punishment

The constitutional protection against cruel and unusual punishment requires prison officials to provide humane conditions of confinement and to take reasonable measures to guarantee the safety of the inmates, including reasonable measures to protect them from violence at the hands of other prisoners. However, not every injury suffered by a prisoner at the hands of a fellow inmate gives rise to a cruel and unusual punishment claim against a corrections officer.

(2) Elements of Plaintiff's Claim

In order to prove [his/her] claim of unconstitutionally excessive force against the corrections officer, [plaintiff] must prove by a preponderance of the evidence the following:

> First, that the risk of violence was objectively serious—in other words, that it posed a substantial risk of serious harm;
>
> Second, that, as a prison official, [defendant] was deliberately indifferent to the risk of violence to [plaintiff]; and
>
> Third, that but for [defendant]'s deliberate indifference to the risk, [plaintiff] would not have been harmed.

To prove that [defendant] was deliberately indifferent, [plaintiff] must prove that [defendant] was more than negligent. [He/She] must prove that [defendant] actually knew of a substantial risk to [plaintiff]'s health or safety, and that [defendant] disregarded it. If you find that [defendant] knew of a substantial risk to [plaintiff]'s health or safety but responded reasonably to that risk under all the circumstances, [defendant] is not liable even if [plaintiff] was harmed.

Bear in mind that knowledge or lack of knowledge often cannot be proven directly because there is no way of directly scrutinizing the workings of the human mind. But you may consider all the facts and circumstances and draw those inferences you find are reasonable in light of experience.

---

[1] This instruction is based upon Farmer v. Brennan, 511 U.S. 825 (1994) and Giroux v. Somerset County, 178 F.3d 28 (1st Cir. 1999). The Eighth Amendment, upon which the instruction is based, applies only in cases involving penal detention.

Substantive due process standards apply in cases involving involuntarily committed mental patients. Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982); Davis v. Rennie, 264 F.3d 86, 97-98 (1st Cir. 2001).

For pre-trial detainees, the First Circuit has held that "[p]retrial detainees are protected under the Fourteenth Amendment Due Process Clause rather than the Eighth Amendment; however, the standard to be applied is the same as that used in Eighth Amendment Cases." Mosher v. Nelson, 589 F.3d 488, 494 n.3 (1st Cir. 2009)(quoting Burrell v. Hampshire Cnty., 307 F.3d 1, 7 (1st Cir. 2002)). The Supreme Court has not yet decided which constitutional provision applies "beyond the point where arrest ends and pretrial detention begins," but "[i]t is clear . . . that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." Graham v. Connor, 490 U.S. 386, 395 n.10 (1989). See also City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (pretrial detainees have protection "at least as great as the Eighth Amendment protections available to a convicted prisoner"); Calderón-Ortiz v. Laboy-Alvarado, 300 F.3d 60, 64 (1st Cir. 2002) (same). In Meléndez-Garcia v. Sánchez, 629 F.3d 25, 36 (1st Cir. 2010), the First Circuit seems to say that even in cases where someone is in custody, the "shock the conscience" standard of substantive due process must be satisfied for violence by others. (Melendez-Garcia was not a custody case.) That seems at odds with the First Circuit statements quoted above. But it may reflect the following gloss on "shock the conscience." In County of Sacramento v. Lewis, 523 U.S. 833, 852 (1998), a case that Melendez-Garcia cites, the Supreme Court said that "in a custodial prison situation . . . deliberate indifference can rise to a constitutionally shocking level." See also Rivera v. Rhode Island, 402 F.3d 27, 36 (1st Cir. 2005) ("In situations where [state]actors have an opportunity to reflect and make reasoned and rational decisions, deliberately willful behavior may suffice to 'shock the conscience.'"). Contrast Hasenfus v. LaJeunesse, 175 F.3d 68, 72 (1st Cir. 1999) ("Even under [the more plaintiff-friendly standard developed in prisoner cases], courts have been very reluctant to find prison guards liable for failing to prevent suicides unless confronted with specific imminent threats.").

Other excessive force claims, where there has been no search, seizure, or detention, are also governed by the Fourteenth Amendment. "The dispositive question in such an analysis is whether the challenged conduct was so extreme as to 'shock the conscience.'" Cummings v. McIntire, 271 F.3d 341, 344 (1st Cir. 2001) (citing County of Sacramento, 523 U.S. at 843). See also Melendez-Garcia, 629 F.3d at 36; Rivera, 402 F.3d at 34.

[2] Although the notes accompanying these instructions generally cite § 1983 caselaw, these instructions should also be usable in excessive force cases against federal actors based on Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). See Graham, 490 U.S. at 394 n.9 (while discussing the role of the Fourth Amendment in a § 1983 excessive force case, the Court noted that "[t]he same analysis applies to excessive force claims brought against federal law enforcement and correctional officials under [Bivens]"), cited in Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cir. 2001) ("The analysis of a qualified immunity defense is identical for actions brought under § 1983 and Bivens."); see also Butz v. Economou, 438 U.S. 478, 496-505 (1978), cited in Wright v. Park, 5 F.3d 586, 591 (1st Cir. 1993) ("[A]bsent a specific statutory provision to the contrary, there is no principled basis for according state actors sued under 42 U.S.C. § 1983 a different degree of immunity than would be accorded federal actors sued for an identical abridgement of rights under Bivens."); Laswell v. Brown, 683 F.2d 261, 268 n.11 (8th Cir. 1982) ("The Butz case looked to 42 U.S.C. § 1983 cases to determine the correct nature of immunity of officials in suits based on Bivens. The same approach is appropriate with regard to the issue of whether respondeat superior is available in Bivens actions." (internal citation omitted)).

3.1 Pretrial Detainees: Use of Excessive Force (Fourteenth Amendment)[1]

[Updated: 10/29/07]

Pattern Jury Instruction

A. LIABILITY[2]

Federal law provides that [plaintiff] may recover damages if [defendant], acting under color of law, deprived [him/her] of a right guaranteed by the Constitution. The right at stake here is the right of a pretrial detainee to be free from the use of excessive force that is used to punish.[3] [The parties have agreed that [defendant] acted "under color" of law. The only issue for you, therefore, is the issue of whether [defendant] used excessive force that amounts to punishment.]

In order to prove [his/her] claim of unconstitutionally excessive force used to punish, [plaintiff] must prove by a preponderance of the evidence the following:

> First, that [defendant] intentionally,[4] rather than negligently, used excessive force on the [plaintiff]; and
>
> Second, that the use of excessive force against [plaintiff] was for the purpose of punishment.[5]

It is not necessary to find that [defendant] knew that punishing [plaintiff] would deprive [plaintiff] of [his/her] constitutional rights in order to find in favor of [plaintiff]. [Plaintiff] is entitled to relief if [defendant] intentionally used excessive force for the purpose of punishment against [plaintiff].

Whether a particular use of force was "excessive" must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[6] With respect to excessive force, the standard of reasonableness at that moment applies. Not every push or shove, even if it may later seem unnecessary, violates the Constitution. The determination of reasonableness must allow for the fact that corrections officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation. Whether or not the force used was excessive is an issue for you to decide based on all the facts and circumstances, including, but not limited to, what the officer believed [plaintiff] was doing; the officer's knowledge and belief concerning any risks [plaintiff] posed; whether [plaintiff] was actively resisting the officer; and the severity of any injury to [plaintiff].[7]

In deciding whether the force was imposed "for the purpose of punishment,"[8] you must determine whether [defendant] *intended* to punish the plaintiff. This is a subjective inquiry based on the state of mind of [defendant]. A state of mind may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] intended, you may consider any statements [he/she] made or things [he/she] did and all other facts and circumstances in evidence that may aid in your determination of [his/her] state of mind.

Although a corrections officer may not punish a pretrial detainee, [he/she] may use force that is reasonably related to maintaining jail security, managing the detention facility, and securing the detainee's presence at trial. If the use of force was related to one of these legitimate objectives, then without more it does not amount to punishment. But if you find that the use of force was in excess of what was necessary to satisfy a legitimate objective, then you may infer that the purpose was to punish. In addition, if you find that the use of force was arbitrary or purposeless, you may infer, but are not required to infer, that [defendant] used force for the purpose of punishment.[9]

[Alternatively, you may find [defendant] liable if, even though [defendant] did not personally use excessive force against [plaintiff], [he/she] had reason to know that excessive force was being used by another officer or officers for the purpose of punishment, [he/she] had a realistic opportunity to intervene to prevent harm from occurring, and [his/her] failure to intervene was intentional.[10]]

---

[1] This instruction is for excessive force claims brought by pretrial detainees. The standard applicable to pretrial detainees' claims for excessive force is an unsettled question of law across the country. Wilson v. Spain, 209 F.3d 713, 715 (8th Cir. 2000) (stating that the standard applicable to an excessive force claim brought by a pretrial detainee is "something of a legal twilight zone"). The Fourth Amendment applies to claims of excessive force in the context of an arrest or investigatory stop of a free citizen, Graham v. Connor, 490 U.S. 386, 394 (1989), see also Instruction 1.1, but the Supreme Court "ha[s] not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." Graham, 490 U.S. at 395 n.10. It is well settled that once criminals are convicted and serving their sentences, the Eighth Amendment applies, Whitley v. Albers, 475 U.S. 312, 318 (1986); see also Instructions 2.1 and 2.2, and that pretrial detainees are entitled to due process protections "at least as great as the Eighth Amendment protections available to a convicted prisoner." County of Sacramento v. Lewis, 523 U.S. 833, 849-50 (1998) (quoting City of Revere v. Mass Gen. Hosp., 463 U.S. 239, 244 (1983)). The unsettled question is what standard applies after Fourth Amendment protection ends (when that occurs is part of the Circuit split) and before Eighth Amendment protection begins (serving a sentence after conviction). See Aldini v. Johnson, 609 F.3d 858, 864-67 & n.6 (6th Cir. 2010) (collecting cases and setting the dividing line between the Fourth and Fourteenth Amendment zones of protection at the completion of the probable-cause hearing); Bozeman v. Orum, 422 F.3d 1265, 1271 (11th Cir. 2005) (stating that although claims brought by pretrial detainees are governed by the Fourteenth Amendment instead of the Eighth Amendment, "it makes no difference . . . because 'the applicable standard is the same'") (quoting Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996)); Wilson, 209 F.3d at 715-16 (applying the Fourth Amendment to an arrestee who had been booked and placed in a detoxification cell); Fuentes v. Wagner, 206 F.3d 335, 346-47 (3d Cir. 2000) (applying the Eighth Amendment in the context of pretrial detainee involved in a prison disturbance); United States v. Walsh, 194 F.3d 37, 47-48 (2d Cir. 1999) (applying an Eighth Amendment standard to claims brought by pretrial detainees under the Fourteenth Amendment); Taylor v. McDuffie, 155 F.3d 479, 483 (4th Cir. 1998) (holding that the Fourteenth Amendment governs claims brought by pretrial detainees but applying a standard—"unnecessary and wanton pain and suffering"—associated with Eighth Amendment claims) (quoting Whitley, 475 U.S. at 320).

The First Circuit has not clearly decided the issue. In Burrell v. Hampshire County, it applied Eighth Amendment analysis to a claim brought against prison officials for deliberate indifference to the health and safety of a pretrial detainee who had been assaulted by other inmates, stating that "the Due Process Clause protections are at least as great as those under the Eighth Amendment." 307 F.3d 1, 7 (1st Cir. 2002) (citing Bell v. Wolfish, 441 U.S. 520, 545 (1979)); accord Calderon-Ortiz v. Laboy-Alvarado, 300 F.3d 60, 63-64 (1st Cir. 2002). In Davis v. Rennie, it approved using the Fourth Amendment "objective reasonableness" standard for an excessive force claim brought by an involuntarily committed mental patient. 264 F.3d 86, 108 (1st Cir. 2001). In O'Connor v. Huard, 117 F.3d 12 (1st Cir. 1997), it *(continued next page)*

approved Fourteenth Amendment substantive due process analysis for a pretrial detainee's claim concerning conditions of confinement:

> Prior to an adjudication of guilt . . . a state government may not punish a pretrial detainee without contravening the Fourteenth Amendment's Due Process Clause. The government may, however, impose administrative restrictions and conditions upon a pretrial detainee that effectuate his detention, and that maintain security and order in the detention facility. When confronted with a charge by a pretrial detainee alleging punishment without due process, the "court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."

Id. at 16 (citations omitted) (quoting Bell, 441 U.S. at 538). In Cummings v. McIntire, 271 F.3d 341 (1st Cir. 2001), it also applied substantive due process principles for claims of excessive force by a police officer outside the context of a Fourth Amendment seizure.

In the face of this complexity, this pattern instruction follows the statement in Graham v. Connor ("the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment"), the principles of O'Connor v. Huard (a pretrial conditions-of-confinement case), and the "objective reasonableness" test applied in Davis v. Rennie. But the law is hardly well-settled.

[2] This instruction does not address qualified immunity.

[3] Graham, 490 U.S. at 395 n.10 ("[T]he Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.") (citing Bell, 441 U.S. at 535-539).

[4] See Lewis, 523 U.S. at 849 ("liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process"); Daniels v. Williams, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property.") (emphasis in original). On the spectrum between intentional and negligence, the Supreme Court has held in conditions-of-confinement cases that "deliberate indifference" may violate a pretrial detainee's due process rights. See Lewis, 523 U.S. at 849–50. In most excessive force cases, however, it will not be necessary to instruct the jury on "deliberate indifference."

[5] O'Connor, 117 F.3d at 15-16; Montes v. Ponce Municipality, 79 Fed. Appx. 448, 450 (1st Cir. 2003) ("Since pretrial detainees are not technically being punished, their protection for Eighth Amendment-type claims springs from the liberty component of the Fourteenth Amendment's Due Process Clause. No unconstitutional deprivation of liberty occurs unless the detainment amounts to punishment, which occurs when the condition is imposed for the purpose of punishment rather than some other legitimate reason.") (citations omitted); Surprenant v. Rivas, 424 F.3d 5, 13-18 (1st Cir. 2005) ("A correctional officer cannot punish a pretrial detainee through deliberate manipulation of an unwitting institutional proxy any more than he can do so by brute force.") (citations omitted). It is important to note that these First Circuit cases, from which this pattern is derived, arise in the context of conditions of confinement, rather than a corrections officer's deliberate use of force against a pretrial detainee. There are no First Circuit cases involving deliberate use of force by a corrections officer against a pretrial detainee. The Supreme Court recognizes that these two types of claims (conditions of confinement and excessive force) are different in kind for Eighth Amendment purposes, Hudson v. McMillian, 503 U.S. 1, 11 (1992). Thus, the sufficiency of this instruction must be considered tentative.

[6] See Pattern Instruction 1.1 "Excessive Force in Violation of the Fourth Amendment." As documented in footnote 1, there is no judicial consensus on the proper standard to be applied to claims of excessive force under the Due Process Clause.

Arguably, "shock-the-conscience" is now the standard to be used for substantive due process claims against executive actions. See Lewis, 523 U.S. at 846 (defining the substantive due process standard; not a pretrial detention case, but a high speed police chase resulting in severe injury); Cummings, 271 F.3d at 344 (defining the standard for substantive due process claims of excessive force against law enforcement officer outside the Fourth Amendment). In discussing "shock-the-conscience," the Court seemed to approve the Eighth Amendment standard for efforts to maintain order in a corrections setting: "liability should turn on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" Lewis, 523 U.S. at 853 (quoting Whitley, 475 U.S. at 320-21).

(continued next page)

Since Lewis, the circuits have split on whether "shocks-the-conscience" is the universal standard for substantive due process claims against any executive action. The First Circuit has found "shocks-the-conscience" is the appropriate standard for only some executive actions. See Davis, 264 F.3d at 99 (the nature of the executive action at issue "removes this case from the ambit of Lewis and its 'shocks the conscience' standard"). While the "reasonableness" standard used in this instruction resounds in the Fourth Amendment, the First Circuit in Davis v. Rennie applied an "objectively reasonable" standard to a claim of excessive force against mental health workers by an involuntarily committed patient. Id., 264 F.3d at 108.

[7] In analyzing excessive force by a police officer under substantive due process standards (not a pretrial detention case), the First Circuit has said:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Cummings, 271 F.3d at 345 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

[8] In Bell, the Court mentioned retribution and deterrence as traditional signs of punishment. 441 U.S. at 537–38 (quoting Kennedy v. Mendoz-Martinez, 372 U.S. 144, 168–69 (1963)).

[9] In O'Connor, 117 F.3d at 15-16, the First Circuit approved an overall instruction in a conditions-of-confinement case that included this component:

> The question for you to decide is whether defendant imposed conditions or restrictions upon plaintiff that were reasonably related to those legitimate goals or whether they were arbitrary or without purpose.
>
> Absent a showing of an expressed intent on defendant's part to punish plaintiff, that question will generally turn on whether the conditions or restrictions could have been used for a legitimate purpose and whether they are excessive in relation to that legitimate purpose.
>
> *If you find the conditions or restrictions were arbitrary or without purpose, you may infer that the purpose of the conditions or restrictions was punishment, and, therefore, unconstitutional.*

(emphasis added). The First Circuit did not address specifically this inference part of the instruction. In criminal cases, it is important to inform the jury that such an inference is not mandatory. See Sandstrom v. Montana, 442 U.S. 510 (1979). There does not appear to be an equivalent requirement for civil cases, but I have included it here. There is an underlying question, however: Is this solely a circumstantial evidence inference in determining whether the guard's intent was to punish? Or is it/should it be the law that liability ensues if the purpose was illegitimate, arbitrary, or without purpose (i.e., no requirement to prove actual purpose of punishment)? The language of the conditions-of-confinement cases seems to require actual purpose to punish. But perhaps that language should not be extended to excessive force cases.

[10] In Gaudreault v. Municipality of Salem, the First Circuit said that in the case of a pretrial detainee, "[a]n officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable . . . for his nonfeasance." 923 F.2d 203, 207 n.3 (1st Cir. 1990). For a more detailed discussion, see Instruction 1.1 n.3. The failure to intervene must be intentional. See note 4 supra. Thus the defendant must have had a "realistic opportunity" to prevent the use of excessive force, Gaudreault, 923 F.2d at 207 n.3, and knowledge that the excessive force was being used for the purpose of punishment.

4.1 Missing Witness[1]

[New: 6/18/10]

Pattern Jury Instruction

If you find that [party] had a witness available to it whom it did not call, and that [party] did not have that witness available to it, you may infer that the witness's testimony would have been unfavorable to [party who failed to call the witness]. You may draw such an inference, but you are not required to.

[1] In Latin American Music Co. v. American Society of Composers, Authors and Publishers, 593 F.3d 95, 101 (1st Cir. 2010), the court said: "Although far more common in criminal cases, a missing witness instruction may be given in a civil case as well. . . . The instruction, however, should only be given where 'the witness is either actually unavailable to the party seeking the instruction or so obviously partial to the other side that the witness [though technically available] is deemed to be legally unavailable.'" Id. at 101-02 (citing United States v. Perez, 299 F.3d 1, 3 (1st Cir. 2002)). In an earlier civil case, the court said that the instruction is permissible "when a party fails to call a witness who is either (1) 'favorably disposed' to testify for that party, by virtue of status or relationship with the party or (2) 'peculiarly available' to that party, such as being with the party's 'exclusive control.'" Grajales-Romero v. American Airlines, Inc., 194 F.3d 288, 298 (1st Cir. 1999) (quoting United States v. DeLuca, 137 F.3d 24, 38 (1st Cir. 1998)). "When deciding whether to issue a missing witness instruction the 'court must consider the explanation (if any) for the witness's absence and whether the witness, if called, would be likely to provide relevant, non-cumulative testimony.'" Latin Am. Music Co., 593 F.3d at 102 (citing Perez, 299 F.3d at 3). Although all this language addresses the court's role in deciding whether to give the instruction, it seems appropriate, if the instruction is given, to allow the jury also to make the underlying determinations as to whether the conditions for the adverse inference are present. Whether to give the instruction is within the trial court's discretion. See Grajales-Romero, 194 F.3d at 298.

5.1 Spoliation[1]

[New: 7/15/10]

Pattern Jury Instruction

If you find that a party destroyed or obliterated a document that it knew would be relevant to an issue being litigated in this case and knew at the time it did so that there was a potential for litigation, then you may infer (but you are not required to infer) that the contents obliterated were unfavorable to that party.

---

[1] Giving this instruction is discretionary with the trial judge. See Booker v. Mass. Dep't of Public Health, 612 F.3d 34, 46 (1st Cir. 2010), citing United States v. St. Michael's Credit Union, 880 F.2d 579, 597 (1st Cir. 1989).

The First Circuit states:

> Before an adverse inference can arise, the sponsor of the inference must lay an evidentiary foundation, proffering evidence sufficient to show that the party who destroyed the document "knew of (a) the claim (that is, the litigation or the potential for litigation), and (b) the document's potential relevance to that claim." A spoliation instruction is not warranted absent this threshold showing, because the trier of fact would have no basis for inferring that the destruction of documents stemmed from the party's consciousness that the documents would damage his case.

Booker, 612 F.3d at 46 (citations omitted). The First Circuit also says:

> Whether the particular person who spoils evidence has notice of the relationship between that evidence and the underlying claim is relevant to the factfinder's inquiry, but it does not necessarily dictate the resolution of that inquiry. The critical part of the foundation that must be laid depends, rather, on institutional notice—the aggregate knowledge possessed by a party and its agents, servants, and employees.

Testa v. Wal-Mart Stores, Inc., 144 F.3d 173, 177-78 (1st Cir. 1998); Booker, 612 F.3d at 45.

The inference is permissive, not mandatory. Testa,144 F.3d at 177.

The First Circuit has declined to take a position on "whether a court can properly decide that there is sufficient evidence to permit the parties to argue for an adverse inference to the jury, while at the same time declining to give a spoliation instruction." Booker, 612 F.3d at 46 n.11.

6.1 Excessive Force—Compensatory Damages

[Updated: 12/10/03]

Pattern Jury Instruction

If you find that [defendant] used excessive force against [plaintiff], and thereby caused damages to [him/her], you will then assess an amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all [plaintiff]'s damages caused by that conduct. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize [defendant]. You may award only such damages as you find by a preponderance of the evidence were caused by unconstitutionally excessive force as I have defined it. It is not necessary for [plaintiff] to prove the amount of [his/her] damages with certainty. On the other hand, [plaintiff] is not to be awarded purely speculative damages. [1]{If you should award damages, they will not be subject to federal or state income taxes, and you should therefore not consider such taxes in determining the amount of damages.}

[2]{[Plaintiff] has the duty to mitigate [her/his] damages—that is, to take reasonable steps that would reduce the damages. If [she/he] fails to do so, then [she/he] is not entitled to recover any damages that [she/he] could reasonably have avoided incurring. [Defendant] has the burden of proving by a preponderance of the evidence that [plaintiff] failed to take such reasonable steps.}

[3]{ If you find that [plaintiff] is entitled to damages for losses that will occur in the future, you will have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost or future damages [plaintiff] will suffer, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.}[4]

The elements of damages that you may consider are as follows:

1. Reasonable past and future medical expenses incurred by [plaintiff] in securing treatment for injuries caused by [defendant]'s conduct.

2. A sum to compensate [plaintiff] for income that [he/she] has lost, plus a sum to compensate [him/her] for any loss of earning power that you find from the evidence [he/she] will probably suffer in the future, if you find by a preponderance of the evidence that [defendant] caused these losses.

In determining the amount of future loss, you should compare what [plaintiff]'s health, physical ability and earning power were before the incident with what they are

now; the nature and severity of [his/her] condition; the expected duration of [his/her] condition; and the extent to which [his/her] condition may improve or deteriorate in the future. The objective is to determine the effect, if any, on future earning capacity, and the present value of any loss of future earning power that you find [plaintiff] will probably suffer in the future. In that connection, you should consider [plaintiff]'s work life expectancy, taking into account [his/her] occupation, [his/her] habits, [his/her] past health record, [his/her] state of health at the time of the incident and [his/her] employment history. Work life expectancy is that period of time that you expect [plaintiff] would have continued to work, given [his/her] age, health, occupation, and education.

3. An amount for any pain and suffering, emotional distress and humiliation that you find from the evidence [plaintiff] endured or will endure as a result of the excessive force. Even though it is obviously difficult to establish a standard of measurement for this element, that difficulty is not grounds for denying recovery. You must, therefore, make the best and most reasonable estimate you can, not from a personal point of view but from a fair and impartial point of view of the amount of pain and suffering, emotional distress and humiliation that [plaintiff] incurred or will incur as a result of the excessive force and you must place a money value on this, attempting to come to a conclusion that will be fair and just to the parties. This will be difficult for you to measure in terms of dollars and cents, but there is no other rule I can give you for assessing this element of damages.

4. If you find that [plaintiff] has proven by a preponderance of the evidence that [defendant] violated [his/her] constitutional rights but that [he/she] has not proven any actual injury caused by the violation, you must nevertheless award [plaintiff] nominal or token damages such as One Dollar ($1) or some other minimal amount.[5] This is so because the law recognizes that the denial of constitutional rights is itself an injury that should be recognized without regard to whether actual damages have been proven.

---

[1] Although the First Circuit has not yet addressed this issue, those circuits that have addressed it have concluded that § 1983 damages are not taxable, even if they are calculated based on types of injury (*e.g.*, lost wages) that would be taxable in another context. Wulf v. City of Wichita, 883 F.2d 842, 871-75 (10th Cir. 1989) (examining decisions by the Third, Fourth and Ninth circuits); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1579-80 (5th Cir. 1989). Therefore, this bracketed sentence may be used in cases where the tax consequences of the jury's award could be an issue.

[2] This bracketed paragraph may be used in cases where the plaintiff's duty to mitigate damages is an issue. Although the First Circuit has not addressed the issue of mitigation in a § 1983 case, those circuits that have addressed the issue have applied the general rule that a plaintiff has a duty to mitigate his or her damages. McClure v. Independent Sch. Dist. No. 16, 228 F.3d 1205, 1214 (10th Cir. 2000); Meyers v. City of Cincinnati, 14 F.3d 1115, 1119 (6th Cir. 1994); Miller v. Lovett, 879 F.2d 1066, 1070-71 (2d Cir. 1989); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1578-80 (5th Cir. 1989); see also Audio Odyssey, Ltd. v. Brenton First Nat'l Bank, 245 F.3d 721, 739 (8th Cir. 2001); Murphy v. City of Flagler Beach, 846 F.2d 1306, 1308-09 (11th Cir. 1988).

[3] These bracketed paragraphs may be used in cases where the plaintiff's claimed damages include future losses. Although the First Circuit has not yet addressed this issue, those circuits that have addressed it have held that § 1983 awards that include future damages must be reduced to present value. Chonich v. Wayne County Cmty. Coll., 874 F.2d 359, 369-70 (6th Cir. 1989) ("'An award of future damages must be reduced to present value in order to take into account the earning power of the money.'" (quoting Rodgers v. Fisher Body Div., GMC, 739 F.2d 1102, 1106 (6th Cir. 1984)); see also Gierlinger v. Gleason, 160 F.3d 858, 874

(continued next page)

(2d Cir. 1998) (noting without comment that jury was instructed to reduce to present value any award of future damages).

[4] The discount rate is determined by the jury. Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 341 (1988); see also St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, 412 (1985) (per curiam) (noting that the discount rate "should take into account inflation and other sources of wage increases as well as the rate of interest"). Notwithstanding inflationary factors, "[t]he discount rate should be based on the rate of interest that would be earned on 'the best and safest investments.'" Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (quoting Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916). The "best and safest investments" are those which provide a "risk-free stream of future income," not those made by "investors who are willing to accept some risk of default." Pfeifer, 462 U.S. at 537; see also Kelly, 241 U.S. at 490-91; Conde v. Starlight I, Inc., 103 F.3d 210, 216 & n.8 (1st Cir. 1997) (suggesting six percent as an appropriate "market interest rate").

[5] In Memphis Community School District v. Stachura, 477 U.S. 299, 306 (1986), the Supreme Court stated that "the level of damages is ordinarily determined according to principles derived from the common law of torts." The Court held that the jury could not be instructed to evaluate the importance of the constitutional right in setting the amount of a damage award and described its holding in Carey v. Piphus, 435 U.S. 247, 264 (1978), as being that "*no* compensatory damages could be awarded for violation of that right absent proof of actual injury." Memphis, 477 U.S. at 308. In Memphis, the Court went on to say in a footnote that "nominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." Id. at 308 n.11.

7.1 Excessive Force—Punitive Damages

[Updated: 3/9/07]

Pattern Jury Instructions

If you have awarded compensatory or nominal damages, you may also award punitive damages to [plaintiff] under some circumstances. To obtain punitive damages, [plaintiff] must prove by a preponderance of the evidence[1] that [defendant] either knew that [his/her] actions violated federal law or acted in reckless or callous indifference to that risk.[2] If [plaintiff] satisfies this requirement, it is entirely up to you whether or not to award punitive damages. But it should be presumed that [plaintiff] has been made whole by compensatory damages, so you should award punitive damages only if [defendant's] culpability is so reprehensible as to warrant further sanctions to achieve punishment or deterrence.[3]

If you decide to award punitive damages, the amount to be awarded is also within your sound discretion. The purpose of a punitive damage award is to punish a defendant or deter a defendant and others from similar conduct in the future. Factors you may consider include, but are not limited to, the nature of [defendant's] conduct (how reprehensible or blameworthy was it), the impact of that conduct on [plaintiff], the ratio between the actual compensatory damages and the punitive damages,[4] the relationship between [plaintiff] and [defendant], the likelihood that [defendant] or others would repeat the conduct if the punitive award is not made, and any other circumstances shown by the evidence, including any mitigating or extenuating circumstances that bear on the question of the size of such an award.[5] You may determine reprehensibility by considering the nature and extent of the harm; whether the conduct showed indifference to or disregard for the health or safety of others; whether the conduct involved repeated actions[6] or was an isolated instance; and whether the harm was the result of intentional malice.[7]

[8]{Respondeat Superior}

---

[1] In Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 23 n.11 (1991), the Supreme Court declined to impose the clear and convincing evidence standard on state punitive damages.

[2] In Smith v. Wade, 461 U.S. 30, 56 (1983), the Supreme Court set forth the requirements for a punitive damage award in a § 1983 case: the plaintiff must prove that the defendant had "evil motive or intent" *or* "reckless or callous indifference to the federally protected rights of others." Drawing upon statements in Kolstad v. American Dental Ass'n, 527 U.S. 526, 535 (1999) (an employment discrimination decision under Title VII, which has a statutory provision for punitive damages), the First Circuit has concluded that the focus is the same under either alternative—namely, the knowledge of federal law. DiMarco-Zappa v. Cabanillas, 238 F.3d 25, 37-38 (1st Cir. 2001) (emphasis added; internal citations, quotations, and footnote omitted):

> Punitive damages may be awarded under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. Such indifference pertains to the defendant's knowledge that it may be acting in violation of federal law, not its

(continued next page)

awareness that it is engaging in discrimination. Although evidence of egregious or outrageous acts may support an inference of the requisite evil motive, *the guiding inquiry is whether the defendant acted in the face of a perceived risk that his actions will violate federal law*.

Accord Iacobucci v. Boulter, 193 F.3d 14, 26 (1st Cir. 1999) (alterations in original; citations omitted):

> The special showing needed to trigger eligibility for punitive damages, which the Smith Court called "evil motive" or "reckless or callous indifference" pertains to the defendant's "knowledge that [he] may be acting in violation of federal law, not [his] awareness that [he] is engaging in discrimination." Thus, the standard requires proof that the defendant acted "in the face of a perceived risk that [his] actions [would] violate federal law."

See also id. at 26 n.7 ("The [Kolstad] Court therefore interpreted the relevant statutory terms [of § 1981a] in lockstep with its understanding of the parallel language in Smith. Consequently, we believe that Kolstad's teachings are fully applicable to punitive damages under section 1983." (citations omitted)); Davis v. Rennie, 264 F.3d 86, 115-16 (1st Cir. 2001) (citing Iacobucci). Therefore, if there was any remaining basis for a punitive damage award in a non-employment case based on "evil motive or intent" apart from the Kolstad definition geared to knowledge of federal law, it has been laid to rest in the First Circuit.

[3] This language comes from State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 419 (2003). The question of reprehensibility is for the jury. See Philip Morris USA v. Williams, 549 U.S. 346, 355 (2007); McDonough v. City of Quincy, 452 F.3d 8, 24 (1st Cir. 2006).

[4] State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 425 (2003), states that few awards exceeding a single-digit ratio will satisfy due process and that anything over 4 to 1 "might be close to the line of constitutional impropriety."

[5] With all of the attention the Supreme Court has given to the constitutionality of punitive damages under state law, apart from Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999), it has had little to say about the standards used in federal law cases either as a matter of constitutional law or under its supervisory powers. The general focus of recent Supreme Court cases on the topic of punitive damages, State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003); Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991); Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988), has been on the standards of *appellate* review for punitive damages awards, not the standards (if any) that should guide jurors. Appellate courts are instructed to consider "the degree of the defendant's reprehensibility or culpability; the relationship between the penalty and the harm to the victim caused by the defendant's actions; and the sanctions imposed in other cases for comparable misconduct." Leatherman, 532 U.S. at 435 (citations omitted); accord BMW, 517 U.S. at 574-75. As the First Circuit noted in Zimmerman v. Direct Federal Credit Union, 262 F.3d 70 (1st Cir. 2001) (Title VII):

> BMW furnishes three general guideposts for conducting such a review:
> (1) What is the degree of reprehensibility of the defendant's conduct?
> (2) What is the ratio between the compensatory and punitive damages?
> (3) What is the difference between the punitive damage award and the civil penalties imposed for comparable conduct?

Id. at 81 (citing BMW, 517 U.S. at 575). The first two standards are reflected in the jury instruction. We have not incorporated the third—the sanctions imposed in other cases—on the reasoning that it is more a subject for judicial, not jury, determination. In theory, however, evidence could be introduced concerning other sanctions for a jury to consider. The instruction also directs the jury to consider "other mitigating or extenuating circumstances" bearing on the appropriate size of a punitive damage award. The Supreme Court implicitly approved such an instruction in TXO Production Corp, v. Alliance Resources Corp., 509 U.S. 443, 463-64 & n.29 (1993).

[6] Conduct affecting non-parties is relevant to determining reprehensibility only if it is "misconduct of the sort that injured" the plaintiff. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003). In

(continued next page)

State Farm, the Supreme Court said that, where the plaintiffs did not present evidence of conduct by the defendant similar to the conduct that harmed them, the conduct that harmed them was "the only conduct relevant to the reprehensibility analysis." Id. at 424. Therefore, if the jury has heard evidence of dissimilar conduct affecting non-parties, it should be instructed that it may not consider that conduct in assessing reprehensibility. On the other hand, the principles of Philip Morris USA v. Williams, 549 U.S. 346 (2007), may be relevant to a federal claim. Philip Morris held that punitive damages *could not be* used "to punish for harm caused strangers," i.e., for injuries inflicted upon nonparties, but that harm to other victims *could be* used "to determine reprehensibility." Id. at 355. The Court did not suggest how a jury instruction could be crafted to make a jury understand such a fine distinction, and seemed to be more concerned with matters of evidence and argument. The pattern instruction here does focus on reprehensibility. Possibly a sentence should be added to the effect: "You must not, however, increase any award for damages you believe were caused to others than [the plaintiff]." Although Philip Morris may be limited because it was concerned with Fourteenth Amendment due process limitations on a state's power (and the concern that one state's policy not be imposed on other states through a punitive damage award for consequences in other states), the Court also reasoned from broader principles that could apply to the Fifth Amendment as well: the principle against "punishing an individual without first providing that individual with 'an opportunity to present every available defense'"; the concern for adding "a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate"; and "no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others." Id. at 353-54.

[7] These factors derive from State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 419 (2003), but are modified to reflect that excessive force cases do not present the same issues as economic injury cases. Factors noted in State Farm but not reflected in this instruction include whether the harm was physical as opposed to economic and whether the harm was the result of "trickery or deceit." In excessive force cases, the harm will always be physical and "trickery or deceit" will rarely, if ever, be encountered. In lieu of the physical / economic factor, we have directed the jury to consider the nature and extent of the harm inflicted. Neither the U.S. Supreme Court nor the First Circuit has directly stated that "nature of the harm" is a factor for the jury to consider in determining punitive damages in excessive force cases. Id. In BMW of North America, Inc. v. Gore, however, the Supreme Court reiterated that "punishment should fit the crime" and, in support, pointed to an old Kentucky case in which the court considered whether the plaintiff's injuries were permanent in assessing the reasonableness of a punitive damage award. 517 U.S. 559, 576 n.24 (1996) (citing Louisville & N. R. Co. v. Brown, 106 S.W. 795, 799 (1908) ("We are not aware of any case in which the court has sustained a verdict as large as this one unless the injuries were permanent.")). In addition, the First Circuit has stated in an employment discrimination case that "because [a punitive damage award] is punishment, it must bear some relation to 'the character of the defendant's act' along with 'the nature and extent of the harm . . . .'" Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 207 (1st Cir. 1987) (quoting Restatement (Second) of Torts § 908(2)(1979)). In State Farm, the Court reiterated that degree of culpability is the most important factor. 538 U.S. at 419.

We have not listed the defendant's wealth as a factor. Although the Supreme Court has never actually prohibited consideration of wealth, there are expressions of concern. See id. at 427 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."), and at 417 ("'the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences,'" quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994)). See also TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 489-95 (1993) (O'Connor, J., dissenting).

[8] Because a defendant may not be held liable in a § 1983 case on a theory of *respondeat superior*, see Instruction 1.1 n.4; Instruction 2.1 n.3, this instruction does not include provisions similar to those used in Title VII cases concerning the scope of an employee's employment or an employer's good-faith efforts to comply with federal law.

8.1 Charge to a Hung Jury[1]

[New: 7/13/09]

Members of the jury, I am going to ask you to continue your deliberations to try to agree upon a verdict and resolve this case. I have a few additional thoughts and comments I would like you to consider.

This case is important to the parties. The trial has been expensive in terms of time, effort, money and emotional strain to both the plaintiff and the defense. If you fail to agree on a verdict, the case is left open and may have to be tried again. A second trial would be costly to both sides, and there is no reason to believe that the case can be tried again, by either side, better or more exhaustively than it has been tried before you.

Any future jury would be selected in the same manner and from the same source as you were chosen. There is no reason to believe that the case could ever be submitted to a jury of people more conscientious, more impartial, or more competent to decide it or that more or clearer evidence could be produced on behalf of either side.

As I stated in my previous instructions, it is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but you should do so only after considering the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to reexamine your own views, and to change your opinion if you are convinced that it is wrong. To reach a unanimous result you must examine the questions submitted to you openly and frankly, with proper regard to the opinions of others and with a disposition to reexamine your own views. Each of you ought to consider whether your own position is a reasonable one if it makes so little impression upon the minds of other equally honest and conscientious fellow jurors who bear the same responsibility, serve under the same oath, and have heard the same evidence. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict.

You may conduct your deliberations as you choose, but I suggest that you carefully reexamine and consider all the evidence in the case bearing upon the questions before you in light of my instructions on the law.

You may be as leisurely in your deliberations as the occasion may require and you may take all the time that you feel is necessary.

I remind you that in your deliberations you are to consider the instructions I have given to you as a whole. You should not single out any part of any instruction, including this one, and ignore others.

You may now go back to the jury room and continue your deliberations.

[1] This proposed instruction is derived largely from Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice and Instructions §§ 106.09, 106.10 (5th ed. 2000).

The First Circuit approved the use of a civil Allen (Allen v. United States, 164 U.S. 492 (1896)) charge in an unpublished decision, Scarpa v. Saggese, 1994 U.S. App. LEXIS 2229, at *5 (finding proper "substantially the same charge" approved in a criminal case, United States v. Nichols, 820 F.2d 508, 511-12 (1st Cir. 1987)). The modified Allen charge approved in Nichols "was carefully phrased so that '(1) the onus of reexamination would not be on the minority alone . . ., (2) a jury would not feel compelled to reach agreement . . ., and (3) jurors would be reminded of the burden of proof.'" Nichols, 820 F.2d at 512 (quoting United States v. Angiulo, 485 F.2d 37, 39 (1st Cir. 1973)). Other circuits include civil Allen charges in their pattern instructions. See Third Circuit, General Instructions for Civil Cases § 3.4; Eighth Circuit, Model Civil Jury Instructions § 3.07; Ninth Circuit, Model Civil Jury Instructions § 3.5; Eleventh Circuit, Pattern Jury Instructions (Civil Cases) § 9. The former Fifth Circuit approved of the use of civil Allen charges in Brooks v. Bay State Abrasive Products, Inc., 516 F.2d 1003, 1004 (5th Cir. 1975), which was cited in United States v. Chigbo, 38 F.3d 543, 546 (11th Cir. 1994). In Brooks, the court stated that it approved the use of an Allen charge if it makes clear to members of the jury that (1) they are duty bound to adhere to honest opinions; and (2) they are doing nothing improper by maintaining a good faith opinion even though a mistrial may result. See also Railway Exp. Agency v. Mackay, 181 F.2d 257, 262-63 (8th Cir. 1950); Hill v. Wabash Ry. Co., 1 F.2d 626, 631-32 (8th Cir. 1924).