

SUPPORT YOUR LOCAL SHERIFF: SUING SHERIFFS UNDER § 1983

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I. INTRODUCTION

Any lawyer who practices in the § 1983¹ area will confirm that the procedural and substantive complexities of litigating under the statute have become huge.² In cases involving claims against sheriffs, the confusion has been compounded by the ramifications of the United States Supreme Court's decision in *McMillian v. Monroe County*.³ For § 1983 purposes, *McMillian* treats the

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1. 42 United States Code § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

2. In *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 430 (1997), Justice Breyer, joined by Justices Ginsburg and Stevens, authored a dissent criticizing the "highly complex body of interpretive law" that has developed under § 1983 to maintain and perpetuate the distinction adopted in *Monell v. Department of Social Services*, 436 U.S. 658, 690-691 (1978), between direct and vicarious liability of local government entities. The dissenters call for a reexamination of "the legal soundness of that basic distinction itself." *Brown*, 520 U.S. at 430.

3. 520 U.S. 781 (1997).

status of sheriffs as a question of federal law, informed by state law, with classification of the sheriff as a state or local policy-maker dependent, in part, upon the particular function performed by the sheriff in that case.⁴ If a sheriff is determined to be making policy for the state when engaged in the challenged conduct, the plaintiff cannot sue the sheriff in his official capacity,⁵ as that would be tantamount to a suit against the state,⁶ forbidden by both the Eleventh Amendment⁷ and the Supreme Court's construction of § 1983.⁸ A county, subject to suit for constitutional

4. *Id.* at 786. Sheriffs, in this sense, are somewhat of a "Mish Mash," a soup served at the Stage Delicatessen on Seventh Avenue in New York City, consisting of a combination of matzoh ball, kreplach, rice, and noodles. Stage Delicatessen, Stage Deli, *New York Menu*, <http://www.stagedeli.com/nymenu.ctm> (accessed Oct. 24, 2004). Thanks to Janet Siegel, Director of Programming at Practising Law Institute, for running out to get the menu to make sure the Author listed the proper ingredients.

5. Naming a government official in his or her official capacity is the equivalent of naming the government entity itself as the defendant, and requires the plaintiff to make out *Monell*-type proof of an official policy or custom as the cause of the constitutional violation. *Ky. v. Graham*, 473 U.S. 159, 165–166 (1985). When a plaintiff names an official in his or her individual capacity, the plaintiff is seeking "to impose personal liability upon a government official for actions he takes under color of state law." *Id.* at 165.

6. *Brandon v. Holt*, 469 U.S. 464, 471 (1985) (noting that petitioners asserting § 1983 claim against the office of "Director of Police, City of Memphis" were asserting claim against the City of Memphis, not the Director of Police in his individual capacity).

7. The Eleventh Amendment of the U.S. Constitution provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although the text of the Amendment would affect only diversity jurisdiction of the federal courts, the Supreme Court has interpreted the Amendment to prohibit federal question suits against unconsenting states as well. *Hans v. La.*, 134 U.S. 1, 15 (1890); see also *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (noting that an "unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State") (quoting *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)). The Court has held that § 1983 does not abrogate Eleventh Amendment immunity of state governments. *Quern v. Jordan*, 440 U.S. 332, 345 (1979). Political subdivisions of the state, such as counties, have no Eleventh Amendment protection from suit in federal court. *Monell*, 436 U.S. at 690 n. 54.

8. In *Will v. Mich. Dept. of St. Police*, 491 U.S. 58, 71 (1989), the Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Thus, even if a state is found to have waived its Eleventh Amendment immunity in federal court, or even if a § 1983 action is brought in state court, where the Eleventh Amendment has no applicability, *Will* precludes a damages action against the state governmental entity. This holding does not apply when a state official is sued in his official capacity for injunctive relief. *Id.*; see also *Gean v. Hattaway*, 330 F.3d 758, 766 (6th Cir. 2003) ("[T]he need for this court to undertake a broad sovereign immunity analysis with respect to the § 1983 claims is obviated by the fact that the defendants in their official capacities are not recognized as 'persons' under § 1983. Even if Tennessee's sovereign immunity has been properly waived or abrogated for the purposes of the federal statute the defendants allegedly violated, a § 1983 claim against the defendants in their official

violations caused by its own policymakers,⁹ will bear no liability for conduct attributed to a sheriff who is a state policymaker.¹⁰ While a suit against a state policymaker may proceed against the official in his individual capacity,¹¹ plaintiffs are often precluded from recovering damages by the official's assertion of the qualified-immunity defense.¹²

Prior to the Supreme Court's decision in *McMillian*, most courts and litigants assumed that county sheriffs, who are elected by the county electorate, funded by the county budget, and who formulate policies to be applied within the jurisdiction of the county, were indeed county officials for purposes of § 1983 litigation.¹³ Since *McMillian*, however, there has been a wave of litiga-

capacities cannot proceed because, by definition, those officials are not persons under the terms of § 1983.”)

9. In *Monell*, 436 U.S. at 663, the Supreme Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), to the extent that *Monroe* had held that local governments could not be sued as “persons” under § 1983. *Monell* holds that local governments may be sued for damages, as well as declaratory and injunctive relief, whenever conduct challenged as unconstitutional “implements or executes” an official policy or custom of the local government. *Monell*, 436 U.S. at 690–691. Rejecting the applicability of vicarious liability, the Court held that “it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.” *Id.* at 694 (emphasis added).

10. *McMillian*, 520 U.S. at 783 (ruling that the Alabama county was not liable under § 1983 because the County Sheriff was a state policymaker).

11. A state official sued in her individual capacity for damages is a “person” under § 1983. See *Hafer v. Melo*, 502 U.S. 21, 23 (1991); see also *Ritchie v. Wickstrom*, 938 F.2d 689, 692 (6th Cir. 1991) (Eleventh Amendment would not bar suit against individual sued as policymaker for state institution, even “[i]f the State should voluntarily pay the judgment or commit itself to pay as a result of a negotiated collective bargaining agreement”); *Kroll v. Bd. of Trustees of U. of Ill.*, 934 F.2d 904, 907 (7th Cir. 1991) *cert. denied*, 502 U.S. 941 (1991). (“Personal-capacity suits raise no [E]leventh [A]mendment issues.”)

12. A public official performing a discretionary function enjoys qualified immunity in a civil action for damages, provided his or her “conduct does not violate clearly established [federal] statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Author has addressed the many problems raised by qualified immunity in other articles and will not address those issues here. See e.g. Karen M. Blum, *Recent Developments in the Law of Qualified Immunity*, in *Civil Rights Litigation and Attorneys Fees Annual Handbook* Vol. 18, 4-1 (Steven Saltzman ed., West 2002); Karen M. Blum, *Qualified Immunity: A User’s Manual*, 26 Ind. L. Rev. 187 (1993).

13. See e.g. *McMillian*, 520 U.S. at 804–805 (Ginsburg, Stevens, Souter & Breyer, J.J., dissenting):

A sheriff locally elected, paid, and equipped, who autonomously sets and implements law enforcement policies operative within the geographic confines of a county, is ordinarily just what he seems to be: a county official. . . . The Court does not appear to question that an Alabama sheriff may still be a county policymaker for some pur-

tion in which sheriffs have contested their status as local officials and have succeeded in defeating attempts by plaintiffs to pursue official-capacity claims against them.¹⁴ The practical import of these cases is tremendous for plaintiffs who suffer serious constitutional injuries caused by official policies or customs that are implemented by individuals who may be protected by the qualified-immunity defense in their individual capacities and whose status as state officials makes recovery against the entity impossible.¹⁵ With no federal remedy for damages against the government entity, plaintiffs must resort to state substantive law and state courts, often encountering damages caps¹⁶ and state law immunities,¹⁷ and no provisions for attorney's fees.¹⁸

The implications for sheriffs and those who defend them are also significant. If the sheriff, in performing law enforcement or jail operations functions, is classified as a state official, plaintiffs

poses, such as hiring the county's chief jailor. . . . And, as the Court acknowledges, under its approach sheriffs may be policymakers for certain purposes in some States and not in others. . . . The Court's opinion does not call into question the numerous Court of Appeals decisions, some of them decades old, ranking sheriffs as county, not state, policymakers.

14. See e.g. *Lancaster v. Monroe County*, 116 F.3d 1419, 1429 (11th Cir. 1997) (Florida sheriff claims immunity); *DeGenova v. Sheriff of DuPage County*, 209 F.3d 973, 977 (7th Cir. 2000) (Illinois sheriff claims immunity); *Manders v. Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003) (Georgia sheriff claims immunity).

15. For example, in *Harris v. Hayter*, 970 F. Supp. 500, 501–502 (W.D. Va. 1997), the newly elected Democratic sheriff failed to reappoint investigators who were employed under the previous Republican sheriff. The investigators brought a § 1983 claim against the sheriff both in his official capacity as sheriff and in his individual capacity, claiming a violation of their First Amendment right of political association. *Id.* at 501. The court determined that Eleventh Amendment immunity protected the sheriff in his official capacity. *Id.* at 502. The court also determined that the plaintiffs' pleadings were not sufficient to show that the sheriff was not protected by qualified immunity in his individual capacity. *Id.* at 506. Therefore, the court dismissed the complaint against the sheriff, leaving the plaintiffs with only the possibility of equitable relief in other proceedings. *Id.*

16. See e.g. Mass. Gen. Laws Ann. ch. 258 § 2 (West 2003) (imposing \$100,000 limitation per plaintiff); see also *Hallet v. Town of Wrentham*, 499 N.E.2d 1189, 1193 (1986) (\$100,000 limitation applies to "total recovery by the executor or administrator in the wrongful death action, and not separately to each beneficiary's damages"); *Irwin v. Ware*, 467 N.E.2d 1292, 1309 (1984) (total damages recoverable by a victim of a public employee's negligence is \$100,000, no matter how many separate "claims" the plaintiff may have).

17. See e.g. *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992) (officer and municipality protected by official immunity for decisions made in course of vehicular pursuit).

18. See e.g. *Beebe v. Pierce*, 521 P.2d 1263, 1265 (Colo. 1974) (generally, attorney's fees are not available to a prevailing party in an ordinary state law tort action). The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b), provides that the prevailing party in actions brought under several civil rights statutes, including § 1983, is entitled to attorney's fees.

will be forced to pursue claims against the sheriff only in his individual capacity.¹⁹ Unless the sheriff can successfully invoke the qualified-immunity defense, there is a risk of personal liability.²⁰ Insurers for the county may refuse to defend or pay judgments rendered against a sheriff in his individual capacity, when the sheriff is deemed a state, not a county, official.²¹ Attorneys who defend county officials may refuse to defend county sheriffs who are state policymakers for purposes of the suit.²² State attorney general offices may face the prospect of defending suits brought all over the state against sheriffs and their deputies or, at least, funding the costs of defense by private attorneys.²³

After a brief review of *McMillian* and the analytical groundwork set out by the Supreme Court in that decision, this Article will survey recent developments in the case law, focusing on post-*McMillian* decisions in the Eleventh, Seventh, and Ninth Circuits, as well as cases from California's Supreme Court, that have engaged in the most comprehensive treatment of the many problems raised by § 1983 suits against sheriffs.²⁴ The major criticism this Author directs at *McMillian* is its total failure to provide a clear test as to what factors of state law should be determinative

19. *Hafer*, 502 U.S. at 30–31 (“[T]he Eleventh Amendment does not erect a barrier against suits to impose ‘individual and personal liability’ on state officials under § 1983.”).

20. *Lancaster*, 116 F.3d at 1431 (ruling that a sheriff who is immune in his official capacity is nevertheless liable in his individual capacity when he cannot assert qualified immunity).

21. Some states, however, do have statutory provisions for representation and indemnification of state officials when they are sued for acts or omissions occurring during the scope of their official duties. See e.g. Wash. Rev. Code §§ 4.92.060, 4.092.070 (2004) (representation); Wash. Rev. Code § 4.92.075 (indemnification).

22. See e.g. *Carver v. Condie*, 2000 WL 204240 at *1 (N.D. Ill. Nov. 9, 2000) (Illinois county refuses to represent sheriff in § 1983 and Title VII claims), *vacated sub. nom. Carver v. Sheriff of LaSalle County*, 324 F.3d 947 (7th Cir. 2003).

23. According to Attorney Robert Spence, a member of the Legal Advisors Section of NSA, the Attorney General's Office in Alabama has refused to take on the defense of the state's sheriffs, not having sufficient resources to do so and not wanting to infringe on the practice of many private attorneys who represent counties and their sheriffs. E-mail from Robert Spence, Gen. Counsel, Hubbard, Smith, McIlwain, Brakefield & Browder, to Karen Blum, Prof. L., Suffolk U. Sch. L., *A NSA White Paper on Election vs. Appointment to Sheriff Office/Department* (Aug. 5, 2004, 1:12 p.m. EDT); see e.g. *Whatcom County v. State*, 993 P.2d 273, 280 (Wash. App. Div. 2000) (county prosecutor and county prevailed in suit against state, seeking order to compel Attorney General of state to defend county prosecutor in suit alleging negligence and violation of civil rights).

24. See *infra* appendix for a breakdown of the most significant post-*McMillian* federal and state cases in each Circuit.

as a matter of federal law in the sheriff-status analysis. While *McMillian* mandates an analysis that is both state and function specific, and, thus, one would anticipate differences in outcome, there appears to be no consistency to the weight afforded various factors in the lower courts' analysis. Many of the opinions read like an Odyssean voyage through state law in search of a key to classification. Depending on the particular route taken and how long one lingers in a chosen provision of the state's constitution or laws, sheriffs have been regarded as (1) state policymakers or arms of the state,²⁵ (2) county officials,²⁶ or (3) independent, autonomous officers, not controlled by the county, but not arms of the state.²⁷ The classification is dictated largely by how much weight is given to the source of ultimate control, the source of direct control, or the source of funding judgments.²⁸ In deciding the

25. See e.g. *Manders v. Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003) (en banc) (sheriff in his official capacity is an arm of the State in establishing use-of-force policy at the jail). In this Author's opinion, much of the confusion that erupts in the status-of-sheriffs cases stems from the confluence of Supreme Court decisions dealing with the concept of "policy-maker" under § 1983 and arm of the state under the Eleventh Amendment. While the "policymaker" question is a statutory one governed by an interpretation of § 1983, the arm-of-the-state analysis flows from Eleventh Amendment principles. The Supreme Court has recognized that these are separate inquiries but has stated that "in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it." *Will*, 491 U.S. at 66, 67.

26. See e.g. *Brewster v. Shasta County*, 275 F.3d 803, 808 (9th Cir. 2001) (sheriff acts for county when investigating crime and when administering jails).

27. See e.g. *Franklin v. Zaruba*, 150 F.3d 682, 685 (7th Cir. 1998) (According to the defendant, if sheriffs in Illinois are not agents of the county for purposes of holding the county liable under respondeat superior, then sheriffs must therefore be agents of the state. This argument overlooks a crucial third possibility that we have found to be dispositive in other cases—namely, that the sheriff is an agent of the county sheriff's department, an independently elected office that is not subject to the control of the county in most respects.).

28. The significance of different methods of weighing these factors was made clear in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003). The *Manders* court used a four-part test to ascertain "whether [a sheriff was] an 'arm of the state': (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *Id.* at 1309. The majority found that, when "the first two factors weigh heavily in favor of immunity, and the third factor tilts that way as well," a state need not be responsible for judgments against the entity to be an arm of the state. *Id.* at 1328. Judge Anderson disagreed, asserting that the majority "overemphasizes the control factor and underestimates the treasury factor." *Id.* at 1331 (Anderson, Tjoflat, Birch & Wilson, J.J., dissenting). The majority and dissenting opinions reach different conclusions as to whether the sheriff was an arm of the state, in part because of the different weights assigned to the four factors. *Id.* at 1329 (majority), 1332 (Anderson, Tjoflat, Birch & Wilson, J.J., dissenting).

weight to be afforded each factor, judges seemingly are guided more by their preferences and prejudices than by any principles of federal law flowing from Supreme Court pronouncements.²⁹ The cases suggest a pressing need for the Supreme Court to return to this issue. In some states, there are conflicting opinions from state and federal courts, with the result that the status of the sheriff turns on the choice of state or federal forum. Courts and litigants need more predictability and uniformity in the approach to this question.³⁰

This Author urges the Court to establish clear principles that would give due respect to concerns of federalism, allow for variations in structures of state and local governments, least disrupt settled practices and expectations with regard to suits brought against county sheriffs, and support the underlying purpose of § 1983—the provision of a meaningful remedy for those whose constitutional rights have been violated by persons acting under color of state law.

II. McMILLIAN v. MONROE COUNTY

In *McMillian*, a five-member majority of the Supreme Court affirmed the decision of the Court of Appeals for the Eleventh Circuit which found that a county sheriff in Alabama is not a final policymaker for the county in the area of law enforcement.³¹ The petitioner was convicted of capital murder and sentenced to death.³² The Alabama Court of Criminal Appeals reversed because the State had suppressed statements and other exculpatory evidence.³³ The petitioner, having spent six years on death row,³⁴

29. In *Manders*, for example, the dissent uses the Supreme Court's decision in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), to argue that the state treasury factor is the most important factor. *Manders*, 338 F.3d at 1330. The majority, however, asserts that *Hess* does not make the state treasury factor dispositive; rather, the majority uses the language in *Hess* to infer that the state control factor is important. *Id.* at 1325 (majority).

30. See e.g. *Cortez v. County of L.A.*, 294 F.3d 1186, 1190 (9th Cir. 2002) (sheriff acting in administrative capacity in county jail is a county official); *Venegas v. County of L.A.*, 87 P.3d 1, 3 (Cal. 2004) (“[S]heriffs act on behalf of the state when performing law enforcement activities.”).

31. *McMillian*, 520 U.S. at 793.

32. *Id.* at 783.

33. *Id.*

34. *Id.*

filed a § 1983 lawsuit in the United States District Court for the Middle District of Alabama, naming Monroe County, as well as Sheriff Tate and Investigator Ikner, both in their official capacities.³⁵ The petitioner claimed the Sheriff and investigator, both acting as officials of Monroe County, intimidated a witness into making false statements and suppressed exculpatory evidence.³⁶

The district court dismissed claims against Monroe County and the official capacity claims against Tate and Ikner.³⁷ The court held that Alabama counties have no authority to make policy in the area of law enforcement, thus actions taken by Tate and Ikner could not represent Monroe County's law enforcement policy.³⁸ The petitioner appealed the decision as to Sheriff Tate, and the Eleventh Circuit affirmed.³⁹ The parties agreed that Sheriff Tate was the final policymaker with respect to law enforcement decisions,⁴⁰ but certiorari was granted to resolve the question as to whether Alabama sheriffs are policymakers for the state or for the county when they act in a law enforcement capacity.⁴¹

In resolving the question, the Supreme Court set out two guiding principles.⁴² First, the analysis is context- or function-specific.⁴³ Chief Justice Rehnquist noted that "[o]ur cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue."⁴⁴ Thus, in *McMillian*, the question was whether an Alabama sheriff was a state or county official when engaged in matters of law enforcement.⁴⁵ Second, although the policymaker question is a matter of state law,⁴⁶ the question of local government liability under

35. *Id.* at 783–784. The petitioner also named Simon Benson, an investigator with the Alabama Bureau of Investigation, but because Benson was not named in his official capacity, the Court did not consider the claim against him. *Id.* at 783–784.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 785–786.

42. *Id.* at 785.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 786. In a series of cases, the Supreme Court has consistently held that the question of who is a final policymaker for purposes of attributing liability to a government

§ 1983 is a question of federal law, in which the state's characterization of the government entity involved is informative but not determinative.⁴⁷

In turning to state law, the Court first examined the treatment of county sheriffs in the Alabama Constitution.⁴⁸ While county sheriffs had always been designated as constitutional officers to be elected by the county electorate, it was in 1875 that county sheriffs were first explicitly included in the list of the state's executive department.⁴⁹ This classification of sheriffs as members of the state executive department was solidified by the framers of the 1901 Alabama Constitution.⁵⁰ First, "neglect" by sheriffs that resulted in prisoners being abducted and lynched was made an impeachable offense.⁵¹ Second, impeachment was moved from the county to the state Supreme Court, where the governor could order the commencement of impeachment proceedings.⁵² The Supreme Court found these provisions, along with the Alabama Supreme Court's interpretation of them,⁵³ convincing support for the proposition that Alabama sheriffs were to be viewed as state officials when engaged in law enforcement.⁵⁴

The United States Supreme Court next reviewed provisions of the Alabama Code.⁵⁵ Pursuant to § 36-22-3,⁵⁶ sheriffs must execute orders of any state court, within the county or outside the county.⁵⁷ For the Court, the most telling provision of the Code was that it gave sheriffs the "complete authority to enforce the state

entity under § 1983 is a question of state law. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

47. *McMillian*, 540 U.S. at 786. The Court in *McMillian* reinforced the concept that a state's action to label "an official who clearly makes county policy" as a "state official" does not bind a federal court. *Id.*

48. *Id.* at 787.

49. *Id.*

50. *Id.* at 788.

51. *Id.*

52. *Id.*

53. See *Parker v. Amerson*, 519 So. 2d 442, 443-444 (Ala. 1987) (relying primarily on the Alabama Constitution to hold that Alabama sheriffs are state officers and that state tort claims against sheriffs for official acts are suits against the state, not the county).

54. *McMillian*, 520 U.S. at 789.

55. *Id.*

56. Ala. Code § 36-22-3(1)-(2) (1991).

57. *McMillian*, 520 U.S. at 789.

criminal law in their counties.”⁵⁸ Under the Code, the governor or the attorney general may direct sheriffs to investigate crimes within their counties and, upon completion of an investigation, a sheriff is required to submit a written report to the state official in charge of the investigation.⁵⁹ In contrast, neither counties nor their governing bodies, county commissions, had any powers with respect to law enforcement matters.⁶⁰ Finally, the Court noted that the salaries of sheriffs are set by the state legislature, not by the county commissions.⁶¹

In response, the petitioner argued that the sheriff’s salary is actually paid by the county, the county provides equipment to the sheriff’s office, the sheriff’s jurisdiction is limited to the county, and the sheriff is elected by local voters in each county.⁶² However, the Court found those factors insufficient to tip the balance in favor of the petitioner.⁶³

Chief Justice Rehnquist concluded by addressing two of the petitioner’s concerns.⁶⁴ He explained that it was perfectly consistent with the history of sheriffs in England,⁶⁵ and in this country,

58. *Id.* at 790 (citing Ala. Code § 360-22-3(4)).

59. *Id.* at 791 (citing Ala. Code § 36-22-5).

60. 520 U.S. at 791 (citing Ala. Code § 11-3-11 (1989)).

61. *Id.* (citing Ala. Code § 36-22-16).

62. *Id.*

63. *Id.*

64. *Id.* at 793.

65. *Id.* The Court explained:

English sheriffs (or “shire-reeves”) were the King’s “reeves” (officers or agents) in the “shires” (counties), at least after the Norman Conquest in 1066. . . . Although chosen locally by the shire’s inhabitants, the sheriff did all the king’s business in the county, . . . and was the keeper of the king’s peace.

Id. (internal citations omitted). For an interesting and relatively brief history of the development of the Office of the Sheriff in England, the United States, and in North Carolina in particular, see Office of the Sheriff, Dare County, N.C., <http://darenc.com/depts/sheriff/sheriff.htm> (accessed May 10, 2005). In some states, a sheriff is deemed to be operating an “Office of the Sheriff,” while in others, the sheriff heads the “Sheriff’s Department.” Richard Weintraub, General Counsel for the NSA, has suggested that the designation may have some significance for purposes of treating the sheriff as a state agent *vel non*. According to Mr. Weintraub,

the Office of the Sheriff is not simply another “department” of county government. The internal operation of an Office of Sheriff is the sole responsibility of the elected sheriff. County department heads, on the other hand, are subordinate to a county governing body, because a “department” is truly only a division of county government. The Office of Sheriff is a statutory/constitutional office having exclusive powers and authority under state law and/or state constitution. These inherent powers are not subject to the dictates of a local county governing body.

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to have some local variation in state law enforcement policies, dependent upon particular sheriffs' practices in making arrests or securing evidence.⁶⁶ Second, a natural product of our federal system would be to have sheriffs characterized differently from state to state, depending on the structure and role of county government in each state.⁶⁷ Thus, the Court observed, "since it is entirely natural that both the role of sheriffs and the importance of counties vary from [s]tate to [s]tate, there is no inconsistency created by court decisions that declare sheriffs to be county officers in one [s]tate, and not in another."⁶⁸ Justice Ginsburg, writing for the dissent, concluded that

a sheriff locally elected, paid, and equipped, who autonomously sets and implements law enforcement policies operative within the geographic confines of a county, is ordinarily just what he seems to be: a county official. Nothing in Alabama law warrants a different conclusion. It makes scant sense to treat sheriffs' activities differently based on the presence or absence of state constitutional provisions of the limited kind Alabama has adopted.⁶⁹

The dissent took some refuge in its belief that the decision, while "misguided, does little to alter § 1983 county and municipal liability in most jurisdictions."⁷⁰ Although it may still be too early to tell, the case law since *McMillian* belies the dissent's impression that the decision would be "Alabama-specific" and of "limited reach."⁷¹ The irony is that a restructuring of the Alabama Consti-

Difference, *Sheriffs Magazine* 51, 53 (Nov.–Dec. 2003). While such distinctions may inform the analysis and may reflect the sheriff's status as a constitutional officer, the state's "labeling" of the sheriff as an "office" or "department" should not be controlling on the federal arm-of-the-state analysis and does not appear to be a factor considered by the state or federal courts in their resolution of the sheriff's status for § 1983 purposes. For purposes of this Article, the terms "sheriff, in his official capacity," "sheriff's office," and "sheriff's department" will be used interchangeably.

66. *McMillian*, 520 U.S. at 794.

67. *Id.* at 795.

68. *Id.*

69. *Id.* at 804. (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting).

70. *Id.* at 805.

71. *Id.* at 804. Shortly after the Supreme Court's decision in *McMillian*, the Eleventh Circuit, sitting en banc, held that sheriffs in Alabama acted as policymakers for the state in operating county jails. *Turquitt v. Jefferson County*, 137 F.3d 1285, 1291 (11th Cir. 1998) (en banc). The opinion in *Turquitt* was unanimous and turned, in large part, on the lack of control of county commissions over the sheriffs in the running of their jails. *Id.* at

tution intended to make sheriffs more accountable⁷² ultimately resulted in a Supreme Court decision sheltering the sheriff's office from damages liability in cases involving civil rights violations attributable to a policy or custom of the sheriff.⁷³ As it turns out, *McMillian* is not so "Alabama-specific" after all.⁷⁴

III. POST-McMILLIAN DEVELOPMENTS IN THE CIRCUITS

A. Eleventh Circuit: Georgia

In *Grech v. Clayton County*,⁷⁵ the Eleventh Circuit Court of Appeals sat en banc, this time turning to the status of Georgia sheriffs and the question of whether a Georgia sheriff was a policymaker for the county or the state with respect to "warrant information on the [Criminal Justice Information System (CJIS)] systems or the training and supervision of his employees in that regard."⁷⁶ No opinion mustered a majority of the court.⁷⁷ The plurality opinion, written by Judge Frank M. Hull, relied heavily on *McMillian* and the lack of control that the county had over the sheriff's law-enforcement function in general and "particularly for the entry and validation of warrants on the CJIS systems and the training and supervision of his employees in that regard."⁷⁸ The plurality concluded that "Georgia's Constitution has made the

1292. Under Alabama law, the county commission was responsible only for erecting and maintaining the physical plant of the jail. *Id.* at 1289, 1290; see also *McClure v. Houston County*, 306 F. Supp. 2d 1160, 1163 (M.D. Ala. 2003) (holding Alabama sheriffs are policy-makers for the state, not the county, when engaged in hiring, training, and supervising deputy sheriffs).

72. See e.g. *Parker v. Amerson*, 519 So. 2d at 443-444 ("The failure of county courts to punish sheriffs for neglect of duty and sheriffs' acquiescence in mob violence and ruthless vigilantism ostensibly led Governor Jones to believe that sheriffs must be held accountable to a higher and more central authority, the Supreme Court, and that this accountability would operate to guarantee the political rights of prisoners.") (citing Off. Proc. of the Const. Conv. of 1901 (Vol. 1) at 887-890); see also *Streit v. County of L.A.*, 236 F.3d 552, 561 n. 11 (9th Cir. 2001) ("Historically, Alabama county sheriffs were squarely placed under state control to stop them from assisting lynch mobs in killing black prisoners.") (citing *McMillian*, 520 U.S. at 788).

73. *McMillian*, 520 U.S. 781.

74. *Id.* at 804.

75. 335 F.3d 1326 (11th Cir. 2003) (en banc).

76. *Id.* at 1327. Grech sued just the County, alleging that "his constitutional rights were violated when he was arrested in 1998 pursuant to a 1985 bench warrant that the Sheriff's Office failed to remove from the CJIS systems." *Id.* at 1328.

77. *Id.* at 1347 n. 46, 1350.

78. *Id.* at 1332.

sheriff a constitutionally protected office independent from the defendant Clayton County and prevented the defendant Clayton County from taking any action to affect the sheriff's office."⁷⁹ Based on the lack of control vested in the county commission, the plurality found that Georgia sheriffs were state officials when performing any law-enforcement function.⁸⁰ Judge Hull recognized, however, that the lack of a majority opinion made Judge R. Lanier Anderson III's concurring opinion, the narrowest ground on which a majority coalesced, the holding of the court.⁸¹ Judge Anderson agreed "that, with respect to the particular function at issue in this case, the Sheriff is acting on behalf of the state."⁸² He saw no need to address the broader question as to whether sheriffs in Georgia were state officials for law enforcement purposes generally.⁸³ Judge Rosemary Barkett likewise agreed "that the activities of this county sheriff in the particular area of maintaining and recalling criminal warrants for a state database did not implicate policymaking on behalf of the county,"⁸⁴ but took issue with the plurality's characterization of Georgia sheriffs as state officials for law enforcement purposes generally.⁸⁵ Judge Barkett first underscored the difference between the Georgia and Alabama constitutions with respect to the classification of sheriffs.⁸⁶ Unlike the Alabama constitution, the Georgia constitution clearly designates sheriffs as "county officers."⁸⁷ Furthermore, Judge Barkett emphasized the fact that sheriffs are independent constitutional officers under Georgia law.⁸⁸ The fact that they are not

79. *Id.* at 1335.

80. *Id.* at 1332–1333 (citing Ga. Const. art. IX, § 2, ¶ 1(c)(1)).

81. *Id.* at 1347 n. 46.

82. *Id.* at 1349. (Anderson, Birch & Wilson, J.J., concurring specially).

83. *Id.*

84. *Id.* at 1350 (Barkett, Tjoflat, & Kravitch, J.J., concurring in result, and Anderson, Birch, & Wilson, J.J., joining in Part I).

85. *Id.*

86. *Id.* at 1352. While the plurality recognized this difference, Judge Hull concluded that such "labeling" by the state was not determinative. *Id.* at 1332 n. 10 (plurality). However, as Judge Barkett notes, the potential problem of "labeling" identified by the Supreme Court in *McMillian* evidenced a concern about labeling local officials as state officials in order to escape liability under § 1983, a concern that is "irrelevant where (as here) there is no contention that the state has mislabeled an officer to avoid liability." *Id.* at 1356 (Barkett, Tjoflat, & Kravitch, J.J., concurring in result, and Anderson, Birch, & Wilson, J.J., joining in Part I).

87. *Id.* at 1352 (citing Ga. Const. art. IX, § 1, ¶ III(a)).

88. *Id.* at 1352, 1362.

subservient to or employees of the county commission does not make them state employees.⁸⁹ As independent elected constitutional officers, sheriffs share policymaking authority with the county commission and are answerable to the county electorate.⁹⁰

Right on the heels of *Grech*, the Eleventh Circuit Court managed to garner a majority opinion in an en banc decision dealing with the status of Georgia sheriffs in setting use-of-force policies at county jails.⁹¹ In *Manders v. Lee*,⁹² a majority held that Georgia sheriffs function as “arms of the state” when establishing such policies.⁹³ In 1997, Willie Manders was charged with felony obstruction of an officer and was brought to the county jail in Clinch County, Georgia.⁹⁴ Manders alleged that, as he was being escorted to a holding cell, Deputy Brown, the chief jailer, and a city police officer, “repeatedly struck him across the head, neck, and face and banged his head against a wall.”⁹⁵ In his § 1983 suit, Manders named as defendants both the County and Sheriff Peterson, in his official capacity.⁹⁶ Sheriff Peterson, as the elected sheriff, was “responsible for the operation of the jail in Clinch County, Georgia, for establishing the use-of-force policy at the jail, and for hiring, training, and disciplining his deputies who work in the jail.”⁹⁷ Although the Sheriff’s Office policy and procedure manual required that all “case[s] involving physical or defensive force be reported in writing to the Sheriff,” Manders alleged that Deputy Brown made no such report, nor did Sheriff Peterson investigate the incident.⁹⁸

The case came to the Eleventh Circuit Court on interlocutory appeal from the district court’s denial of Eleventh Amendment

89. *Id.* at 1362 n. 36.

90. *Id.* at 1363.

91. *Manders*, 338 F.3d 1304.

92. *Id.*

93. *Id.* at 1305–1306. The court split six to five. *Id.* at 1305, 1132. Senior Circuit Judge Phyllis A. Kravitch, as a member of the original panel that had decided *Grech*, chose to participate in the *Grech* en banc hearing pursuant to 28 U.S.C. § 46(c). 335 F.3d at 1327. Judge Kravitch was not on the panel in *Manders*, and thus, did not have the option of participating in its en banc proceeding. 338 F.3d at 1305.

94. *Id.* at 1306.

95. *Id.*

96. *Id.* at 1307.

97. *Id.* at 1306.

98. *Id.* at n. 2.

immunity to Sheriff Peterson in his official capacity.⁹⁹ The majority opinion, written by Judge Hull,¹⁰⁰ the author of the plurality opinion in *Grech*,¹⁰¹ began with the factors to be considered in deciding whether Sheriff Peterson was functioning as an arm of the state for purposes of Eleventh Amendment immunity when he was engaged in establishing the force policy at the jail and in training and disciplining his deputies with respect to the policy.¹⁰² The arm-of-the-state analysis required consideration of “(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity.”¹⁰³ While the question was admittedly one of federal law, the court noted that state law would necessarily inform the answer to the federal question.¹⁰⁴ Thus began the court’s lengthy excursion into the governmental structure of the Sheriff’s Office, the State and the County, and their relationships to one another under Georgia law.¹⁰⁵ In examining the Sheriff’s Office, the court looked closely at the particular functions assigned to that office under state law.¹⁰⁶

An examination of the Georgia Constitution and statutes led the majority to the following conclusions as to the governmental structure: (1) the sheriff’s office is an elected constitutional office subject to control by and deriving its authority from the state legislature and not subject to control by the county;¹⁰⁷ (2) the county is a separate corporate entity, independent of the sheriff’s office,

99. *Id.* at 1307–1308. The Supreme Court has held that a denial of Eleventh Amendment immunity is subject to interlocutory appeal. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The Eleventh Circuit Court acknowledged that the case might have been disposed of on the statutory issue of whether the Sheriff, sued in his official capacity, was a “person” within the meaning of § 1983. *Manders*, 338 F.3d at 1328 n. 53; *see also supra* n. 7 and accompanying text (discussing the Supreme Court’s interpretation of the Eleventh Amendment). However, because the statutory issue was neither briefed nor argued on appeal, the court did not address the issue. *Manders*, 338 F.3d at 1328 n. 53.

100. *Id.* at 1305.

101. *Grech*, 335 F.3d at 1327.

102. *Manders*, 338 F.3d at 1308–1309.

103. *Id.* at 1309 (quoting *Micosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm.*, 226 F.3d 1226, 1231 (11th Cir. 2000)).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1310.

required by state law to fund the sheriff's office, but with no authority to control how the sheriff spends the budget;¹⁰⁸ (3) deputies are employees of the sheriff, not employees of the county;¹⁰⁹ and (4) the Georgia Constitution's designation of sheriffs as "county officers" merely "reflects a geographic label defining the territory in which a sheriff is elected and mainly operates."¹¹⁰

The court next turned to the functions assigned to the sheriff's office under Georgia law.¹¹¹ Although the majority treated the facts in *Manders* as raising a question only with respect to the use-of-force policy at the jail and training in that regard, the court surveyed the three primary duties delegated to the sheriff's office by state law under the headings of law enforcement, state courts, and corrections.¹¹² With respect to law enforcement, the majority concluded that the sheriff, while elected by the county electorate for the purpose of maintaining peace within the jurisdiction of the county, "directly represents the sovereignty of the State, has no superior in his county, and performs state functions for the sovereign in enforcing the laws and keeping the peace."¹¹³ The court's detailed examination of Georgia state law was for the purpose of determining how the State treated the sheriff's office so as to inform the federal court in its analysis of the federal question of whether the sheriff "is an 'arm of the State' in establishing force policy at the jail and in training and disciplining his deputies in that regard."¹¹⁴ The court concluded on this first factor that the sheriff wears a "state hat" when engaged in use-of-force policy in the jail.¹¹⁵

The Eleventh Amendment analysis next turned to the question of control over the sheriff's force policy and training of depu-

108. *Id.* at 1311.

109. *Id.*

110. *Id.* at 1312.

111. *Id.*

112. *Id.* The court reviewed a plethora of state statutes that delegated certain duties to county sheriffs related to the state's criminal justice system and criminal matters entertained by the state superior courts. *Id.* at 1314–1315. Likewise, the court examined statutes assigning to county sheriffs various corrections duties regarding state offenders. *Id.* at 1315–1318.

113. *Id.* at 1313.

114. *Id.* at 1319.

115. *Id.*

ties.¹¹⁶ Georgia law requires the Georgia Sheriffs' Association to provide annual training of sheriffs in all counties¹¹⁷ and mandates sanctions for noncompliance.¹¹⁸ Furthermore, the court noted that state law vested in the Governor powers to investigate and suspend a sheriff with regard to misconduct in performance of his or her duties.¹¹⁹ Because counties have no control over sheriffs in their use-of-force policies or training, the majority found the "control factor also weighs heavily in favor of Sheriff Peterson's entitlement to Eleventh Amendment immunity."¹²⁰

On the third factor in the Eleventh Amendment analysis, the funding of the entity, the majority noted that the state funded the annual training of sheriffs, assumed the costs of any disciplinary proceedings initiated by the Governor against sheriffs, and paid expenses of certain state prisoners assigned to county jails.¹²¹ Conceding that counties were primarily saddled with funding sheriffs' budgets, the majority drew on the similar situation in Alabama and the Supreme Court's discounting of the funding of the sheriff's budget as a major factor in the policymaker analysis in *McMillian*.¹²² While the county was responsible for providing the budget for the sheriff's office, this was so only because state law mandated it, and there was no element of control over force policies or training policies connected to the funding power.¹²³

Finally, the majority turned to the question of who would pay any adverse judgment rendered against the Sheriff in his or her official capacity.¹²⁴ A review of Georgia law led the majority to conclude that neither the county nor the state was obliged to pay a judgment against the sheriff in his official capacity.¹²⁵ Rather, such a judgment would be paid from the budget of the sheriff's office, which, in the case of a large adverse judgment, would un-

116. *Id.* at 1320.

117. *See id.* (citing Ga. Code Ann. § 15-16-3(d)-(e) (Harrison 2001) (stating that Georgia Sheriffs' Association is required by Georgia law to provide annual training for Georgia sheriffs using state or federal funds)).

118. 338 F.3d at 1320-1321 (citing Ga. Code Ann. § 15-16-3(e)(1), (4)).

119. *Id.* at 1321 (citing Ga. Code Ann. § 15-16-3(e)(1), (4)).

120. *Id.* at 1322.

121. *Id.* at 1323.

122. *Id.* at 1324 n. 45.

123. *Id.* at 1324.

124. *Id.*

125. *Id.* at 1326-1327.

doubtedly have implications for both county and state funds.¹²⁶ Recognizing that the Supreme Court has identified the impact on the state treasury to be a “core concern” of the Eleventh Amendment,¹²⁷ the court took the position that the “state-treasury-drain element” was determinative only when the judgment results in a significant drain on state funds.¹²⁸ Where state funds are not substantially affected, the other arm-of-the-state¹²⁹ factors still may weigh in favor of immunity.¹³⁰ Having found that the first three factors—state treatment of the entity, state control, and state involvement with respect to funding the particular functions of the sheriff’s office at issue—weighed in favor of immunity, the majority concluded that “at a minimum, the liability-for-adverse-judgment factor does not defeat Sheriff Peterson’s immunity claim.”¹³¹ In its conclusion, the court underscored two points. First, its decision addressed only the status of Georgia sheriffs with respect to the particular functions involved in this case: use-of-force policy at the jail, and training and disciplining of deputies in that regard.¹³² Second, the parties did not argue and the court did not address whether “the sheriff’s office is an independent,

126. *Id.* at 1327.

127. *Hess*, 513 U.S. at 48, 51.

128. *Manders*, 338 F.3d at 1327 n. 51.

129. *Id.* at 1309.

130. *Id.*

131. *Id.* at 1328–1329.

132. *Id.* In cases following *Manders*, lower courts have relied on the decision to find sheriffs sued in their official capacity are arms of the state, protected by Eleventh Amendment immunity in contexts other than use-of-force policy at the jail. *See e.g. Mladek v. Day*, 293 F. Supp. 2d 1297, 1304 (M.D. Ga. 2003) (concluding that sheriff and deputies, to extent sued in official capacity, were entitled to Eleventh Amendment immunity for functions performed by sheriff and deputies in context of arrest and detention of plaintiff); *Bunyon v. Burke County*, 306 F. Supp. 2d 1240, 1251–1255 (S.D. Ga. 2004) (analyzing the arm-of-the-state factors and concluding that the sheriff was entitled to Eleventh Amendment immunity for conduct “in establishing and implementing bail and release procedures for inmates being held on charges pending in a municipality”). The Eleventh Circuit Court has recently found *Manders* controlling in a case involving conditions of confinement at a county jail. *See Purcell ex rel. Estate of Morgan v. Toombs County*, 400 F.3d 1313, 1325 (11th Cir. 2005) (“Although we declined to determine that a Georgia sheriff wears a ‘state hat’ for all functions, we decided that a sheriff’s ‘authority and duty to administer the jail in his jurisdiction flows from the State, not [the] County’. . . . Thus *Manders* controls our determination here; Sheriff Kight functions as an arm of the State—not of Toombs County—when promulgating policies and procedures governing conditions of confinement at the Toombs County Jail. Accordingly, even if Purcell had established a constitutional violation, Sheriff Kight would be entitled to Eleventh Amendment immunity from suit in his official capacity.”).

constitutional, elected office that is neither the State nor the county,”¹³³ a possibility discussed by Judge Anderson in his dissenting opinion.¹³⁴

Judge Anderson criticized the majority’s opinion for “overemphasiz[ing] the control factor and underemphasiz[ing] the state treasury factor.”¹³⁵ The state control that was operative here was the type of indirect, ultimate control the state exercises with respect to all state-created entities, the type of control the Supreme Court has discounted in its Eleventh Amendment analysis.¹³⁶ With respect to the state treasury factor, the dissent gave great weight to the fact that the state clearly was not required to pay a judgment against the sheriff.¹³⁷ Beyond its disagreement with the emphasis afforded these two factors, the dissent chided the majority for asking the wrong question.¹³⁸ According to Judge Anderson, the question asked should not have been whether the state or the county is implicated by the sheriff’s conduct.¹³⁹ The question is simply whether the sheriff was an arm of the state or not.¹⁴⁰ The court noted that the “fact that the sheriff is not [subject to control] by the county commission [and] that the county has no *respondeat superior* liability for judgments against the sheriff, do not [establish that the] sheriff is an arm of the state” entitled to Eleventh Amendment immunity.¹⁴¹ Thus, for purposes of resolving the question before the court, it would have been sufficient to hold that the sheriff is not an arm of the state, leaving the implications of that holding for another day.¹⁴²

Judge Barkett wrote a lengthy dissent, taking issue with the majority’s analysis on several fronts.¹⁴³ First, she accused the majority of defining “function” in an “unprecedented fashion,” by conflating the concept of function “with what is more properly

133. *Manders*, 338 F.3d at 1328 n. 54.

134. *Id.* at 1331–1332 (Anderson, Tjoflat, Birch, & Wilson, JJ., dissenting).

135. *Id.* at 1331.

136. *Id.* at 1330 (citing *Hess*, 513 U.S. at 47).

137. *Id.* at 1331.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1331–1332.

142. *Id.* at 1332.

143. *Id.* at 1332–1348 (Barkett, Tjoflat, Birch, & Wilson, JJ., dissenting, and Anderson, J., dissenting in part).

deemed a general attribute of the defendant's office, incidental to a range of official functions."¹⁴⁴ The relevant function, according to Judge Barkett, is the operation of the county jail.¹⁴⁵ Use-of-force policy is not a function, but an attribute of the sheriff's office implicated in all functions performed by the sheriff and his deputies.¹⁴⁶ To define the function as use-of-force policy and to locate the source of authority for the exercise of force in state law is to make sheriffs arms of the state in "virtually every function sheriffs have traditionally served."¹⁴⁷ Furthermore, to make Eleventh Amendment immunity turn on the fact that the powers and duties of the office ultimately flow from the general assembly is to confer arm-of-the-state status on all local government entities.¹⁴⁸ Through a different lens, the dissent engaged in its own examination of the four factors¹⁴⁹ controlling the Eleventh-Amendment arm-of-the-state analysis.¹⁵⁰

First, on the factor of how state law defines and treats the sheriff's office, the dissent referenced its discussion in *Grech*¹⁵¹ with respect to the "language, structure, and history of the Georgia Constitution" and its unequivocal designation of sheriffs as "county officers."¹⁵² Sheriffs, in performing their function as "jailers of the counties,"¹⁵³ carry out responsibilities delegated by state law to counties for maintenance of jails and care of prisoners.¹⁵⁴ When engaged in the function of operating county jails, "sheriffs cannot be decreed the arms of the state."¹⁵⁵ The fact that the ultimate source of authority for sheriffs' duties and responsibilities

144. *Manders*, 338 F.3d at 1333.

145. *Id.*

146. *Id.*

147. *Id.* at 1334. The dissent also charged that a theory tying the concept of state agent to state-authorized use of force would extend Eleventh Amendment immunity to all city, county, and private security guards who used force to effectuate arrests pursuant to authority vested in them by state law. *Id.*

148. *Id.* at 1334–1345.

149. *Id.* at 1335–1347.

150. *Id.* at 1309 (majority).

151. *Id.* at 1335 (Barkett, Tjoflat, Birch & Wilson, JJ., dissenting, and Anderson, J., dissenting in part) (discussing *Grech*, 335 F.3d at 1332–1349).

152. *Id.* Judge Barkett noted that this designation would militate against finding sheriffs to be "arms of the state in any of their official functions." *Manders*, 338 F.3d at 1335 (emphasis in original).

153. *Id.* (citing Ga. Code Ann. § 42-4-1(a)).

154. *Id.* (citing Ga. Code Ann. § 42-4-1(a)).

155. *Id.*

with respect to law enforcement, jail operations, and courts is the Georgia General Assembly is not enough to entitle sheriffs to Eleventh Amendment protection.¹⁵⁶ The delegation-of-authority-from-the-state argument proves too much, as all local entities derive their powers from the state.¹⁵⁷ Furthermore, the fact that sheriffs are not answerable to or employed by the county commission, does not translate into sheriffs being arms of the state, but rather “vests them with final policy-making authority over those county functions entrusted to their office.”¹⁵⁸

On the degree-of-control factor, Judge Barkett again blamed the majority’s flawed focus on use-of-force policy as the relevant function for its misguided analysis of the statutory scheme governing sheriffs’ powers in operation of the county jails.¹⁵⁹ The dissent makes a persuasive case that county jails in Georgia are subject to very little direct oversight by the State,¹⁶⁰ that counties in Georgia have broader responsibilities than Alabama counties towards maintenance of the jails and their inmates,¹⁶¹ and that the majority’s reliance on a state training requirement and the Governor’s suspension power as elements of state control “cannot bear the weight assigned them.”¹⁶² As the dissent notes, Georgia law imposes a training requirement for not only sheriffs but also county commissioners as well as city and county police officers.¹⁶³ Furthermore, “the training [of sheriffs] is overseen by the Georgia Sheriffs’ Association, a private organization [consisting of] the state’s elected sheriffs.”¹⁶⁴ The limited suspension power of the Governor conveys no authority to remove a sheriff and does not translate into any real power to control the sheriff in his jail operations function.¹⁶⁵ Ultimately, the dissent’s position is that there is an absence of any direct or meaningful control by the

156. *Id.* at 1336.

157. *Id.* at 1338.

158. *Id.* at 1337 n. 7.

159. *Id.* at 1342.

160. *Id.* at 1339–1342.

161. *Id.* at 1342.

162. *Id.* at 1343.

163. *Id.* at 1343–1344 (citing Ga. Code Ann. § 15-16-3(a), (e)(1)) (training requirement for county commissioners), Ga. Code Ann. §§ 35-8-9, 35-8-21 (training requirement for city and county police officers), and Ga. Code Ann. § 36-20-4 (training requirement for sheriffs).

164. *Manders*, 338 F.3d at 1343 (citing Ga. Code Ann. § 15-16-3(e)(1)).

165. *See id.* at 1344 (citing Ga. Code Ann. § 15-16-26(c) (giving the Governor power to suspend a sheriff for up to 90 days)).

state over sheriffs in the operations of county jails, and the lack of control by county commissioners reflects a separation of powers within the county structure, rendering a county sheriff “not . . . independen[t] *from the county*, but rather [an official with] *independent authority to act for the county* with respect to the functions entrusted his office.”¹⁶⁶

With regard to the funding factor, the divergent views of the majority and the dissent as to the relevant function in question led them to different statutes and different conclusions.¹⁶⁷ The majority focused on the source of funding for the state-mandated hours of training (which the majority assumed included training on use of force),¹⁶⁸ while Judge Barkett underscored the county’s funding of jail construction, maintenance¹⁶⁹ and operation. The dissent found it “undisputed that the *state* exercises no control whatsoever over the sheriff’s expenditures.”¹⁷⁰ Finally, lack of control by the county commissioners did not mean lack of control by the county if one viewed the sheriff as an independent county officer.¹⁷¹

In assessing the impact of an adverse judgment on the state treasury, the dissent agreed that the state was not obligated to pay a judgment rendered against the sheriff, but disagreed that

166. *Id.* at 1343 n. 15 (emphasis in original). The Court of Appeals for the Second Circuit has used such reasoning in finding a sheriff in New York to be a policymaker for the county, not the state, with respect to the existence of a “code of silence” among employees at the jail. In *Jeffes v. Barnes*, 208 F.3d 49, 60–61 (2d Cir. 2000), the court concluded:

In sum, State law requires that the Schenectady County sheriff be elected; County law provides that elected officials are not subject to supervision or control by the County’s chief executive officer; there is only routine civil service supervision over the sheriff’s appointments; State law places the sheriff in charge of the Jail; and the County’s chief executive officer, advised by the County’s attorneys, treats the sheriff, insofar as Jail operations are concerned, as “autonomous.”

The County has pointed us to no provision of State or local law that requires a sheriff to answer to any other entity in the management of his jail staff with respect to the existence or enforcement of a code of silence. We conclude that Sheriff Barnes was, as a matter of law, the County’s final policymaking official with respect to the conduct of his staff members toward fellow officers who exercise their First Amendment rights to speak publicly or to inform government investigators of their co-workers’ wrongdoing.

167. *See Manders*, 339 F.3d at 1323–1324 (majority), 1344–1346 (Barkett, Tjoflat, Birch & Wilson, JJ., dissenting, and Anderson, J., dissenting in part).

168. *Id.* at 1323 (majority).

169. *Id.* at 1345 (Barkett, Tjoflat, Birch, & Wilson, JJ., dissenting, and Anderson, J., dissenting in part).

170. *Id.* at 1346 (emphasis in original).

171. *Id.*

the county was protected as a matter of federal law from such judgments.¹⁷² While counties may not be obligated under state law to defend sheriffs or pay adverse judgments, the dissent thought it significant that state law does authorize county commissions to pay for the defense of civil rights actions brought against sheriffs, a defense counties would have no reason to fund if judgments were to be paid from state funds.¹⁷³ Conceding that there could be a case for Eleventh Amendment immunity even in the absence of a drain on the state treasury, the dissent nevertheless found the fact that Georgia would incur no liability for judgments rendered against county sheriffs a fact that “simply cannot be ignored.”¹⁷⁴ Together with the other factors weighed in the arm-of-the-state analysis, the reality that the state treasury would not be impacted led the dissent to the conclusion that, “[i]n every sense, a suit under 42 U.S.C. § 1983 against a county sheriff alleging mistreatment in a county jail is a suit against a local government.”¹⁷⁵

B. Eleventh Circuit: Florida

In *Hufford v. Rodgers*,¹⁷⁶ the Eleventh Circuit Court of Appeals held that a suit against a Florida sheriff was not barred by the Eleventh Amendment because the Florida Constitution designates the sheriff as a county officer, and the sheriff’s budget, salary and any judgment against him is paid by the county.¹⁷⁷ Recently, the court has reaffirmed the status of a Florida sheriff as a county official who acts for the county and not as an arm of the state when enforcing a county ordinance.¹⁷⁸ In *Abusaid v. Hills-*

172. *Id.* The dissent correctly noted that immunity from suit under state law, with respect to claims asserting violations of state law, does not create immunity from liability under § 1983 for violations of federal rights. *Manders*, 338 F.3d at 1346 (citing *Howlett v. Rose*, 496 U.S. 356, 376–377 (1990)).

173. *Manders*, 338 F.3d at 1347.

174. *Id.*

175. *Id.* at 1347–1348.

176. 912 F.2d 1338 (11th Cir. 1990).

177. In *Cook v. Sheriff of Monroe County*, 2005 WL 552483 (11th Cir. Mar. 10, 2005), the court, without discussion, noted that “[w]hen, as here, the defendant is the county sheriff, the suit is effectively an action against the governmental entity he represents—in this case, Monroe County.” *Id.* at *15. See also *Samarco v. Neumann*, 44 F. Supp. 2d 1276, 1285 (S.D. Fla. 1999) (“For purposes of § 1983 liability, Florida sheriffs are officials of the county, not the state, and thus, do not enjoy Eleventh Amendment immunity from suit.”).

178. *Abusaid v. Hillsborough County Bd. of County Commrs.*, 2005 WL 858296, at *1

borough County Board of County Commissioners,¹⁷⁹ the district court dismissed, on Eleventh Amendment grounds, federal claims of false arrest, malicious prosecution, and conspiracy asserted against the Hillsborough County Sheriff's Office (HCSO). On appeal, the HCSO argued that the Circuit's pre-*McMillian*, pre-*Manders* law with respect to the status of sheriffs in Florida should no longer be controlling and that the court should evaluate the immunity claim in light of the new case law, particularly as it relates to the law enforcement function of sheriffs in Florida.¹⁸⁰ The HCSO noted the constitutional and statutory similarities between sheriffs in Florida and sheriffs in Alabama and Georgia, emphasizing that after *Manders*, the designation of sheriffs as "county officers" in the Florida Constitution is "nothing more than a geographic label defining the territory in which the sheriff is elected and operates."¹⁸¹ In sum, the HCSO maintained that the four arm-of-the-state factors analyzed by the court in *Manders* dictated the same outcome for sheriffs in Florida.¹⁸² In rejecting the arguments made by the HCSO, the court of appeals concluded that

[o]ther than the advent of a function-by-function approach, little has changed since *Hufford* was decided in 1990. The relevant Florida law remains essentially unaltered. Our four-factor test, which *Hufford* applied, remains intact. Moreover, the Supreme Court's holding in *McMillian* that an Alabama sheriff was a policymaker for the state, and this Court's holding in *Manders* that a Georgia sheriff was an arm of the state, do not compel the outcome in this case, since those cases stressed that their conclusions were highly dependent on the particularities of state law.¹⁸³

Applying the four-factor arm-of-the-state test, the court concluded that (1) Florida's constitution and case law treat sheriffs

(11th Cir. Apr. 15, 2005). The plaintiff's claims against the sheriff stemmed from the enforcement of a county ordinance aimed at regulating "Rave" or "Dance Halls," "clubs featuring music and dancing, but not licensed to serve alcohol." *Id.*

179. 2005 WL 858296.

180. Ans. Br. of App. at 10–12, *Abusaid*, slip op.

181. *Id.* at 13 n. 6.

182. *Id.* at 12–19.

183. *Abusaid*, 2005 WL 858296 at *5.

as county officials;¹⁸⁴ (2) while the state retains control over sheriffs in some circumstances,¹⁸⁵ “the Sheriff cannot be deemed to be acting under the state’s control when enforcing a local ordinance;”¹⁸⁶ (3) sheriffs’ budgets are derived from county taxes, not from state funding;¹⁸⁷ and (4) the state is not liable for judgments rendered against sheriffs.¹⁸⁸ In applying the function-by-function approach in *Abusaid*, the court did not treat the function involved as simply one of “law enforcement.” Instead the court was very focused on the fact that it was county or local law that was being enforced. As the court put it, “[t]he relevant ‘function’ in this case is enforcement of a County ordinance.”¹⁸⁹ The court also gave great weight to the fact that a judgment against the sheriff would result in no impact on the state treasury. Indeed, the court stated that “the fact that a judgment against the Sheriff in this case would *not* be paid out of the state treasury is, in itself, a clear marker that the Sheriff is not an arm of the state.”¹⁹⁰ If, as the court suggests, the impact-on-the-state-treasury factor is, *in itself*, enough to take the sheriff out of the arm-of-the-state category, one might wonder why that factor was not sufficient in *Manders*. Because of the limited precedential value of cases decided under the function-by-function approach, it will remain to be seen which functions performed by Florida sheriffs will cloak the office with Eleventh Amendment immunity.

The Eleventh Circuit Court will no doubt speak to the issue again in *Troupe v. Sarasota County*,¹⁹¹ a case currently pending before the court. Unlike *Abusaid*, the function performed in

184. *Id.* at *5 (noting that Florida’s constitution labels sheriffs as “county officers”) (citing Fla. Const. art. VIII. § 1(d)).

185. *Id.* at *7 (noting that under the Florida constitution, the governor has the power to remove a county officer, given extraordinary circumstances) (citing Fla. Const. art. IV, § 7). Florida law empowers the governor to enlist sheriffs to help keep the peace in a state of emergency and Florida law also sets out a list of functions sheriffs must perform. *Id.* at *9 (citing Fla. Stat. § 30.15 (2004)). Despite the assignment of functions by the state, the court concluded that the function involved in this case, the enforcement of a local ordinance, was assigned by the County. *Id.*

186. *Id.* at *10.

187. *Id.* at **11–12.

188. *Id.* at **12–13.

189. *Id.* at *3. The Ordinance was enacted by the County and made the sheriff responsible for enforcement. *Id.*

190. *Id.* at *13 (emphasis in original).

191. No. 8:02-cv-53-T-24MAP (M.D. Fla. filed Jan. 22, 2004).

Troupe did not involve the enforcement of a local law, but rather the use of force by deputies engaged in a law enforcement function. In *Troupe*, the plaintiff sued on behalf of the decedent, claiming his death was the result of an unreasonable seizure which caused the vehicle in which he was a passenger to crash into a concrete pole.¹⁹² The district court concluded that the use of force was reasonable under the circumstances, that the force used did not proximately cause the plaintiff's injuries, and that, in any event, the individual law enforcement officers would have qualified immunity.¹⁹³ The court then addressed the claims against the County and the County Sheriff, in his official capacity. Having found no underlying constitutional violations, the court could have dismissed the derivative claims against the county and sheriff on that basis.¹⁹⁴ Instead, the court engaged in an analysis of the relationship between the county and the sheriff's office under Florida law. Relying heavily on *McMillian* and the plurality opinion in *Grech*,¹⁹⁵ the court concluded that under Florida law, a county has no control over a sheriff with respect to his law enforcement function or the hiring, training, supervising and disciplining of deputies.¹⁹⁶ Based on the county's lack of control over the sheriff in matters of law enforcement, the court dismissed the county as an improper party to the lawsuit.¹⁹⁷ The court noted, however, "that finding a Florida sheriff is not the final policymaker for a Florida county with regard to its law-enforcement function does not necessarily mean that a Florida sheriff is instead the final policymaker for the state."¹⁹⁸

192. *Id.*, slip op. at 6, 8.

193. *Id.* at 8–17.

194. *City of L.A. v. Heller*, 475 U.S. 796 (1986) (holding that, if there is no constitutional violation, there can be no liability on the part of the individual officer or the government body); see also *Cuesta v. School Bd. Of Miami Dade County*, 285 F.3d 962, 970 n. 2 (11th Cir. 2002) ("Because we hold that Cuesta suffered no deprivation of her constitutional rights, we need not decide the question of whether the County's policy, in which all felony arrestees are strip searched, might deprive others of their constitutional rights."). Indeed, the court of appeals could dispose of the case on this basis and not reach the Eleventh Amendment issue in *Troupe*.

195. The district court cited to both the Supreme Court and the Eleventh Circuit opinions in *McMillian*. See *Troupe*, slip op. at 20–24. Oddly, the district court made no reference to *Manders*.

196. *Troupe*, slip op. at 23.

197. *Id.*

198. *Id.* at 23 n. 4 (citing *McMillian*, 88 F.3d at 1579) ("We need not, and do not, decide whether sheriffs are state policymakers to hold that they are not county policymakers.").

In addressing the question of liability of the sheriff in his official capacity, the court assumed that the “official capacity” suit was a suit against the sheriff’s office and treated the Sarasota County Sheriff’s Office (SCSO) as a legal entity that had the capacity to be sued under Federal Rule of Civil Procedure 17(b).¹⁹⁹ The case relied on for this proposition is itself somewhat confusing on this point. In *Samarco v. Neumann*,²⁰⁰ the court adhered to the pre-*McMillian* and pre-*Manders* Eleventh Circuit precedent of *Hufford* for the proposition that county sheriffs, as county officials, enjoy no Eleventh Amendment immunity for purposes of § 1983 liability.²⁰¹ The court observed, however, that because the Palm Beach County Sheriff’s Office is a separate entity from the County, “suing a county sheriff in his official capacity is somewhat of a hybrid, in that the suit is actually against the Sheriff’s Office.”²⁰² Thus, the courts in *Troupe* and *Samarco* treated a suit against the sheriff in his or her official capacity as a suit against the sheriff’s office and assumed that this office was a separate entity, independent from the county, suable under § 1983. Neither court cited to Rule 17. Furthermore, the assumption ran counter to other opinions from and within the Circuit. In *Dean v. Barber*,²⁰³ in a decision involving Alabama sheriffs, the court of appeals commented that “[s]heriff’s departments and police departments are not usually considered legal entities.”²⁰⁴ In *Mann v.*

199. *Id.* at 23. Federal Rule of Civil Procedure 17(b) provides, in relevant part,

The capacity of an individual, other than one acting in a representative capacity, to sue or be sued should be determined by the law of the individual’s domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held

The court in *Troupe* stated that “[u]nder the Florida Constitution and the Florida Statutes, a sheriff’s office is a separate legal entity from the county in which it serves.” *Troupe*, slip op. at 23 n. 5 (citing *Samarco v. Neumann*, 44 F. Supp. 2d 1276, 1286 n. 1 (S.D. Fla. 1999)). The bulk of the discussion with respect to the SCSO dealt with the merits of plaintiff’s claims, and the court rejected all of plaintiff’s theories for imputing liability to the governmental entity. *Id.* slip op. at 23–29.

200. 44 F. Supp. 2d 1276 (S.D. Fla. 1999). In *Samarco*, plaintiff alleged that the sheriff was a final policymaker for the county with respect to an allegedly unconstitutional policy of using canines in apprehending felony suspects. *Id.*

201. *Id.* at 1285–1286.

202. *Id.* at 1286 n. 1.

203. 951 F.2d 1210 (11th Cir. 1992).

204. *Id.* at 1214. The court dismissed a claim against sheriff’s department because the department was not subject to suit under Alabama law. *Id.* at 1214–1215.

Hillsborough County Sheriff's Office,²⁰⁵ the court held the Sheriff's Office lacked the capacity to be sued, but did not decide who the proper party to sue might be because plaintiffs failed to claim that the alleged wrong was caused by an official policy or custom.²⁰⁶ The majority of federal courts to address the issue have concluded that a sheriff's office or sheriff's department does not have the capacity to be sued.²⁰⁷ However, in most of the cases where sheriff's offices or departments have been dismissed for lack of capacity to be sued, the underlying assumption was that the County was the entity to be named and the sheriff's department was regarded as an agency of the County.²⁰⁸

C. Seventh Circuit: Illinois

In *Franklin v. Zaruba*,²⁰⁹ the Court of Appeals for the Seventh Circuit, relying on the Illinois Constitution²¹⁰ and a decision by the Illinois Supreme Court,²¹¹ concluded that a sheriff does not act for the state when engaged in general law enforcement du-

205. 946 F. Supp. 962 (M.D. Fla. 1996).

206. *Id.* at 971.

207. *E.g. Wade v. Tompkins*, 73 Fed. Appx. 890, 893–894 (8th Cir.2003) (relying on *Dean* and affirming summary judgment on § 1983 claim against Arkansas sheriff's department); *Streit v. County of Los Angeles*, 236 F.3d 552, 566 (9th Cir. 2001) (sheriff's department in California is separately suable entity). *Contra Rhodes v. McDannel*, 945 F.2d 117, 120 (6th Cir. 1991) (Sheriff's Department in Michigan is not a legal entity subject to suit); *Dean*, 951 F.2d at 1214 (sheriff's department in Alabama lacks capacity to be sued under Rule 17); *Barrett v. Wallace*, 107 F. Supp. 2d 949, 954 (S.D. Ohio 2000) (under Ohio case law, a county sheriff's office is not a legal entity that is capable of being sued).

208. *See e.g. Wright v. Wyandotte County Sheriff's Department*, 963 F. Supp. 1029, 1034 (D. Kan. 1997) (noting that sheriff's department is agency of county, not capable of being sued, and that plaintiff should have brought suit against the Board of County Commissioners); *Catlett v. Jefferson County*, 299 F. Supp. 2d 967, 968, 969 (E.D. Mo. 2004) (holding that Sheriff's Department is mere department of Jefferson County and not legal entity subject to suit under § 1983, and therefore any claims based on the conduct of defendants should be asserted against County). *See also Allen v. York County Jail*, 2003 WL 221842, at *6 (D. Me. Jan. 30, 2003) (noting that "several courts have stated, matter-of-factly, that arms of a municipal entity, such as the jail and the sheriff's department vis-à-vis York County, cannot be sued independently of the municipality because they do not have a legal identity distinct from the municipality" but distinguishing those cases because they "involved actions in which the court observed that the municipality was also a named party and would remain as the proper defendant vis-à-vis the claims asserted against its subunit or 'arm'" (internal citations omitted)).

209. 150 F.3d 682 (7th Cir. 1998).

210. Illinois Constitution Article VII, § 4(c) designates the sheriff as a county officer.

211. *See Moy v. County of Cook*, 640 N.E.2d 926, 931 (Ill. 1994) (holding that sheriffs, while county officers, are independent from county governing body).

ties.²¹² In *DeGenova v. Sheriff of DuPage County*,²¹³ again relying on state law, the court concluded that the Sheriff does not act as an arm of the state when operating the jail.²¹⁴ The court pointed to state statutes that placed responsibility for maintenance and support of the jail on the county, not the state.²¹⁵ The Sheriff's argument that the office should be entitled to Eleventh Amendment immunity rested on aspects of state law very similar to those relied on by the Eleventh Circuit majority in *Manders*.²¹⁶ Illinois has a mandatory annual training program for sheriffs, the State Department of Corrections is authorized to inspect jails annually, and the Governor may remove a sheriff who fails to protect a prisoner from a lynch mob.²¹⁷ The court, however, found that these provisions reflected only a "very tenuous and indirect" form of regulation by the State, clearly outweighed by "the Illinois Constitution, the Illinois Supreme Court, and Illinois statutory provisions that overwhelmingly designate the sheriff's office as a local entity apart from the State."²¹⁸ The fact that Illinois sheriffs

212. *Franklin*, 150 F.3d at 686. In *Scott v. O'Grady*, 975 F.2d 366, 371 (7th Cir. 1992), a pre-*McMillian* case, the court had recognized that a sheriff could be an arm of the state when engaged in certain functions:

[W]hen a county sheriff in Illinois performs his duties as the principal executive officer or chief law enforcement officer of the county, he acts as a county official and does not get the benefit of the Eleventh Amendment. But this conclusion does not end our inquiry.

• • •

The county sheriff acts as an arm of the Illinois state judicial system in executing Writs of Assistance and other state court orders. When fulfilling this statutory duty, the sheriff and his deputies must be deemed state officials for the purposes of Eleventh Amendment immunity.

But see Richman v. Sheahan, 270 F.3d 430, 440 (7th Cir. 2001) (holding that sheriff was not acting as arm of state with respect to training and supervision of deputies in use of force when executing judge's orders in courtroom); *Ruehman v. Sheahan*, 34 F.3d 525, 528–529 (7th Cir. 1994) (where challenge was not to mere execution of state-issued warrants, but to warrant-tracking system designed and implemented by sheriff and county government, policy challenged was not that of state).

213. 209 F.3d 973 (7th Cir. 2000).

214. *Id.* at 976.

215. *Id.* (citing 730 Ill. Comp. Stat. Ann. 125/20 (West 1993) (county maintains and furnishes jail); 730 Ill. Comp. Stat. Ann. 12515 (county bears costs of maintaining prisoners); 55 Ill. Comp. Stat. Ann. 515-1106 (county board builds jail and funds sheriff's reasonable and necessary expenses related thereto); 730 Ill. Comp. Stat. Ann. 1251/12 (sheriff must notify county board if jail deemed insufficient to secure prisoners)).

216. *Manders*, 338 F.3d at 1320–1328.

217. *DeGenova*, 209 F.3d at 976.

218. *Id.*

were not county employees and were not subject to control by the county governing body did not make sheriffs agents of the State.²¹⁹

The Sheriff in *DeGenova* also made the argument that the sheriff's department was not a suable entity under Illinois law.²²⁰ The Seventh Circuit, guided by Rule 17, looked to state law and noted that, "[t]o be sued in Illinois, a defendant must have a legal existence, either natural or artificial."²²¹ It then relied on the Illinois Constitution for the proposition that the sheriff is "an independently-elected constitutional officer,"²²² and thus, "the Sheriff's office has a legal existence separate from the county and the State, and is thus a suable entity."²²³ An unanswered question in *DeGenova* was whether a judgment rendered against the Sheriff's office would be collectible.²²⁴

In *Carver v. Sheriff of LaSalle County*,²²⁵ the Sheriff was sued in his official capacity by employees asserting claims of sexual harassment and seeking recovery under both § 1983 and Title VII of the Civil Rights Act of 1964.²²⁶ Because the Sheriff's budget was provided by the County, plaintiffs named the County as a defendant.²²⁷ Arguing that the County exercised no control over the Sheriff's Office, the County was successful in persuading the district court judge to dismiss the County as a party to the suit.²²⁸ After the County's dismissal, the Sheriff settled the suit, agreeing to the entry of judgment against him for the amount of \$500,000.²²⁹ In trying to enforce the judgment, the plaintiffs became embroiled in a classic "Catch 22."²³⁰ The Sheriff's Office de-

219. *Id.*

220. *Id.* at 976 n. 2.

221. *Id.* (quoting *Magnuson v. Cassarella*, 812 F. Supp. 824, 827 (N.D. Ill. 1992) (citing *Jackson v. Village of Rosemont*, 536 N.E.2d 720, 723 (1988))). In *Magnuson*, the court dismissed a claim against the Cook County Sheriff's Police Department on the ground that the Department had no legal existence separate from the Sheriff of Cook County and thus was not a suable entity. 812 F. Supp. at 827-828.

222. *DeGenova*, 209 F.3d at 976 n. 2 (citing Ill. Const. art. VII, § 4(c)).

223. *Id.* (citing *Franklin v. Zaruba*, 150 F.3d 682, 685 (7th Cir. 1998)).

224. *Id.* at 973-977.

225. 243 F.3d 379 (7th Cir. 2001).

226. *Id.* at 381.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

rived its budget from the County, but had no power to levy taxes to fund a judgment.²³¹ Plaintiffs initiated proceedings against the County under Federal Rule of Civil Procedure 69(a).²³² The district court ultimately held that the County was not responsible for payment.²³³ On appeal, Judge Easterbrook noted that the question of who must pay the judgment is not directly controlled by any “free-standing rule of federal law.”²³⁴ According to the Seventh Circuit Court, “the district court put into the judgment no more than Sheriff Condie had the authority to promise, and the extent of that authority is a matter of state law.”²³⁵ The County’s argument, which implied that money judgments against sheriffs’ offices were unenforceable in Illinois,²³⁶ would create serious concerns and conflicts with federal law.²³⁷ As the court put it,

[a] state may not evade compliance by modeling its internal organization after a huckster’s shell game, so that no matter which entity the plaintiff sues, the state (or its subdivisions) always may reply that someone else is responsible—and that power has been divided in such a fashion that the responsible person can’t pay, and the entity that can pay isn’t responsible for doing so.²³⁸

231. *Id.* at 384. The court noted that it was unclear whether the budget appropriated for the Sheriff’s Office had line-item restrictions or could be used in any way the Sheriff liked. *Id.*

232. Federal Rule of Civil Procedure 69(a) provides that the process to be employed in enforcement of a judgment “shall be in accordance with the practice and procedure of the state in which the district court is held.” In Illinois, the relevant rule is Ill. Sup. Ct. R. 277(a), which allows a party to commence a supplementary proceeding “with respect to a judgment which is subject to enforcement . . . against the judgment debtor or any third party the judgment creditor believes has property of or is indebted to the judgment debtor.” *Carver v. Condie*, 169 F.3d 469, 471 (7th Cir. 1999) (omission in original).

233. *Carver*, 2000 WL 204240 at *1.

234. *Carver*, 243 F.3d 379, 381 (7th Cir. 2001), certifying question to, *Carver v. Sheriff of LaSalle County*, 787 N.E.2d 127 (Ill. 2003).

235. *Id.* at 385.

236. *Id.*

237. As the Seventh Circuit Court notes, the Supreme Court has made clear that Title VII is binding on state and local governments. *Id.* at 385–386 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)); see also *Howlett v. Rose*, 496 U.S. 356 (1990) (finding that a § 1983 action against a local government entity cannot be barred by state law doctrine of sovereign immunity).

238. *Carver*, 243 F.3d at 386.

Because the law of Illinois did not furnish “a clean solution to this conflict,”²³⁹ the Seventh Circuit Court, in “the spirit of cooperative federalism,”²⁴⁰ certified to the Illinois Supreme Court the question of “whether, and if so when, Illinois law requires counties to pay judgments entered against the sheriff’s office in an official capacity.”²⁴¹

Providing a detailed analysis of the issues raised by the question, the Illinois Supreme Court²⁴² concluded that the county sheriff is a “local governmental body” under § 1-206 of the Illinois Tort Immunity Act,²⁴³ and, thus, is a “local public entity” for purposes of the Act.²⁴⁴ Thus, the county is “empowered and directed” by § 9-102 of the Act “to pay any tort judgment or settlement for compensatory damages for which it or an employee while acting within the scope of his employment is liable.”²⁴⁵ Given the Sheriff’s lack of authority to levy taxes, however, the problem remained as to how the judgment was to be funded.²⁴⁶ In order to best effectuate the state’s statutory scheme and to avoid leaving meritorious plaintiffs with a hollow victory, the Court concluded that “the county is obligated to provide funds to the county sheriff to pay official capacity judgments entered against the sheriff’s

239. *Id.* at 381.

240. *Id.* at 386.

241. *Id.* Such certification was permitted by Circuit Rule 52 and authorized by Ill. Sup. Ct. R. 20.

242. *Carver*, 787 N.E.2d at 135–138.

243. A “local public entity” is defined in the Illinois Tort Immunity Act as including a county, township, municipality, municipal corporation, school district, school board, educational service region, regional board of school trustees, community college district, community college board, forest preserve district, park district, fire protection district, sanitary district, museum district, emergency telephone system board, and *all other local governmental bodies*. . . . It does not include the State or any office, officer, department, division, bureau, board, commission, university, or similar agency of the State.

745 Ill. Comp. Stat. 10/1-206 (2000) (emphasis added).

244. *Id.*

245. Section 9-102 of the Act provides:

A local public entity is empowered and directed to pay any tort judgment or settlement for compensatory damages . . . for which it or an employee while acting within the scope of his employment is liable in the manner provided in this Article. . . . A local public entity may make payments to settle or compromise a claim or action which has been or might be filed or instituted against it when the governing body or person vested by law or ordinance with authority to make over-all policy decisions for such entity considers it advisable to enter into such a settlement or compromise.

Id. at 10/9-102.

246. *Carver*, 787 N.E.2d at 137.

office.”²⁴⁷ On return to the Seventh Circuit, the court remanded to the district court for proceedings consistent with the conclusion reached by the Illinois Supreme Court.²⁴⁸ Given the obligation of payment imposed upon the County by state law, the Seventh Circuit Court determined that the County was an indispensable party to the litigation.²⁴⁹ The court made clear that in future suits, a county was to be named as a necessary party when a suit was brought seeking damages from an independently elected county officer in an official capacity.²⁵⁰

D. Ninth Circuit: California

In *Streit v. County of Los Angeles*,²⁵¹ a suit against both the County and the Sheriff’s Department, the Ninth Circuit Court of Appeals held that the Sheriff acts for the County, and not the State, when administering the County’s policy with respect to the release of prisoners from the County jail.²⁵² As in *McMillian*, the parties in *Streit* agreed that the Sheriff of Los Angeles County was a final policymaker.²⁵³ The dispute was about whether the Sheriff was a policymaker for the State or for the County as to the

247. *Id.* at 138. The court also clarified, in response to a request made by the Seventh Circuit, that the obligation of the County to fund the judgment was not dependent on whether the judgment was the product of settlement or trial. *Id.* at 139–140.

It was clear that under Illinois law the County had a duty to indemnify the sheriff as to a judgment rendered against him in his individual capacity. *See id.* at 134 (discussing 5-1002 of the Counties Code, 55 Ill. Comp. Stat. 5/5-1002, providing “the county shall indemnify *the sheriff or deputy*, as the case may be, for any judgment recovered *against him or her*” (emphases added)). Since the suit here was against the Sheriff in his official capacity, the provision did not apply. Furthermore, this indemnification provision exempted from its coverage injury that resulted from “wilful misconduct of the sheriff or deputy.” 55 Ill. Comp. Stat. 515-1002. The exemption would make indemnification unavailable in Title VII discriminatory treatment suits, as well as in equal protection suits under § 1983 and in any other actions where impermissible motive is an essential component of the constitutional claim.

248. *Carver v. Sheriff of LaSalle County*, 324 F.3d 947, 948 (7th Cir. 2003).

249. *Id.*; *see* Fed. R. Civ. P. 19.

250. *Carver*, 324 F.3d at 948; *see e.g. Toma v. County of Kane*, 2004 WL 1093497, at *1 n. 1 (N.D. Ill. May 3, 2004) (relying on *Carver* and reinstating the county as defendant even though no allegations were asserted against the county).

251. 236 F.3d 552.

252. *Id.* at 555–556. Plaintiffs alleged that, due to the method of conducting release records checks, prisoners were routinely held in the jails “after all legal justification for their seizure and detention ended.” *Id.* at 556.

253. *Id.*

specific matter in question.²⁵⁴ The court first disposed of the County's argument that the issue was controlled by state law.²⁵⁵ The court noted that, "although it may be instructive on questions of liability in certain specific contexts, state law does not control our interpretation of a federal statute."²⁵⁶ With the United States Supreme Court's analysis in *McMillian* as the guide, the court then proceeded to examine state law for relevant instruction.²⁵⁷ Like the Seventh Circuit Court in *DeGenova*,²⁵⁸ the Ninth Circuit Court readily distinguished the treatment of sheriffs under the California Constitution from their treatment under the Alabama Constitution.²⁵⁹ Sheriffs in California were designated as "county officers."²⁶⁰ Furthermore, the court found support in the California Government Code for the conclusion that counties in California have control over the operation of county jails.²⁶¹ A "crucial factor," according to the court, was the provision of the California Code that makes counties liable for the payment of judgments rendered in § 1983 suits against public employees.²⁶² These provisions, together with others in both the California Code and the Los Angeles County Code, led the court to the inexorable conclusion that the Los Angeles County Sheriff's Department "is tied to the County in its political, administrative, and fiscal capacities."²⁶³

254. *Id.* at 559.

255. *Id.*

256. *Id.* at 560.

257. *Id.*

258. *DeGenova*, 209 F.3d at 976 (distinguishing Illinois Constitution's classification of sheriffs as county officers from Alabama Constitution's listing of sheriffs as state executive officers).

259. *Streit*, 236 F.3d at 561.

260. Cal. Const. art. XI, § 1(b).

261. *Streit*, 236 F.3d at 561 (citing Cal. Govt. Code § 25303 (granting county boards of supervisors broad fiscal and administrative powers over individual county jails) and Cal. Govt. Code § 23013 (granting counties power to transfer control of county jail from sheriff to county-created department of corrections)).

262. *Id.* at 562. California Government Code § 815.2 provides in relevant part:

(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

263. *Streit*, 236 F.3d at 562.

The County urged that the California Court of Appeal's decision in *County of Los Angeles v. Superior Court*,²⁶⁴ (*Peters*) was controlling.²⁶⁵ In *Peters*, the court held that, "in setting policies concerning release of persons from the Los Angeles County jail, the Los Angeles County Sheriff acts as a state officer performing state law enforcement duties, and not as a policymaker on behalf of the County of Los Angeles."²⁶⁶ The Ninth Circuit Court distinguished *Peters* as a case involving a law-enforcement function (acting upon facially valid warrant in detaining a person), as opposed to an administrative function more closely aligned with jail operations (searching for "wants and holds" on the Automated Justice Information System before releasing a prisoner).²⁶⁷ Significantly, however, the court noted that *Peters*, even if "on all fours," would not be controlling on the question of federal law.²⁶⁸ The court thus affirmed the district court's holding that the County was subject to liability for constitutional violations caused by the Sheriff's administration of the county jail.²⁶⁹ Because the Los Angeles County Sheriff's Department was named as a defendant in the suit and challenged its suability as a separate entity, the court addressed the question of the Department's capacity to be sued under Rule 17(b).²⁷⁰ Ninth Circuit precedent²⁷¹ had held police departments were public entities under the California Code²⁷² and thus suable in federal court. The court found no basis for distinguishing a sheriff's department and held such departments to be separately suable entities.²⁷³

Finally, the court dealt with the argument that the Sheriff's Department, even if a suable entity, is an arm of the state, enti-

264. 80 Cal. Rptr. 2d 860 (Cal. App. 2d Dist. 1999).

265. *Streit*, 236 F.3d at 1324.

266. *Peters*, 80 Cal. Rptr. 2d at 868.

267. *Streit*, 236 F.3d at 564.

268. *Id.*

269. *Id.* at 564–565.

270. *Id.* at 565.

271. *Karim-Panahi v. L.A. Police Dept.*, 839 F.2d 621, 624 n. 2 (9th Cir. 1988); *Shaw v. Cal. Dept. of Alcoholic Bev. Control*, 788 F.2d 600, 604 (9th Cir. 1986).

272. California Government Code Annotated § 945 (West 1995) provides that "[a] public entity may sue or be sued." California Government Code § 811.2 defines a public entity as "the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or political corporation in the State."

273. *Streit*, 236 F.3d at 565.

tled to Eleventh Amendment immunity, and not a “person” within the meaning of § 1983.²⁷⁴ The court reviewed the arm-of-the-state claim under the following five factors employed by the Ninth Circuit Court in making such determinations:

- (1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the entity may sue or be sued, (4) whether the entity has the power to take property in its own name or only the name of the state, and (5) the corporate status of the entity.²⁷⁵

Heaviest weight was placed on the first factor. Under state law, the County would be financially liable for the Sheriff’s over-detention of persons who had completed their prison sentences.²⁷⁶ Second, the court concluded that conducting the pre-release checks at issue in the case was a function related to the counties’ fiscal and administrative oversight with respect to county jails rather than to some central government function of the state.²⁷⁷ The court had already determined the Sheriff’s Department to be a suable entity,²⁷⁸ and there was no information as to the last two factors.²⁷⁹ Based on these findings, the court concluded that the Los Angeles Sheriff’s Department was not an arm of the state of California when administering the local county jail, thus rejecting the Eleventh Amendment immunity defense.²⁸⁰

In *Brewster v. Shasta County*,²⁸¹ the Ninth Circuit Court addressed the different question of whether the Shasta County, California, Sheriff’s Department was acting for the State or the County when engaged in a law-enforcement function, specifically, the investigation of a crime.²⁸² Plaintiff alleged that his constitutional rights were violated by deputies executing the Sheriff’s policies in the course of an investigation of a murder and sexual

274. *Id.* at 566.

275. *Id.* (citing *Durning v. Citibank*, 950 F.2d 1419, 1423 (9th Cir. 1991)).

276. *Id.* at 567 (citing *Sullivan v. County of L.A.*, 527 P.2d 865, 868 (Cal. 1974)).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. 275 F.3d 803 (9th Cir. 2001).

282. *Id.* at 805.

assault.²⁸³ The district court denied the County's motion for summary judgment, concluding the Sheriff was acting for the County, not the State, when engaged in crime investigation, and certified the order for interlocutory appeal.²⁸⁴ Because *McMillian* dictates a function-specific approach, the court's decision in *Streit* regarding the status of the Sheriff administering the County's policy on release from jail, was not controlling as to the status of the Sheriff engaged in the function of crime investigation.²⁸⁵ The court did rely, however, on *Streit's* analysis of the California Constitution and the California Code, and noted that it required "little extension of *Streit* for us to conclude that the Shasta County Sheriff acts for the County, not the state, when investigating crime in the county."²⁸⁶

As in *Streit*, the court found compelling the state law that required the County to indemnify and defend all county officials, including the Sheriff and the Sheriff's deputies.²⁸⁷ The County argued that a provision of the California Constitution that places county sheriffs under the "direct supervision" of the Attorney General, supported its argument that the sheriff acts for the State, and not the county, when investigating crime.²⁸⁸ The court observed that this provision made the Attorney General the direct

283. *Id.* Brewster claimed that the deputies had caused a witness to give a false identification, failed to test physical evidence, and ignored exculpatory evidence. *Id.*

284. *Id.* Because the County cannot claim Eleventh Amendment immunity, there is no right to an immediate appeal under *P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 147. The County's appeal was pursuant to 28 U.S.C. § 1292(b), which allows a district court judge to certify for interlocutory appeal "an order not otherwise appealable" when the district court is of the opinion that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and where "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

285. *Brewster*, 275 F.3d at 806.

286. *Id.* at 807.

287. *Id.* at 808; Cal. Govt. Code Ann. § 815.2.

288. *Brewster*, 275 F.3d at 808–809. California Const. art. V, § 13, provides in relevant part:

Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable.

supervisor of all law enforcement officers designated by law, and as such, reliance on the provision proved too much, as it would make all local law enforcement officers state officials.²⁸⁹ Furthermore, while this provision had been found to support the conclusion that California district attorneys were acting for the State, not the County, when deciding whether to prosecute an individual,²⁹⁰ the court in *Brewster* distinguished the control that could be exercised by the Attorney General over district attorneys from that which could be exercised with respect to sheriffs.²⁹¹ The court proceeded to note differences between Alabama law and California law that supported its conclusion that the California sheriff acts for the county in matters of crime investigation.²⁹² The court noted that, “[u]nlike in Alabama, . . . in California, county boards of supervisors have authority to supervise the conduct of sheriffs, including their law enforcement conduct, subject to the limitation that the board not obstruct the sheriff’s investigation of crime.”²⁹³ Furthermore, unlike Alabama, in California the county, rather than the state legislature, sets the sheriff’s salary, “thus permitting the board of supervisors to exercise a somewhat more direct influence over the sheriff.”²⁹⁴ Finally, as in *Streit*, the court refused to be bound by the state court’s determination in *Peters* that California sheriffs are state actors.²⁹⁵

Consistent with both *Streit* and *Brewster*, the Ninth Circuit held, in *Cortez v. County of Los Angeles*,²⁹⁶ that the Los Angeles County Sheriff acts as the final policymaker for the County “in establishing and implementing policies and procedures for the

289. *Brewster*, 275 F.3d at 809 (citing *Roe v. County of Lake*, 107 F. Supp. 2d 1146 (N.D. Cal. 2000)).

290. *Weiner v. San Diego County*, 210 F.3d 1025, 1031 (9th Cir. 2000); see also *Pitts v. County of Kern*, 949 P.2d 920, 923 (Cal. 1998) (discussed *infra*, nn. 310–314, 316, and accompanying text).

291. Cal. Const. art. V, § 13 provides in relevant part that, “[w]henver in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute,” and “in such cases the Attorney General shall have all the powers of a district attorney.” There is no similar “takeover” provision with respect to the Attorney General assuming the duties of the county sheriff. *Brewster*, 275 F.3d at 810–811.

292. *Id.* at 811.

293. *Id.*

294. *Id.*

295. *Id.*

296. 294 F.3d 1186.

safe[-]keeping of inmates in the county jail.”²⁹⁷ The suit was brought by the family of a detainee, a former gang member, who was placed in the gang unit at the county jail while awaiting trial, and beaten to death by five cellmates.²⁹⁸ There was no question that the Sheriff was a final policymaker with respect to the administration of security measures at the jail.²⁹⁹ It was likewise clear that the placement of the deceased detainee in the gang unit was pursuant to the Sheriff’s policy to segregate gang members for purposes of security in the jail.³⁰⁰ The County, however, insisted that the Sheriff acted for the State and not the County in his role as administrator of the jail.³⁰¹ Although the particular conduct here involved classification of prisoners, as opposed to jail-release policies, both functions were matters of jail administration, on which the court found *Streit* to be controlling.³⁰² Relying on the same provisions of California law that supported the result in *Streit*—the designation of California sheriffs as county officers by the California Constitution,³⁰³ the statutory provisions giving counties ultimate control over the county jails,³⁰⁴ and the state law requiring counties to defend and indemnify county sheriffs for money judgments against them³⁰⁵—the court concluded the County was subject to liability under § 1983 for constitutional harm caused by the administration of the Sheriff’s policy.³⁰⁶ Alternatively, the court held that, even if it accepted the County’s characterization of the function involved as one of “keeping the peace” or law enforcement, “*Brewster and Bishop Paiute Tribe* demonstrate that California sheriffs are final policymakers for the county not only when managing the local jail, but also when performing some law enforcement functions.”³⁰⁷

297. *Id.* at 1187; see also *Green v. Baca*, 306 F. Supp. 2d 903, 907 n. 31 (C.D. Cal. 2004) (relying on *Streit* and *Cortez* in treating Sheriff as policymaker for County in suit seeking damages for alleged overdetention at county jail).

298. *Cortez*, 294 F.3d at 1187.

299. *Id.* at 1189.

300. *Id.* at 1190.

301. *Id.* at 1189.

302. *Id.* at 1190.

303. Cal. Const. art. XI, § 1(b).

304. Cal. Govt. Code Ann. §§ 23013, 25303.

305. Cal. Govt. Code § 815.2.

306. *Cortez*, 294 F.3d at 1190.

307. *Id.* at 1192. In *Bishop Paiute Tribe v. County of Inyo*, the court had concluded that “the Sheriff acted as a county officer when obtaining and executing a search warrant

In direct conflict with the case law of the Ninth Circuit is the Supreme Court of California's recent decision in *Venegas v. County of Los Angeles*,³⁰⁸ holding that "sheriffs act on behalf of the state when performing law enforcement activities."³⁰⁹ Plaintiffs in *Venegas* sued the County, the Sheriff's Department, the Sheriff, his deputies, and others, asserting claims under § 1983 arising from an alleged unreasonable search and seizure.³¹⁰ The California Court of Appeal had relied on the Ninth Circuit opinions discussed above to reinstate plaintiffs' claims against the County, its Sheriff's Department, Sheriff, and deputies.³¹¹ The California Supreme Court analyzed both state and federal cases dealing with the status of sheriffs in California for purposes of § 1983 litigation and found the state cases more compelling on the interpretation of California law.³¹²

In *Pitts v. County of Kern*,³¹³ plaintiffs, whose convictions for child molestation had been reversed on appeal,³¹⁴ sued the County, its District Attorney, and his employees, for violations of constitutional rights stemming from alleged prosecutorial misconduct during the course of their criminal prosecution.³¹⁵ The District Attorney had absolute prosecutorial immunity with regards to the claims filed against him in his individual capacity.³¹⁶ Thus, the question was whether the suit could proceed against the County based on the claim that the District Attorney was the final policymaker for the County and not the State when engaged

against the Tribe." 291 F.3d 549, 566 (9th Cir. 2002), *vacated on other grounds and remanded*, *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701 (2003).

308. 87 P.3d 1, 5 (Cal. 2004).

309. *Id.* at 3 (emphasis in original).

310. *Id.* at 4. The Sheriff's Department was in charge of an interagency task force formed to investigate auto thefts involving multiple jurisdictions. *Id.* at 3.

311. *Venegas v. County of L.A.*, 130 Cal. Rptr. 2d 461, 480-481 (Cal. App. 2d Dist. 2002), *modified* (Jan. 22, 2003).

312. *Venegas*, 87 P.3d at 5.

313. 949 P.2d 920.

314. *Id.* at 923.

315. *Id.* at 923-924.

316. *Id.* at 926 (prosecutors engaged in their prosecutorial functions are afforded absolute immunity from suit under § 1983); *see e.g. Burns v. Reed*, 500 U.S. 478, 487-496 (1991) (prosecutor absolutely immune for functions performed in probable cause hearing, but only qualified immunity attached to function of giving legal advice to police); *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (absolute immunity for prosecutors performing activities "intimately associated with the judicial phase of the criminal process").

in the activities of trial preparation, prosecution, and training and developing policies for his employees in these areas.³¹⁷ Using the *McMillian* framework and placing considerable reliance on the fact that the Attorney General had direct supervisory power over every district attorney,³¹⁸ the court concluded that the district attorney acts on behalf of the State in preparing for and engaging in criminal prosecutions.³¹⁹ Finding no meaningful way to separate or distinguish the function of training employees and developing policies for employees to follow in prosecuting cases, the court drew the same conclusion as to the status of district attorneys engaged in such activity.³²⁰

In *Peters*, the California Court of Appeal relied on *McMillian* and *Pitts* to hold that the County Sheriff acts for the State in setting jail-release policies.³²¹ The court found the California constitutional and statutory provisions relating to sheriffs to be virtually identical to those provisions governing district attorneys.³²² The Attorney General was the direct supervisor of both.³²³ Furthermore, state law imposed on the county sheriff the duty to enforce the state's criminal law and to "take charge of and keep the county jail and the prisoners in it."³²⁴ The setting of jail-release policies was determined to be a law-enforcement function, not merely a jail administrative function, and, given that sheriffs perform their law-enforcement functions independent of any control by the county boards of supervisors,³²⁵ the court concluded that the County could not be held liable for the Sheriff's conduct in this case.³²⁶

317. *Pitts*, 949 P.2d at 928.

318. Cal. Const. art. V, § 13.

319. *Pitts*, 949 P.2d at 932–934.

320. *Id.* at 935. The court noted,

Our conclusion as to which entity the district attorney represents might differ were plaintiffs challenging a district attorney's alleged action or inaction related to hiring or firing an employee, workplace safety conditions, procuring office equipment, or some other administrative function arguably unrelated to the prosecution of state criminal law violations. Those considerations are not presented here.

Id.

321. *Peters*, 80 Cal. Rptr. at 861–862.

322. *Id.* at 865.

323. *Id.*

324. *Id.* at 866 (citing Cal. Govt. Code § 26605).

325. *Id.* at 867.

326. *Id.* at 868.

In *Venegas*, the Supreme Court of California measured *Pitts* and *Peters* against the Ninth Circuit Court's decisions in *Brewster* and *Bishop Paiute Tribe v. County of Inyo*,³²⁷ and concluded that the federal court was deficient in its analysis of state law;³²⁸ and, even on the ultimate federal question of liability under § 1983, the federal court's decisions were not binding on the state court.³²⁹ The majority opinion in *Venegas* criticized *Brewster* for putting too much emphasis on the payment factor and too little emphasis on the state statutory and constitutional provisions that made the sheriff a policymaker for the State in matters of law enforcement.³³⁰ In *Bishop*, the federal court had concluded that both the District Attorney and the Sheriff were acting for the County when procuring and executing a search warrant.³³¹ The majority in *Venegas* noted the contrary outcomes in *Pitts* and *Peters* and voiced its disagreement with the federal court's view that giving the Attorney General's supervisory role dispositive weight would immunize all local law enforcement officers from liability under § 1983.³³² The court also criticized *Bishop* for evincing strong concern about establishing a "broad immunity from suit," a concern not reflected in *McMillian's* factor-balancing test.³³³

In the end, the California Supreme Court found the federal decisions unpersuasive on the issue and concluded that "California sheriffs act as state officers while performing state law enforcement duties."³³⁴

Justice Joyce L. Kennard, who had dissented in *Pitts*,³³⁵ agreed with the majority that there was no distinction between district attorneys and sheriffs in terms of their treatment under California law, but, unlike the majority, would hold that both district attorneys, when engaged in training, supervision and managerial tasks, and sheriffs, when engaged in law enforcement func-

327. 291 F.3d 549, 566.

328. *Venegas*, 87 P.3d at 8–9.

329. *Id.* at 8.

330. *Id.* at 9.

331. *Bishop*, 291 F.3d at 562–566.

332. *Venegas*, 87 P.3d at 11.

333. *Id.*

334. *Id.*

335. *Pitts*, 949 P.2d at 937–941 (Kennard, J., concurring with the dissenting opinion of Mosk, J.).

tions, are county officials.³³⁶ Justice Kathryn Mickle Werdegar also disagreed with the classification of sheriffs as state officials, suggesting that the majority's analysis relied too heavily on the source-of-control factor and did not give sufficient weight to the judgment-funding factor.³³⁷ In her opinion, Justice Werdegar viewed as crucial the factors found "most salient" by the United States Supreme Court in its Eleventh Amendment determinations, those factors concerned with the state's dignity and treasury.³³⁸

In *Hess v. Port Authority Trans-Hudson Corporation*,³³⁹ the Supreme Court held that a bi-state railway, formed pursuant to an interstate compact between New York and New Jersey, was not an arm of the state for Eleventh Amendment purposes.³⁴⁰ The Port Authority argued that, because New York and New Jersey wielded ultimate control over the agency, it should be protected as an arm of the state.³⁴¹ The Court found the control-factor analysis unconvincing and unhelpful,³⁴² and not sufficiently attentive to the "impetus for the Eleventh Amendment: the prevention of federal-court judgments that must be paid out of a State's treasury."³⁴³ Relying on *Hess*, Justice Werdegar, in *Venegas*, thought the appropriate focus should be on the question of whether a judgment rendered against the sheriff's office would threaten California's treasury.³⁴⁴ She concluded that, under California law, the sheriff is an elected county officer, the sheriff's office is funded by the county, and, most importantly, the county is liable for tort judgments rendered against the sheriff, as well as against the sheriff's department.³⁴⁵ These factors, together with the reality

336. *Venegas*, 87 P.3d at 20, 21 (Kennard, J., concurring in part and dissenting in part).

337. *Id.* at 22 (Werdegar, J., dissenting).

338. *Id.* (citing *Hess*, 513 U.S. at 48). In *Hess*, the Court held that a bi-state entity, created by an interstate compact, was not protected by the Eleventh Amendment from an FELA suit in federal court. *Id.* (citing *Hess*, 513 U.S. at 41–42).

339. 513 U.S. 30.

340. *Id.* at 48.

341. *Id.* at 47. The states had the power to appoint and remove the commissioners, the governors could veto the Authority's actions, and the states' legislatures had substantial control over what projects were undertaken by the Authority. *Id.*

342. *Id.* As the Court notes, "ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates." *Id.*

343. *Id.* at 48.

344. *Venegas*, 87 P.3d at 23.

345. *Id.* at 23–24 (citing various provisions of the California Constitution, California

that ultimate supervision by the attorney general of the state was a “theoretical power” that left state sheriffs with “wide autonomy” over matters of law enforcement, convinced Justice Werdegar that a Los Angeles County Sheriff is a county officer for purposes of liability under § 1983.³⁴⁶

In defending her position as consistent with *McMillian*, Justice Werdegar found critical the Supreme Court’s conclusion that, under Alabama law, suits seeking damages against Alabama sheriffs in their official capacity are treated as suits against the State, and Alabama counties are not liable in respondeat superior for acts of Alabama sheriffs.³⁴⁷ While there is no respondeat superior liability under § 1983,³⁴⁸ Justice Werdegar viewed the vicarious liability of counties for sheriffs’ state law torts as “strong evidence” that California sheriffs were agents of the county and not the State.³⁴⁹ Because a suit for damages against a California sheriff in his official capacity would not be a suit seeking damages against the State, the suit would not be barred by *Will v. Michigan Department of State Police*.³⁵⁰ Finally, the dissent distinguished *Pitts* on the basis that sheriffs are different from district attorneys, who “have a particularly strong association with the direct exercise of the state’s power” and who “prosecute state criminal offenses in the name of, and as the legal representatives of, the People of the State of California.”³⁵¹

Both Justice Kennard and Justice Werdegar noted with concern the division that now exists between the federal and state

Government Code, and Los Angeles County Charter). Furthermore, under California law, the sheriff can be removed from office “only at an election by the county voters or, during his or her term of office, by trial on an accusation returned by a county grand jury.” *Id.* at 25 (citing Cal. Govt. Code Ann. § 3060).

346. *Id.* at 24.

347. *Id.* at 25–26 (citing *McMillian*, 520 U.S. at 790–791) (“[T]he [Alabama] court has held unequivocally that sheriffs are state officers, and that tort claims brought against sheriffs based on their official acts therefore constitute suits against the State, not suits against the sheriff’s county. Thus, Alabama counties are not liable under a theory of *respondeat superior* for a sheriff’s official acts that are tortious.”) (internal citations and footnote omitted)).

348. *Monell*, 436 U.S. 658, 694 (1978).

349. *Venegas*, 87 P.3d at 26. Justice Werdegar explained that a suit against a California sheriff in his official capacity would be tantamount to a suit against the Los Angeles Sheriff’s Department, whose budget is established by the County. *Id.* Funds to pay judgments would presumably come from that budget. *Id.*

350. 491 U.S. at 65–66.

351. *Venegas*, 87 P.3d at 26–27.

courts on the status of sheriffs in California for purposes of liability under § 1983.³⁵² Plaintiffs with federal constitutional claims against California sheriffs will take their claims to federal court

352. *Id.* at 21 (Kennard, J., concurring in part and dissenting in part) and 22 (Werdegar, J., dissenting). This problem is not unique to California. In *Henderson Amuse., Inc. v. Good*, 172 F. Supp.2d 751 (W.D.N.C. 2001), *aff'd on other grounds*, 59 Fed. Appx. 536 (4th Cir. 2003) (unpublished), the court disagreed with the result reached by other federal courts in North Carolina and made the following observations:

As this court can discern, a decisional rift is growing between state and federal courts in North Carolina in Section 1983 actions, which are actionable in either forum. The potential for inconsistency is most real in such circumstances, inasmuch as federal and state courts share Section 1983 jurisdiction. . . . The difficulty arises when on one side of the street (in federal court) a Section 1983 claim against a sheriff is viable, while on the other side (in state court) it is not. Compounding this problem, there is no method in North Carolina for a federal court to certify an issue of state law (whether a sheriff is considered by the state to be a state official) so that a federal forum can determine the ultimate federal issue (whether Eleventh Amendment immunity can be extended to such official).

With due deference and the utmost respect for decisions which have reached opposite conclusions in this district, . . . and based upon all the information and precedent available to this court, including the decision of the Supreme Court in *McMillian*, this court finds that the Section 1983 official-capacity claim lodged against the sheriff is not viable, inasmuch as it is a suit against the State of North Carolina, which enjoys eleventh-amendment immunity.

172 F.Supp.2d at 763 (citations omitted). *But see Gantt v. Whitaker*, 203 F. Supp. 2d 503 (M.D. N.C. 2002), *aff'd on other grounds*, 57 Fed. Appx. 141 (4th Cir. 2003), in which the court criticized the result reached by the district court in *Henderson* with these comments:

Defendants also raise the defense of sovereign immunity to the claim against Whitaker, asserting that North Carolina sheriffs are state officials and consequently immune from suit under the Eleventh Amendment. In support of this argument, Defendants offer the recently-decided case of *Henderson Amuse[.], Inc. v. Good*. . . . While the *Henderson Amusement* court did grant immunity to a North Carolina sheriff, . . . it did so in spite of clear Fourth Circuit precedent affirming that North Carolina sheriffs are local, not state, officials and lack Eleventh[-]Amendment immunity. . . . The *Henderson Amusement* court justified its departure from this controlling precedent by citing two post-*Harter* Supreme Court decisions which it argued have overruled the immunity analysis employed by the Court of Appeals in *Harter*. However, after examining these Supreme Court decisions in a subsequent case, *Cash v. Granville County Bd. of Educ.*, . . . the Fourth Circuit reaffirmed the validity of *Harter* in no uncertain terms. . . . Therefore, in accordance with these controlling authorities, the court hereby finds that Sheriff Whitaker, as a local official, is not entitled to Eleventh Amendment immunity from Plaintiff's official capacity § 1983 claim.

Id. at 508–509 (internal citations and footnotes omitted). The Fourth Circuit left the question unresolved in *Henderson*, 59 Fed. Appx. at 542 (noting that “[b]ecause we conclude that Henderson Amusement’s § 1983 claim against Sheriff Good in his personal capacity fails because Henderson Amusement has not adequately alleged the deprivation of a constitutional right, it follows that the complaint does not state a claim against the sheriff in his official capacity. We therefore do not reach the issue of whether the Eleventh Amendment bars the claim against Sheriff Good in his official capacity.” (citation omitted)).

to avoid certain dismissal in state courts.³⁵³ Justice Kennard has urged the United States Supreme Court to decide the issue “to ensure uniformity in the enforcement of federal civil rights law in both state and federal courts in California,”³⁵⁴ while Justice Werdegar has underscored the need for the Supreme Court “to consider removing this anomaly by deciding the underlying issue of federal law.”³⁵⁵

IV. CONCLUSION: PROPOSAL FOR FEDERAL STANDARD

This Author agrees with Justice Werdegar that the issue dividing the federal and state courts in California raises a question of federal law that should be clarified by the Supreme Court.³⁵⁶ As framed by Justice Werdegar, “the disputed point is the relevance and weight, *under federal law*, to be given a particular aspect of state law defining the relationship of . . . sheriffs to the state and county governments.”³⁵⁷ Clarifying this point would not entail the “blunderbuss approach” eschewed by the Court in *McMillian* or the “national characterization” of sheriffs,³⁵⁸ but would provide a uniform test to be applied by state and federal courts in resolving the ultimate federal issue of the status of sheriffs under § 1983. The confusion wrought by *McMillian* stems from the Court’s having engaged in a § 1983 policymaker analysis to resolve an Eleventh-Amendment arm-of-the-state problem.³⁵⁹ Nowhere in *McMillian* is there a reference to *Hess* or other arm-of-the-state decisions. The term arm of the state is not mentioned. *McMillian*, instead, references the Court’s final-policymaker line of cases, *Pembaur*, *Praprotnik*, and *Jett*.³⁶⁰ In deciding who has final policymaking power, the courts must be guided by the structure of authority set out by state and local governments in their constitutions, codes, charters, or other relevant documents.³⁶¹ As Judge Posner has explained, in the final-policymaker analysis,

353. *Venegas*, 87 P.3d at 21 (Kennard, J., concurring in part and dissenting in part).

354. *Id.*

355. *Id.* at 27 (Werdegar, J., dissenting).

356. *Id.*

357. *Id.* (emphasis in original).

358. *McMillian*, 520 U.S. at 795.

359. *Id.* at 785.

360. *Id.* at 786.

361. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124–125 (1988).

“[t]he 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.”³⁶² The determination of final-policymaker status for § 1983 purposes is an inquiry into who has the last word on a particular matter under state or local law.³⁶³ The issue in *McMillian*, however, was not whether the sheriff was a final policymaker. The parties agreed he was, and the Court acknowledged as much.³⁶⁴ Nor was the issue one of whose policy was being enforced.³⁶⁵ There are a number of cases in which sheriffs, or other admittedly county officials, are merely enforcing a policy mandated by state law and left no discretion as to whether, when, or how to accomplish enforcement.³⁶⁶ In such cases, courts have held that the policy being enforced is that of the state, not of the county, and thus, there is no local government liability under § 1983.³⁶⁷ In *McMillian*, it was clear that the constitutional injuries were caused by a policy adopted and promulgated by the Sheriff, as a final policymaker, and thus attributable to his office.³⁶⁸ The question was whether the Sheriff’s Office

362. *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 468 (7th Cir. 2001) (citation omitted).

363. See e.g. *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 248 (5th Cir. 2003) (School Board is the “one and only policymaker for HISD.”); *Quinn v. Monroe County*, 330 F.3d 1320, 1326–1328 (11th Cir. 2003) (distinguishing between “final policymaker,” whose decisions can result in municipal liability, and “official decisionmaker,” whose decisions may result in individual liability (emphasis in original)); *LaVerdure v. County of Montgomery*, 324 F.3d 123, 126 (3d Cir. 2003) (holding that “[t]o be a policymaker for § 1983 purposes, an official must have final policymaking authority” (emphasis in original)).

364. *McMillian*, 520 U.S. at 783.

365. *Id.*

366. See e.g. *Gottfried v. Med. Plann. Servs., Inc.*, 280 F.3d 684, 693 (6th Cir. 2002) (finding that a sheriff who had no discretionary authority as to enforcement of state court injunction acted as an “arm of state”); *Bethesda Lutheran Homes & Services, Inc. v. Leean*, 154 F.3d 716, 718 (7th Cir. 1998) (“When the municipality is acting under compulsion of state or federal law, it is the policy contained in that state or federal law, rather than anything devised or adopted by the municipality, that is responsible for the injury.”); *Lui v. Comm. on Adult Ent. Estab. of the St. of Del.*, 213 F.R.D. 166, 174 (D. Del. 2003) (“[T]he County acts only as an agency of the State in exercising its zoning authority.”), *aff’d in part and rev’d in part*, 369 F.3d 319 (3d Cir. 2004); *West v. Congemi*, 28 F. Supp. 2d 385, 394–395 (E.D. La. 1998) (“The Fifth Circuit has long recognized that simply following the mandatory dictates of state law cannot form a predicate for *Monell* liability. . . . Chief Congemi was enforcing a constitutional Louisiana state statute, the terms of which mandate termination in the situation at issue” (citations omitted)).

367. *Id.*

368. *McMillian*, 520 U.S. at 803 (Ginsberg, Stevens, Souter, & Breyer, JJ., dissenting).

was operating as an arm of the state when enforcing a policy not mandated by state law.³⁶⁹

This Author would suggest that a county sheriff elected by the county electorate, funded by the county budget, and operating primarily within the jurisdiction of the county, should not be treated as an arm of the state unless (1) the state has signaled its willingness to bear financial responsibility for constitutional harm caused by the particular function performed by a sheriff, through assumption of costs of defense or assumption of the obligation to indemnify the sheriff for any judgment rendered against him or her in his or her individual capacity, or (2) the claim asserted by the plaintiff arises from constitutional harm resulting from the sheriff's enforcement of a nondiscretionary, ministerial duty imposed by a particular state court order or state law.³⁷⁰

The first factor looks to impact on the state's treasury.³⁷¹ If, under state law, the sheriff would be defended by a state's attorney or by a private attorney, at the state's expense,³⁷² or payment of judgments against the sheriff, in his individual capacity, assuming no immunities apply,³⁷³ would come from the state treasury or insurance funded by the state,³⁷⁴ then a suit against the sheriff in his official capacity, tantamount to a suit against the

369. *Id.*

370. *Id.* at 804.

371. As Judge Anderson notes, "Following *Hess*, the cases have uniformly continued to consider the state treasury factor as dominant." *Manders v. Lee*, 338 F.3d 1304, 1330 n. 3 (11th Cir. 2003) (en banc) (Anderson, Tjoflat, Birch & Wilson, JJ., dissenting) (citations omitted).

372. E-mail from Jeff Moore, Legal Advisor's Section, NSA, *Ongoing NSA Inquiry* (Aug. 9, 2004, 3:42 p.m. EDT); e-mail from Cecily Smith, Legal Advisor, Sheriff of Durham County, N.C. (May 10, 2005, 5:04 p.m. EDT). In South Carolina, the State defends and insures the sheriff in any litigation. E-mail from Jeff Moore. On the other hand, North Carolina does not require the State to defend or indemnify its sheriffs. The County of Durham provides the defense for the Sheriff in that County. E-mail from Cecily Smith.

373. Immunities that might attach as a matter of state law do not shield officials from liability under § 1983. *Howlett v. Rose*, 496 U.S. 356 (1990).

374. In some states, the county has the obligation to defend or indemnify county sheriffs. For example, in South Dakota, the board of county commissioners is required by statute to pay "[a]ll judgments rendered against the sheriff, deputies, and clerks by reason of any official duties performed by the sheriff, deputies, and clerks." S.D. Codified Laws § 7-12-26 (2003). The board is also required to "purchase and pay premiums on such insurance for deputies and employees of those county peace officers for which the board may determine the insurance necessary. The premiums shall be paid from the county general fund." § 7-12-26.1.

sheriff's office or department,³⁷⁵ should be treated as a suit against the state.³⁷⁶ There is unlikely to be impact on the state's treasury in the sense described unless the state has some immediate interest in and direct control over the function being performed. As Justice Sandra Day O'Connor observed, rarely will the

375. *Will*, 491 U.S. at 71 (“[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.”) (citation omitted).

376. In Maryland, for example, the sheriff and deputy sheriffs are defined as state personnel for purposes of the Maryland State Tort Claims Act and by law are represented by the state for claims arising from

- (1) courthouse security;
- (2) service of process;
- (3) the transportation of inmates to or from court proceedings;
- (4) personnel and other administrative activities;
- (5) activities, including activities relating to law enforcement functions, arising under a multijurisdictional agreement under the supervision and direction of the Maryland State Police or other State agency; or
- (6) any other activities, except for activities relating to performing law enforcement functions or detention center functions.

Code Md. Reg. tit. 12, § 12-405 (2004). Sheriffs and deputy sheriffs are represented by the county for claims arising from performing law enforcement or detention center functions. Code Md. Regs. tit. 9 § 9-108; tit. 12 §§ 12-101(a)(6), 12-501 (2004). Under this scheme, and the standard proposed by this author, Maryland sheriffs should be treated as county officials for purposes of § 1983 litigation arising out of their law enforcement and detention center functions. E-mail from Bruce Sherman, Assistant Sheriff, Montgomery County Sheriff's Office (Aug. 6, 2004, 4:21 p.m. EDT).

It may be that, in some situations, sheriffs will explicitly and clearly be designated as state officials. See e.g. *Broner v. Flynn*, 311 F. Supp. 2d 227, 233 (D. Mass. 2004) (“Effective July 1, 1998, the government of Worcester County was abolished. Effective September 1, 1998, the Sheriff of Worcester County . . . became an officer and employee of the Commonwealth of Massachusetts and all of the ‘functions, duties and responsibilities for the operation and management of the WCJHC were transferred to the Commonwealth. Mass. Gen. Laws ch. 34(B), §§ 1, 12 (2004). Therefore, a Section 1983 suit against Sheriff Flynn in his official capacity is deemed to be a suit against the Commonwealth. Since a state is not a ‘person’ for purposes of Section 1983, all claims against Sheriff Flynn in his official capacity are barred.” (citation omitted)). Here, it is not just the state's “labeling” that is dispositive, but the reality that the state will be defending the official as a state employee.

At the time of this writing, there is an ongoing dispute about whether employees of the sheriff's department in Suffolk County, Massachusetts, are state or county employees for purposes of invoking the benefits of a law signed by Governor Mitt Romney, guaranteeing the benefits of state workers who have been called into active military service since September 11, 2001. B. Rick Kein, *Sheriff Denies Wartime Benefits*, Boston Globe 84 (Aug. 5, 2004). Suffolk County Sheriff Andrea J. Cabral has taken the position that employees of the Nashua Street Jail and Suffolk County House of Correction are county employees and not entitled to the benefits guaranteed to state workers. *Id.* Boston's Corporation Counsel, Merita A. Hopkins, has taken the position that “state law should apply to sheriff's department workers because the state has abolished most county government functions, and has brought the Suffolk sheriff's office under the purview of state government.” *Id.* The author had the pleasure of knowing both the Sheriff and the Corporation Counsel when they were students at Suffolk Law School and will not express a view in this particular debate.

state be obligated to “foot the bill” with no power of oversight or control over the acting entity.³⁷⁷ The control factor per se, however, is particularly unhelpful when the status of sheriffs is in question. In most § 1983 cases, sheriffs are found to be final policymakers because they are *not* subject to control in their law enforcement or jail operations functions by other county officials or state officials.³⁷⁸ The overwhelming majority of sheriffs in the United States are elected by a county electorate³⁷⁹ and ultimately held accountable to that electorate, not to county commissioners or state officials, except in a very attenuated way. Even under the control test, there are few states in which Justice O’Connor’s “control-centered formulation” of the arm-of-the-state analysis, which would “turn on *real, immediate control and oversight*, rather than on the potentiality of a State taking action to seize the reins[,]”³⁸⁰ would result in Eleventh Amendment immunity for sheriffs.³⁸¹

If the state treasury will not be implicated in either the defense of the sheriff or in the payment of judgments, the sheriff should not be viewed as an arm of the state unless, pursuant to the second factor, the sheriff is acting as a mere conduit for the ministerial enforcement of a state court order or state law. This factor takes into account situations where the county sheriff truly acts as an agent of the state when *merely enforcing* a state court

377. *Hess*, 513 U.S. at 62 (O’Connor, Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

378. *McMillian*, 520 U.S. at 795–796 n. 10 (majority), 801 n. 2 (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting).

379. E-mail from Richard Weintraub, Gen. Counsel, NSA, to Karen Blum, Prof. L., Suffolk U. Sch. L., *Ongoing NSA Inquiry* (Aug. 11, 2004); e-mail from Thomas A. Mitchell, Deputy Counsel, New York State Sheriffs’ Association, to Karen Blum, Prof. L., Suffolk U. Sch. L., *Ongoing NSA Inquiry* (Aug. 8, 2004, 8:47 p.m. EDT). According to NSA’s 2004 Annual Sheriffs’ Directory, there are 3,088 sheriff offices and departments in the United States. There are only four states in which there are some sheriffs who are appointed rather than elected: Colorado—two appointed sheriffs out of sixty-four; Florida—sixty-six elected sheriffs and one appointed Director of the Miami-Dade Police Department; New York—two appointed sheriffs out of fifty-eight; and Rhode Island—five Sheriffs appointed by the Governor.

380. *Hess*, 513 U.S. at 62 (emphasis added); *see also Hernandez v. County of San Bernardino*, 12 Cal. Rptr. 3d 452, 458 (Cal. App. 4th Dist. 2004) (“[S]tate interest and involvement must be overt, explicit, and pervasive for apparent county activity to be characterized as state conduct.”).

381. There is the possibility that some sheriffs would still be protected by Eleventh Amendment immunity depending upon the particular state’s laws and local governmental structure. *Broner*, 311 F. Supp. 2d at 233, and *supra* n. 373.

order or a law or policy of state-wide application. If it is the order or policy, and not any discretionary method of enforcement, that is at the root of plaintiff's complaint, the local entity (whether sheriff's office or county), even if it is obliged to provide a defense for the sheriff, should not be saddled with liability under § 1983, and the plaintiff should be limited to a suit for damages against the sheriff, in his individual capacity,³⁸² or a suit against the state attorney general for prospective injunctive relief.³⁸³

McMillian, in short, has created a mess and has resulted in judicial opinions too much like "Mish Mash"³⁸⁴—good in a soup, but not so good in legal doctrine. The state and lower federal court opinions that have followed in *McMillian*'s wake reflect tedious exercises in sorting out myriad state constitutional and statutory provisions in search of abstract links connecting the sheriff's office to the state. The search for control, important in answering the § 1983 final-policymaker question, is misdirected in the Eleventh Amendment arm-of-the-state analysis. The two-part test

382. Qualified immunity attaches only when the official sued was performing a "discretionary function." *Harlow*, 457 U.S. at 818 (defining "discretionary" for qualified immunity purposes so that an official performing a purely "ministerial" task might still be able to invoke the qualified immunity defense). In *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004), the Eleventh Circuit Court explained:

In many areas other than qualified immunity, a "discretionary function" is defined as an activity requiring the exercise of independent judgment, and is the opposite of a "ministerial task." In the qualified immunity context, however, we appear to have abandoned this "discretionary function—ministerial task" dichotomy. In *McCoy v. Webster*, we interpreted "the term 'discretionary authority' to include actions that do not necessarily involve an element of choice," and emphasized that, for purposes of qualified immunity, a governmental actor engaged in purely ministerial activities can nevertheless be performing a discretionary function.

Instead of focusing on whether the acts in question involved the exercise of actual discretion, we assess whether they are of a type that fell within the employee's job responsibilities. Our inquiry is two-fold. We ask whether the government employee was (a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize.

Id. at 1265 (citations omitted); *but see Brooks v. George County*, 84 F.3d 157, 165 (5th Cir. 1996) (finding that Mississippi law imposed on the Sheriff "a non-discretionary duty to keep records of work performed by pretrial detainees and to transmit those records to the board of supervisors so that pretrial detainees [could] be paid" and that the Sheriff was not entitled to qualified immunity on plaintiff's due process claim). Under the Eleventh Circuit Court's concept of "discretionary function," a sheriff would still be entitled to qualified immunity unless the law being enforced was so clearly unconstitutional that a reasonable sheriff would have understood that enforcement violated plaintiff's constitutional rights.

383. Suits that seek prospective relief to enjoin violations of federal constitutional rights are not barred by the Eleventh Amendment. *Ex parte Young*, 209 U.S. 123 (1908).

384. *Supra* n. 4.

suggested in this article looks to state law primarily for the purpose of determining the state's financial stake in the litigation, reflected in the state's scheme for defending or indemnifying its county sheriffs. If a sheriff is engaged in nondiscretionary, ministerial enforcement of state law, he is truly acting as an agent for the state, and Eleventh Amendment immunity clearly applies. When the policy is not the state's, the sheriff's office should be treated as an arm of the state only where the state has indicated its real and immediate concern in the matter by assuming the costs of defense or liability.

This Article has hopefully called attention to the confusion that reigns in the federal and state court opinions following *McMillian*. The Author joins those jurists who have implored the United States Supreme Court to revisit the issue. Until the Court clarifies the federal standard to be applied in determining the status of sheriffs for § 1983 purposes, choose the appropriate bumper sticker, or, if in California, proudly display both.

