23-1084, *Whitson v. Hanna*
PHILLIPS, J. dissenting.

I would affirm the district court's dismissal of the claims against Sedgwick County because Sheriff Hanna did not act as a final policymaker in his decision to sexually abuse Ms. Biggs. I agree with the district court's conclusion that Sheriff Hanna advanced a purely personal agenda in committing the sexual assault and acted outside his authorized law-enforcement "realm" of setting policy for the transportation of prisoners. *Whitson v. Hanna* (*Whitson II*), No. 1:18-CV-02076, 2023 WL 2570224 at *4 (D. Colo. Mar. 6, 2023) (quoting *Randle v. City of Aurora*, 69 F.3d 441, 448 (10th Cir. 1995)). As the district court put it so well, sexual assault "is not within the policymaking authority a county sheriff has." *Id.*

I disagree with the majority's characterization that Sheriff Hanna's sexual assault occurred "while transporting [Ms. Biggs] between county jails" and "in the course of carrying out official duties for which he was charged with setting policy[.]" *See* Majority Op. at 2, 6, 19. In fact, Sheriff Hanna interrupted the transport between the county jails by stopping at his house and taking Ms. Biggs into his home to sexually assault her. The jail transport resumed only after he completed the sexual assault.

I agree that Sheriff Hanna had policymaking authority over the jail transportation of detainees like Ms. Biggs, and that legitimately exercising this authority could result in municipal liability under § 1983. For instance, if the sheriff had instructed deputies to tighten handcuffs one extra click during transport out of concern for escape risks and a detainee suffered nerve damage, the sheriff's exercise of policymaking authority should

qualify as municipal policy. Or if concerned that detainee transports were taking too long, the sheriff had instructed deputies not to fasten detainees with safety belts to speed their entry and exit from sheriff vehicles and a detainee was injured in a head-on collision, the sheriff's exercise of policymaking authority should again qualify as municipal policy. The voters may have elected an unsuitable sheriff, but the sheriff, however misguided, would be acting within a sheriff's realm there. But those sorts of policies bear no resemblance to Sheriff Hanna's supposed "policy" of halting detainee jail transport for whatever time he needed to commit a sexual assault. The majority opinion goes too far for me in approving as municipal policy a rogue sheriff's one-time, *secret* action that is unquestionably outside of the sheriff's realm and legitimate policymaking authority.

In justifying its holding, the majority opinion relies on a conglomeration of three distinct categories of final-policymaker cases. In each category, the policymaker is acting under color of law (and is thus suable under § 1983), as Sheriff Hanna was here. In the first category, which by my reading covers the bulk of final-policymaker cases, the policymaker makes wrong decisions—but within the realm of his or her authority—and causes a constitutional injury to another person. In the second category, which involves far fewer cases, the policymaker—again within the realm of his or her authority—acts in his employment in an illegal way, for instance, by falsifying evidence and the like while investigating crimes. In the third category, which involves far fewer cases even yet, the final policymaker acts outside the authorized realm by committing crimes, such as sexual

assaults, solely for personal gratification. For these third-category cases, I cannot see how the municipality is the driving force of the constitutional violation.[1]

Though the majority opinion doesn't lack for case citations, the cases from the first two categories offer little help. None of the cited Supreme Court cases concern the third-category situation. So that leaves us with the circuit courts. I dispute the majority's declaration that its "conclusion in this case finds strong support in the decisions by other circuits." Majority Op. at 9.

I. The Majority Opinion's Third-Category Cases

As support for its holding, the majority opinion relies heavily on *Bennett v. Pippin*, 74 F.3d 578 (5th Cir. 1996). In *Bennett*, a woman shot her husband after he allegedly assaulted her. *Id.* at 583. The woman was arrested in another county after informing the authorities there. *Id.* The county sheriff drove her back to her house, surveyed the scene of the shooting, then left to attend to other law enforcement duties. *Id.* After arrest and booking, a deputy took the woman home. *Id.* Later, the sheriff returned alone to "assuage [her] previously expressed concern that [her husband's] friends would attack her" and because "he was mildly aroused by the manner in which Ms. Bennett had touched him as

[1] The majority opinion notes that "[n]either the County of Sedgwick nor the Sedgwick County Sheriff's Department had any policy in place to oversee and monitor the actions of Sheriff Hanna." Majority Op. at 4. It in turn blames this "lack of oversight," *id.*, for Sheriff Hanna's being "unchecked and unmonitored," *id.* at 5. But the county has limited options, as noted by *Simmons v. Uintah Health Care Special Service District*, 506 F.3d 1281 (10th Cir. 2007), which the majority cites for the proposition that "[m]unicipalities are 'equally answerable for actions undertaken by their final policymakers, whether or not those actions conform to their preexisting rules." Majority Op. at 7 (quoting *Simmons*, 506 F.3d at 1287).

he lit a cigarette for her." *Id.* From there, the sheriff's and woman's accounts greatly differed. *Id.* But at the civil bench trial involving § 1983 claims, the court found that "the Sheriff raped Ms. Bennett in the manner described in her testimony." *Id.* at 584. This testimony included Ms. Bennett's account that the sheriff raped her after telling her that "he was the Sheriff and could therefore do what he pleased." *Id.* at 583. The woman asserted a § 1983 claim against the county alleging that the sheriff had acted as its final policymaker. *Id.* at 581.

The Fifth Circuit began by noting that "[o]ur cases make clear that under *Monell*, a single decision may create municipal liability *if* that decision were made by a final policymaker responsible for that activity." *Id.* at 586 (cleaned up). Next, the court declared that "in Texas, the county sheriff is the county's final policymaker in the area of law enforcement, not by virtue of the delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected." *Id.* (citations omitted). Critically, the court then stated that

> the Sheriff's actions were those of the County because his relationship with Bennett grew out of the attempted murder investigation and because, as we will explain, he used his authority over the investigation to coerce sex with her. The fact that rape is not a legitimate law enforcement goal does not prevent the Sheriff's act from falling within his law enforcement function.

Id. (citation omitted).

So if *Bennett* were a Tenth Circuit case, it might well control the present case. But as an out-of-circuit case, *Bennett* must earn its way into our caselaw by its persuasive value. For me, *Bennett* hasn't earned its place. Other circuits have rejected it, and we should too. I agree with the cases below criticizing *Bennett* and declining to follow it.

II. A Circuit-Court Survey

Below, I collect the cases I have found raising issues akin to those decided in *Bennett* and our present appeal.

In *Wooten v. Logan*, a case the district court relied on but the majority opinion ignores, a "mentally handicapped minor" alleged that the then-sheriff and his female friend, who had befriended the girl's mother, conspired to rape the girl. 92 F. App'x 143, 144 (6th Cir. 2004). Having won the mother's trust, the woman took the minor girl for an overnight stay, but as prearranged, the sheriff activated his lights and stopped the car. *Id.* Soon after, the sheriff and his coconspirator had the girl "engage in oral intercourse, digital penetration and sexual intercourse over a two hour period." *Id.* During the sexual assaults, the sheriff was wearing his uniform, badge, and firearm and acted under his authority as the county's chief law-enforcement officer. *Id.* The sheriff and his woman friend later pleaded guilty to statutory rape. *Id.* The district court granted summary judgment against the plaintiff's § 1983 municipal-liability claim. *Id.* at 145. Specifically, it ruled that "although [the sheriff] was the county's final policymaker with regard to enforcement of the law, [the sheriff's] alleged criminal conduct did not establish or constitute 'a municipal policy.'" *Id.* (cleaned up).

A divided panel of the Sixth Circuit affirmed, ruling that "[t]he district court properly entered summary judgment in favor of the County because [the plaintiff] has not demonstrated that [the sheriff's] conduct represented the 'official policy' of the County, as required for the County to be held liable under § 1983." *Id*. The court acknowledged that "[u]nder appropriate circumstances, a single act by a local government official can

constitute the government's 'official policy.'" *Id.* at 146. It noted that this occurs "where the official 'possesses final authority to establish municipal policy with respect to the action ordered.'" *Id.* (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986)). But the court ruled that the plaintiff "has not demonstrated that [the sheriff's] conduct represented the 'official policy' of the County, as she has not shown that [the sheriff] was acting in a policymaking capacity when he detained and assaulted her." *Id.* The court commented that holding otherwise would "contravene *Pembaur*'s attempt 'to distinguish acts of the *municipality* from acts of *employees* of the municipality.'" *Id.* at 147 (quoting *Pembaur*, 475 U.S. at 479).

The *Wooten* court considered and rejected the Fifth Circuit's contrary ruling in *Bennett*. *Id.* at 146 n.3. Noting *Bennett*'s holding that "the rape constituted the county's 'official policy,'" *Wooten* characterized *Bennett*'s holding as a "brief analysis [that] could be questioned as effectively providing for *respondeat superior*." *Id.* (citing *Bennett*, 74 F.3d at 586).

Next, in *Roe v. City of Waterbury*, the city's mayor sexually abused minor females "on numerous occasions at the mayor's office, in his home, and in his city-issued police cruiser." 542 F.3d 31, 33 (2d Cir. 2008). He arranged these meetings with a city-paid cell phone. *Id.* at 34. In pursuing § 1983 claims in their lawsuit, the minors contended that the mayor was the final policymaker "in the areas of law enforcement, safety, and social issues; and as a result he had final policymaking authority over the area of conduct that included his abusive acts." *Id.* at 37. On this point, the court noted, a plaintiff must show a municipal official had final policymaking power and that his challenged actions were

"within that official's area of policymaking authority." *Id.* (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988)).

The Second Circuit upheld the grant of summary judgment for the city, reasoning that "[d]ecisions to sexually abuse young children are not made for practical or legal reasons and are not in any way related to the City's interest." *Id.* at 38 (quoting *Anthony v. City of New York*, 339 F.3d 129, 139 (2d Cir. 2003)). This meant that "[t]he City cannot be said to be the 'moving force' behind the abuse." *Id.* (quoting *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404 (1997)). The court determined that the mayor's actions were "in an area in which he was not a policymaker," so he "had no authority to make policy authorizing, condoning, or promoting the sexual abuse of children." *Id.* at 40.

The Second Circuit also rejected the Fifth Circuit's ruling in *Bennett*: "In our view, *Bennett* cannot be reconciled with *Pembaur* and *Praprotnik*'s prohibition against finding municipal liability based on *respondeat superior*. Consequently, we decline to follow the Fifth Circuit's reasoning with respect to municipal liability under § 1983." *Id.* at 41. It reasoned that "[a]n official acts wholly outside his official policymaking capacity when he misuses his power to advance a purely personal agenda." *Id.*

Next, in *Dahl v. Rice County*, a deputy sheriff filed a claim under § 1983 after a dispute with the sheriff about an unauthorized purchase of badges led to a physical altercation. 621 F.3d 740, 742–43 (8th Cir. 2010). In a meeting to discuss the unauthorized purchase, the deputy alleged that the "sheriff lost his temper" and "struck Dahl in the chest with the heel of his hand, causing Dahl to injure his back." *Id.* at 742

(internal quotation marks omitted). The district court granted summary judgment for the county. *Id.* at 741.

The Eighth Circuit recited the legal principles of the municipal-liability analysis, including that "a governmental entity may be held liable if a plaintiff proves that its policy or custom was the 'moving force [behind] the constitutional violation.'" *Id.* at 743 (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)). The court further acknowledged that "[a] policy can be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business." *Id.* (citing *Praprotnik*, 485 U.S. at 123). Applying those standards, the court affirmed on grounds that "[t]here is no evidence that this single incident of Sheriff Cook losing his temper represents a policy of Sheriff Cook's or of Rice County's" or that the sheriff or county "maintains a policy or custom of corporal punishment." *Id.* (citing *Pembaur*, 475 U.S. at 483). The court did not cite or discuss *Bennett*.

Finally, in *Doe v. Burleson County*, a clerk in the county attorney's office alleged that the county judge had sexually assaulted her several times, including twice in his office. 86 F.4th 172, 174 (5th Cir. 2023).[2] She brought § 1983 claims against the judge and the county. *Id.* After settling with the judge, the plaintiff went to jury trial against the county. *Id.* at 175. This ended in a mistrial after two jurors conversed with the plaintiff. *Id.* Before the second trial, the court heard argument on whether the judge "had final policymaking authority for purposes of Doe's claim against Burleson County." *Id.* This

[2] *Doe* was published on November 9, 2023, after briefing in this case was complete.

time, the court concluded that the judge "did not have final policymaking authority for any area relevant to Doe's claim against Burleson County." *Id.* (cleaned up).

On appeal, the Fifth Circuit determined that though the judge had violated the plaintiff's constitutional rights in committing the sexual assaults, the judge "did not possess final policymaking authority in any area relevant to Doe's claim," so it affirmed. *Id.* at 176. The court noted that "[a]n unconstitutional governmental policy could be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business." *Id.* at 176 (quoting *Praprotnik*, 485 U.S. at 123). The court described a final policymaker as "one that decides the goals for a particular city function and devises the means of achieving those goals." *Id.* (quoting *Sweetin v. City of Texas City*, 48 F.4th 387, 392 (5th Cir. 2022)).

The court recited that the judge had "numerous executive, legislative and administrative chores in the day-to-day governance of the county." *Id.* at 177 (quoting *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980)). The court determined that the plaintiff had failed to show that the judge "possessed the requisite authority as it relates specifically to the alleged sexual abuse" and commented that "it is hard to imagine that [the judge] would be considered the 'ultimate repository of county power' if he engages in independent, private sexual assault against another." *Id.* (quoting *Familias Unidas*, 619 F.2d at 404). Though the plaintiff alleged that the judge summoned her to his office to assist with county business, the court noted that even if he had authority to summon her there, the judge was "engaging in his own independent misconduct, unrelated to his position as County Judge." *Id.* at 178 n.2.

The court cited its earlier decision in *Bennett* just once, for the proposition that "[w]hen a final policy maker makes the relevant decision, and when that decision is within the sphere of the policy maker's final authority, the existence of a well-established, officially-adopted policy will not insulate the municipality from liability." *Id.* at 176–77 (quoting *Bennett*, 74 F.3d at 585). Though *Doe* did not explicitly overrule *Bennett*, it did not attempt to distinguish *Bennett* on the facts, either. By my reading, if the Fifth Circuit had applied *Bennett*'s rule to the facts of *Doe*, the Fifth Circuit should have come out the other way and reversed the district court's dismissal of the plaintiff's claims against the county. Because it did not, *Doe* casts doubt on *Bennett*'s continued validity.

III. Tenth Circuit Cases of Interest

Though the Tenth Circuit has not until now had occasion to weigh in on a similar case to those discussed above, it has decided cases in which governmental officials have acted outside their realm for personal gratification. In my view, our cases point away from *Bennett*, not toward it.

For starters, in *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989), a former employee in a County Assessor's Office filed § 1983 claims against the assessor and county, premised on sexual harassment committed by the assessor, who was also her supervisor. *Id.* at 811. The district court entered judgment for the County after a jury trial. *Id.*

On appeal, this court considered "whether the County can be held liable under Section 1983 for the Assessor's acts." *Id.* Among the "largely undisputed" facts were

these: the assessor "repeatedly made sexual advances toward plaintiff and other female employees, often while he appeared to be intoxicated" and "[t]hose advances included propositioning plaintiff, requesting that she meet him at his house or at other secluded locations, making obscene gestures toward her, and pinching her on the buttocks." *Id.* at 812. We noted that "the jury reasonably could have concluded that [the assessor's] conduct toward plaintiff discriminated against [the plaintiff] because of her sex and thereby deprived her of the right to equal protection of the laws." *Id.* at 815.

We affirmed the district court's finding of county liability for the plaintiff's termination from employment, but we reversed the finding of county liability for the assessor's acts of sexual harassment. *Id.* at 818. We acknowledged that § 1983 municipal liability can occur "for the acts of a municipal official only when the official possesses 'final policymaking authority' to establish municipal policy with respect to the acts in question." *Id.* (citing *Pembaur*, 475 U.S. at 483; *Praprotnik*, 485 U.S. at 123). But we noted that those cases "emphasized that municipal liability is limited to acts that are, properly speaking, acts of the municipality—that is, acts which the municipality has officially sanctioned or ordered." *Id.* (cleaned up). Regarding the sexual-harassment claims, we reversed the district court's denial of the County's motion for judgment notwithstanding the verdict, because the "acts of sexual harassment complained of here were private rather than official acts" and "were personal in nature without any indicia of being 'officially sanctioned or ordered.'" *Id.* at 819–20 (quoting *Pembaur*, 475 U.S. at 480).

Finally, in *Lankford v. City of Hobart*, two female dispatchers of the city's police and fire departments sued under § 1983, alleging sexual harassment and discrimination by the police chief. 73 F.3d 283, 285 (10th Cir. 1996). The alleged harassment included "unwelcome sexual advances, obscene remarks, and inappropriate physical touching of their bodies." *Id.* After finding no official city policy favoring sexual harassment, we turned to whether "the official charged with sexual harassment [had] 'final policy making authority' with respect to the acts in question as a matter of state law." *Id.* at 286 (quoting *Pembaur*, 475 U.S. at 483). That left the question "whether [the police chief's] acts can be characterized as a deliberate choice of the city and whether he had final policy making authority for the City of Hobart." *Id.* We affirmed the district court's grant of summary judgment on the city's behalf, reasoning that "[t]his case exemplifies a situation where the defendant was committing private, rather than public, acts of sexual harassment." *Id.* at 287.

These cases all reject municipal liability for the private acts of a final policymaker that are taken outside the realm of that official's duties. So in my view, they point against adopting *Bennett*'s rule.

IV. The District Court's Decision

The district court issued a thorough decision accounting for these precedents. It acknowledged that "a county can be liable for the actions of its policymakers, even when those actions violate a previously established policy." *Whitson II*, 2023 WL 2570224, at *4. But the district court wisely noted that "not *every* action by a policymaker is attributable to the entity, which is the implication of the plaintiff's position." *Id.* (first

citing *Pembaur*, 475 U.S. at 482 ("[W]e . . . emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish policy with respect to the action. . . ."); then citing *Randle*, 69 F.3d at 448 (municipality may be liable for one-time decision by final policymaker if "the policy decision purportedly made by the official [wa]s within the realm of the official's grant of authority")).

In my view, the district court got it right by concluding that "the transportation of prisoners is within the realm of the county sheriff's policymaking authority" but that the municipality defendants "are not being sued because Mr. Hanna transported Ms. Biggs; they are being sued because he sexually assaulted her. That is not within the policymaking authority a county sheriff has." *Id.* The district court did not err by concluding that Sheriff Hanna's actions were "wholly outside" his authority and lawful realm because he "misuse[d] his power to advance a purely personal agenda." *Id.* (quoting *Roe*, 542 F.3d at 41).

For these reasons I respectfully dissent and would affirm the district court's order granting the motion to dismiss the claims against Sedgwick County. I disagree with the majority opinion's holding that the sheriff can create a municipal policy with his one-time, *illegal*, and *secret* act of sexually assaulting a detainee by interrupting a detainee's jail transport and improperly taking her inside his home to commit a sexual assault. With that as our circuit's new rule, I see no way for a municipality to do anything but write

checks—strict liability for the municipality despite its legal inability to constrain a rogue sheriff determined to gratify his sexual desires.