In the

# United States Court of Appeals

## For the Seventh Circuit

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No. 22-1194

BRIAN OROZCO, as Administrator of the Estate of Gregory Koger,

*Plaintiff-Appellant*,

*v.*

THOMAS J. DART and COOK COUNTY, ILLINOIS,

*Defendants-Appellees*.

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:14-cv-06361 — **Maria Valdez**, *Magistrate Judge*.

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ARGUED SEPTEMBER 23, 2022 — DECIDED APRIL 6, 2023

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Before RIPPLE, ROVNER and BRENNAN, *Circuit Judges*.

BRENNAN, *Circuit Judge*. Cook County Jail staff searched Gregory Koger's cell on October 5, 2013. That search sparked lengthy litigation, including two prior visits to this court. Koger alleges that the officers who conducted the search removed approximately 30 books from his cell and disposed of them. Seeking to hold the County responsible, Koger filed suit under 42 U.S.C. § 1983. Though his allegations have evolved,

Koger lands on a claim that the County deprived him of his books without due process. The district court granted summary judgment to the County, and we affirm. Koger received constitutionally sufficient due process surrounding any property deprivation, and he presents insufficient evidence to hold the County liable under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and its progeny.

## I

### A

The following facts are drawn from the evidentiary record developed during the parties' motions for summary judgment.

In July 2013, Koger began serving a 300-day sentence in Cook County Jail. While incarcerated, he received 42 books and a magazine through the mail. Per Jail policy, inmates can keep no more than three books or magazines (excluding religious texts) in their cell at any time. Koger had approximately 30 volumes in his cell at the time of the search. The three-book policy is contained in the Inmate Information Handbook ("Handbook") which is given to all inmates upon arrival. The policy states that any items or property—in excess of the amounts allowed—is considered contraband. It is undisputed that Koger received a copy of the Handbook.

Inmates with excess books have a few options. They can mail them out of the Jail using large manila envelopes and postage available for purchase through the Jail commissary. Indigent inmates may request postage from a Correctional Rehabilitation Worker, but Koger maintained at least one hundred dollars in his inmate trust account at all relevant times. In addition, inmates can have someone outside the Jail

pick up personal property. Inmates are also free to donate their books to other inmates. And if an inmate believes that Jail staff has mishandled his personal property, he may use the Inmate Request and Grievance Procedures.

Though the three-book policy has long been in effect, it was not strictly enforced during Koger's stay. As a result, it was common for inmates to have more than three books in their cells. Despite historically lax enforcement, in October 2013 the Jail prepared to confiscate excess reading materials. Koger testified that Jail administrators warned him they would soon search inmate cells and take excess books:

> Well, we had heard from other decks that [Jail staff] had already shaken down their cells. And in the days leading up to that, there were administrators of the Cook County Jail who came into our deck and told us you can only have three books. Not verbatim, but something along the lines of get rid of any more books than three books because we're coming to take that stuff.

Though Koger "knew that this was coming" he did not try to divest himself of his excess books, "[b]ecause they were [his] books" and "[t]here was no reason for [him] to get rid of the books."

On October 5, 2013, Sergeant Peter Giunta's team of six correctional officers searched the cells on Koger's tier. According to Koger, Giunta's team took all but three books from his cell. Koger testified that he never saw any of the confiscated books again. He wrote a grievance after his books were removed, but he decided not to file it.

Testimony from other inmates, including Gerald Washington, Jerry Collins, Jovanny Martinez, and others supports Koger's account of the search. Kevin Long, another fellow inmate, offers additional details in his Declaration.[1] Long states he saw confiscated books packed into large garbage bags following the October 5th search, though he apparently recovered some of his own books after speaking with correctional officers.

The County disputes Koger's account of the search and provides its own supporting evidence. Jail records confirm that a search took place on October 5th, but the search report does not mention confiscated books. On that point, Giunta testified that if his officers had taken books, he would have written about it in the search report or an incident report. Giunta also testified that he does not remember any books or magazines being removed from the searched cells. A genuine factual dispute thus exists about whether any books were taken and, if they were, what became of them. Koger acknowledges this point on appeal.

Given that Koger seeks recovery from Cook County, a municipality, it is also necessary to examine the record for evidence of County policies or customs. As discussed, it is undisputed that the County has an express written policy limiting an inmate to three books in his cell. But the parties apparently agree that the Jail has no written policy on what

[1] The County moved to strike the Declaration of Kevin Long based on Koger's alleged failure to disclose Long as a witness pursuant to the Federal Rules of Civil Procedure. The district court denied that motion as moot after awarding summary judgment to the County. Because the County prevails despite our consideration of Long's account, we view the objection as immaterial.

happens to books in the event Jail staff confiscates them. Either way, neither party identifies such a policy.

Koger claims the County's policy is "to not have any policy," thus entrusting guards with "total discretion to do what they want with inmates' confiscated books." In Koger's brief he argues this "creates a high risk of erroneous deprivations." This position has some record support. Daniel Moreci was the Jail's first assistant executive director at time of deposition.[2] When asked "[w]hat happens to books or magazines that are confiscated from inmates" when a cell search reveals "[c]lutter, [un]sanitary conditions, contraband … [or] security concerns," he responded that such reading materials are "[m]ost likely destroyed, thrown in the garbage." Moreci later answered "No" when asked whether correctional officers are "supposed to ask which books and magazines the inmate would like to keep" prior to confiscation. This accords with Koger's account of the search, as well as those of his fellow inmates.

In response, the County provides evidence that it does not instruct correctional officers to summarily destroy inmate property. Giunta testified to the only procedure he recalls using to enforce the three-book policy:

> I would basically interview the inmate and let him know that he has an excessive amount of whether it be books or magazines, and that he's

[2] In a district court motion, the County objected to Koger calling Moreci a Federal Rule of Civil Procedure 30(b)(6) witness. After siding with the County on summary judgment, the district court dismissed this motion as moot. Because we likewise rule for the County, Moreci's designation is inconsequential.

> generally allowed three, but pick the ones you want. The rest I would bag. I would place in a bag or some type of box … and it would be—it would be the inmate's responsibility to have them either sent home or to have some family member or someone else come and pick them up for [the inmate].

And when asked how correctional officers are supposed to deal with an inmate's excess personal property, former Executive Director Scott Kurtovich testified, "Either remove it or have the ability to have him send that excess stuff home via US Mail out to his family; or have his family even pick it up, believe it or not."

Cook County Department of Corrections General Order 14.7 states: "Items in your possession that have not been provided or approved by the [Jail] will be considered contraband, confiscated and a Disciplinary Report will be completed." While that Order suggests Disciplinary Reports are mandatory, Moreci testified that creation of a formal report is left to the "common sense" of the officer and supervisor. In Moreci's time with the County, he had "never seen a disciplinary report state that [an inmate was] being written up because [he had] too many books or magazines."

Regardless of how the Jail handles confiscated books, the record confirms that enforcement of the three-book policy was rare. *See, e.g.*, Roman Declaration ("In my whole time at the jail, I have seen the rule enforced three times … ."); Martinez Declaration ("During my time at the jail, I have only rarely seen this rule enforced against inmates."); Collins Declaration ("In my experience, the jail rarely enforces this rule."); Washington Declaration ("Correctional Officers knew

that many inmates had more than that number of books, but they never enforced the rule limiting the number of books we were allowed to keep in our cells.").

The Jail released Koger from custody on October 24, 2013, and he passed away in 2020. Though Brian Orozco has taken over the suit as administrator of Koger's estate, throughout this opinion we attribute Orozco's arguments to Koger.

**B**

The procedural history of this case is extensive and significant. Koger's legal action against the County began on August 18, 2014, when he filed a complaint in federal district court. The thrust of that initial complaint differs from Koger's current position. Koger first alleged that the three-book policy violated the First Amendment. Among other arguments, he asserted that the three-book policy "unreasonably and irrationally censors and restricts [inmates'] ability to receive information," and thus infringes First Amendment rights.

The district court granted summary judgment to the County in September 2017. The court ruled that two additional litigants lacked standing to sue and that Koger had no standing to seek injunctive relief. On the merits, the court determined that Koger could not show municipal fault. Specifically, the court concluded that any deprivation of Koger's books was attributable to the negligent or intentional wrongdoing of Jail staff, not a Jail policy or custom.

On appeal, this court affirmed in part and reversed in part. *Lyons v. Dart*, 901 F.3d 828 (7th Cir. 2018). We agreed with the district court's standing analysis, *id.* at 829–30, but remanded for additional fact-finding on Koger's First Amendment claim. *Id.* at 830. Due to "Koger's allegation that the

confiscation of his reading material was authorized by the Jail's policy," we sent the case back to determine "exactly what policy the Jail is employing, how (if at all) it affected Koger, and if necessary consider the validity of that policy and whether Koger is entitled to damages." *Id.*

Back in the district court, Koger sought leave to file an amended complaint with a procedural due process claim. The district court denied that motion, identified "no due process claim in the case," and awarded summary judgment to the County again in June 2019. Koger moved for reconsideration, and in September 2019, the district court again ruled for the County but expanded its analysis. In short, the district court determined that the three-book policy did not violate the First Amendment and reiterated that Koger had not properly pleaded a due process claim.

Once more this court affirmed in part and reversed in part. *Koger v. Dart*, 950 F.3d 971 (7th Cir. 2020). As to the First Amendment claim, we agreed with the district court that the three-book policy is constitutionally valid. *Id.* at 974. But we concluded that the district court should have evaluated Koger's due process claim. "Complaints plead *grievances*, not legal theories," so we remanded with instructions that the district court consider the due process claim on its merits. *Id.* at 974, 976. With that, Koger returned to the district court a third time—and lost on summary judgment a third time. After additional proceedings on Koger's due process claim, the district court held, "Koger was on notice of the three-book rule in the Handbook, was given multiple in-person warnings, and had opportunities to divest himself of his excess books through various means." So even if the County was responsible for permanently depriving Koger of his books, he received

constitutionally adequate procedural protections. Koger again sought reconsideration, but the district court denied his motion. Orozco, as administrator of Koger's estate, appealed to this court.

**II**

Koger appeals from a grant of summary judgment to the County, so our review is de novo. *Barnes v. City of Centralia*, 943 F.3d 826, 828 (7th Cir. 2019) (citing *Tapley v. Chambers*, 840 F.3d 370, 376 (7th Cir. 2016)). In analyzing the record, we construe all facts and reasonable inferences in nonmovant Koger's favor. *Id.* Summary judgment is properly awarded when "the admissible evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Hanover Ins. Co. v. N. Bldg. Co.*, 751 F.3d 788, 791 (7th Cir. 2014) (citing FED. R. CIV. P. 56(c)). We will not grant summary judgment if a "dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). But "[a] party who fails to produce evidence sufficient to establish an element essential to that party's case on which they bear the burden of proof cannot survive a summary judgment challenge." *Stockton v. Milwaukee County*, 44 F.4th 605, 614 (7th Cir. 2022) (citation omitted).[3]

[3] One additional procedural point: Koger and the County both moved for summary judgment in the district court, but on appeal Koger does not press his motion. Appellant's Brief at 23 n.12. So, we exclusively analyze the County's motion and treat Koger as the nonmoving party throughout.

Koger brings his claim under 42 U.S.C. § 1983 which, in relevant part, prohibits a person acting under the color of state law from depriving a U.S. citizen of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. By way of his § 1983 claim, Koger alleges a violation of his Fourteenth Amendment due process rights. The Due Process Clause of the Fourteenth Amendment requires states to provide citizens with adequate procedural protections relative to certain deprivations, a violation of which is actionable under § 1983. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). To establish a due process claim, Koger must show two things: "(1) deprivation of a protected interest and (2) insufficient procedural protections surrounding that deprivation." *Tucker v. City of Chicago*, 907 F.3d 487, 491 (7th Cir. 2018) (quoting *Michalowicz v. Vill. of Bedford Park*, 528 F.3d 530, 534 (7th Cir. 2008)).

**A**

Koger's alleged protected interest here is a property interest in his books, which he asserts the Jail unlawfully seized and destroyed. We agree with Koger that he has a protected interest in his books and, construing the facts favorably to him, we assume for purposes of summary judgment that the Jail deprived Koger of that protected property interest.

An interest in property is a protected interest for purposes of procedural due process. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569–70 (1972). Under normal circumstances, books plainly qualify as property. But the analysis is more complex in the jail context. Per the Handbook, any books in an inmate's cell beyond the allotted three qualify as contraband. The County points to this policy and argues that inmates have no protectable property interest in items

deemed contraband. Koger disagrees on the impact of the policy, arguing that the contraband status of the books may limit an inmate's right to *possess* the excess reading materials in his cell, but it cannot instantly extinguish an inmate's *property* interest in those materials. On this point, the district court found a protectable property interest in the excess books, writing that "the Seventh Circuit's statements in this case foreclose [the County's] contention."

We agree with the district court. Koger had a continuing property interest in the books, even if the three-book policy deems them contraband. The County's position to the contrary does not square with our prior holding in *Koger*, 950 F.3d at 975. There, the County argued "that the books (in excess of three) were contraband, which public officials may seize and destroy without notice, hearings, or compensation." *Id.* In response, we explained, "That proposition is far from clear: That public officials *call* something contraband does not make it so." *Id.* Continuing, we recognized "*Excess* books may be a kind of contraband, but only while in the cell." *Id.* Unlike cocaine or other banned substances, books are generally permitted in public and in jail. Indeed, "Cook County acknowledges that Koger could have mailed the books home an hour before the search and that the outbound books would not have been seized and destroyed." *Id.* We also recognized that Illinois "has adopted by statute a long list of items classified as contraband inside prisons," but "[b]ooks are not on that list." *Id.* (citing 720 ILL. COMP. STAT. 5/31A-0.1). Therefore, Koger did not lose a property interest in his books by virtue of having too many of them.

*United States v. Miller*, 588 F.3d 418 (7th Cir. 2009), illuminates this distinction. We found that case instructive in *Koger*,

950 F.3d at 975–76, and we continue to do so. There, the United States charged Miller with a felony and seized his firearms. *Miller*, 588 F.3d at 418. Upon conviction, Miller became ineligible to possess his seized firearms, meaning the government could not return them to him. *Id.* at 418–19. But the government had also failed to timely pursue a forfeiture proceeding for the guns. *Id.* This created an impasse. The guns could not go back to Miller, but the government was not entitled to keep them either. The district court initially ordered the weapons destroyed, but we reversed that decision. *Id.* at 419–20. Identifying several alternatives to destroying the firearms or returning them to Miller, we held that "Miller's property interest in the firearms continues even though his possessory interest has been curtailed." *Id.* at 420.

In *Koger*, we drew a parallel. "What was true of Miller is true of Koger too: he lost a possessory interest in the books by keeping too many in his cell, but he did not automatically lose his property interest." *Koger*, 950 F.3d at 975. This remains true. The Jail's policy limited Koger's possessory interest in his books but could not immediately extinguish his property interest in them. Still, "[p]roperty interests are created and defined by state law," so Illinois law could conceivably divest Koger of a property interest in the excess books. *United States v. Knoll*, 785 F.3d 1151, 1156 (7th Cir. 2015) (quoting *Butner v. United States*, 440 U.S. 48, 55 (1979)). But the County identifies no such law.

The County points to *Webb v. Lane*, a state appellate court decision, but that case is neither controlling nor persuasive. 583 N.E.2d 677, 679 (Ill. App. Ct. 1991). In *Webb*, a prison staffer discovered Webb with cash and confiscated it permanently. *Id.* No Illinois statute defined cash in prison as

contraband, but a Department of Corrections regulation did. *Id.* at 679, 683. The Illinois state court held that Webb had "no protected property interest in the possession of unauthorized currency," so he could not prevail on a procedural due process claim. *Id.* at 686.

Per the County, it follows from *Webb* that inmates lack a property interest in contraband books. But two reasons persuade us that *Webb*'s holding does not apply here. First, the prison regulation at issue in *Webb* dealt with currency, which received special treatment under the prison's rules. *Id.* at 679. Per Department Rule 501.230, the prison treated unauthorized currency differently than other excess property contraband. *Id.* Indeed, the prison rules stated that unauthorized cash was to be permanently confiscated, but "other unauthorized or excess property" not involving drugs, weapons, or alcohol could be shipped out of the prison or collected by an outsider. *Id.* (citation omitted). Cash was thus unique within the prison's policy scheme, and *Webb* concerned only cash. We do not read *Webb* to hold that inmates automatically lose a property interest in an item just because a jail policy deems it contraband. *See Koger*, 950 F.3d at 975.

Second, the prison regulation in *Webb* banned prisoners from possessing currency. "Pursuant to Department Regulation 504, possession of money is made a punishable offense … ." *Webb*, 583 N.E.2d at 682 (citation omitted). Not so for the books here. Inmates are entitled to have books in Cook County Jail so long as they do not have more than three at any given time in their cell. Therefore, *Webb* neither establishes that Illinois jails may destroy anything deemed contraband, nor does it hold that inmates have no property interest in excess books. We decline to change course from our earlier

opinion in this case. Koger continued to have a property interest in his books, even after he accumulated more than three. "We have seen before, and rejected, an argument that items deemed contraband only because found in the wrong hands may be summarily destroyed." *Koger*, 950 F.3d at 975. We again reject that contention here.

This holding does not end the first step of the due process analysis, though. It is not enough for Koger to have a protectable property interest in the books. The County must have deprived him of that interest. Koger contends that the Jail destroyed or otherwise disposed of all his books and claims that a gap in the County's policies was the moving force behind the deprivation.[4] In response, the County denies that Jail employees ever took Koger's books. The County further argues that—even if a deprivation occurred—the loss of property cannot be attributed to a County policy or custom. As such, the parties dispute what happened to the books and who is responsible.

At the summary judgment stage, we "construe facts favorably to the nonmoving party" and draw all reasonable inferences in that party's favor. *Lox v. CDA, Ltd.*, 689 F.3d 818, 821 (7th Cir. 2012) (quoting *Bagley v. Blagojevich*, 646 F.3d 378, 388 (7th Cir. 2011)). Koger is the nonmoving party here, so we take as true his contested assertion that the Jail personnel disposed of all his books, depriving him of a protected interest in his property.

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[4] When questioned at oral argument about what kind of policy Koger alleges for purposes of municipal liability, counsel responded: "It's a gap in the policies where a policy was absolutely necessary." Oral Arg. at 7:43–48.

**B**

The next step in the due process analysis asks what process the County afforded Koger and whether that process is constitutionally adequate. We conclude that the County afforded Koger all the process he was due under the Constitution. Thus, even if a County policy caused the destruction of Koger's books, his claim fails.

As noted above, we assume at all times that Jail staff destroyed Koger's books. And when analyzing the process Koger was given, we also temporarily assume that the County is responsible for that deprivation. This extra assumption allows us to isolate the procedural component of the due process inquiry for now, though we return to the merits of Koger's municipal liability theory later.

A procedural due process claim requires the deprivation of a protected interest and "insufficient procedural protections surrounding that deprivation." *Cannici v. Vill. of Melrose Park*, 885 F.3d 476, 479 (7th Cir. 2018) (quoting *Michalowicz*, 528 F.3d at 534). In other words, the bare fact that a state has deprived someone of a protected interest is not inherently unconstitutional. "[W]hat is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon*, 494 U.S. at 125 (citation omitted). Therefore, we "ask what process the State provided, and whether it was constitutionally adequate." *Id.* at 126.

*1. Process Provided to Koger*

We begin with the pre-deprivation process the County provided. Koger received notice of the three-book policy in a number of ways. All agree that the Jail provides inmates with the Handbook, which expressly limits the number of non-

religious books or magazines that an inmate may have in his cell to no more than three and defines excess books as a type of contraband. We previously held that policy constitutional in *Koger*. 950 F.3d at 974. Because Koger had access to the Handbook and an opportunity to apprise himself of its rules, he had constructive notice of the three-book policy. The County also provided ancillary notice by way of its General Orders. General Order 14.7 tells inmates "[i]tems in your possession that have not been provided or approved by the CCDOC will be considered contraband, confiscated and a Disciplinary Report will be completed."

Beyond paperwork, Koger received pre-confiscation notice from Jail staff. Koger testified that before the deprivation administrators told him "something along the lines of get rid of any more books than three books because we're coming to take that stuff." Koger was thus instructed prior to the deprivation that he needed to get rid of his extra books. That warning was not a dead letter, as Koger had several options at his disposal for divesting himself of the books. Inmates are permitted to purchase large envelops through the commissary and use them to send outgoing mail. Koger always had enough money in his inmate account to afford shipping supplies, though Correctional Rehabilitation Workers can assist with mailings for indigent inmates. Koger could have also worked with a Correctional Rehabilitation Worker to organize a pickup of his personal property. The Handbook provides that "[Correctional Rehabilitation Workers] assigned to [an inmate's] living unit can help [inmates] with questions about [their] … personal property." The Handbook further states "[Inmates] may authorize an individual to retrieve [their] personal property." An individual outside the Jail

could have traveled to the Jail and collected Koger's books.[5] Finally, Koger could have donated his surplus books to other inmates. It is undisputed that inmates are permitted to give away reading materials to other inmates.

Instead, Koger chose to retain his excess books after the Jail staff warned him of the impending search and confiscation. He saw no reason to get rid of his excess books because they belonged to him. Like all inmates, Koger was entitled to use the grievance process to seek redress, including post-deprivation, if he believed that the Jail had mishandled his personal property. Koger wrote such a grievance but chose not to submit it.

*2. Constitutional Sufficiency of Provided Process*

Having identified the process afforded to Koger, we next decide whether it was constitutionally adequate. "Due process, as [the Supreme Court] often has said, is a flexible concept that varies with the particular situation." *Zinermon*, 494 U.S. at 127. It only requires "such procedural protections as the particular situation demands." *Grant v. Trs. of Ind. Univ.*, 870 F.3d 562, 571 (7th Cir. 2017) (quoting *Riano v. McDonald*, 833 F.3d 830, 834 (7th Cir. 2016)). And "[t]he essential requirements of due process … are notice and an opportunity to

[5] In the district court, Koger argued that the portion of the Handbook authorizing release of property to individuals outside the Jail pertains only to property "a detainee is required to relinquish upon being processed into the jail," and not "property that inmates may possess in their cells," such as books. But the relevant portion of the Handbook states, without limitation, "You may authorize an individual to retrieve your personal property." At least two witnesses also testified that property, like books, can be released to people outside the Jail. Koger offers no contrary evidence.

respond." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

The County claims the process that was provided to Koger is constitutionally adequate. Koger disagrees, primarily arguing that the County owed him additional process between the confiscation of his books and their destruction. Relatedly, Koger asserts that the County's policy "creates a high risk of erroneous deprivations" because of the discretion it grants to correctional officers" For Koger, that risk is in tension with *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976), and could be remedied without great burden on the Jail. The district court sided with the County, finding that Koger received all the process he was due under the Fourteenth Amendment.

The factors in *Mathews* guide our inquiry into whether the County provided constitutionally sufficient process.[6] *See Simpson v. Brown County*, 860 F.3d 1001, 1006 (7th Cir. 2017) ("The general test for determining what process is due and when was set out in *Mathews* … ."). Those three factors are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest,

[6] Koger's argument that different interest types (i.e., possessory versus property) necessarily "demand different types of process" slices the due process inquiry too thinly. Due process requires contextualized, flexible analysis, and Koger cites no authority supporting a strict differentiation between process due for possessory and property interests. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). So, we fully examine the process surrounding Koger's deprivation.

> including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335.

The parties offer competing applications of those factors.[7] The County chiefly suggests that the risk of erroneous deprivation under the approach it took in Koger's case is minimal. Koger responds that the County's chosen procedures confer too much discretion on the Jail staff, risking erroneous deprivation.

*Mathews Factor One.* We agree with Koger that the permanent deprivation of personal property, such as books, is a serious private interest, so we conclude that the first *Mathews* factor weighs in Koger's favor.

*Mathews Factor Two*. This case's outcome revolves largely around the second factor—the risk of erroneous deprivation through the procedures used, and the probable value of additional or substitute procedural safeguards. *Id.* This factor has two components. As to the risk of erroneous deprivation under the County's procedure, we conclude that the risk is

[7] The County contends Koger waived his ability to argue the *Mathews* factors, but we disagree. The *Mathews* factors guide the inquiry into what process is due. *See Mathews*, 424 U.S. at 335 (explaining that "identification of the specific dictates of due process generally requires consideration of three distinct factors"). At the summary judgment stage, Koger repeatedly argued that he was not given adequate process and cited directly to *Mathews* twice. "Waiver doctrine rests on concerns about fair notice and the proper roles of the trial and appellate courts in our adversarial system." *Johnson v. Prentice*, 29 F.4th 895, 903 (7th Cir. 2022). We have no such concerns here given the briefing in the district court.

minimal. The County notified Koger upon his arrival to the Jail that he was allowed to have three books in his cell. This warning was given in the Handbook as well as the Jail's General Orders. Koger was thus on notice that he would be taking a risk by accumulating more than three books in his cell; he had an opportunity at the start to comply with the policy and to avoid all chance of deprivation. The County also notified Koger again before taking his excess texts. When this notice occurred is unclear, but it came days in advance of the search. At that point, Koger once more had an opportunity to comply. He could have mailed the books out, given them away to other inmates, or arranged to have someone pick them up. He chose not to pursue any of those options.

Koger then had post-deprivation remedies at his disposal. Per the Inmate Request and Grievance Procedures, he could have filed the grievance that he drafted but chose not to do so. And even if Koger was soon to be released from custody, he might have found relief. Indeed, one of Koger's fellow inmates reported getting back some of his books after complaining to Jail staff. Koger is responsible for utilizing the procedures the Jail provides. "The availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative procedure." *Dusanek v. Hannon*, 677 F.2d 538, 542–43 (7th Cir. 1982).

Moving to the second component of *Mathews* factor two, Koger repeatedly contends he was due additional process between the confiscation of his books and their destruction. He urges that the County should have given him a post-confiscation opportunity to relocate his books as well as post-confiscation notice that the books would be destroyed if he did not

act. But mandating such a process would essentially repeat the procedure already provided. As Koger points out, "the opportunity to comply means having procedures in place that gives inmates a fair chance to discard their books in a manner that will not result in their permanent deprivation." That is precisely the opportunity the County afforded Koger.[8] The advance notice of the three-book policy, the in-person notice, and the availability of the grievance procedure were constitutionally adequate. Any additional policy would be duplicative, so the probable value, if any, of further or substitute procedural policies that might prevent erroneous deprivation is low. *Mathews*, 424 U.S. at 335.

This is also not a case where a procedure of a different kind—such as a hearing—would have been necessary. That Koger had excess books was obvious. That the excess books qualified as contraband was apparent to everyone, including Koger, who had the most opportunity to resolve the situation. Additional or different procedural safeguards were not constitutionally required.

*Mathews Factor Three*. This factor, which examines the government's interest, *id.*, also favors the County. If the Jail were to implement a system of post-confiscation, pre-destruction process, it would unavoidably entail additional administrative oversight and expense. The Jail would need to organize a system for storing confiscated reading materials, dedicate space to the storage, and assign staff to catalogue and date the

[8] Koger says the verbal pre-deprivation warning came too late to give him a "realistic opportunity to protect himself from the summary destruction of his books." But this assertion ignores the initial notice all inmates are given of the three-book policy in the Handbook and the fact that Koger never tried to divest himself of the excess books.

confiscated books. This all detracts from the Jail's core function of maintaining safety and security. So, under *Mathews*, Koger received constitutionally adequate process.

This circuit's case law on procedural due process leads to the same conclusion as the *Mathews* factors. We begin with *Forbes v. Trigg*, 976 F.2d 308 (7th Cir. 1992). There, an inmate was assigned to work in the Officer's Barber Shop, a vocational learning shop in the Indiana Youth Center facility. *Id.* at 310. Per prison rules, inmates working at the Barber Shop were subject to urine tests for drugs. *Id.* Prison officials maintained that Forbes received a copy of that rule and was verbally informed of it. The rule was also posted on a bulletin board near his workstation. *Id.* at 310, 313. Still, when the time came for a test, Forbes refused. *Id.* at 310. Forbes was sanctioned for his conduct, and he challenged those sanctions as a procedural due process violation. *Id.* at 311–12. Discussing the constitutional requirements of due process, this court explained that "fastidious notice procedures are not required in order for the prison to enforce its officers' verbal orders." *Id.* at 314 (citing *Meis v. Gunter*, 906 F.2d 364, 366 (8th Cir. 1990)). From there, this court explained that if a prisoner is sanctioned for a rule of which he has no notice and opportunity to comply, then there might be a procedural due process violation. *Id.* In highlighting that point, this court provided a hypothetical based on a similar three-book policy:

> [If the prison] makes it an offense for an inmate to have in his cell more than three books, and if an inmate, not knowing of the [rule], has four books in his cell, and if an officer, upon discovering the four books, institutes disciplinary proceedings against the inmate without first

> informing him of the three-book limit and giving him a chance to get rid of the fourth book, obviously problems of due process arise.

*Id.* (quoting *Meis*, 906 F.2d at 367). But Forbes "ha[d] not been subject to th[at] kind of draconian handling," so this court identified no due process violation based on insufficient notice. *Id.*

We recognize that *Forbes* dealt with sanctions and not the deprivation of personal property, but the decision is still instructive on what notice is constitutionally due. If Koger was either not warned of the three-book policy or not given adequate opportunity to relocate his books, then a procedural due process issue might lie. But Koger received both—he received notice at least twice, and he was afforded means of relocating his books. Accordingly, this case does not present the risk of a due process violation like that envisioned in the *Forbes* hypothetical.

*Streckenbach v. Vandensen*, 868 F.3d 594, 596 (7th Cir. 2017), examines a prison's property release policy and notice procedures, and further suggests that Koger received adequate notice before the Jail took his books. There, a Wisconsin prison policy directed that an inmate could place personal property on deposit with prison staff, to be collected within 30 days. *Id.* If no one outside the prison collected the property within that window, prison staff would ship the property to the inmate's chosen designee at the inmate's expense. If the inmate lacked funds adequate to cover shipping, staff would destroy the property. *Id.* The prison notified the inmates of that policy in two ways. First, it was posted on a bulletin board. *Id.* at 596, 598. Second, prison staff would inform the inmate at time of drop off how much the shipping would cost. *Id.* at 598. The

inmate was given no additional notice before the property destruction. *Id.* at 596. Streckenbach put his property on deposit, and the prison—following the policy—ultimately destroyed it. *Id.* Streckenbach challenged the policy on due process grounds, claiming that the prison should have provided him additional notice, especially between the end of the 30-day period and the destruction of his property. *Id.* at 596, 598. On review, this court observed:

> [T]he 2013 policy cannot be condemned on the ground that it authorizes property to be destroyed without notice. The policy itself provides for notice—both general notice by posting and specific notice by calculating shipping costs when property is received for pickup. That it does not provide for a *third* notice (after the 30 days have lapsed) does not call its validity into question. Notice matters only when there are choices to be made.

*Id.* at 598.

Similar reasoning applies here, because Koger received notice when he had a choice to make. Even setting aside the Handbook, the County notified Koger days in advance of the search that staff would soon take any excess books. At that point, Koger knew all relevant information. He could get his books out of the Jail via mail or pickup, or he could give them to other inmates. Koger chose none of those options, explaining "There was no reason for me to get rid of the books." As in *Streckenbach*, the Constitution does not require notice beyond that which the County already provided.

Finally, *Conyers v. City of Chicago*, 10 F.4th 704 (7th Cir. 2021), *cert denied*, 142 S. Ct. 1669 (2022), provides a guidepost for what notice is constitutionally required prior to a property deprivation. In *Conyers*, this court reviewed a City of Chicago policy that requires officers to confiscate certain property from arrestees. *Id.* at 706. If that property is not claimed within 30 days, the City deems it abandoned and either sells or destroys it. *Id.* The plaintiffs in *Conyers* argued that they received insufficient notice of the policy and the destruction deadline. *Id.* at 708. At the time, the City's policy for providing notice was to give each detainee an inventory receipt, which "included a short note that explained the governing procedures" and "informed the arrestee that he or she should have received another form entitled 'Notice to Property Owner or Claimant.'" *Id.* at 707. The receipt also told detainees that they could obtain a complete copy of the policy on the Chicago Police Department website or in person at the Chicago Police Department facility. *Id.* Examining that notice framework, we identified no due process violation based on inadequate notice. *Id.* at 714–15. Here, Koger received even more personalized and meaningful notice of the three-book policy.

In addition to notice, Koger had an adequate chance to protect his property interest. *Kelley-Lomax v. City of Chicago*, a recent decision of ours, is instructive on this point. 49 F.4th 1124 (7th Cir. 2022). There, we again examined a City of Chicago policy for handling arrestee property (apparently the same policy at issue in *Conyers*). *Id.* at 1124–25. Under the City's rules, detainees were afforded 30 days to reclaim the property taken from them at time of booking. *Id.* at 1124. Otherwise, "Property remaining in the City's hands after 30 days is sold or thrown away." *Id.* Our decision in *Kelley-Lomax* primarily scrutinized Fourth Amendment and substantive due

process considerations, but it also addressed procedural due process. *Id.* at 1125. On that point, we repeated that "[t]he Due Process Clause requires notice and an *adequate* opportunity to protect one's interests," and recognized that the 30-day policy is perhaps too short for detainees to get their property back. *Id.* But we also concluded that "a longer time did not matter to Kelley-Lomax," because he did not try to retrieve his property during his entire six months in custody. *Id.* Thus, the 30-day limitation was immaterial to him. Though perhaps the property-collection period was short, and "may matter to other detainees," it did not matter to Kelley-Lomax. *Id. Kelley-Lomax* highlights that an aggrieved party's own actions play a part in the due process analysis.

There are similarities between that reasoning and this case. Koger contends the County did not give him a fair chance to protect his property. He claims he had insufficient time to properly relocate his excess books. But, as with the plaintiff in *Kelley-Lomax*, Koger did nothing to protect his interest in the books. It is not as if Koger was scrambling to relocate his books and simply ran out of time. He decided to retain his books in contravention of the Jail's noticed policy: "[T]hey were my books. There was no reason for me to get rid of the books."

Koger received adequate process surrounding the deprivation of his books, so the County is entitled to summary judgment. The district court correctly reached the same conclusion.

**III**

Though Koger's claim fails based on the due process analysis above, summary judgment for the County is appropriate

for another reason—Koger falls short of demonstrating municipal liability. Oddly, Koger's briefing neither cites to *Monell* nor comprehensively explains his theory of municipal liability. But we interpret his arguments as an attempt to establish municipal liability through a "gap in policy" theory. He agrees that "the jail did not have any formal policy (written or unwritten) regarding what is to be done with books confiscated pursuant to the jail's three-book/magazine policy," and argues that such an omission subjects the Jail to liability. Namely, Koger asserts that "written policies were and are necessary here because they are a protection against willy-nilly destruction of inmates' personal property." By refusing to implement a policy on how confiscated books were to be handled, Koger believes the Jail "create[d] a serious risk that inmates will be deprived of their property without due process." The County disputes municipal liability, contending Koger identifies no actionable policy or custom and falls short of proving fault and causation.

In our evaluation of Koger's procedural due process claim above, we assumed that Koger suffered a deprivation and that the County caused it. Now that we turn to the question of municipal liability, our inferences change. Because of the procedural posture, we continue to assume that Jail staff destroyed Koger's books in the manner alleged. But at this point we no longer take for granted that *the County* is responsible for the loss of Koger's books; instead, we examine the record for evidence that the culpable Jail staff acted pursuant to a *Monell* "policy or custom."

Because Koger is suing a municipality, it is not sufficient for him to merely demonstrate a valid due process violation. He must go a step further and show the municipality itself is

liable for the harm he suffered. *Monell*, 436 U.S. at 690–91, 694. Municipalities are suable "persons" for purposes of § 1983, but they may only be held liable for their own wrongs. *Id.* at 690. As such, a municipality is not vicariously liable for the conduct of its employees. *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 403 (1997) ("We have consistently refused to hold municipalities liable under a theory of *respondeat superior*."). Indeed, "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom … inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694. So, "The central question is always whether an official policy, however expressed … caused the constitutional deprivation." *Glisson v. Ind. Dep't of Corr.*, 849 F.3d 372, 379 (7th Cir. 2017) (en banc).

We have identified "three requirements to establish a *Monell* claim—policy or custom, municipal fault, and 'moving force' causation." *Bohanon v. City of Indianapolis*, 46 F.4th 669, 676 (7th Cir. 2022). Starting with policy or custom, three kinds of municipal action support *Monell* liability: "(1) an express policy that causes a constitutional deprivation when enforced; (2) a widespread practice that is so permanent and well-settled that it constitutes a custom or practice; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority." *Id.* at 675 (quoting *Spiegel v. McClintic*, 916 F.3d 611, 617 (7th Cir. 2019). Plus, "[i]naction can also give rise to liability if it reflects the municipality's 'conscious decision not to take action.'" *Id.* (quoting *Glisson*, 849 F.3d at 381).

In addition to a policy or custom, a *Monell* plaintiff must also show municipal fault. *Id.*; *Bryan County*, 520 U.S. at 404. This requirement is "easily established when a municipality acts, or directs an employee to act, in a way that facially violates a federal right." *Bohanon*, 46 F.4th at 675 (citation omitted). But a plaintiff's route becomes more difficult when he alleges only "that the municipality caused an employee to violate a federal right." *Id.* "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Bryan County*, 520 U.S. at 405. Under those circumstances, "[t]he plaintiff must demonstrate that the municipality itself acted with 'deliberate indifference' to [the plaintiff's] constitutional rights." *Bohanon*, 46 F.4th at 675 (quoting *Bryan County*, 520 U.S. at 407); *see also Taylor v. Hughes*, 26 F.4th 419, 435 (7th Cir. 2022). This is a high bar. As the Supreme Court explains, "'[d]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (quoting *Bryan County*, 520 U.S. at 410).

Finally, a plaintiff seeking to hold a municipality liable must show causation. "That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bryan County*, 520 U.S. at 404; *Bohanon*, 46 F.4th at 675 ("[A] plaintiff bringing a *Monell* claim must prove that the municipality's action was the 'moving force' behind the federal rights violation.") (citation omitted).

With that, we turn to municipal liability in Koger's case. Koger points to the three-book policy as causing him injury and giving rise to municipal liability. But we have already held the policy constitutional, *Koger*, 950 F.3d at 974, so Koger cannot claim that the County's "affirmative municipal action is itself unconstitutional." *J.K.J. v. Polk County*, 960 F.3d 367, 377 (7th Cir. 2020) (en banc). Instead, Koger must travel the more difficult liability route and show that the "municipality caused an employee to violate a federal right." *Bohanon*, 46 F.4th at 675. For that, Koger turns to a "gap in policy" liability theory. Koger suggests that—by creating the three-book policy without any accompanying instructions for how officers are to deal with confiscated books—the County was deliberately indifferent to the constitutional property rights of Jail inmates. "The door is left open for guards to do whatever they want with inmates' property," says Koger.

As indicated, "municipal liability can be premised, as here, on municipal inaction, such as 'a gap in express policies.'" *Id.* at 676 (quoting *Daniel v. Cook County*, 833 F.3d 728, 734 (7th Cir. 2016)). Indeed, a municipality can be held liable when it "has knowingly acquiesced in an unconstitutional result of what its express policies have left unsaid." *Taylor*, 26 F.4th at 435 (citation omitted); *see also Daniel*, 833 F.3d at 734 ("An unconstitutional policy can include both implicit policies as well as a gap in expressed policies.") (citation omitted). Yet while "gap in policy" liability is possible, it entails unique concerns and stringent requirements. We have cautioned "the path to *Monell* liability based on inaction is steeper because, unlike in a case of affirmative municipal action, a failure to do something could be inadvertent and the connection between inaction and a resulting injury is more tenuous." *J.K.J.*, 960 F.3d at 378; *see also Calhoun v. Ramsey*, 408 F.3d 375, 380 (7th

Cir. 2005) ("At times, the absence of a policy might reflect a decision to act unconstitutionally, but the Supreme Court has repeatedly told us to be cautious about drawing that inference."). So, "[a] gap in policy 'amounts to municipal action for *Monell* purposes *only if* the [municipality] has notice that its program will cause constitutional violations.'" *Bohanon*, 46 F.4th at 676 (quoting *J.K.J.*, 960 F.3d at 379). "Demonstrating that notice is essential to an ultimate finding and requires a 'known or obvious' risk that constitutional violations will occur." *J.K.J.*, 960 F.3d at 379–80 (citing *Bryan County*, 520 U.S. at 410).

This means Koger must show the County had notice that its gap in policy would cause constitutional violations and was deliberately indifferent to that risk. *Bohanon*, 46 F.4th at 675. Koger can demonstrate the requisite notice in either of two ways. He can show a pattern of constitutional violations such that the County was put on notice of the constitutional harm its gap in policy was causing. *Id.* at 676–77; *see also J.K.J.*, 960 F.3d at 380 ("In many *Monell* cases notice requires proof of a prior pattern of similar constitutional violations.") (citation omitted). Or he can show that the risk of a constitutional violation under the County's existing three-book policy was so high as to be obvious. *J.K.J.*, 960 F.3d at 380 ("[A] risk of constitutional violations can be so high … that the municipality's failure to act can reflect deliberate indifference and allow an inference of institutional culpability, even in the absence of a similar prior constitutional violation.").

Option one is closed to Koger, as there is no record evidence showing an actionable pattern of similar constitutional violations. The testimony and declarations in the record show the three-book policy was rarely enforced and offer no

evidence of repeated book or magazine destruction. *See, e.g.*, Martinez Declaration ("During my time at the jail, I have only rarely seen this rule enforced against inmates."); Collins Declaration ("I have only heard of a three-book-or-magazine rule being enforced three times in the years I have been in the Cook County Jail."); Washington Declaration ("I have only heard of the three-book rule on one other occasion in early 2014 … . However, no one confiscated extra books or magazines at that time."); Roman Declaration ("In my whole time at the jail, I have seen the rule enforced three times … ."). Sergeant Giunta likewise testified that enforcement of the policy is rare. When asked how many times he has enforced the three-book rule, he answered, "Maybe three or four times in the last two years."

Koger thus presents evidence of the County enforcing the policy just a few times in a multi-year span, let alone book or magazine destruction. This evidence does not, as a matter of law, establish municipal notice via a pattern. *See Connick*, 563 U.S. at 62 (rejecting evidence of four *Brady* violations in ten years as insufficient to put the prosecutor's office on notice that extra training was needed to avoid constitutional violations); *see also Hildreth v. Butler*, 960 F.3d 420, 430 (7th Cir. 2020) (examining the related question of how many violations are necessary to establish an unconstitutional municipal custom and holding that three potential violations over nineteen months "does not establish a widespread custom or practice").[9]

[9] We note also that Koger does not pursue a municipal liability theory based on repeated constitutional violations. He acknowledges that he

That leaves Koger with option two—demonstrating that the risk of unconstitutional property deprivation under the County's policies was so high as to be obvious. *J.K.J.*, 960 F.3d at 380. Here, too, Koger comes up short. Qualifying circumstances under this doctrine are rare, and this is not one of those cases. *See Bohanon*, 46 F.4th at 677 (explaining that the range of cases "where notice can be inferred from the obviousness of the consequences of failing to act" is narrow) (citation omitted). It was not "blatantly obvious" that implementing the three-book policy without providing additional guidance to correctional officers would result in constitutional violations. *Id.* Without more, the bare fact that a policy authorizes confiscation does not create an imminent risk that Jail staff will unconstitutionally destroy that property. We also emphasize it is not sufficient for Koger to show that a policy could conceivably or potentially lead to a constitutional violation. *See Bryan County*, 520 U.S. at 410–11 (explaining that municipal inaction that merely makes "a violation of rights more *likely*" cannot alone show liability). A constitutional violation must be a "blatantly obvious" consequence of inaction for single-incident liability, *Bohanon*, 46 F.4th at 677, and Koger cannot make that showing here.

This case closely resembles *Bohanon*, where we reviewed a § 1983 claim built around a gap in policy liability theory. 46 F.4th at 676–77. There, two off-duty officers were celebrating at a bar when patron Bohanon got into an altercation with a bartender. *Id.* at 671–72. Though the officers had been drinking, they identified themselves as law enforcement and intervened. *Id.* at 672–73. The officers badly beat Bohanon and

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"does not make a widespread practice claim in this case." Appellant Reply Br. at 5.

allegedly robbed him. *Id.* Bohanon sued the officers and the City of Indianapolis. *Id.* at 674. The City's policies generally prohibited intoxicated officers from performing law enforcement functions but contained a narrow exception allowing them to do so in an "extreme emergency situation[]." *Id.* at 672, 676. Bohanon seized on the emergency exception, arguing that "'gap' in the policy led to the 'highly predictable' outcome of his assault." *Id.* at 676. For Bohanon, "*any* exception permitting off-duty officers to take police action with alcohol in their blood demonstrates that the City was deliberately indifferent to the obvious risk of constitutional violations based on police use of excessive force." *Id.* Yet all agreed that no similar incident had ever happened before, so Bohanon had to establish single-incident liability. *Id.* at 677.

We held that the City was not liable as a matter of law, concluding that Bohanon could show neither municipal liability nor causation. *Id.* at 677. On the former point, we determined that "the City's substance-abuse policy did not present a policy 'gap' that made it glaringly obvious that off-duty officers would use excessive force." *Id.* at 672. To the contrary, "[n]othing about the text of [the policy] alone put the City on notice that constitutional violations of this kind were likely to occur." *Id.* at 677. The same reasoning applies here. The three-book policy did not present a glaring risk of constitutional violation such that the Jail should have been on notice of impending harm even with no pattern of past violations. The summary destruction of inmate reading materials does not naturally and imminently follow from the three-book policy. Because Koger does not demonstrate municipal fault, a required element, we decline to weigh in on causation. *Id.* at 676.

## IV

Procedural due process is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey*, 408 U.S. at 481. The flexibility of procedural due process "is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." *Id.* The County afforded Koger constitutionally adequate procedure given the context. "The essential requirements of due process … are notice and an opportunity to respond." *Loudermill*, 470 U.S. at 546. Koger had the benefit of both. He had notice. The County notified Koger of the three-book policy upon his entry to the Jail. Jail administrators then provided additional warning that they were soon coming to take Koger's excess books. Koger had an opportunity to respond. He could have mailed his books out of the Jail, had them picked up, or given them away. Koger elected not to act. Koger could have also filed a grievance but decided against it. Therefore, even if the County is responsible for depriving Koger of his books as alleged, we find no constitutional violation.

We also conclude that Koger cannot establish municipal liability even if his procedural due process claim were sound. He complains of a gap in the County's policies but provides evidence of only a single possible constitutional violation. With no evidence of a pattern of similar constitutional violations, this court is left having to infer that the severity of the policy gap itself put the County on notice. We decline to hold that the three-book policy is the type of policy that makes a constitutional violation blatantly obvious.

For these reasons, the judgment of the district court is AFFIRMED.