

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 WILLIAM BARBOZA,

4 Plaintiff,

5 v.

13 Civ. 4067 CS

6 STEVEN D'AGATA, et al.,

7 Defendants.

9 White Plains, N.Y.
10 September 10, 2015
10:00 a.m.

11 Before:

12 HON. CATHY SEIBEL,

13 District Judge

14 APPEARANCES

15 BERGSTEIN & ULLRICH
16 Attorney for Plaintiff
STEPHEN BERGSTEIN

17 NEW YORK CIVIL LIBERTIES UNION
18 Attorney for Plaintiff
MARIKO HIROSE
JORDAN WELLS

19 DRAKE, LOEB, HELLER, KENNEDY, GOGERTY, GABA & RODD
20 Attorney for Defendants
ADAM LAWRENCE RODD

21 DECISION

1 THE COURTROOM DEPUTY: William Barboza v. Detective
2 D'Agata, et al.

3 THE COURT: Have a seat, everyone. Good morning
4 Mr. Bergstein, Ms Hirose, and Mr. Wells and Mr. Rodd. If I
5 remember, Mr. Yasgur is unavailable because of a medical thing
6 and you're pinch-hitting for him, Mr. Rodd.

7 MR. RODD: Correct, your Honor.

8 THE COURT: Not that anything substantive is going to
9 be asked of you. I have reviewed the papers. Is there
10 anything that anybody wants to add that's not covered by the
11 papers.

12 Hearing nothing I will proceed.

13 I have summary judgment motions from the Village of
14 Liberty, Steven D'Agata and Melvin Gorr, who I will refer to as
15 the village defendants, and from defendant Zangala. And I have
16 a cross-motion for summary judgment from the plaintiff.

17 The following facts are based on the parties' 56.1
18 statements and the supporting materials and are undisputed
19 except as noted.

20 Plaintiff is a resident of [REDACTED], Connecticut. On
21 May 4, 2012 he was issued a speeding ticket while driving in
22 Liberty, New York. On June 3, 2012 he pleaded guilty to a
23 speeding violation by mail. He later received a form from the
24 Town of Liberty Justice Court accepting the guilty plea and
25 providing instructions for paying the fine. Plaintiff returned

1 the payment form with his credit card information. At the top
2 of the payment form, however, plaintiff crossed out the word
3 Liberty in Liberty Town Court and replaced it with tyranny.
4 And he also wrote in all caps and underlined across the top
5 middle section of the form the following: Fuck your shitty
6 town bitches. Upon receiving the plaintiff's form the town of
7 Liberty Justice Court clerk brought it to the attention of Town
8 Judge Brian Rourke. At the time all the court clerks were
9 women. The clerk who delivered the form to Judge Rourke
10 indicated that she and the other clerks were upset and alarmed
11 by it. Judge Rourke believed that the phrase "fuck your shitty
12 town bitches" might be a threat to those women and he referred
13 the form to defendant Zangala, an assistant district attorney@
14 for Sullivan County, to determinese if the communications
15 constituted a crime. Zangala took the form back to his office
16 and showed it to fellow assistant district attorney Meagan
17 Galligan. Zangala left the form in Galligan's office and when
18 he saw it next the form had the words "ag harassment" written
19 on it in the handwriting of Sullivan County District Attorney
20 James Farrell. Zangala commented to Galligan that he too
21 determined that aggravated harassment was the appropriate
22 charge. Zangala came to that conclusion only by reviewing the
23 aggravated harassment statute. He did not speak to the clerk
24 who opened the envelope containing plaintiff's form or
25 otherwise conduct an investigation. He later discussed the

1 matter with Farrell who agreed that the words written by
2 plaintiff fit the charge of aggravated harassment. Zangala and
3 Farrell discussed the fact that plaintiff might have a First
4 Amendment defense to the charge but Farrell instructed Zangala
5 to file the charge.

6 Judge Rourke wrote to plaintiff on September 26, 2012
7 advising plaintiff that plaintiff's payment for the speeding
8 ticket would not be accepted and ordering plaintiff to appear
9 in court on October 18, 2012. Zangala planned to file the
10 aggravated harassment charge when plaintiff appeared in court.
11 Zangala understood that upon the filing of the charge plaintiff
12 would be arrested and processed. And since that's going to be
13 important I'm going to specify where I get that from. I get
14 that from Zangala's deposition at pages 34, 42 to 43 and 65,
15 and plaintiff's 56.1 statement paragraph 26. I assume somebody
16 is going to be ordering this transcript for Mr. Yasgur because
17 he's going to need it.

18 On October 18, 2012 Detective Steven D'Agata was
19 provided police security service at the Town of Liberty Justice
20 Court. Once plaintiff entered the courtroom, Zangala showed
21 D'Agata plaintiff's comments on the payment form and told
22 D'Agata that the court clerks felt threatened by it and worried
23 for their safety because of it. Zangala instructed D'Agata to
24 draft and file an information charging plaintiff with
25 aggravated harassment in the second degree under New York Penal

1 Law 240.31(a). Plaintiff asserts that Zangala instructed
2 D'Agata to file the information, whereas the village defendants
3 say Zangala only asked D'Agata to do so. The difference is not
4 material.

5 D'Agata drafted an information charging plaintiff with
6 aggravated harassment in the second degrees and gave a copy to
7 Zangala who reviewed and approved it. D'Agata asked Officer
8 Melvin Gorr to assist him in arresting the plaintiff. When
9 plaintiff's case was called, Zangala handed the information to
10 Judge Rourke, Judge Rourke reprimanded plaintiff for the
11 comments on the form, handed plaintiff the information and
12 informed plaintiff that he would be arrested. D'Agata and Gorr
13 then handcuffed plaintiff and took him to the Village of
14 Liberty Police Department for processing.

15 The criminal charge against plaintiff was ultimately
16 dismissed as violative of plaintiff's First Amendment rights.

17 Arrests under Section 240.30 are common in the village
18 and village officers frequently face situations where they are
19 making an arrest because of the use of vulgar words in what may
20 be perceived as a threatening context. Between 2003 and 2012,
21 the Liberty Police Department made 63 arrests under Section
22 240.31(a). There is actually a discrepancy in the number of
23 arrests between the parties. I count 62 but the difference is
24 not material. These arrests include those of people who used
25 profanity, made crude sexual accusations and comments, and made

1 intimidating threats. The department also made nine arrests
2 between 2003 and 2009 under 240.30 without specifying the
3 subsection.

4 From 2000 to the date of plaintiff's arrest the
5 village did not provide training to its officers concerning
6 Section 240.30(1) or on the First Amendment limitations of
7 arrests for speech or written expression. Similarly, neither
8 the Village of Liberty Police Department general rules of
9 conduct nor the Liberty Police Department rules and regulations
10 and manual of procedure contain guidelines about arresting
11 people under 240.30 or for abusive expression. The village has
12 no requirement to insure its officers are trained on the First
13 Amendment. The village seemed to rely in this respect on the
14 Police Academy training that officers are required to obtain
15 before being hired, but takes no steps to freshen its officers'
16 understanding as the law develops. The village police
17 department does not maintain hard copies or an electronic
18 database of caselaw when making arrests. They rely on the
19 black letter law found in the penal code.

20 Scott Kinne, the officer in charge of the Liberty
21 Police Department since the end of 2011 and the chief of police
22 at the time of plaintiff's arrest testified that he was aware
23 of any cases limiting the application of Section 240.30(1), any
24 court rulings interpreting the law, or any First Amendment
25 problems arising from the law. D'Agata also testified that he

1 was unaware of any court rulings interpreting the statute.

2 Kinne expects his officers to take directions from the District
3 Attorney's Office on legal questions.

4 It's a motion for summary judgment and the familiar
5 standards under Rule 45 apply. I won't take the time to repeat
6 them; we're all familiar with them.

7 I'm going to start with qualified immunity. An
8 official suit under Section 1983 is entitled to qualified
9 immunity unless it is shown that the official violated a
10 statutory or constitutional right that was clearly established
11 at the time of the challenged conduct. *Plumhoff v. Rickard*,
12 134 S.Ct. 2012, 2023. "In deciding questions of qualified
13 immunity at summary judgment, courts engage in a two-pronged
14 inquiry. The first prong asks whether the facts taken in the
15 light most favorable to the party asserting the injury showed
16 the officer's conduct violated a federal right; and the second
17 prong asks whether the right in question was clearly
18 established at the time of the violation." *Resparto v.*
19 *Carlone*, 770 F.3d 97, 113. Under prong two, a government
20 official's conduct violates clearly established law when at the
21 time of the challenged conduct, the contours of a right are
22 sufficiently clear that every reasonable official would have
23 understood that what he is doing violates that right. *Abrams*
24 *v. Department of Public Safety*, 754 F.3d 244, 255. To
25 determine whether the relevant law was clearly established, we

1 considered the specificity with which a right is defined, the
2 existence of Supreme Court or Court of Appeals case law on the
3 subject, and the understanding of a reasonable officer in light
4 of preexisting law. *Terebesi v. Torres*, 754 F.3d 217, 231.
5 Although courts in this Circuit generally look to Supreme Court
6 and Second Circuit precedent existing at the time of the
7 alleged violation to determine whether the conduct violated a
8 clearly established right, the absence of a decision by the
9 Second Circuit or the Supreme Court directly addressing the
10 right at issue will not preclude a finding that the law was
11 clearly established, so long as preexisting law clearly
12 foreshadows a particular ruling on the issue. *Garcia v. Does*,
13 779 F.3d 84, 92.

14 In this Circuit, even if the right was clearly
15 established, an officer is entitled to qualified immunity if it
16 was objectively reasonable for the officer to believe the
17 conduct at issue was lawful. *Gonzalez v. City of Schenectady*,
18 728 F.3d 149, 154. Ordinarily, determining whether official
19 conduct was objectively reasonable requires examination of the
20 information possessed by the officials at that time without
21 consideration of subjective intent. *Connecticut Ex Rel*
22 *Blumenthal v. Crotty*, 346 F.3d 84, 106.

23 The objectively reasonable standard is not without
24 controversy, as other judges in the Circuit have described
25 objective reasonableness as part of the clearly established

1 inquiry rather than a separate prong. See Judge Straub's
2 dissenting opinion in *Taravella*, 599 F.3d 137 where he
3 criticizes the majority for describing a two-step analysis and
4 yet relying on an extraneous third step. Also see *Okin v.*
5 *Village of Cornwall-on-Hudson Police Department*, 577 F.3d 415,
6 433 note 11 and *Walczyk v. Rio*, 496 F.3d 139, 166.

7 Notwithstanding these criticisms, the Second Circuit
8 has continued to find the object reasonableness inquiry as
9 separate from that of clearly established law and I am bound by
10 those decisions. See for example, *Coggins v. Buonora*, 776 F.3d
11 108, 114, and *Gardner v. Murphy*, 14 CV 1142, 2015 WL 3461615 at
12 page 1 from June 2 of this year.

13 Turning first to Detective D'Agata and Officer Gorr.
14 Plaintiff argues that they violated his right to be free from
15 arrest without probable cause and his right to be free from
16 arrest in retaliation for writing "fuck your shitty town
17 bitches" on a parking ticket which he asserts is protected
18 speech. I find, unsurprisingly, that defendants violated
19 plaintiff's First Amendment rights when they arrested him under
20 New York Penal Law Section 240.30(1) which was held
21 unconstitutional by the New York Court of Appeals in 2014. See
22 *Amore v. Navarro*, 624 F.3d 522, 532, where the Circuit said an
23 arrest under a statute that has been authoritatively held to be
24 unconstitutional is ordinarily a constitutional violation.
25 Speech is often provocative and challenging ... but it is

1 nevertheless protected against censorship or punishment unless
2 shown likely to produce a clear and present danger of a serious
3 substantive evil that raises, that rises far above public
4 inconvenience, annoyance or unrest. *City of Houston, Tex. v.*
5 *Hill* 482 U.S. 451, 461. Restraints on speech on the basis of
6 its content except in a few limited categories are generally
7 disallowed. *Hobbs v. County of Westchester*, 397 F.3d 133, 148.
8 To be criminalized threatening speech must rise to the level of
9 so-called fighting words, those personally abusive epithets
10 which when addressed to the ordinary citizen are as a matter of
11 common knowledge inherently likely to provoke a violent
12 reaction. *Williams v. Town of Greenburgh*, 535 F.3d 71, 77.
13 Fighting words must tend to incite an immediate breach of the
14 speech. *Posr v. Court Officer Shield* 207, 180 F.3d 409, 415.
15 A state may also ban speech that constitutes "true threats"
16 which encompasses those statements where the speaker means to
17 communicate a serious expression of an intent to commit an act
18 of unlawful violence to a particular individual or group of
19 individuals. *Virginia v. Black*, 538 U.S. 343, 359. The words
20 at issue here are not inherently likely to provoke violent
21 reaction, they were not directed at anyone in particular, and
22 could not be interpreted as threatening any particular action.
23 See *Cohen v. California*, 403 U.S. 15, 20 where the court said
24 that while the four-letter word displayed by the defendant is
25 not uncommonly employed in a personally provocative fashion, in

1 this instance it was not clearly directed to the person of the
2 hearer. Further, the words don't rise to the level of fighting
3 words, and in any event because they were mailed, they did not
4 suggest imminent action. See Posr, 180 F.3d 416 where the
5 Court noted that the phrase "one day you're going to get yours"
6 was not fighting words in part because it was directed to a
7 time other than the immediate and carried several plausible
8 meanings that would not involve the threat of violence.

9 For these reasons I do find the defendant's First
10 Amendment rights were violated and defendants do not seem to
11 seriously contest that plaintiff suffered a constitutional
12 violation. That's the first prong of the qualified immunity
13 test.

14 I also find that plaintiff's right not to be arrested
15 for the expression at issue was clearly established. In the
16 complaint, plaintiff appears to proceed on both facial and as
17 applied challenges to 240.30(1), although in his brief he
18 states that his claim does not rest on the facial invalidity of
19 the statute. I will in any event address both theories.

20 It was not clearly established at the time of
21 plaintiff's arrest that 240.30(1) was facially invalid.
22 Although the statute had previously been strictly construed to
23 reach only conduct intended to threaten or harass, such as
24 specific threats and intolerable invasions of privacy. People
25 vs. Rodriguez, 19 Misc.3d, 830, 833, New York City Criminal

1 Court, 2008, citing *People vs. Smith*, 89 Misc.2d 789, 791,
2 Second Department 1977. The Second Circuit noted in *Vives v.*
3 *City of New York*, 405 F.3d 115, 118 that at least as of 2002,
4 far from being so grossly and flagrantly unconstitutional that
5 any person of reasonable prudence would be bound to see its
6 flaws, several courts have specifically declined to find
7 Section 240.30(1) unconstitutional. That's *Vives* at 118.
8 Since then, other courts have declined to hold the statute
9 unconstitutional. See *Adebiyi v. City of New York*, 2014
10 Westlaw 4922888, page 6, where the court said at the time of
11 plaintiff's arrest in 2012, as in *Vives*, the section was not
12 sufficiently facially unconstitutional so as to place the
13 defendant on notice. *People v. Dimuzio*, 801 N.Y.S.2d 239,
14 Appellate Term 2015, finding that section neither
15 unconstitutional on its face or as applied where the defendant
16 told the complainant that he engaged in certain sexual acts
17 with the plaintiff's wife. See also *People vs. Little* 830
18 N.Y.S.2d, Appellate Term 2006, where the court said although
19 some have questioned the constitutionality of 240.30, neither
20 the Second Circuit nor the Court of Appeals has held the
21 statute unconstitutional. And the statute was not held
22 constitutional until 2014, see *People vs. Golb*, 15 N.E.3d 805,
23 814 from the New York Court of Appeals, cert denied 135 S.Ct.
24 1009. So the officers could not have been expected to know
25 that the statute was unconstitutional on its face.

1 It was clearly established, however, at the time of
2 plaintiff's arrest that Section 240.30(1) could not be applied
3 to expressions like the one at issue here, which though crude
4 and offensive to some, did not convey an imminent threat and
5 was made in the context of complaining about government
6 activity. In *People v. Mangano*, 100 N.Y.2d 569, 570, the New
7 York Court of Appeals in 2003 upheld an as applied challenge to
8 section 240.30(1) where the defendant left five voice messages
9 on the Village of Ossining Parking Violations Bureau's
10 answering machine in which the defendant rained invective on
11 two village employees, wished them and their family ill health,
12 and complained of their job performance as well as the tickets
13 that she had received. *Mangano*, 570. The Court of Appeals
14 found this was in the scope of protected speech because
15 defendant's messages were crude and offensive but made in the
16 context of complaining about government action on a telephone
17 answering machine set up for the purpose, among others, of
18 receiving complaints from the public. *Mangano* 571. That
19 decision is on all fours with this case. It dealt with
20 offensive language used to express to government employees
21 dissatisfaction with government action. Indeed, the conduct in
22 *Mangano* was arguably closer than plaintiff's to the realm of
23 unprotected threats because it was repeated, directed at
24 specific persons and wished them harm. And *Mangano* is in line
25 with well-settled Supreme Court and Second Circuit precedents

1 cited above to the effect that only fighting words and true
2 threats, rather than crude or offensive critiques of government
3 can be penalized. See for example, *Texas v. Johnson*, 491 U.S.
4 397, 409 where the Court described flag burning as a
5 generalized expression of dissatisfaction with the policies of
6 the federal government rather than a direct personal insult or
7 invitation to exchange fisticuffs; *Cohen*, 403 U.S. 16, 20 where
8 the court said wearing a jacket saying "fuck the draft" did not
9 amount to fighting words; and *Posr* 180 F.3d 415 where "one day
10 you're going to get yours" was held not to amount to fighting
11 words. That the court clerks who received plaintiff's message
12 was apparently alarmed by it does not alter the analysis.
13 Whether a right is clearly established is assessed in light of
14 the legal rules that were clearly established at the time.
15 *Pearson v. Callahan*, 555 U.S. 223, 244. And under the
16 applicable case law, plaintiff's message could not have been
17 considered fighting words or true threats.

18 Accordingly, plaintiff's right not to be arrested for
19 the message at issue was clearly established.

20 Nonetheless I find that D'Agata and Gorr are entitled
21 to qualified immunity because under the circumstances here
22 their actions were objectively reasonable. D'Agata and Gorr
23 executed the arrest after D'Agata was instructed to draft a
24 charge by an assistant district attorney who had in turn been
25 ordered to do so by the District Attorney which D'Agata knew.

1 See D'Agata's deposition at page 12 and his affidavit at
2 paragraph 11. Plaintiff argues that this fact cannot be
3 considered in the qualified immunity analysis and points out
4 that the Second Circuit stated in *In Re County of Erie*, 546
5 F.3d 222, 229 that because whether a right is clearly
6 established is determined by case law, reliance upon advice of
7 counsel therefore cannot be used to support the defense of
8 qualified immunity. But I am persuaded by the analysis in
9 *McChesney v. Bastien*, 2013 Westlaw 4504459 at pages 7 to 8,
10 Northern District of New York, August 22, 2013 which I
11 incorporate here without repeating, that that phrase,
12 considered in context, does not mean what it sounds like, and
13 that advice of counsel remains relevant to the objective
14 reasonableness analysis. Further, the Second Circuit has
15 stated more recently that at the very least the solicitation of
16 legal advice informs the reasonableness inquiry. *Taravella*,
17 599 F.3d 135, note 3. So I find I can consider it. That
18 D'Agata was instructed by Zangala to draft the charge, Zangala
19 believed there was probable cause for the charge, and Zangala
20 reviewed and approved the charge before it was filed renders
21 the officers' actions objectively reasonable. See *Amore* 624
22 F.3d at 535 granting qualified immunity where the defendant
23 acted deliberately and rationally in seeking to determine the
24 then valid applicable and enforceable law before arresting
25 plaintiff even though the statute was held unconstitutional by

1 the New York Court of Appeals 18 years earlier; Kelly v.
2 Borough of Carlisle, 622 F.3d 248, 255-6, Third Circuit 2010,
3 where the court said that a police officer who relies in good
4 faith on a prosecutor's legal opinion that an arrest is
5 warranted under the law is presumptively entitled to qualified
6 immunity from Fourth Amendment claims premised on a lack of
7 probable cause; Kijonka v. Seitzinger, 363 F.3d 645, 648,
8 Second Circuit 2004 where the court said that consulting a
9 prosecutor goes far to establish qualified immunity; Muhammad
10 v. City of Peekskill 2008 Westlaw 4525367 at page 7, where the
11 court said normally it is reasonable for law enforcement
12 officers to rely on a prosecutor's advice in bringing charges;
13 Strawn v. Holohan, 2008 Westlaw 65586 at page 6, January 4,
14 2008 where the court said the fact that the officer consulted
15 with the DA's Office before the arrest while not dispositive of
16 the issue is a factor supporting the reasonableness of the
17 officer's actions.

18 In these circumstances, where Zangala prompted D'Agata
19 to draft the charge, Zangala let D'Agata know that he and his
20 boss approved of it and Zangala reviewed and approved the
21 instrument before it was filed, the officers could hardly be
22 expected to refuse the ADA's request or instructions. See
23 Davis v. Scherer, 468 U.S. 183, 196, note 13 where the court
24 said it is unfair and impracticable to hold public officials
25 generally to the standard of trained lawyers; Amore, 624 F.3d

1 534 where the court said police officers are not expected to be
2 lawyers or prosecutors; cf. *Young v. County of Fulton*, 160 F.3d
3 899, 903, (2d Cir. 1998) where the court said the question is
4 not what a lawyer would learn or intuit from researching case
5 law, but what a reasonable person in defendant's position
6 should know about the constitutionality of the conduct.
7 Moreover, the cases on which plaintiff relies to argue that
8 there is no advice of counsel defense, which appear at pages 6
9 and 7 of plaintiff's reply brief are distinguishable because
10 none involved an arrest initiated by an ADA who then dragoons
11 officers into executing it. See *Lawrence v. Reed*, 406 F.3d
12 1224, 1231, Tenth Circuit 2005; and *O'Rourke v. Hayes*, 378 F.3d
13 1201, 1210. It is one thing for an officer to make an arrest
14 after getting advice in a case he initiated. And in that
15 scenario the officer is still likely although not automatically
16 entitled to qualified immunity because we want officers to seek
17 legal advice to prevent improper arrests. See *Kijonka*, 363
18 F.3d at 648. It is another thing however to expect an officer
19 to refuse to proceed with a case that an ADA initiates.
20 Denying qualified immunity here would mean that we would expect
21 every cop asked to make an arrest in this situation by an ADA
22 to refuse, which cannot be the case. See *Dale v. Kelley*, 908
23 F.Supp. 125, 138, Western District of New York, 1995; affirmed,
24 95 F.3d 2, where the district court said as a practical matter,
25 police officers must be able to rely on the advice of

1 prosecutors; the judicial system depends on this reliance.

2 Further, Judge Rourke informing plaintiff that he
3 would be arrested also supports the officer's claim for
4 qualified immunity. It would not be reasonable to expect
5 officers to know that an action seemingly endorsed by the
6 District Attorney, assistant district attorneys, and a judge
7 was not proper. Nor would it be reasonable to expect the
8 officers to distinguish between Mangano, which involved crude
9 criticism of government to government, and cases like Dimuzio,
10 where the crude statements were made to a civilian, especially
11 in light of the ADA's instructions. Accordingly, D'Agata and
12 Gorr are entitled to qualified immunity.

13 Now turning to ADA Zangala. He argues he's entitled
14 to summary judgment and dismissal of the claims against him on
15 the basis of absolute prosecutorial immunity which protects
16 prosecutors from civil suits arising from activities intimately
17 associated with the judicial phrase of the criminal process.
18 *Imbler v. Pachtman*, 424 U.S. 409, 430. The essential purpose
19 of absolute immunity is to insulate from judicial scrutiny the
20 motives and reasonableness of a prosecutor's official act.
21 *Robison v. Via*, 821 F.2d 913, 918. In determining whether
22 absolute immunity protects a prosecutor's conduct from civil
23 suits, courts look to the nature of the function performed
24 rather than the identity of the performer. See *Kalina v.*
25 *Fletcher*, 522 U.S. 118, 127.

1 A wide range of a prosecutor's conduct is protected by
2 absolute immunity. The Second Circuit has interpreted that
3 definition to include all conduct closely associated with the
4 judicial process which is part of the prosecutor's traditional
5 role as an advocate for the state. *Belot v. Wieshaupt*, 1997
6 Westlaw 218449 at page 5. A district attorney is not only
7 absolutely immune from civil liability for initiating a
8 prosecution and presenting the case at trial, but also immune
9 for conduct in preparing for those functions; for example,
10 evaluating and organizing evidence for presentation at trial or
11 to a grand jury, or determining which offenses are to be
12 charged. *Hill v. City of New York*, 45 F.3d 653, 651.

13 A prosecutor's administrative duties and those
14 investigatory functions that do not relate to an advocate's
15 preparation for the initiation of a prosecution or for judicial
16 proceedings, however, are not entitled to absolute immunity,
17 *Buckley v. Fitzsimmons*, 509 U.S. 259, 273. When a prosecutor
18 performs the investigative functions normally performed by a
19 detective or a police officer, *Buckley* at 273, such as giving
20 police legal advice on the propriety of investigative
21 techniques or on whether or not probable cause exists to make
22 an arrest, *McCray v. City of New York*, 2008 Westlaw 4352748 at
23 page 15, he or she is entitled only to the protection of
24 qualified immunity. See *Bernard v. County of Suffolk*, 356 F.3d
25 495, 502.

1 Plaintiff argues that Zangala is not entitled to
2 absolute immunity because he ordered plaintiff's arrest which
3 is a police function. Whether a prosecutor involved in an
4 arrest is entitled to absolute immunity depends on the
5 prosecutor's role in the arrest. See *Murphy v. Senior*
6 *Investigator Neuberger*, 1996 Westlaw 442797 at page 10, denying
7 absolute immunity where due to an undeveloped factual record,
8 the court cannot determine precisely what the prosecutor's role
9 in the arrest was. A prosecutor's participation in the
10 execution of an arrest is not protected by absolute immunity.
11 *Day v. Morgenthau*, 909 F.2d 75, 77-78. See *Hickey v. City of*
12 *New York*, 2002 Westlaw 1974058 page 3.

13 A prosecutor's communication to police officers of his
14 decision as to precisely what charges he would lodge against an
15 individual, however, is protected by absolute immunity. *Ying*
16 *Jing Gan v. City of New York*, 996 F.2d 522, 531. The Second
17 Circuit has thus recognized a meaningful distinction between
18 filing a criminal information and procuring an arrest warrant
19 on the one hand and executing the arrest warrant on the other.
20 *Barr v. Abrams*, 810 F.2d 358, 362.

21 Zangala is entitled to absolute immunity for his
22 decision to charge plaintiff. See *Hill*, 45 F.3d at 661. But
23 if he ordered a warrantless arrest of plaintiff as opposed to
24 say a desk appearance ticket, which would not have entailed an
25 arrest, he is not absolutely immunity for that decision.

1 Zangala failed to respond to plaintiff's properly supported
2 Local Rule 56.1 statements which states in paragraph 26:
3 Zangala directed D'Agata to charge and arrest plaintiff for
4 aggravated harassment. Because Zangala failed to respond to a
5 properly supported statement, the statement is admitted for
6 purposes of plaintiff's motion. See Federal Rule of Civil
7 Procedure 56(e)(2) and *Giannullo v. City of New York*, 322 F.3d,
8 139, 140.

9 Further, Zangala does not even argue the objective
10 reasonableness of his actions, relying only on his subjective
11 intent, which is irrelevant. See Zangala's opposition brief at
12 page 10 and *Amore*, 624 F.3d at 535.

13 Finally, that Zangala ordered the arrest is amply
14 supported in the record. See D'Agata's deposition at pages 34
15 to 35 where he says the ADA instructed me to do it and I did
16 it; Zangala's deposition at page 43 where D'Agata testified
17 that when Zangala instructed him to draw up the information,
18 Zangala also said that he is in court today and we're going to
19 arrest him; and D'Agata's affidavit in paragraph 11 which said
20 that Zangala advised D'Agata that at the time of the calendar
21 call, D'Agata was to arrest the plaintiff after he was charged;
22 also see Zangala's reply declaration, paragraph 11, where he
23 points out that a criminal prosecution can be initiated by
24 appearance tickets issued by law enforcement officer or by an
25 arrest; Zangala's deposition at page 65, where Zangala says an

1 decision to file an accusatory instrument and an arrest go hand
2 in hand; Zangala's deposition at 28 to 30 where he testifies he
3 planned to have plaintiff arrested when he showed up for court
4 and he would have discussed that with Judge Rourke in advance;
5 and Judge Rourke's deposition at pages 59 to 60 where he
6 testified he understood in advance that the plaintiff was going
7 to be charged and believed that Zangala also determined that
8 the plaintiff would be arrested. Accordingly, while Zangala is
9 entitled to absolute immunity for the decision to charge
10 plaintiff, he has not shown that he is entitled to absolute
11 immunity for the decision to arrest plaintiff. And plaintiff
12 has shown that he is not.

13 So plaintiff's motion is granted and Zangala's motion
14 is denied on the issue of absolute immunity for the decision to
15 arrest plaintiff.

16 I now turn to qualified immunity. I also find that
17 Zangala is not entitled to qualified immunity for instructing
18 D'Agata to make the arrest. For the same reasons I've already
19 discussed, plaintiff's arrest violated his clearly established
20 constitutional right to engage in and be free from arrests
21 because of protected speech. Zangala argues that he did not
22 believe there was a constitutional bar to charging plaintiff
23 with a crime, his reply at page 10. I don't quite see how one
24 can at once believe that the First Amendment could be raised as
25 a defense to the charge and at the same time be unaware of any

1 constitutional impediments to bringing the charge. It almost
2 sounds like D'Agata and Farrell knew the arrest was
3 unconstitutional but were willing to go forward and wait and
4 see if plaintiff would realize it. I'm not sure that's what
5 Zangala means, I hope not. But in any event I may not consider
6 an official's subjective intent in determining whether he is
7 entitled to qualified immunity, that's Amore at 535.

8 I also note that Zangala has directed the Court to
9 Heien v. North Carolina, 135 S. Ct. 530. He brought that to my
10 attention in docket entry 68. That court held that a
11 reasonable mistake of law can support reasonable suspicion to
12 initiate the traffic stop, 135 S. Ct. 534, 540. Heien is
13 distinguishable not only because it is not a qualified immunity
14 case and reasonable mistakes of law have been recognized as
15 excusable in the qualified immunity context long before Heien,
16 see Saucier 533 U.S. at 205, but because Zangala's mistake was
17 not reasonable. In that respect, Zangala's qualified immunity
18 claim differs from D'Agata's and Gorr's. The precedent
19 distinguishing police officers from lawyers, which helps the
20 officers, hurts Zangala. If cops are not expected to know what
21 a lawyer would learn or intuit from researching case law, Amore
22 at 533-34, an assistant district attorney certainly is. And
23 there surely is nothing unfair or impracticable about holding a
24 trained lawyer to the standard of trained lawyer. While it is
25 reasonable for a police officer to rely in certain

1 circumstances on the legal advice of a prosecutor, the
2 prosecutor himself must be held to the standard of a trained
3 lawyer. See Kijonka 363 F.3d at 648 which denied qualified
4 immunity to a prosecutor because no prosecutor, a law-trained
5 specialist in the enforcement of the criminal law, could
6 reasonably believe that the defendant had committed a crime
7 while granting qualified immunity to an officer who consulted
8 and was instructed to arrest by the prosecutor. See also Davis
9 v. Scherer, 468 U.S. at 196 note 13. As the Supreme Court
10 stated in the Connick case, 131 S. Ct. 1361-62, legal training
11 is what differentiates attorneys from average public employees.
12 Attorneys are trained in the law and equipped with the tools to
13 interpret and apply legal principles, understand constitutional
14 limits, and exercise legal judgment. Before they may enter the
15 profession and receive a law license, all attorneys must
16 graduate from law school or pass a substantive examination.
17 Attorneys in the vast majority of jurisdictions must do both.
18 These threshold requirements are designed to insure that all
19 new attorneys have learned how to find, understand and apply
20 legal rules. Nor does professional training end at graduation.
21 Most jurisdictions require attorneys to satisfy continuing
22 education requirements. That's also from the Connick case.

23 For these reasons, Zangala is not saved by his getting
24 approval from the District Attorney in the way that the
25 officers are saved by complying and getting approval from an

1 assistant district attorney. See *O'Rourke v. Hayes*, 378 F.3d
2 1201, 1210 where the court said officers cannot rely on the
3 orders of a superior if there is a reason why any of them
4 should question the validity of that order. Zangala's actions
5 are even less reasonable given that he had the time to do the
6 relatively simple legal research but did not.

7 Accordingly, Zangala is not entitled to qualified
8 immunity, Zangala's motion for summary judgment is denied, and
9 plaintiff's motion for summary judgment as to liability is
10 granted as to Zangala.

11 Turning now to municipal liability. Congress did not
12 intend municipalities to be held liable under Section 1983
13 unless action pursuant to official municipal policy of some
14 nature caused a constitutional tort. That's *Monell v.*
15 *Department of Social Services*, 436 U.S. 658. Thus, to prevail
16 on a claim against a municipality under Section 1983 based on
17 acts of a public official, a plaintiff is required to prove
18 actions taken under color of law, deprivation of a
19 constitutional or statutory right, causation, damages, and that
20 an official policy of a municipality caused a constitutional
21 injury. *Roe v. City of Waterbury*, 542 F.3d 31, 36.

22 As discussed above, I find that plaintiff suffered a
23 deprivation of his First Amendment rights when he was arrested
24 under color of law. The parties' argument focus on the fifth
25 and third elements to which I now turn. I'm going to take the

1 fifth element first which is whether a policy of the
2 municipality caused the injury. That element reflects the
3 notion that a municipality may not be held liable under Section
4 1983 solely because it employs a tort feasor. In *Re Dayton*
5 2011 Westlaw 2020240 at page 8. There must be a direct causal
6 link between a municipal policy or custom and the alleged
7 constitutional deprivation. *City of Canton v. Harris*, 489 U.S.
8 378, 385. An act performed pursuant to a custom that has not
9 been formally approved by an appropriate decision-maker may
10 fairly subject a municipality to liability on the theory that
11 the relevant practice is so widespread as to have the force of
12 law. *Board of County Commissioners v. Brown*, 520 U.S. 397,
13 404. Monell's reach, therefore, goes beyond unconstitutional
14 policies that have been formally endorsed by the municipality
15 and includes instances in which a municipality's knowledge of
16 and support for its officers' unconstitutional conduct can be
17 inferred from its failure to curtail that conduct. *MacIsaac v.*
18 *Town of Poughkeepsie*, 770 F.Supp.2d 587, 597. See
19 *Dorsett-Felicelli v. County of Clinton*, 371 F.Supp.2d 183, 194.
20 In *City of Canton* the Supreme Court established that a
21 municipality can be liable for failing to train its employees
22 where it acts with deliberate indifference in disregarding the
23 risk that its employees will unconstitutionally apply its
24 policies without more training. *Amnesty America v. Town of*
25 *West Hartford*, 361 F.3d 113, 129. Failure to train, however,

1 is a narrow basis of liability, and any municipality's
2 culpability for a deprivation of rights is at its most tenuous
3 where a claim turns on failure to train. Connick, 131 S.Ct. at
4 1359. See Tuttle, 471 U.S. 822-23. To satisfy the statute, a
5 municipality's failure to train its employees in any relevant
6 respect must amount to deliberate indifference to the rights of
7 the persons with whom the untrained employees come into
8 contact. City of Canton at 388. Only then can such a
9 shortcoming be properly thought of as a city policy or custom
10 actionable under Section 1983. Canton at 389; see Connick at
11 1359-60 where the court said deliberate indifference is a
12 stringent standard of fault requiring proof that a municipal
13 actor disregarded a known or obvious consequence of his action.
14 And see Brown 520 U.S. at 410 and Cash v. County of Erie, 2011
15 Westlaw 3625093 at page 7 Second Circuit August 18, 2011.
16 Thus, when city policy-makers on actual or constructive notice
17 that a particular omission in their training program causes
18 city employees to violate citizens' constitutional rights, the
19 city may be deemed deliberately indifferent if the
20 policy-makers choose to retain that program. Brown, 520 U.S.
21 at 407. The city's policy of inaction in light of notice that
22 its program will cause constitutional violations is a
23 functional equivalent of a decision by the city itself to
24 violate the Constitution. That's Justice O'Connor's decision
25 in Canton, confirming in part and dissenting in part, at page

1 395.

2 A pattern of similar constitutional violations by
3 untrained employees is ordinarily necessary to determine
4 deliberate indifference for purposes of failure to train.
5 Connick at 1360. Policy-makers continued adherence to an
6 approach that they know or should know has failed to prevent
7 tortious conduct by employees may establish the conscious
8 disregard of the consequences of their actions, the deliberate
9 indifference to necessary to trigger municipality liability.
10 Bryan County, 520 U.S. at 407. Without notice that a course of
11 training is deficient in any particular respect,
12 decision-makers can hardly be said to have deliberately chosen
13 a training program that will cause violations of constitutional
14 rights. See Connick at 1360.

15 There's no dispute that the village did not provide
16 training of any kind to its officers on First Amendment issues.
17 I find, however, that there is a fact issue on the existence of
18 a pattern of similar constitutional violations sufficient to
19 put the village on notice of the need for training with respect
20 to 240.30(1). It's undisputed that the village was not on
21 notice of any judicial determinations that the conduct of its
22 police officers violated the First Amendment. Plaintiff has,
23 however, provided nine criminal informations from 2007 through
24 2010 -- although some of the dates are redacted so I'm not sure
25 they all fall in that window -- accusing people other than

1 plaintiff of violating that same section for reasons that
2 plaintiff argues are unconstitutional. They're Exhibit 16 to
3 Mr. Bergstein's affidavit. While the degree of threatening
4 language found in these informations varies, a jury could
5 conclude that at least some of them reflect an unconstitutional
6 basis for arrest under 240.30(1) similar to plaintiff.

7 For example, looking at those exhibits, at page 1, the
8 information charged someone with, the defendant with calling
9 someone a slut and saying go fuck yourself. The second one
10 involved repeatedly stating fuck you and bitch. The third one
11 is talking about sexual acts on a police department phone line.
12 The fourth is about someone saying I'm going to run you and
13 your tow trucks off the road, see how much that will cost you.
14 The fifth is threatening to kill someone's dog. The sixth is
15 saying you betterer watch your ass in town. The seventh is a
16 threaten to wash you up. The eighth is the statement if I
17 can't have you then no one can have you. And the ninth is
18 calling someone a punk ass motherfucker. I can't say that
19 these statements constitute a pattern of constitutional
20 violations as a matter of law, because (a) they don't reflect
21 that arrests were actually made and (b) even if they did there
22 may have been circumstances of the arrest not reflected in the
23 information. And it is a jury question whether they are
24 frequent enough to amount to a custom. On the other hand, I
25 don't say that no rational juror could be persuaded by them.

1 The plaintiff also attaches criminal informations
2 accusing people of violating 240.20(3), the disorderly conduct
3 statute. Those are Exhibit 17 to Mr. Bergstein's affidavit.
4 They can also be used to support the idea that the village had
5 a custom of arresting people for foul language in the absence
6 of a legitimate threat.

7 I also find plaintiff can proceed at trial on a single
8 incident theory of liability. Under *Canton* and *Connick*, in a
9 narrow range of circumstances a plaintiff need not show a
10 history or pattern of prior violations because the need for
11 more or different training is patently obvious. *Connick* at
12 1360-61. Contrary to defendant's argument, this remains good
13 law after *Connick*. See *Chamberlain v. City of White Plains*,
14 986 F.Supp.2d 363, 391. To succeed on this theory, plaintiff
15 must show that a policy-maker knows to a moral certainty that
16 its employees will confront a certain situation, that the
17 situation presents the employee with a difficult choice of the
18 type training will make less difficult, and that violation of
19 constitutional rights is a highly predictable consequence of
20 the failure to train. *Walker v. City of New York*, 974 F.2d
21 293, 297; *Connick* at 1361; see *Chamberlain* 986 F.Supp.2d at
22 391. There's evidence the village knew its officers would
23 confront situations similar to plaintiff's. Police Chief Kinne
24 testified that arrests under the same statute were common, and
25 D'Agata testified that it was a pretty common charge for patrol

1 officers though he said it was not one of his most common
2 charges. The village also made some 62 arrests under the
3 statute between 2003 and 2012. Given that the statute in force
4 at the time of plaintiff's arrest authorized unconstitutional
5 arrests the jury could, but would not be required, to find that
6 this evidence shows to a moral certainty on the part of the
7 village that officers would confront situations like
8 plaintiff's. Also, given that the statute authorized unlawful
9 arrests, a jury could conclude that constitutional violations
10 were a highly predictable consequences of the village's failure
11 to train, but because police officers receive some training on
12 First Amendment at the Police Academy and because D'Agata and
13 Gorr submit in their affidavits that a result of their Police
14 Academy training they knew that a citizen could not be
15 criminally charged for engaging in speech that is merely
16 alarming or annoying or which criticizes the government, even
17 if crude and profane, a jury would not be required to so
18 conclude.

19 There is also a fact issue as to causation. In
20 analyzing a Monell claim rigorous standards of culpability and
21 causation must be applied to insure that the municipality is
22 not held liable solely for the actions of its employee. That's
23 *Brown*, 528 U.S. 397, 405. Plaintiff must identify a specific
24 deficiency in the village's training program and establish that
25 that deficiency is closely related to the ultimate injury such

1 that it actually caused the constitutional deprivation.
2 Amnesty America, 361 F.3d. at 129. In other words, plaintiffs
3 must demonstrate that the employee's shortcomings resulted from
4 a faulty training program rather than from other unrelated
5 circumstances. That's Amnesty America, at 129-30. The
6 relevant inquiry is thus would the injury have been avoided had
7 the employee been trained under a program that was not
8 deficient in the identified respect. Canton at 391.

9 The village and the plaintiff agree that Zangala
10 directed D'Agata to make the arrest. There is thus a strong
11 argument that plaintiff's arrest was caused by Zangala's
12 direction and not the village's policy. By the way, that
13 agreement can be found in paragraphs 26 of the respective 56.1
14 statements. So if we assume that Zangala directed D'Agata to
15 make the arrest, there is a good argument that the arrest was
16 caused by Zangala and not by the village's policy.

17 But I cannot find lack of causation as a matter of law
18 in these circumstances. In a situation where an officer
19 blindly follows the prosecutor's instructions without no
20 opportunity to reflect on or analyze it, I suspect that as a
21 matter of law causation cannot exist. But given that Zangala
22 knew the basis of the charge, the text of the statute and, as
23 he asserts in his affidavit, that crude or offensive language
24 could not be criminalized, or language which criticizes the
25 government could not be criminalized even if crude or profane,

1 and that he sat for a period of time after the initial
2 instruction drafting the charge and reviewed it with Zangala
3 before filing it, I can't rule out the possibility that a
4 rational juror might conclude that a properly trained officer
5 would have rejected Zangala's request or at least opened a
6 dialogue that might have avoided plaintiff's arrest. See *Back*
7 *v. Hastings-on-Hudson Union Free School District*, 365 F.3d 107,
8 126 where the evidence was insufficient to find as a matter of
9 law that an intervening cause was sufficient to break the chain
10 of causation. Although I find it most unlikely based on the
11 evidence before me, I cannot make the causation determination
12 as a matter of law given my obligation at this stage to
13 construe the facts in plaintiff's favor.

14 So in conclusion, and for the foregoing reasons, the
15 village defendant's motion is granted as to D'Agata and Gorr
16 and denied as to the village.

17 Zangala's motion is denied.

18 Plaintiff's motion is denied as to D'Agata, Gorr and
19 the village but granted as to Zangala.

20 Plaintiff's Monell claim will proceed to trial where I
21 assume the issues will be the existence of a pattern of similar
22 violations, the obviousness of the risk of violations under a
23 single incident theory, and whether the village's failure to
24 train caused plaintiff's arrest. And the trial will also
25 determine the damages, if any, on plaintiff's claim against

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DECISION

1 Zangala.

2 So the Clerk of the Court needs to terminate three
3 motions, 49, 54 and 59 and also terminate D'Agata and Gorr as
4 parties.

5 I want to set a trial date. It's going to be, I
6 guess, hard to do without Mr. Yasgur unless Mr. Rodd you know
7 his schedule.

8 MR. RODD: I don't, your Honor.

9 THE COURT: I also think this case needs to settle
10 now. Come to the sidebar for a second.

11 (Discussion off the record)

12 THE COURT: I'm going to refer the parties to Judge
13 Smith for settlement and I don't want to set a trial date in
14 Mr. Yasgur's absence. So why don't we say by two weeks from
15 today, by the 24th, the parties will send me a joint letter
16 with a proposal for trying the case and that letter should
17 include the dates counsel are actually engaged or on vacation
18 or have medical stuff scheduled. So if you can give me windows
19 I'll take one that works for me. I only have at this point --
20 I had a long criminal case go away so at this point I only have
21 a couple of short trials scheduled between now and year-end so
22 I do want to do this by year-end if it can't be resolved, which
23 I hope it can be.

24 Mr. Bergstein, I'm going to put you in charge of
25 making sure I get that letter. You're the one who has to beat

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DECISION

1 up on everybody else if they're having a hard time getting
2 together. Anything else we should do now?

3 MR. BERGSTEIN: No, your Honor.

4 MR. RODD: Thank your Honor.

5 THE COURT: Thank you all.

6 (Proceedings adjourned)

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