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## Municipal Liability: Strategies, Critiques, and a Pathway toward Effective Enforcement of Civil Rights

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**Municipal Liability: Strategies, Critiques, and a Pathway toward Effective Enforcement of Civil Rights**

# MUNICIPAL LIABILITY: STRATEGIES, CRITIQUES, AND A PATHWAY TOWARD EFFECTIVE ENFORCEMENT OF CIVIL RIGHTS

MATTHEW J. CRON, ARASH JAHANIAN, QUSAIR MOHAMEDBHAJ, AND SIDDHARTHA H. RATHOD<sup>†</sup>

## ABSTRACT

This Article begins by providing an overview of 42 U.S.C. § 1983 and municipal liability. It discusses the specific types of municipal liability claims, focusing on Tenth Circuit jurisprudence. The Article also discusses effective strategies that plaintiffs should utilize to prevail on municipal liability claims. Finally, the Article proposes a relaxation of the onerous legal standards for municipal liability claims in order to fulfill the remedial purpose of § 1983.

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## INTRODUCTION

Ever since the Supreme Court's 1978 decision in *Monell v. Department of Social Services*,<sup>1</sup> it is well settled that municipalities can be sued for constitutional violations under 42 U.S.C. § 1983.<sup>2</sup> However, the *Monell* Court declined to enunciate "the full contours of municipal liability under § 1983," leaving that effort for "another day."<sup>3</sup> Thirty-five years later, the "contours of municipal liability" remain ill-defined.<sup>4</sup> But the Supreme Court has made at least one thing clear: plaintiffs that bring municipal liability claims will not have an easy go of it.

Although proving municipal liability can sometimes be demonstrated fairly easily, for example when an official municipal policy directly causes a constitutional injury, such cases are rare because municipalities do not often announce and enforce policies that are facially unconstitutional. Rather, as more often is the case, plaintiffs must show that the alleged injury was caused by a municipality's unwritten policy or by municipal inaction. In such cases, proving municipal liability is "exceptionally difficult"<sup>5</sup> because the Supreme Court has instituted "rigorous standards of culpability and causation . . . to ensure that the municipality is not held liable solely for the actions of its employee."<sup>6</sup>

Regardless of whether one agrees with the current approach to municipal liability,<sup>7</sup> the result is that courts rarely find municipalities liable under § 1983.<sup>8</sup> These onerous legal standards have the predictable conse-

1. 436 U.S. 658, 690 (1978) ("Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.").

2. The term "municipality" refers to all "[l]ocal governing bodies." *Id.* Further, a suit against an official in his or her official capacity is considered the same as a suit against a municipality itself. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985).

3. *Monell*, 436 U.S. at 695.

4. As one commentator observes, "[A] generation of lawyers and judges has struggled to fit particular cases within the pigeonholes carved out by the handful of municipal 'policy' cases the Court has fortuitously chosen to decide." Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 21 (2000). The Supreme Court has itself recognized that its jurisprudence in this area "manifestly needs clarification." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988).

5. Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1920-21 (2007).

6. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 405 (1997).

7. Compare John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 68 (1998) (arguing that the "current law [of municipal liability] seems . . . basically sound"), with Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1755 (1989) (criticizing municipal liability law as having the "principal consequence" of "deny[ing] citizens recoveries against local governments for damage caused by officials' constitutional violations").

8. See *infra* app. 1. Of the thirty-six Tenth Circuit cases charted, the plaintiff had prevailed in the district court in only four of the cases. See generally *Bass v. Pottawatomie Cnty. Pub. Safety*

quence of discouraging plaintiffs from pursuing municipal liability claims. However, there are a number of considerations that should encourage plaintiffs to be vigilant in prosecuting civil rights claims against municipalities. This Article intends to provide a comprehensive discussion of the importance and benefits of *Monell* claims from the perspective of practicing civil rights attorneys.

Part I of the Article provides an overview of the current standards for municipal liability, drawing primarily on Tenth Circuit law.<sup>9</sup> It discusses the different types of municipal liability claims and the idiosyncrasies of each. Part II provides guidance on how to persuasively present municipal liability claims to courts. Part III demonstrates how municipal liability legal standards are overly restrictive and discourage plaintiffs from bringing municipal liability claims. It explains that although bringing municipal liability claims may not always lead to greater financial gain for plaintiffs, prosecuting such claims serves social justice aims that often outweigh the result of an individual case.

Ultimately, given the importance of municipal liability claims as a means not only to remedy constitutional violations but also to prevent further violations, this Article urges plaintiffs to vigorously pursue such claims where available. Further, this Article advocates for reforming municipal liability jurisprudence in order to encourage rather than dissuade plaintiffs from seeking redress for constitutional violations causally linked to municipalities.

## I. SECTION 1983 AND MUNICIPAL LIABILITY

### A. Overview of § 1983 and Elements of a Municipal Liability Claim

To bring a case under 42 U.S.C. § 1983,<sup>10</sup> a plaintiff must allege that some person has deprived him or her of a federal right and that such person acted under color of state law when depriving him or her of that right.<sup>11</sup> Prior to *Monell*, the Supreme Court had held that municipalities could not be sued under § 1983 because they were not “persons” within

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Ctr., 425 F. App'x 713 (10th Cir. 2011); *J.M. ex rel Morris v. Hilldale Indep. Sch. Dist. No. 1-29*, 397 F. App'x 445 (10th Cir. 2010); *Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2*, 523 F.3d 1219 (10th Cir. 2008); *Zuniga v. City of Midwest City*, 68 F. App'x 160 (10th Cir. 2003). Only *Bass* and *J.M.* were affirmed by the Tenth Circuit.

9. See *infra* app. 1.

10. Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2012).

11. See, e.g., *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

the meaning of the statute.<sup>12</sup> Undertaking a “fresh analysis” of the legislative history, the Court in *Monell* determined that “Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.”<sup>13</sup> Thus, the Court held that municipalities “can be sued directly under § 1983 for monetary, declaratory, or injunctive relief.”<sup>14</sup>

However, the *Monell* Court significantly narrowed the reach of its holding by declaring that “a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.”<sup>15</sup> As this Article will demonstrate, the federal courts’ unyielding fidelity to this rule against respondeat superior liability has led it to formulate far more burdensome standards.

Broadly speaking, a plaintiff must satisfy four elements to establish municipality liability. First, as is true for any claim brought pursuant to § 1983, the plaintiff must prove the deprivation of a federal right by a person acting under color of state law.<sup>16</sup> Second, the plaintiff must show “the existence of a municipal policy or custom.”<sup>17</sup> Third, the plaintiff must demonstrate a “direct causal link between the policy or custom and the injury alleged.”<sup>18</sup> And, most onerously, the Tenth Circuit has recently stated that “the Supreme Court require[s] a plaintiff to show that the

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12. See *Monroe v. Pape*, 365 U.S. 167, 191 (1961), *overruled by Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978). The Supreme Court affirmed and extended *Monroe* several times prior to reversing itself in *Monell*. See *Aldinger v. Howard*, 427 U.S. 1, 19 (1976) (applying *Monroe* to counties); *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973) (holding that *Monroe* protects municipalities from injunctions as well as damages). Importantly, however, *Monroe* greatly expanded the breadth of § 1983 by holding that plaintiffs could employ § 1983 to remedy constitutional injuries inflicted by local officials whose “[m]isuse of power, possessed by virtue of state law [was] made possible only because the wrongdoer [was] clothed with the authority of state law.” *Monroe*, 365 U.S. at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)) (internal quotation mark omitted).

13. *Monell*, 436 U.S. at 665, 690.

14. *Id.* at 690.

15. *Id.* at 691. Respondeat superior is “[t]he doctrine holding an employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency.” BLACK’S LAW DICTIONARY 1426 (9th ed. 2009). The *Monell* Court reasoned that the legislative history and text of § 1983 imposed a causation requirement that exempted municipalities from respondeat superior liability. *Monell*, 436 U.S. at 691–92. There is significant scholarly debate over whether the *Monell* Court’s analysis on the issue of respondeat superior liability is correct. See David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2248 (2005) (concluding that “the *Monell* doctrine should be overruled” on the issue of respondeat superior liability). Further, as Achtenberg notes, four Supreme Court Justices “have called for reexamination of *Monell*’s conclusion that [municipalities] are exempt from respondeat superior liability.” *Id.* at 2184–85.

16. See, e.g., *City of L.A. v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) (“[I]f the [employee] inflicted no constitutional injury on respondent, it is inconceivable that [the city] could be liable to respondent.”); *Huntley v. City of Owasso*, 497 F. App’x 826, 832–33 (10th Cir. 2012) (affirming summary judgment to the defendant city where the court found that the city’s officers had committed no constitutional violation); *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993) (“A municipality may not be held liable where there was no underlying constitutional violation by any of its officers.”).

17. *Bryson v. City of Oklahoma City*, 627 F.3d 784, 788 (10th Cir. 2010).

18. *Id.*

[municipal] policy was enacted or maintained with deliberate indifference to an almost inevitable constitutional injury.”<sup>19</sup>

The following challenged practices may constitute official municipal policy or custom:

- (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers’ review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.<sup>20</sup>

This municipal policy or custom requirement is “intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make[s] clear that municipal liability is limited to action for which the municipality is actually responsible.”<sup>21</sup>

If a plaintiff can establish the existence of a municipal policy or custom, the plaintiff must then show that “the challenged policy or practice [was] ‘closely related to the violation of the plaintiff’s federally protected right.’”<sup>22</sup> In other words, the municipality’s policy or custom must

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19. *Schneider v. City of Grand Junction Police Dep’t*, 717 F.3d 760, 769 (10th Cir. 2013) (citing *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 403 (1997)); *see also Cacioppo v. Town of Vail*, 528 F. App’x 929, 931–32 (10th Cir. 2013). Relying on *Brown*, the court in *Schneider* observed that “the prevailing state-of-mind standard for a municipality is deliberate indifference regardless of the nature of the underlying constitutional violation.” *Schneider*, 717 F.3d at 771 n.5. However, *Brown* held only that “deliberate indifference” was necessary in cases where the plaintiff proceeds “on the theory that a facially lawful municipal action has led an employee to violate a plaintiff’s rights.” *Brown*, 520 U.S. at 407; *see also id.* at 405 (noting that the strict “deliberate indifference” element must be established only in cases “[w]here a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so”). In situations where a plaintiff claims that a municipality’s legislative body or authorized decisionmaker directly caused a constitutional injury, “proof that the municipality’s decision was unconstitutional . . . suffice[s] to establish that the municipality itself [is] liable.” *Id.* at 406. Thus, it appears that the Tenth Circuit overstated the Supreme Court’s holding in *Brown*.

20. *Bryson*, 627 F.3d at 788 (alteration omitted) (citations omitted) (internal quotation marks omitted). The fifth category is more accurately described in broader terms as a category of municipal inaction, as it is not limited to situations where the municipality has failed to train or supervise its employees. *See, e.g., Cacioppo*, 528 F. App’x at 933 (discussing municipal liability claims based on inadequate hiring, inadequate training, and ratification); *Schneider*, 717 F.3d at 770 (discussing a municipal liability claim based on deficiencies in the police department’s hiring process); *J.M. ex rel. Morris v. Hilldale Indep. Sch. Dist. No. 1-29*, 397 F. App’x 445, 456 (10th Cir. 2010) (discussing a municipal liability claim based on a school district’s practice of failing to investigate sexual harassment allegations).

21. *Schneider*, 717 F.3d at 770 (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986)) (internal quotation mark omitted).

22. *Id.* (quoting MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION CLAIMS AND DEFENSES § 7.12[B] (2014)).

have been the "moving force" behind the constitutional injury.<sup>23</sup> This causation element is especially rigorous when the municipal policy or custom is not facially unconstitutional, such as claims "based upon inadequate training, supervision, and deficiencies in hiring."<sup>24</sup>

The standard for deliberate indifference is satisfied when "the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm."<sup>25</sup> The stated rationale for this standard is again to avoid collapsing municipal liability into respondeat superior liability.<sup>26</sup> In many cases, a plaintiff proves that the municipality was on notice by demonstrating the existence of a pattern of tortious conduct.<sup>27</sup> However, deliberate indifference can also be established absent a pattern of tortious conduct "if a violation of federal rights is a 'highly predictable' or 'plainly obvious' consequence of a municipality's action or inaction, such as when a municipality fails to train an employee in specific skills needed to handle recurring situations, thus presenting an obvious potential for constitutional violations."<sup>28</sup>

### B. *Specific Types of Municipal Liability Claims*

#### 1. A Formal Regulation or Policy Statement

Under the "formal regulation or policy statement" theory of relief, a municipality is responsible for a constitutional injury when the injury was directly caused by an official policy adopted by the municipality's lawmakers.<sup>29</sup> *Monell* itself was such a case. In *Monell*, a class of female employees of the Department of Social Services and of the Board of Education of New York City alleged "that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons."<sup>30</sup> Thus, the *Monell* plaintiffs challenged a formal policy that, when implemented, necessarily caused a violation of their right to equal protection under the Fourteenth Amendment. In such situations, "fault

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23. *Id.* (quoting *Brown*, 520 U.S. at 404) (internal quotation marks omitted).

24. *Id.* (quoting SCHWARTZ, *supra* note 22, § 7.12[A]) (internal quotation mark omitted).

25. *Bryson*, 627 F.3d at 789 (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998)) (internal quotation marks omitted).

26. *Brown*, 520 U.S. at 415.

27. *Barney*, 143 F.3d at 1307.

28. *Id.* at 1308 (quoting *Brown*, 520 U.S. at 409).

29. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) ("Local governing bodies . . . can be sued directly under § 1983 . . . where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.")

30. *Id.* at 660-61.



and causation [are] obvious” and a plaintiff must prove only that the official policy is unconstitutional.<sup>31</sup>

Claims proceeding under a formal policy theory of municipal liability are relatively unusual,<sup>32</sup> but there are several illustrative examples found in the Tenth Circuit. In *Christensen v. Park City Municipal Corp.*,<sup>33</sup> the Tenth Circuit considered whether a municipality was liable for its police officers’ enforcement of ordinances that prohibited the plaintiff from displaying and selling his artwork in a public park.<sup>34</sup> Reversing the district court’s dismissal of the plaintiff’s municipal liability claim, the Tenth Circuit explained that “[i]f a governmental entity makes and enforces a law that is unconstitutional as applied, it may be subject to liability under § 1983.”<sup>35</sup> After the case was remanded to the district court, a jury ultimately returned a verdict finding that the municipality had violated the plaintiff’s First and Fourth Amendment rights.<sup>36</sup>

In *Lopez v. LeMaster*,<sup>37</sup> the plaintiff suffered an assault at the hands of other inmates.<sup>38</sup> The plaintiff claimed that Jackson County, Oklahoma, maintained a policy of understaffing its jails, which resulted in his injury.<sup>39</sup> In reversing the district court’s grant of summary judgment for the defendant municipality, the Tenth Circuit explained that “the existence of an official municipal policy which itself violated federal law” satisfies the plaintiff’s burden “as to culpability, and the heightened standard applicable to causation for unauthorized actions by a municipal employee will not apply.”<sup>40</sup>

## 2. Decisions by Final Policymakers

A municipality can also be held liable for constitutional injuries resulting from the decisions or conduct by “decisionmaker[s] possess[ing] final authority to establish municipal policy with respect to the [complained of] action.”<sup>41</sup> In *Pembaur v. City of Cincinnati*,<sup>42</sup> the plaintiff

31. *Brown*, 520 U.S. at 406; see also Barbara Kritchevsky, “Or Causes to Be Subjected”: The Role of Causation in Section 1983 Municipal Liability Analysis, 35 UCLA L. REV. 1187, 1205 (1988) (observing that the “only question” in *Monell* “was whether the policy and the outcome it prescribed were constitutional”).

32. As one commentator astutely observes, rarely are modern-day policymakers found “sitting in a smoke-filled backroom discussing whether to direct local officials to trammel the constitutional rights of the citizenry.” Gilles, *supra* note 4, at 36–37.

33. 554 F.3d 1271 (10th Cir. 2009).

34. *Id.* at 1273–74.

35. *Id.* at 1280. Interestingly, the Tenth Circuit affirmed the district court’s dismissal of the individual officers on qualified immunity grounds because the plaintiff was unable to show that the officers allegedly violated a clearly established constitutional right. *Id.* at 1278.

36. See *Christensen v. Park City Mun. Corp.*, 462 F. App’x 831, 833 (10th Cir. 2012). Despite finding the municipality liable, the jury awarded the plaintiff only nominal damages in the amount of \$1.00. *Id.*

37. 172 F.3d 756 (10th Cir. 1999).

38. *Id.* at 759.

39. *Id.* at 763.

40. *Id.* at 763.

41. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986).

alleged that the City of Cincinnati had violated his Fourth Amendment right to be free from unreasonable searches and seizures when police officers, at the direction of the county prosecutor, forcibly entered the plaintiff's workplace to arrest two of his employees.<sup>43</sup> Unlike the policy in *Monell*, the decision of the prosecutor was not made through normal legislative processes, nor was it intended to serve as a rule of general applicability to be used in future situations like an official policy. Nevertheless, the *Pembaur* Court held that "municipal liability may be imposed for a single decision by municipal policymakers . . . whether or not that body had taken similar action in the past or intended to do so in the future."<sup>44</sup>

As explained by the Tenth Circuit, *Pembaur* is a logical extension of *Monell* because "[a]n act by a municipality's final policymaking authority is no less an act of the institution than the act of a subordinate employee conforming to a preexisting policy or custom."<sup>45</sup> Thus, a municipality can be found liable even where a final policymaker acts in defiance of a lawful municipal policy or custom.<sup>46</sup>

As with claims challenging a formal policy enacted by a municipality's legislative body, proving that a final policymaker's decision or conduct was responsible for the plaintiff's injury "will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains."<sup>47</sup> The difficulty with this type of claim is showing that a municipal employee was a final policymaker, that is, one who possessed "final authority to establish municipal policy."<sup>48</sup>

The question of who qualifies as a "final policymaker" is a matter of state law.<sup>49</sup> Because it is a matter of law, courts, not juries, are tasked with determining whether a municipal employee is empowered to exercise final policymaking authority.<sup>50</sup> This makes it more difficult for a plaintiff to prevail because while looking at state law, the key inquiry is whether an official has "final, unreviewable discretion to make a decision or take an action."<sup>51</sup>

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42. 475 U.S. 469 (1986).

43. *See id.* at 472-74.

44. *Id.* at 480.

45. *Simmons v. Uintah Health Care Special Dist.*, 506 F.3d 1281, 1285 (10th Cir. 2007).

46. *Id.*

47. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 405 (1997).

48. *Pembaur*, 475 U.S. at 481.

49. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (plurality opinion). Notably, the *Praprotnik* Court was sharply divided on how courts should determine whether a municipal employee possesses the final authority necessary to trigger municipal liability. *See id.* at 143 (Brennan, J., concurring) (internal quotation marks omitted) (suggesting that state law be "the appropriate starting point, but ultimately the factfinder must determine where such policymaking authority actually resides, and not simply where the applicable law purports to put it").

50. *Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2*, 523 F.3d 1219, 1224 (10th Cir. 2008).

51. *Dempsey v. City of Baldwin*, 143 F. App'x 976, 986 (10th Cir. 2005).

Courts must consider whether: “1) the official is meaningfully constrained by policies made by another; 2) the official’s decisions are subject to meaningful review; and 3) the decisions are within the realm of the official’s authority.”<sup>52</sup>

In contrast to the practical, commonsense view that juries might take, this formalistic approach to determining the identity of a final policymaker allows a municipality “to use legal forms to hide the function of its true policies.”<sup>53</sup>

The Court’s decision in *City of St. Louis v. Praprotnik*<sup>54</sup> illustrates the difficulties that plaintiffs may encounter in asserting the “final policymaker” theory of municipal liability. In *Praprotnik*, a city employee who had suffered an adverse employment action brought a claim against his supervisors and the City of St. Louis, claiming that the adverse action violated the First Amendment and constituted a denial of due process.<sup>55</sup> After the Eighth Circuit affirmed a jury verdict for the plaintiff, the Supreme Court reversed on the basis that the plaintiff’s supervisors did not have final policymaking authority because the St. Louis City Charter identified the Civil Service Commission as the final personnel policymaker for the municipality.<sup>56</sup> Because the Commission had not itself denied the plaintiff due process, the Court refused to impose municipal liability even though there was evidence that the Commission had accorded extreme deference to some lower-level personnel decisions and failed to review others.<sup>57</sup> As Justice Brennan observed in a biting concurrence, the plurality “turn[ed] a blind eye to reality” by ignoring the supervisors’ de facto decisionmaking authority.<sup>58</sup>

The Tenth Circuit has repeatedly adhered to this formalistic approach.<sup>59</sup> In *Ware v. Unified School District No. 492*,<sup>60</sup> for example, the Tenth Circuit held that a superintendent was not the final policymaker of the school district, refusing to even consider evidence in the record that

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52. *Id.*

53. *Milligan-Hitt*, 523 F.3d at 1225. The Supreme Court has justified this approach by emphasizing a claimant’s ability to show an unconstitutional municipal custom. *Id.* (citing *Praprotnik*, 485 U.S. at 127 (plurality opinion)). However, as this Article demonstrates, *infra* Part I.B.4, it is far more difficult to prevail on a custom theory of relief than by showing an unconstitutional decision or action by a final policymaker. Thus, municipalities are perversely incentivized to create final policymaker bodies that do not, in practice, make policy.

54. 485 U.S. 112 (1988).

55. *Id.* at 114–16 (plurality opinion).

56. *Id.* at 117, 125–29.

57. *Id.* at 129–30.

58. *Id.* at 146 (Brennan, J., concurring). As Justice Brennan warned in his *Praprotnik* concurrence, the Court’s narrow construction of who qualifies as a final policymaker allows “municipalities to insulate themselves from liability for the acts of all but a small minority of actual city policymakers.” *Id.* at 132.

59. *Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2*, 523 F.3d 1219, 1225 (10th Cir. 2008).

60. 902 F.2d 815 (10th Cir. 1990).

could “support an inference that the board delegated its final authority.”<sup>61</sup> In *Jantz v. Muci*,<sup>62</sup> the Tenth Circuit held that a school principal did not have final policymaking authority over hiring decisions, despite the district court’s factual finding that the principal had “virtual de facto hiring authority.”<sup>63</sup> In *Milligan-Hitt v. Sheridan County School District No. 2*,<sup>64</sup> the Tenth Circuit reversed a \$160,000 jury verdict in favor of the plaintiff on the grounds that the school superintendent was not a final policymaker, despite evidence that the school board’s “supervision of the superintendent’s role in the hiring process was so deferential that he was functionally unreviewed.”<sup>65</sup>

### 3. Final Policymakers’ Ratification of Decisions

A municipality can also be held liable in cases where a final policymaker ratifies a subordinate’s unconstitutional actions.<sup>66</sup> However, a final policymaker will be deemed to ratify a subordinate’s decision only where “[t]he final policymaker . . . not only approve[s] the decision, but also adopt[s] the basis for the decision.”<sup>67</sup> As the cases in the previous subsection indicate, final policymakers often approve decisions of subordinates without any real oversight or review, and therefore do not “adopt the basis for the decision.” This creates a perverse incentive for policymakers to avoid careful review of subordinates’ decisions.

### 4. Informal Custom Amounting to a Widespread Practice

Under the custom-based theory of municipal liability, a municipality can be held liable if its employees acted pursuant to the municipality’s custom, even if that custom had never been formally adopted by the municipality.<sup>68</sup> Unlike written policies that can be affirmatively attributed to the decisions of governmental law-making entities or final policymakers, customs are practices of governmental officials that are “not authorized by written law.”<sup>69</sup>

To show that a challenged practice is a “custom,” the practice must be so “persistent and widespread” that it “constitutes the standard operating procedure of the local governmental entity.”<sup>70</sup> Municipal custom may

61. *Id.* at 818 n.1.

62. 976 F.2d 623 (10th Cir. 1992).

63. *Id.* at 631.

64. 523 F.3d 1219 (10th Cir. 2008).

65. *Id.* at 1223, 1229–30.

66. *Bryson v. City of Oklahoma City*, 627 F.3d 784, 790 (10th Cir. 2010).

67. *Dempsey v. City of Baldwin*, 143 F. App’x 976, 986 (10th Cir. 2005).

68. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

69. *Id.* at 691 (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167–68 (1970)). The Ninth Circuit has explained that the existence of “custom” as a basis for municipal liability is necessary to ensure that municipalities are held responsible for widespread practices that are sufficiently pervasive so as to have the force of law. *Thompson v. City of L.A.*, 885 F.2d 1439, 1444 (9th Cir. 1989), *overruled on other grounds by Bull v. City & Cnty. of S.F.*, 595 F.3d 964 (9th Cir. 2010)).

70. *Mitchell v. City & Cnty. of Denver*, 112 F. App’x 662, 672 (10th Cir. 2004) (quoting *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)) (internal quotation marks omitted).

also be comprised of “a series of decisions by a subordinate [governmental] official of which the supervisor [was] aware.”<sup>71</sup>

Although the Supreme Court recognized the custom theory in *Monell*, it has largely ignored these cases since then.<sup>72</sup> There are several cases in the Tenth Circuit, however, where plaintiffs have prevailed under this theory of municipal liability. In *Watson v. City of Kansas City*,<sup>73</sup> the Tenth Circuit reversed the district court’s grant of summary judgment for the defendant municipality where the plaintiff alleged that the Kansas City Police Department followed an unwritten custom of responding differently and affording less protection to victims of domestic violence than to nondomestic assault victims.<sup>74</sup> In finding that the plaintiff had presented sufficient evidence of an unwritten policy or custom to present the case to a jury, the Tenth Circuit relied largely on statistical evidence that Kansas City police officers had a significantly lower arrest rate for domestic assaults than nondomestic assaults.<sup>75</sup> The plaintiff also presented evidence that police officers were trained in domestic violence situations to defuse the situation and to arrest the assailant only as a last resort.<sup>76</sup>

As demonstrated by *Watson*, statistical evidence can be highly probative in showing the existence of a custom. However, courts are normally unwilling to acknowledge the existence of an unlawful custom when the plaintiff relies on statistical evidence alone.<sup>77</sup> In *Duran v. City & County of Denver*,<sup>78</sup> for example, the plaintiff asserted that the Denver Sheriff’s Department maintained “a custom of routinely exonerating officers who were the subject of excessive force claims, except in cases . . . where the officer also was found to have ‘departed from the truth’ during the investigation of the charges.”<sup>79</sup> The plaintiff presented evi-

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71. *Id.* (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988) (plurality opinion)). This formulation of “custom” appears similar to the ratification theory discussed previously. *See supra* Part I.B.3. The Tenth Circuit has explained that liability attaches in such cases because “the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official.” *Mitchell*, 112 F. App’x at 672 (quoting *Praprotnik*, 485 U.S. at 130 (plurality opinion)) (internal quotation marks omitted). However, the law again encourages supervisors to turn a blind eye to the actions of their subordinates because “the mere failure to investigate the basis of a subordinate’s discretionary decisions does not amount to a delegation of policymaking authority.” *Id.* (quoting *Praprotnik*, 485 U.S. at 130 (plurality opinion)) (internal quotation mark omitted).

72. *See Gilles, supra* note 4, at 49 & n.134. Post-*Monell*, the Supreme Court has not considered a single § 1983 case where a plaintiff alleged injury caused by an unconstitutional municipal custom. *Id.*

73. 857 F.2d 690 (10th Cir. 1988).

74. *Id.* at 695–96.

75. *Id.* at 695.

76. *Id.* at 696.

77. *See, e.g., Saviour v. Kan. City*, No. 90-2430-L, 1992 U.S. Dist. LEXIS 8813, at \*14 (D. Kan. May 15, 1992) (citing *McCleskey v. Kemp*, 481 U.S. 279 (1987)) (“Although the plaintiff’s statistical evidence is relevant, this court would not find the statistical evidence alone enough to prove the existence of a policy or custom.”).

78. No. 10-cv-01569-REB-KMT, 2012 WL 4478800 (D. Colo. Sept. 28, 2012).

79. *Id.* at \*2.

dence establishing that none of the seventy-four excessive force claims lodged against the Sheriff's Department had been sustained between 2005 and 2007.<sup>80</sup> The district court found that this statistical evidence, by itself, was insufficient to demonstrate that the sheriff's department maintained a custom of exonerating officers.<sup>81</sup> Even in *Watson*, the Tenth Circuit stated that statistical evidence, though relevant, "may not be enough to prove the existence of a policy or custom."<sup>82</sup>

Another illustrative example of a custom claim is the recent case of *Ortega v. City & County of Denver*.<sup>83</sup> In that case, the plaintiffs alleged that the Denver Police Department ("DPD") had customs of failing to adequately investigate citizen complaints of its officers and failing to discipline its officers for using excessive force.<sup>84</sup> In addition to statistical evidence, the plaintiffs presented deposition testimony from Denver's former independent monitor that the DPD "had a 'systemic problem' of officers not being held accountable for their uses of force."<sup>85</sup> Additionally, the plaintiffs presented evidence of specific instances in which the DPD Internal Affairs Bureau failed to adequately investigate citizen complaints or discipline the offending officer.<sup>86</sup> The district court found that this combination of statistical and testimonial evidence was "sufficient to allow a reasonable juror to find that [the DPD's] failure to adequately investigate citizen's excessive force complaints and to discipline officers implicated therein was so widespread as to constitute a custom."<sup>87</sup>

Once a plaintiff has demonstrated the existence of a municipality's custom, the plaintiff must then show that the custom created a substantial risk of serious harm and that the municipality was deliberately indifferent to that risk. In *Bass v. Pottawatomie County Public Safety Center*,<sup>88</sup> the

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80. *Id.*

81. *Id.*; see also *Trujillo v. Campbell*, No. 09-cv-03011-CMA-KLM, 2012 WL 3609747, at \*5-6 (D. Colo. Aug. 22, 2012) (rejecting "failure to discipline" claim where plaintiff presented only statistical evidence without additional context); *Merman v. City of Camden*, 824 F. Supp. 2d 581, 591 (D.N.J. 2010) ("Isolated and without further context, . . . statistical evidence alone may not justify a jury's finding that a municipal policy or custom authorizes or condones the unconstitutional acts of police officers."). But see *Trujillo*, 2012 WL 3609747 (citing *Lobato v. Ford*, No. 05-cv-01437-LTB-CBS, Doc. # 266 slip op. at 20 (D. Colo. Oct. 31, 2007) (concluding that statistical evidence of lower than average rate of sustained excessive force complaints was sufficient evidence of a custom or policy of failure to discipline).

82. *Watson v. City of Kansas City*, 857 F.2d 690, 696 (10th Cir. 1988).

83. 944 F. Supp. 2d 1033 (D. Colo. 2013).

84. *Id.* at 1037. Using similar evidence, the plaintiffs were also able to present sufficient evidence that Denver has a custom of tolerating its officers' "code of silence." *Id.* at 1040 (internal quotation marks omitted).

85. *Id.* at 1039.

86. *Id.* at 1039-40; see also *Saviour v. Kan. City*, No. 90-2430-L, 1992 U.S. Dist. LEXIS 8813, at \*14 (D. Kan. May 15, 1992) (discussing a plaintiff who had "challenged the City's investigation of excessive force complaints as cursory and indifferent . . . [and] proffer[ed] witnesses who themselves ha[d] filed excessive force complaints that they believe[d] to have been wrongfully determined by the City to be unfounded").

87. *Ortega*, 944 F. Supp. 2d at 1040.

88. 425 F. App'x 713 (10th Cir. 2011).

plaintiff brought a lawsuit against a county jail after he was assaulted in the “drunk pod” by a non-intoxicated detainee.<sup>89</sup> The plaintiff demonstrated that the jail had a custom of permitting its detention officers “to commingle unclassified, intoxicated detainees with unclassified, non-intoxicated detainees in the drunk pod when the intake facility was overcrowded.”<sup>90</sup> Because this custom violated the State of Oklahoma’s Minimum Jail Standards for housing intoxicated prisoners as well as the jail’s own written policies, the Tenth Circuit found that the jail’s custom created a substantial risk that intoxicated detainees, such as the plaintiff, would suffer serious injury.<sup>91</sup> The Tenth Circuit also found that the jail had caused the injury because the injury would not have occurred if the assailant had not been put in the drunk pod with the plaintiff,<sup>92</sup> and that the jail acted with deliberate indifference because it failed to adequately monitor the substantial risk that it had created through its custom.<sup>93</sup>

### 5. Municipal Inaction

In *City of Canton v. Harris*,<sup>94</sup> the Supreme Court held that a municipality could be liable under § 1983 “for constitutional violations resulting from its failure to train municipal employees.”<sup>95</sup> Building upon *City of Canton*, the lower federal courts have recognized municipal liability claims based on other forms of municipal inaction such as failure to supervise, failure to investigate, and failure to discipline.<sup>96</sup>

The attraction of a municipal inaction claim is that a plaintiff does not need to identify an unlawful municipal policy, nor must a plaintiff locate a final policymaker within the labyrinth of a municipal bureaucracy.<sup>97</sup> However, the appeal of this model of liability is tempered by the “rigorous standards of culpability and causation” that a plaintiff must satisfy.<sup>98</sup>

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89. *Id.* at 716.

90. *Id.*

91. *Id.* at 720. Notably, the Tenth Circuit held that that the custom was “sufficient in [itself] to show the substantial risk of serious harm” and the plaintiff therefore did “not have to put forth evidence showing that there had been similar assaults previously at the Jail.” *Id.* at 720 n.2. Thus, a plaintiff who can show that the existence of an unlawful custom violated written safety policies will stand a better chance of showing that the custom created a substantial risk of injury.

92. *Id.* at 722–23.

93. *Id.* at 720–21.

94. 489 U.S. 378 (1989).

95. *Id.* at 380.

96. See Gilles, *supra* note 4, at 41–42.

97. Because a plaintiff does not need to identify a policy or final policymaker, municipal inaction claims are perhaps the most common type of municipal liability claim. See G. Flint Taylor, *Municipal Liability Litigation in Police Misconduct Cases from Monroe to Praprotnik and Beyond*, 19 CUMB. L. REV. 447, 452 (1989).

98. Bd. of Cnty. Comm’rs v. Brown, 520 U.S. 397, 405 (1997).

a. Failure to Train/Failure to Supervise

The most common type of municipal inaction claim is where the plaintiff alleges that the municipality failed to train or supervise its police officers in the use of force.<sup>99</sup> To prevail on this theory, a plaintiff must first show that the training was in fact inadequate, and then satisfy the following requirements:

- (1) the officers exceeded constitutional limitations on the use of force;
- (2) the use of force arose under circumstances that constitute a usual and recurring situation[] with which police officers must deal;
- (3) the inadequate training demonstrates a deliberate indifference on the part of the city toward persons with whom the police officers come into contact, and
- (4) there is a direct causal link between the constitutional deprivation and the inadequate training.<sup>100</sup>

Typically, the most difficult elements to satisfy under this standard are the third and fourth elements.<sup>101</sup>

In *City of Canton*, the Supreme Court explained that the deliberate indifference element requires a plaintiff to show that “the need for more . . . training is so obvious, and the inadequacy so likely to result in the violation of the constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.”<sup>102</sup> Although this is a demanding standard,<sup>103</sup> a plaintiff can satisfy this element in a variety of ways. For example, In *Allen v. Muskogee*,<sup>104</sup> the Tenth Circuit held that the plaintiff demonstrated deliberate indifference by presenting expert testimony that “the training was out of synch with the entire United States in terms of what police are being trained to do.”<sup>105</sup> In *Ortega*, the plaintiffs showed deliberate indifference by citing deposition testimony of the individual officer defendants and their supervisors that the officers’ conduct was in accord with their training.<sup>106</sup> Ad-

99. The Tenth Circuit treats allegations of failure to train and failure to supervise the same way. *Whitewater v. Goss*, 192 F. App’x 794, 797 (10th Cir. 2006).

100. *Carr v. Castle*, 337 F.3d 1221, 1228 (10th Cir. 2003) (quoting *Brown v. Gray*, 227 F.3d 1278, 1286 (10th Cir. 2000)).

101. *See id.* at 1228–32 (finding that the plaintiff satisfied the first two elements, but not the latter two); *see also Whitewater*, 192 F. App’x at 798–99 (finding that the plaintiff did not satisfy the third element on a failure to train or supervise claim); *Lopez v. LeMaster*, 172 F.3d 756, 760 (10th Cir. 1999) (finding that the plaintiff did not satisfy the fourth element on a failure to train or supervise claim).

102. *City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

103. *See supra* note 19 and accompanying text.

104. 119 F.3d 837 (10th Cir. 1997).

105. *Id.* at 843 (internal quotation marks omitted). As a practical tip, expert testimony can be very helpful to show deliberate indifference. *See Ortega v. City & Cnty. of Denver*, No. 11-cv-02394-WJM-CBS, 2013 WL 438579, at \*4 (D. Colo. Feb. 5, 2013) (“The Tenth Circuit has also repeatedly permitted expert testimony on whether departmental policies comply with generally accepted practices when municipal liability is at stake.”).

106. *See Ortega v. City & Cnty. of Denver*, 944 F. Supp. 2d 1033, 1038–39 (D. Colo. 2013). Another Colorado district court recently relied on similar evidence to find the City and County of



ditionally, the plaintiffs presented testimony of Denver's former safety manager, who testified that he "believed Denver's police officers had used 'heavy-handed tactics' since 1993" and that such tactics resulted from the city's training policy.<sup>107</sup> Importantly, however, a plaintiff must show more than deficient training; a plaintiff must also establish that the municipality knew or should have known that its deficient training was likely to result in constitutional violations.<sup>108</sup>

The fourth element requires a plaintiff to identify a specific deficiency in a municipality's training program that is "closely related to the ultimate injury."<sup>109</sup> This element is difficult to prove because a plaintiff must establish more than "general deficiencies" in training; rather, a plaintiff must point to a specific deficiency "closely related to his ultimate injury."<sup>110</sup> Essentially, the plaintiff must be able to show that no constitutional injury would have occurred but for the deficient training.<sup>111</sup> A plaintiff is more likely to satisfy this causation element where he or she can show that the training at issue was incorrect rather than inadequate. In *Allen v. Muskogee*, for example, the Tenth Circuit found the fourth element satisfied where "the officers . . . were trained to do precisely the wrong thing."<sup>112</sup> Notably, the court observed that "[t]he causal link between the officers' [incorrect] training and the alleged constitutional deprivation is more direct than in cases in which officers are not given enough training to know the correct response to a dangerous situation."<sup>113</sup> Similarly, in *Ortega*, the plaintiffs presented evidence that the officers were incorrectly trained, which allowed the reasonable inference that the plaintiffs would not have been subjected to the same amount of force if the DPD had provided correct training.<sup>114</sup>

#### b. Failure to Investigate/Failure to Discipline

A second type of municipal inaction claim is based on a municipality's failure to investigate or discipline an officer's conduct. This type of claim has inherent difficulties with respect to the fourth element of causation.<sup>115</sup> In *Cordova v. Aragon*,<sup>116</sup> the Tenth Circuit considered a plain-

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Denver was deliberately indifferent to the need for additional training. See *Moore v. Miller*, No. 10-cv-00651-JLK, 2014 U.S. Dist. LEXIS 72452, at \*23–25 (May 28, 2014).

107. *Id.* at 1039.

108. *Carr v. Castle*, 337 F.3d 1221, 1229 (10th Cir. 2003).

109. *City of Canton v. Harris*, 489 U.S. 378, 391 (1989).

110. *Lopez v. LeMaster*, 172 F.3d 756, 760 (10th Cir. 1999) (finding that the plaintiff "simply has failed to tie [his] claim to his injuries").

111. Gilles, *supra* note 4, at 46–47.

112. 119 F.3d 837, 844 (10th Cir. 1997).

113. *Id.*

114. *Ortega v. City & Cnty. of Denver*, 944 F. Supp. 2d 1033, 1039 (D. Colo. 2013); see also *Moore v. Miller*, No. 10-cv-00651-JLK, 2014 U.S. Dist. LEXIS 72452, at \*26–27 (May 28, 2014).

115. See *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 777 (10th Cir. 2013) (quoting *Butler v. City of Norman*, 992 F.2d 1053, 1056 (10th Cir. 1993)) (rejecting a failure to discipline claim, noting that "[r]arely if ever is 'the failure of a police department to discipline in a specific instance . . . an adequate basis for municipal liability under *Monell*'" (omission in original)).

tiff's claim that the municipality failed to discipline an officer for using deadly force.<sup>117</sup> In affirming the district court's grant of summary judgment for the municipality, the Tenth Circuit reasoned that "basic principl[es] of linear time prevent us from seeing how conduct that occurs after the alleged violation could have somehow caused that violation."<sup>118</sup>

Although the causation element dooms the majority of failure to investigate or discipline claims, there are rare cases where such claims may succeed. In *Ortega*, the plaintiffs were able to satisfy the causation element because one of the officers alleged to have committed excessive force had previously been involved in another excessive force incident.<sup>119</sup> Thus, the district court found that a reasonable juror could have found that the officer would not have inflicted the injuries suffered by the *Ortega* plaintiffs had he been adequately disciplined for his conduct in the prior incident.<sup>120</sup>

### c. Failure to Adequately Screen Employee During Hiring

A third category of municipal inaction claims is when a municipality fails to adequately screen an employee during the hiring process. The Supreme Court has cautioned that "[c]ases involving constitutional injuries allegedly traceable to an ill-considered hiring decision pose the greatest risk that a municipality will be held liable for an injury that it did not cause."<sup>121</sup> For a plaintiff to prevail on this type of claim, he or she must show that "adequate scrutiny of an applicant's background would [have led] a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire . . . would be the deprivation of a third party's federally protected right," and that adequate screening would have shown that "this officer was highly likely to inflict the particular injury suffered by the plaintiff."<sup>122</sup> Given this demanding standard, it is not surprising that such claims are very rarely brought, nor is it

116. 569 F.3d 1183 (10th Cir. 2009).

117. *Id.* at 1194.

118. *Id.* (emphasis omitted). However, the Tenth Circuit opined that in the right circumstances, "[a] subsequent cover-up might provide circumstantial evidence that the city viewed the policy as a policy in name only and routinely encouraged contrary behavior." *Id.*; see also *Estate of Rice v. City & Cnty. of Denver*, No. 07-cv-01571-MSK-BNB, 2008 U.S. Dist. LEXIS 42381, at \*25 (D. Colo. May 27, 2008) ("[P]ost-incident investigations and discipline are relevant to the issue of policy or custom.").

119. See *Ortega*, 944 F. Supp. 2d at 1040.

120. *Id.* Another district court recently found that a demonstrated lack of discipline "is relevant to the legality of the training and/or supervision." *Moore v. Miller*, No. 10-cv-00651-JLK, 2014 U.S. Dist. LEXIS 72452, at \*17 n.3 (May 28, 2014). The court reasoned that "if supervisors tacitly condone illegal conduct by refraining from disciplining wrongdoers, their supervision is not adequate because it lacks meaning or effect." *Id.*

121. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 415 (1997).

122. *Id.* at 411-12.

surprising that the Tenth Circuit does not appear to have held a municipality liable under an inadequate screening theory of liability.<sup>123</sup>

## II. EFFECTIVE STRATEGIES TO PROVING MUNICIPAL LIABILITY

Despite the onerous legal standards discussed above, plaintiffs have found success on municipal liability claims by employing certain carefully crafted strategies. This Part of the Article focuses on concrete litigation strategies that have proven effective in developing facts that can establish municipal liability, including specific written discovery requests and Federal Rule of Civil Procedure 30(b)(6) depositions.

### A. Discovery Requests

Plaintiffs must be especially diligent in conducting discovery in municipal liability cases. Carefully constructed discovery requests, while potentially requiring production of a significant volume of documents by governmental agencies, are often of utmost importance in demonstrating municipal liability. Plaintiffs must overcome courts' reluctance to require municipal defendants to undertake extensive discovery obligations, as they often read an unwritten rule of proportionality into discovery standards. Additionally, courts will sometimes be reluctant to allow extensive discovery if the injuries or social import of the plaintiff's claims are considered insignificant.

Plaintiffs attempting to demonstrate municipal liability are usually best served by establishing their municipal liability theories early in a case in order to craft narrow discovery requests targeted at the specific type of municipal liability claim. Courts will often require attorneys that are attempting to obtain discovery related to governmental liability to explain with specificity why the discovery is necessary, contrary to the spirit of liberal discovery rules. However, courts have allowed broad discovery where significant public policy interests would be furthered.<sup>124</sup>

Generally, "a plaintiff asserting municipal liability under *Monell* is entitled not only to factual information concerning [a governmental actor's] alleged past violations, but also to information concerning his superiors' knowledge of those violations and what, if anything, they did

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123. See *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 772–73 (10th Cir. 2013) (rejecting a hiring-based claim where a background investigation of a police officer "was not adequate"); *Cacioppo v. Town of Vail*, 528 F. App'x 929, 933 (10th Cir. 2013).

124. *Fourhorn v. City & Cnty. of Denver*, No. 08-cv-01693-MSK-KLM, 2009 U.S. Dist. LEXIS 71042, at \*13–14 (D. Colo. Aug. 3, 2009) ("[G]iven the apparent frequency with which mistaken-identity arrests occurred and the alleged collateral harm caused by the arrests, the issue is one of great importance in assuring the public that innocent citizens are not being unlawfully and unnecessarily detained by police. While disclosure of the internal affairs documents at issue may marginally contribute to timidity in future handling of investigations, disclosure may also have the opposite effect here. Specifically, it may caution City officials to take similar issues seriously and to conduct investigations and adopt policies calculated to correct and minimize future mistakes.").

about them.”<sup>125</sup> Documents that contain information regarding statistical studies and comparative data of the discipline (or lack thereof) of municipal employees “are directly related to establishing notice and deliberate indifference.”<sup>126</sup> In the same vein, documents relating to independent investigations are relevant to key issues, such as whether “policymaking officials had notice of the alleged widespread practice and acted with deliberate indifference, or tacit approval, towards the previously alleged violations” by a governmental entity, and are also discoverable.<sup>127</sup> Document requests under Federal Rule of Civil Procedure 34 should be “specifically tailored to adduce statistical evidence relevant to . . . [the alleged] custom of unconstitutional misconduct.”<sup>128</sup>

District courts in the Tenth Circuit have repeatedly found that evidence of similar citizen incidents can be strong evidence in the prosecution of a municipal liability claim.<sup>129</sup> In *Mason v. Stock*,<sup>130</sup> the court permitted the discovery of evidence into internal affairs files, disciplinary investigations, and actions.<sup>131</sup> The plaintiff, who had brought a § 1983 claim against a municipal defendant, sought information related to citizen complaints of police misconduct, including “all investigatory files and case files related to those complaints.”<sup>132</sup> In finding that the plaintiff was entitled to discover this information, the court stated that it was “simply giving plaintiff a full and fair opportunity to come up with evidence that substantiates his ‘pattern and practice’ claims.”<sup>133</sup> The Colorado Supreme Court has likewise held that this type of evidence is relevant to issues regarding the training and supervision of police officers.<sup>134</sup>

125. *Everitt v. Brezzel*, 750 F. Supp. 1063, 1069 (D. Colo. 1990).

126. *Graber v. City & Cnty. of Denver*, No. 09-cv-01029-JLK-MJW, 2011 U.S. Dist. LEXIS 82226, at \*11 (D. Colo. July 27, 2011).

127. *Id.* at \*10–11.

128. *Id.* at \*9 (holding that a request for a police officer’s performance reviews and all of the Denver Police Department officers’ disciplinary records was “reasonably calculated to lead to the discovery of admissible evidence” (quoting FED. R. CIV. P. 26(b)(1))).

129. *See, e.g., Schlenker v. City of Arvada*, No. 09-cv-01189-WDM-KLM, 2010 U.S. Dist. LEXIS 84963, at \*4–5 (D. Colo. July 19, 2010) (“Documents and information regarding similar citizen complaints are clearly relevant to the conduct at issue here, particularly to Plaintiff’s municipal liability claim. . . . Further, because the definition of relevance is broadly construed for purposes of seeking discovery, Defendant Arvada’s position that the discovery sought had to be more closely ‘linked’ to the conduct at issue here, rather than merely similar, was likewise an unreasonable position.”).

130. 869 F. Supp. 828 (D. Kan. 1994).

131. *Id.* at 835.

132. *Id.* at 830.

133. *Id.* at 835.

134. *Martinelli v. Dist. Ct.*, 612 P.2d 1083, 1087 (Colo. 1980). The court also stated:

[I]nformation relating to: [citizens’ complaints] against individual police officers; records of actions taken in response to citizen complaints; and reports on the officers’ handling of many different situations . . .

. . . could be probative of the department’s knowledge of specific instances of misconduct on the part of the individual police officers, or their propensities toward such misconduct, if any. The information could also be probative of the department’s efforts to supervise the officers and to minimize the occurrence of such misconduct, and of the de-

Municipal defendants will often oppose even narrowly-tailored discovery requests by claiming undue burden and asserting that the plaintiff has embarked on a “fishing expedition.” Governmental defendants often proclaim it is difficult, if not impossible, to produce the requested documents due to expenses related to the lack of searchability of internal filing systems, and general difficulties surrounding document management and retention infrastructure and processes.

However, district courts in the Tenth Circuit have repeatedly rejected these boilerplate arguments, especially when plaintiffs can demonstrate relevance and need. A municipal defendant asserting undue burden or expense must show “that the burden or expense is unreasonable in light of the benefits to be secured from discovery.”<sup>135</sup> Courts have often rejected monetary driven undue burden arguments as unavailing. Further, preventing discovery because of governmental expenses resulting from any deficiencies in a government’s own document management and retention systems may inappropriately incentivize governmental entities to deliberately maintain poor filing systems of documents relating to its misconduct.<sup>136</sup> “The fact that Defendant maintains records in different locations, utilizes a filing system that does not directly correspond to the subjects set forth in Plaintiffs’ interrogatory, or that responsive documents might be voluminous would not suffice to sustain a claim of undue burden.”<sup>137</sup>

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partment’s reasons for retaining individual police officers after the resolution by the Staff Investigation Bureau of citizen complaints against the officers.

*Id.* (internal quotation marks omitted). While *Martinelli* involved a discovery dispute pursuant to the Colorado Rules of Civil Procedure, Colorado Rule 26(b)(1), like its federal counterpart, provides that “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” COLO. R. CIV. P. 26(b)(1).

135. *Booth v. Davis*, No. 10-4010-RDR, 2011 WL 1627004, at \*10 (D. Kan. Apr. 28, 2011) (quoting *Heartland Surgical Specialty Hosp. v. Midwest Div., Inc.*, No. 05-2164-MLB-DWB, 2007 WL 3171768, at \*2 (D. Kan. Oct. 29, 2007)) (internal quotation mark omitted) (holding that the production of 84,000 to 105,000 pages of documentation, without specificity as to why production was burdensome, did not constitute an undue burden); see also *OneSource Commercial Prop. Servs., Inc. v. City & Cnty. of Denver*, No. 10-cv-02273-WJM-KLM, 2011 U.S. Dist. LEXIS 72454, at \*6 (D. Colo. July 6, 2011) (citing *Klesch & Co. v. Liberty Media Corp.*, 217 F.R.D. 517, 524 (D. Colo. 2003); *Schartz v. Unified Sch. Dist. No. 512*, No. 95-2491-EEO, 1996 U.S. Dist. LEXIS 19123, at \*5-6 (D. Kan. Dec. 18, 1996) (“Discovery, by its very nature, is inherently burdensome to some extent. The question, however, is whether the discovery [is] unduly burdens[ome] . . .”).

136. *Graber v. City & Cnty. of Denver*, No. 09-cv-01029-JLK-MJW, 2011 U.S. Dist. LEXIS 99594, at \*3 (D. Colo. Sept. 6, 2011) (“[W]ere I to reconsider my earlier order because of Defendants’ ineptitude, I would be perversely rewarding Defendants for their poor filing system. Furthermore, instead of prodding Defendants to reform their data collection, storage, and retention policies, I would be providing an incentive to maintain a poor document management system as an excuse for resisting meaningful participation in discovery.”).

137. *Greystone Constr., Inc. v. Nat’l Fire & Marine Ins. Co.*, No. 07-cv-00066-MSK-CBS, 2008 U.S. Dist. LEXIS 106695, at \*17 (D. Colo. Mar. 21, 2008) (citing *Simon v. ProNational Ins. Co.*, No. 07-60757-CIV-COHN/SELTZER, 2007 U.S. Dist. LEXIS 96318, at \*5 (S.D. Fla. Nov. 1, 2007)); see also *Kelly v. Montgomery Lynch & Assocs.*, No. 1:07-CV-919, 2007 U.S. Dist. LEXIS 93651, at \*2, \*5 (N.D. Ohio 2007) (rejecting the defendant’s claim of undue burden and granting the plaintiff’s motion to compel, notwithstanding the defendant’s proffer that its “filing system is not maintained in a searchable way and the information sought would require ‘manually searching through hundreds of thousands of records’”); *Baine v. Gen. Motors Corp.*, 141 F.R.D. 328, 331

In *Rehberg v. City of Pueblo*,<sup>138</sup> the district court entered an order denying the City of Pueblo's objection to a magistrate judge's discovery order.<sup>139</sup> Critically, in the underlying order, the magistrate judge had permitted wide discovery against Pueblo concerning municipal liability, and found among other things that Pueblo would not be unduly burdened in producing substantial discovery, even though Pueblo submitted an affidavit arguing it would be expensive and time consuming to comply with the Court's discovery order.<sup>140</sup>

Obtaining discovery in the possession of the governmental defendant is often required to survive motions for summary judgment in municipal liability cases. Plaintiffs must establish liability theories and discovery plans early, and be prepared to overcome governmental defendants' resistance by taking discovery production deficiencies to the court early in discovery periods and as often as necessary. Attorneys who assert municipal liability claims on behalf of their clients must take the pursuit of discovery seriously and be well-versed in both discovery and municipal liability standards.

### *B. Federal Rule of Civil Procedure 30(b)(6) Depositions*

Under Fed. R. Civ. P. 30(b)(6), a party may take a deposition of an organization or other entity through a designee or designees who then testify on the organization's behalf on designated topics.<sup>141</sup> This procedure provides a ready venue for a plaintiff to garner testimony that it can point to as representing the municipality. For example, a Rule 30(b)(6) deposition can be used to determine a municipality's policies, the identity of a final policymaker, or various facts related to training.<sup>142</sup>

One case demonstrating the effective use of Rule 30(b)(6) depositions to survive summary judgment on municipal liability is *Dalgarn v. Johnson*.<sup>143</sup> In that case, the court cited Rule 30(b)(6) testimony in finding that the plaintiff had established the difficult elements of deliberate indifference and causation in a failure to train claim.<sup>144</sup> Among other

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(M.D. Ala. 1991) ("The mere fact that producing documents would be burdensome and expensive and would interfere with [a] party's normal operations is not inherently a reason to refuse an otherwise legitimate discovery request.") (granting the plaintiff's motion to compel document discovery because a company cannot sustain a claim of undue burden by citing deficiencies in its own filing system or claiming disruption in operations).

138. No. 10-cv-00261-LTB-KLM, 2011 U.S. Dist. LEXIS 87860 (D. Colo. Aug. 9, 2011).

139. See *id.* at \*2-5.

140. *Rehberg v. City of Pueblo*, No. 10-cv-00261-LTB-KLM, 2011 U.S. Dist. LEXIS 58776, at \*3-5, \*17-18 (D. Colo. June 2, 2011).

141. FED. R. CIV. P. 30(b)(6).

142. Note, however, that a municipality's designation of a person as its representative for purposes of Rule 30(b)(6) does not mean that the designated individual enjoys final policymaking authority for the municipality. See *Heinrich v. City of Casper*, 526 F. App'x 862, 863 (10th Cir. 2013).

143. No. 09-cv-01887-CMA-BNB, 2010 U.S. Dist. LEXIS 98566 (D. Colo. Sept. 20, 2010).

144. *Id.* at \*30-31.

admissions, the court found that the defendant “apparently agree[d]” that its training was inadequate.<sup>145</sup>

Several factors can contribute to the effective use of a Rule 30(b)(6) deposition. One factor is which topics the plaintiff lists on the deposition notice. As a straightforward example, a plaintiff proceeding under a failure to train theory should list the training at issue as one topic for which the municipal representative must designate a testifying representative.

Another factor is the timing of the deposition. Rule 30(b)(6) depositions are generally more useful when taken early in a case, because they can provide insight into the workings of a defendant organization or entity, which lays the foundation for further factual development. In the case of a municipal liability claim, a Rule 30(b)(6) deposition taken early can help to form the strongest municipal liability theory.<sup>146</sup>

### III. CHALLENGES, BENEFITS, AND A PATHWAY FORWARD

The strategies presented above may give plaintiffs additional tools to succeed in surviving summary judgment on municipal liability claims, but the truth remains that many plaintiffs’ attorneys are discouraged from bringing such claims due to the standards imposed by federal courts. Courts have enforced these stringent standards with sometimes open hostility to plaintiffs’ claims.<sup>147</sup> Plaintiffs are further discouraged by practical and procedural considerations such as the potential for bifurcation and lack of economic incentive.

Against this legal backdrop, it is important to remember that the purpose of § 1983 is “to provide a federal forum for litigants who ha[ve] been deprived of their constitutional rights.”<sup>148</sup> The Supreme Court has also aptly observed that adequate damages remedies are vitally important to protect our citizenry’s “cherished constitutional guarantees, and the importance of assuring [their] efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.”<sup>149</sup> In light of these purposes and the importance of adequate remedies, the courts should move the standards and requirements for municipal liability toward a legal standard that is more unified with these goals.

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145. *Id.* at \*30 & n.51.

146. For a recent example of the detriment of waiting too long to take a Rule 30(b)(6) deposition, see *Doty v. City & Cnty. of Broomfield*, No. 12-cv-01340-PAB-MJW, 2013 U.S. Dist. LEXIS 96324 (D. Colo. July 10, 2013), in which the plaintiff unsuccessfully moved for leave to amend his complaint “to conform to what Plaintiff argues is newly-discovered evidence obtained during the Rule 30(b)(6) deposition taken on May 16, 2013.” *Id.* at \*3.

147. See *Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2*, 523 F.3d 1219, 1223 (10th Cir. 2008) (suggesting that municipalities are “tempting targets for lawsuits” because they “have more money and no immunity.”).

148. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 76 (1989) (Brennan, J., dissenting).

149. *Owen v. City of Independence*, 445 U.S. 622, 651 (1980).

### A. Courts' Hostility Toward Municipal Liability Claims

Federal courts have enforced the demanding standards for municipal liability with such rigor that it has sometimes resulted in expressions of open skepticism and even hostility. Ever since the Supreme Court first rejected *respondeat superior* as a standard for municipal liability, courts have been hyper-vigilant about protecting municipalities from this form of liability and have applied heightened standards of causation and culpability where the municipality did not directly inflict an injury.<sup>150</sup> The Supreme Court has justified these "rigorous standards" as necessary "to ensure that the municipality is not held liable solely for the actions of its employee."<sup>151</sup>

These high standards have resulted in a scarcity of successful municipal liability claims in the federal courts.<sup>152</sup> For example, since *Monell*, the Supreme Court has not directly considered a single § 1983 case where a plaintiff's alleged injury was caused by an unconstitutional municipal custom,<sup>153</sup> and cases in the Tenth Circuit are likewise few and far between.<sup>154</sup>

The evolution of these uniquely stringent standards has led to a perception among civil rights attorneys that courts "simply do not understand, or are hostile to, *Monell* claims."<sup>155</sup> This perception is demonstrated by statements, such as the Tenth Circuit's observation, that municipalities "are tempting targets for lawsuits when municipal officials have erred" because municipalities "have more money" than the officials themselves.<sup>156</sup> As demonstrated in the following subpart, such statements are not only alarming in their lack of empathy for victims of civil rights violations but also divorced from reality.

### B. Other Challenges for Municipal Liability Plaintiffs

Even if plaintiffs do succeed in meeting the Supreme Court's high municipal liability requirements, they face a number of practical and procedural hurdles to obtaining a jury award. Contrary to the Tenth Cir-

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150. See *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 415 (1997) ("Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability.").

151. *Id.* at 405.

152. See *infra* app. 1.

153. Gilles, *supra* note 4, at 49 & n.134.

154. See *id.* at 21 (observing that "the truly animating forces of modern day police misconduct are . . . pervasive unwritten codes of conduct followed by rank and file officers that regularly abridge the constitutional rights of the citizenry").

155. Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 569 (1993) (quoting Taylor, *supra* note 97, at 464) (discussing interviews with plaintiff civil rights attorneys about some of the reasons that plaintiffs do not bring *Monell* claims, and cautioning litigators to "be aware of these sobering realities before filing or pursuing a *Monell* claim in a police misconduct case").

156. *Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2*, 523 F.3d 1219, 1223 (10th Cir. 2008).



cuit's dismissive observation, plaintiffs often have little economic incentive to bring *Monell* claims. Unlike with claims against individual municipal employees, plaintiffs cannot recover punitive damages against governmental entities.<sup>157</sup> Further, municipal employees are often indemnified for their constitutional torts,<sup>158</sup> so municipalities commonly bear the cost of their employees' constitutional torts, regardless of whether they are sued directly.<sup>159</sup> Thus, plaintiffs in fact have little financial incentive to pursue municipal liability claims rather than undertake the more attainable task of suing individual officers.

Procedural hurdles may additionally prevent plaintiffs from ever getting to the point of collecting damages from municipalities. In particular, courts have shown an increasing willingness to bifurcate claims against officers from claims against a municipality.<sup>160</sup> Their principal reasoning is that a plaintiff must prove the underlying constitutional harm committed by the officer to proceed against the governmental entity,<sup>161</sup> so the plaintiff should have to establish individual liability "before turning to the more burdensome and time-consuming task of litigating the *Monell* claim."<sup>162</sup>

The result of bifurcation is to make the task of proving municipal liability even more onerous. In bifurcated cases, plaintiffs must bear the costs of undergoing two separate trials, or worse, two lengthy and burdensome discovery periods.<sup>163</sup> In the first trial against the officers, plaintiffs must overcome "pro-police" juries.<sup>164</sup> Furthermore, as some courts have observed, "[t]here is a danger that bifurcation may deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action which they have brought into the

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157. See *Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1307 (10th Cir. 2003) ("The fact that municipalities are immune from punitive damages does not . . . mean that individual officials sued in their official capacity are likewise immune."); *Dill v. City of Edmond*, 155 F.3d 1193, 1210 (10th Cir. 1998) ("[M]unicipalities are not liable for punitive damages under § 1983."). *But see* *Murphy v. Spring*, No. 13-CV-96-TCK-PJC, 2013 U.S. Dist. LEXIS 130231, at \*18–19 (N.D. Okla. Sept. 12, 2013) (observing that *Youren* "has been called into question by lower courts" and criticized for lacking support).

158. Gilles, *supra* note 4, at 30 & n.52 (referencing a list of state statutes which provide for indemnification).

159. See Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987) (finding that "no case . . . showed that an individual official had borne the cost of an adverse constitutional tort judgment" in a survey of cases where payments to victims of constitutional wrongs were recorded).

160. See Colbert, *supra* note 155, at 552–60 (discussing the trend of claim bifurcation in § 1983 litigation in certain U.S. cities). *But see* *Awalt v. Marketti*, No. 11 C 6142, 2012 WL 1161500, at \*10 n.2 (N.D. Ill. Apr. 9, 2012) ("It is clear that the weight of authority holds that bifurcation is now heavily disfavored.").

161. See *City of L.A. v. Heller*, 475 U.S. 796, 799 (1986).

162. *Ojeda-Beltran v. Lucio*, No. 07 C 6667, 2008 U.S. Dist. LEXIS 54116, at \*5 (N.D. Ill. July 16, 2008) (internal quotation marks omitted).

163. Colbert, *supra* note 155, at 504.

164. *Id.* at 548–49.

court, replacing it with a sterile or laboratory atmosphere.”<sup>165</sup> Because of the additional hurdles it creates, bifurcation has been referred to as an “‘end-around’ method for avoiding Supreme Court law upholding section 1983 municipal liability” and “a nearly infallible defense strategy.”<sup>166</sup>

### C. Importance and Benefits of Municipal Liability Claims

Despite the hurdles of bringing municipal liability claims, plaintiffs nonetheless have many good reasons to bring such claims, which helps explain why practitioners in the Tenth Circuit have begun bringing *Monell* claims with greater frequency.<sup>167</sup> One such benefit is that in select cases, *Monell* provides a path to recovery for plaintiffs stymied by the doctrine of qualified immunity. To overcome qualified immunity and prevail on a § 1983 claim against an individual governmental official, a plaintiff usually must show that the constitutional right at issue was “clearly established” in addition to showing that the defendant deprived him or her of a constitutional right.<sup>168</sup> Because municipalities do not enjoy qualified immunity,<sup>169</sup> a municipality can be held liable for an officer’s constitutional torts where the constitutional right at issue was not clearly established.<sup>170</sup>

However, the greater incentive for pursuit of municipal liability lies in the potential impact of favorable rulings on a broader societal level. For many plaintiffs, the potential of preventing future civil rights violations is significantly more important than receiving monetary compensation for their own injuries. To that end, many plaintiffs request (and receive) injunctive relief in municipal liability cases that may have no direct benefit to an individual plaintiff.<sup>171</sup> For example, the settlements

165. *Estate of Owensby v. City of Cincinnati*, 385 F. Supp. 2d 626, 666 (S.D. Ohio 2004) (quoting *In re Beverly Hills Fire Litig.*, 695 F.2d 207, 217 (6th Cir. 1982)) (internal quotation marks omitted); see also *Marcum v. Scioto Cnty.*, No. 1: 10-cv-790, 2012 U.S. Dist. LEXIS 93042, at \*8 (S.D. Ohio July 5, 2012).

166. Colbert, *supra* note 155, at 507, 509.

167. As of February 25, 2014, a search on LEXIS for “municipal liability” or “Monell” in the District of Colorado returns 602 hits, with 473 of the hits (78.6%) from cases that were filed after January 1, 2007.

168. See, e.g., *Morris v. Noe*, 672 F.3d 1185, 1191 (10th Cir. 2012) (quoting *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009)) (internal quotation mark omitted).

169. See *Walker v. City of Orem*, 451 F.3d 1139, 1152 (10th Cir. 2006).

170. See *Bass v. Pottawatomie Cnty. Pub. Safety Ctr.*, 425 F. App’x 713, 718 (10th Cir. 2011) (rejecting a municipality’s inconsistent verdict argument where the jury found the municipality liable but that the individual officer was protected by qualified immunity); *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1278 (10th Cir. 2009) (finding that the individual officers were protected by qualified immunity but that “[t]he defense of qualified immunity is not available to a municipality such as Park City”); *Watson v. City of Kansas City*, 857 F.2d 690, 697 (10th Cir. 1988) (“[T]here is nothing anomalous about allowing . . . a suit [against the city] to proceed when immunity [based on a lack of clearly established law] shields the individual defendants.”).

171. See, e.g., *Hall v. Terrell*, No. 08-cv-00999-DME-MEH, 2009 U.S. Dist. LEXIS 48870, at \*3–4 (D. Colo. June 10, 2009) (involving a female inmate who, after being brutally raped by a prison guard, filed a § 1983 lawsuit seeking “actual, compensatory, and punitive damages, as well as injunctive remedies”). Illustrating the societal benefit of municipal liability claims, *Hall* “prompted

resulting from *Estate of Rice v. City & County of Denver*<sup>172</sup> required the Denver Health Medical Center and the City & County of Denver to change the policies and customs that had contributed to the death of the female detainee.<sup>173</sup>

When municipalities are held liable for constitutional harms, they are forced to confront their unconstitutional policies and customs and develop comprehensive responses so that the violations do not reoccur.<sup>174</sup> Unfavorable jury verdicts “expose municipalities to costly, indeterminate liability during these times of fiscal austerity, making reform of police practices an economic, as well as a political, imperative.”<sup>175</sup> The negative publicity resulting from a municipality being put on trial can serve as a similarly strong deterrent.<sup>176</sup> Further, municipalities “possess the resources and broad vantage point with which to identify the particular deficiencies, and [to] take appropriate corrective action.”<sup>177</sup>

#### IV. CONCLUSION

During the legislative debate preceding passage of the Civil Rights Act of 1871, now codified as § 1983,<sup>178</sup> Representative Samuel Shellabarger of Ohio, the drafter of the Act, stated:

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the state prison system to change some of its practices.” Andrea Dukakis, *Prisoner Abuse Case Leads to Big Changes*, COLO. PUB. RADIO (May 26, 2010), [http://www.cpr.org/article/Prisoner\\_Abuse\\_Case\\_Leads\\_to\\_Big\\_Changes](http://www.cpr.org/article/Prisoner_Abuse_Case_Leads_to_Big_Changes).

172. No. 07-cv-01571-MSK-BNB, 2008 U.S. Dist. LEXIS 42381 (D. Colo. May 27, 2008).

173. See, e.g., Felisa Cardona, *Settlement Reached in Jail Death: Denver Health to Pay \$4 Million to Family of Emily Rae Rice*, DENV. POST, May 30, 2008, at A1 (noting that the settlement of Rice’s wrongful death case included a mandate that the hospital institute new procedures for checking patients’ vital signs); Daniel J. Chacon, *City to Pay \$3 Million in Emily Rice Wrongful Death Lawsuit*, ROCKY MTN. NEWS, Nov. 13, 2008, <http://m.rockymountainnews.com/news/2008/nov/13/denver-pay-3-million-emily-rice-wrongful-death-law> (discussing the settlement of Rice’s wrongful death case, which included Denver Health policy changes known as “Emily’s Rights,” as well as “23 changes in protocol and procedures” at the Denver jail (internal quotation marks omitted)). Similarly, in *Hall v. Terrell*, the Department of Corrections “agreed to install more security cameras in the area where the sexual assaults took place.” Gary Hunter, *Sexual Abuse by Prison and Jail Staff Proves Persistent, Pandemic*, PRISON LEGAL NEWS, May 15, 2009, [https://www.prisonlegalnews.org/21225\\_displayArticle.aspx](https://www.prisonlegalnews.org/21225_displayArticle.aspx) (last visited Feb. 24, 2014).

174. See, e.g., Colbert, *supra* note 155, at 502 (“Jury verdicts holding municipalities liable for depriving citizens of their constitutional rights serve to effectively short-circuit official toleration and condonation of longstanding unconstitutional police practices.” (footnote omitted)); Christina B. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 49–50 (1980) (observing that holding local governments liable for constitutional harms inspires the types of “systemic changes” needed to fix “systemic problems” within local governments (internal quotation marks omitted)).

175. Colbert, *supra* note 155, at 502 (footnotes omitted).

176. See Gilles, *supra* note 4, at 88 (“[I]nstitutional change is induced not only by the threat of monetary penalties, but for other reasons, including a defendant’s desire to avoid adverse publicity, [as well as] the cost and burden of litigation . . . . Such behavior-modifying factors should have an even stronger effect in the public law sphere, where municipal liability claims based on unconstitutional customs can implicate high profile social issues, such as police brutality, corruption, or cover-ups.”).

177. Note, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2018–19 (1998).

178. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 664 (1978).

This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.<sup>179</sup>

The Supreme Court has also recognized the remedial purposes served by § 1983 and the deterrent effect it has on constitutional deprivations.<sup>180</sup> It is no wonder that municipal liability claims have been described as representing “the greatest hope for curbing the excessive use of force by police officers.”<sup>181</sup>

Yet, clearly there is a disconnect between the potential societal benefit that can arise from successful municipal liability claims and the various barriers that courts have erected to prevent plaintiffs from pursuing such claims. It is important to understand that the current legal standard reflects the courts’ unyielding fidelity to the principle that municipalities should not be subject to respondeat superior liability.<sup>182</sup>

This Article does not assert that respondeat superior liability is necessarily the appropriate standard for municipal liability claims, although there is persuasive scholarship to that effect.<sup>183</sup> But this Article does question why such a stringent standard is necessary to protect municipalities from respondeat superior liability. After all, “*Monell* confines cities’ liability for compensatory damages more tightly than the common law restricts private employers’ liability for punitive damages.”<sup>184</sup> If avoiding respondeat superior liability is the animating force behind the Court’s jurisprudence, the Court has failed to explain why lesser standards of causation and culpability would not suffice. For example, employing a standard of gross negligence or recklessness would avoid respondeat superior liability while simultaneously making it more feasible for plaintiffs to pursue municipal liability claims.<sup>185</sup>

179. *Id.* at 684 (quoting CONG. GLOBE, 42d Cong., 1st Sess. App. 68 (1871)).

180. *Owen v. City of Independence*, 445 U.S. 622, 651–52 (1980).

181. Colbert, *supra* note 155, at 502.

182. *See Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 415 (1997) (“Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability. . . . Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights.”); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986).

183. *See Achtenberg, supra* note 15, at 2191–92.

184. *Id.* at 2193.

185. *See* Teresa E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 SETON HALL L. REV. 153, 171 n.75 (2011) (describing the difference between gross negligence and deliberate indifference).

In any event, some relaxation of the idiosyncratically demanding legal standards would permit plaintiffs to challenge the root cause of many constitutional deprivations and more robustly deter the scourge of constitutional deprivations on society. In the meantime, plaintiffs and their attorneys must forge ahead to overcome the currently burdensome standards to further societal remedies and to uphold their individual constitutional rights.

## APPENDIX:

TENTH CIRCUIT MUNICIPAL LIABILITY CASES FROM THE PAST TEN YEARS<sup>186</sup>

<u>Name of Case</u>	<u>Category of Municipal Liability Claim</u>	<u>District Court Decision on Municipal Liability Claim</u>	<u>Tenth Circuit Holding</u>
Ledbetter v. City of Topeka, 318 F.3d 1183 (10th Cir. 2003).	Final policy-maker	Granted motion for summary judgment	Affirmed district court. Held that municipal judges do not act as policymakers.
Zuniga v. City of Midwest City, 68 F. App'x 160 (10th Cir. 2003).	Failure to train	<b>Denied motion for judgment as a matter of law under Fed. R. Civ. P. 50(a)</b> <sup>187</sup>	Reversed district court. Held that there was insufficient evidence to support municipal liability because no linkage between alleged lack of training and unconstitutional search and seizure.
Dubbs v. Head Start, Inc., 336 F.3d 1194 (10th Cir. 2003).	Formal policy	Granted motion for summary judgment	<b>Reversed district court.</b> Held that a private entity acting under color of state law could be held liable for performing medical examinations on children on the basis of forms that would not be understood by a reasonable person as providing parental consent.
Carr v. Castle, 337 F.3d 1221 (10th Cir. 2003).	Failure to train	Granted motion for summary judgment	Affirmed district court. Held that the plaintiff failed to prove municipal liability because he failed to show deliberate indifference by the municipality, nor could he show a direct causal link.
Ferencich v. Merritt, 79 F. App'x 408 (10th Cir. 2003).	Formal policy; Informal custom	Granted motion for summary judgment	Affirmed district court. Held that there was no evidence that sexual harassment of

186. This table omits cases where the Tenth Circuit affirmed summary judgment on municipal liability claims on the basis that the plaintiffs had not met the first element of showing that there was an underlying constitutional basis. This table also omits cases where pro se plaintiffs filed frivolous municipal liability claims and the Tenth Circuit did not engage in any instructive analysis.

187. Bolded text indicates a decision that was favorable to the plaintiff.

			employee by supervisor stemmed from county policy or custom, such as a policy of tolerating sexual harassment.
Douglas v. Beaver Ctny. Sch. Dist. Bd., 82 F. App'x 200 (10th Cir. 2003).	None	Dismissed complaint	Affirmed district court. Held that the plaintiff had not sufficiently alleged that any customs or policies of the school district caused the alleged constitutional violation.
Wright v. City of St. Francis, 95 F. App'x 915 (10th Cir. 2004).	Formal policy; Final policymaker	Granted motion for summary judgment	<b>Vacated district court's order and remanded</b> with respect to one claim against city. Held that the chief of police's false statements about violent tendencies of plaintiffs may have contributed to unlawful search.
Gonzales v. City of Castle Rock, 366 F.3d 1093 (10th Cir. 2004), <i>rev'd</i> , 545 U.S. 748 (2005).	Formal policy; Informal custom	Dismissed complaint	<b>Reversed district court.</b> Held that the plaintiff's procedural due process rights were violated where municipality did not protect the plaintiff after issuing a protection order. The Supreme Court then reversed the Tenth Circuit's conclusion that there had been a constitutional violation.
Roberson v. Pinnacol Assurance, 98 F. App'x 778 (10th Cir. 2004).	Formal policy	Dismissed municipal liability claim	<b>Reversed in part and remanded to district court.</b> Held that the plaintiff had alleged sufficient facts for the district court to consider her claim that Pinnacol, a statutorily created insurance company, violated her constitutional rights through the acts of its authorized agents who carried out Pinnacol's decision to terminate her benefits.
Donohue v. Hoey, 109 F. App'x 340 (10th Cir. 2004).	Formal policy; Failure to train	Granted motion for summary judgment	Affirmed district court. Held that the disclosure of nude photographs of the plaintiff by a police lieutenant was not caused by any policy because

			the plaintiff had not submitted evidence of any unconstitutional policy.
Mitchell v. City & Ctny. of Denver, 112 F. App'x 662 (10th Cir. 2004).	Informal custom	Granted motion for summary judgment	Affirmed district court. Held that there was not sufficient evidence of custom where plaintiff submitted evidence of racial discrimination by only one supervisor toward him and one other minority employee.
Dempsey v. City of Baldwin, 143 F. App'x 976 (10th Cir. 2005).	Final policymaker; Ratification	Granted motion for summary judgment	Affirmed district court. Held that the mayor was not a final policymaker on personnel matters, nor did the city council—which was the policymaker—ratify the mayor's discipline of municipal employees.
Beedle v. Wilson, 422 F.3d 1059 (10th Cir. 2005).	Final policymaker	Dismissed complaint	<b>Reversed district court in part.</b> Held that the plaintiff had made sufficient allegations that executives of hospital were official policymakers for defendant hospital and the hospital could therefore be held liable for First Amendment retaliation claim.
Walker v. City of Orem, 451 F.3d 1139 (10th Cir. 2006).	Failure to train	Granted motion for summary judgment	Affirmed district court. Held that there was insufficient evidence of policy that officers could retain witnesses for unreasonable amounts of time, nor was there any evidence that any of the officers were final policymakers for purposes of municipal liability.
Whitewater v. Goss, 192 F. App'x 794 (10th Cir. 2006).	Formal policy; Failure to train; Failure to supervise	Granted motion for summary judgment	Affirmed district court. Held that the plaintiff had failed to show that possible violation of his constitutional rights was caused by police department policy or failure to train.
Novitsky v. City of	Formal policy	Granted motion	Affirmed district court. Held



Aurora, 491 F.3d 1244 (10th Cir. 2007).		for summary judgment	that an officer's discretion in exercise of particular functions did not give rise to municipal liability based on the exercise of that discretion.
Darr v. Town of Telluride, 495 F.3d 1243 (10th Cir. 2007).	Formal policy	Granted motion for summary judgment	Affirmed district court. Held that a municipality's negligent supervision of citizens' advisory board could not form the basis for money damages against municipality because negligence is not a basis for liability under § 1983.
Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007).	Failure to train; Failure to supervise	Granted motion for summary judgment	<b>Reversed district court.</b> Held that there was sufficient evidence to show that the University of Colorado was deliberately indifferent to the need to train player-hosts of football recruits. The plaintiff's claim was brought under Title IX, relying on municipal liability law.
Simmons v. Uintah Health Care Special Serv. Dist., 506 F.3d 1281 (10th Cir. 2007).	Final policymaker	Granted motion for summary judgment	<b>Reversed district court.</b> Held that a final policymaker who does not follow official policy still binds the municipality.
Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2, 523 F.3d 1219 (10th Cir. 2008).	Final policymaker	<b>Jury verdict for plaintiff</b>	Reversed district court on municipal liability claim. Held that a superintendent was not final policymaker for the school district and the district could therefore not be held liable for conduct of superintendent.
Boyett v. Cnty. of Wash., 282 F. App'x 667 (10th Cir. 2008).	Formal policy	Granted motion for summary judgment	Affirmed district court. Held that the plaintiff failed to prove that a jail had unconstitutional policies and, even if he could, failed to show causation.
Carney v. City & Cnty. of Denver, 534 F.3d 1269 (10th Cir.	Informal custom	Granted motion for summary judgment	Affirmed district court. Held that the statistical evidence of the racial and gender makeup

2008).			of the Denver Police Department produced by plaintiff was insufficient to show custom of discrimination.
Christensen v. Park City Mun. Corp., 554 F.3d 1271 (10th Cir. 2009).	Formal policy	Granted motion for summary judgment	<b>Reversed district court on municipal liability claim and remanded.</b> Held that an officer's enforcement of city ordinances regarding the display and sale of artwork in a public park could trigger municipal liability.
Moss v. Kopp, 559 F.3d 1155 (10th Cir. 2009).	Formal policy; Final policymaker	Granted motion for summary judgment	Affirmed district court. Held that an officer's allegedly unconstitutional conduct in a single incident could not be attributed to the municipality because the plaintiff could not show the officer's conduct was taken pursuant to a decision made by a final policymaker.
Cordova v. Aragon, 569 F.3d 1183 (10th Cir. 2009).	Failure to train; Failure to discipline	Granted motion for summary judgment	Affirmed district court. Held that there was insufficient evidence that a municipality insufficiently trained its officers on the use of deadly force, nor did the municipality's failure to discipline officer give rise to municipal liability.
Nielander v. Bd. of Cnty. Comm'rs, 582 F.3d 1155 (10th Cir. 2009).	Final policymaker	Granted motion for summary judgment	Affirmed district court. Held that a county prosecutor was not a municipal policymaker because, under Kansas law, county attorneys are officials of the state, not the county.
Brammer-Hoelter v. Twin Peaks Charter Acad., 602 F.3d 1175 (10th Cir. 2010).	Formal policy	Granted motion for summary judgment	<b>Reversed district court in part.</b> Held that a First Amendment retaliation claim against a charter academy survived for some plaintiffs, but held that other bases for municipal liability were properly disposed of on summary judgment.

J.M. <i>ex rel.</i> Morris v. Hilldale Indep. Sch. Dist. No. 1-29, 397 F. App'x 445 (10th Cir. 2010).	Failure to investigate	<b>Jury verdict for plaintiff</b>	<b>Affirmed district court.</b> Held that a school district could be held liable for failing to investigate abuse of student by teacher because superintendent and principal were informed about potential abuse and failed to act on the information.
Porro v. Barnes, 624 F.3d 1322 (10th Cir. 2010).	Failure to train	Granted motion for summary judgment	Affirmed district court. Held that a municipality's alleged violation of prophylactic federal policy does not necessarily demonstrate deliberate indifference to the plaintiff's constitutional rights.
Bryson v. City of Oklahoma City, 627 F.3d 784 (10th Cir. 2010).	Failure to train; Failure to supervise	Granted motion for summary judgment	Affirmed district court. Held that the plaintiff presented insufficient evidence of municipality's deliberate indifference in failing to train forensic chemists where the plaintiff was exonerated by DNA evidence after seventeen years of incarceration for a rape and kidnapping he did not commit.
Bass v. Pottawatomie Cnty. Pub. Safety Ctr., 425 F. App'x 713 (10th Cir. 2011).	Formal policy; Informal custom	<b>Jury verdict for plaintiff</b>	<b>Affirmed district court.</b> Held that a jail's policy or custom of permitting jailors to commingle unclassified, intoxicated detainees with unclassified, non-intoxicated detainees showed deliberate indifference to the safety of non-intoxicated detainees, such as the plaintiff.
Coffey v. McKinley Cnty., 504 F. App'x 715 (10th Cir. 2012).	Formal policy (failure to enact policy)	Granted motion for summary judgment	Affirmed district court. Held that the plaintiff failed to show deliberate indifference where claim was based on jail's alleged lack of adequate fourteen day medical procedures policy.
Layton v. Bd. of Cnty. Comm'rs, 512	Formal policy; Final poli-	Granted motion for summary	<b>Reversed district court.</b> Held that the plaintiff pre-

F. App'x 861 (10th Cir. 2013).	cymaker	judgment	sented sufficient evidence to survive summary judgment on whether a county's policies regarding medical care provided to detainees evidenced the county's deliberate indifference to conditions at jail.
Schneider v. City of Grand Junction Police Dep't, 717 F.3d 760 (10th Cir. 2013).	Failure to train; Failure to investigate; Failure to discipline; Failure to supervise; Inadequate hiring	Granted motion for summary judgment	Affirmed district court. Held that the plaintiff failed to show deliberate indifference by a municipality regarding failure to train, failure to investigate, failure to discipline, and inadequate hiring claims where a police officer had raped the plaintiff. Held that the plaintiff also failed to establish causation with regard to failure to supervise claim.
Bailey v. Kerns, 527 F. App'x 680 (10th Cir. 2013).	Formal policy; Failure to train	Granted motion for summary judgment	Affirmed district court. Held that any medical negligence or deliberate indifference resulted from municipal employees' decisions, not from municipal policies, and that there was no pattern of conduct that would have put municipality on notice that its training of medical staff was inadequate.
Cacioppo v. Town of Vail, 528 F. App'x 929 (10th Cir. 2013).	Failure to train; Inadequate hiring; Ratification	Granted motion for summary judgment	Affirmed district court. Held that the plaintiff's hybrid, three-tiered theory failed to show deliberate indifference.