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CIVIL RIGHTS: QUALIFIED IMMUNITY AND MUNICIPAL LIABILITY UNDER SECTION 1983

INTRODUCTION

Every year the courts are burdened with a vast number of civil rights claims against government officials. This saddles the judicial system with the complex task of balancing the public policy interests of the state against the interest in safeguarding an individual's rights.[1] Most of the recent controversy regarding immunity for officials and municipalities revolves around ambiguous legislative intent and recent judicial expansion of the law surrounding civil rights actions brought under 42 U.S.C. § 1983.[2] During the present survey period,[3] the Tenth Circuit Court of Appeals was placed in the difficult position of weighing the need to compensate individuals for the constitutional harms they suffer against the need to provide public officials and municipalities with room for discretion.

This survey examines the Tenth Circuit's approach to qualified immunity and municipal liability actions arising under section 1983.[4] Part I discusses the procedural and substantive process of appeal from summary judgment based upon qualified immunity, particularly those judicial tests developed for assessing alleged violations of an individual's First Amendment right to free speech. Part II focuses on recent procedural changes developed for reviewing the denial of qualified immunity to city officials. Finally, Part III evaluates how the court determines municipal liability and in what context a municipality will be held liable for its policies or customs.

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1. *See* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 262 (1995) (discussing the dilemma facing federal courts using judicial standards to balance the need to insulate public officials from needless litigation against the need to compensate individuals whose rights have been violated).

2. *See* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 499 (1992) (indicating that the immunity doctrine is unstable due to inconsistencies in the Court's interpretive function).

3. The survey period addresses cases decided by the United States Court of Appeals for the Tenth Circuit from September 1, 1997 through August 31, 1998.

4. 42 U.S.C. § 1983 (1994) provides individuals with a cause of action, stating in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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 . . . except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

I. QUALIFIED IMMUNITY UNDER SECTION 1983

A. *Background*

The Supreme Court has struggled with the doctrine of qualified immunity over the past four decades.[5] Although not specifically mentioned in section 1983, the Supreme Court has incorporated this doctrine into interpretations of the statute.[6] Qualified immunity provides state and local officials with an affirmative defense that shields them from civil liability while performing discretionary functions.[7] The doctrine is premised on the perceived societal need to allow officials leeway in their discretionary roles and to protect those who could not have anticipated that their conduct was unconstitutional.[8] By applying qualified immunity to section 1983 jurisprudence, the Court recognized the importance of protecting officials from over-deterrence, undue interference with official duties, and potentially disabling threats of liability.[9]

In 1982, the Supreme Court decided *Harlow v. Fitzgerald*,[10] which affords state and local officials increased protection upon the assertion of the immunity defense.[11] *Harlow* sets forth a broad set of general guidelines that require lower courts to analyze immunity claims on a case-by-case basis.[12] These guidelines require weighing the fundamental concerns of both an individual's need for relief against the need to limit a public official's liability. As with all balancing tests, there is wide room for judicial discretion.[13] Following the guidelines set out in *Harlow*, the Tenth Circuit developed a framework for analyzing qualified immunity cases.

The Tenth Circuit's standard of review for examining qualified immunity issues consists of a three-part test (hereinafter the "Immunity Test"). If the plaintiff fails to satisfy any part of this test, a court will grant qualified immunity to the defendant.[14] The first part of the analysis requires that the pleadings set forth all of the factual allegations necessary to sustain a finding that the defendant violated a constitutionally or

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5. *Cf.* Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (holding that no civil liability attaches to officials for actions constituting legitimate legislative activity).

6. *See* Malley v. Briggs, 475 U.S. 335, 339 (1986).

7. *Cf.* 42 U.S.C. § 1983.

8. *Cf.* Chen, *supra* note 1, at 273.

9. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

10. 457 U.S. 800 (1982).

11. *See id.* Following its decision in *Harlow*, the Court established stricter guidelines to protect officials from liability. *See* Malley v. Briggs, 475 U.S. 335, 341 (1986) (adopting a "reasonable official" standard of review for allegedly unconstitutional official action).

12. *See Harlow*, 457 U.S. at 814 (discussing the public policy concerns involved in denying or granting qualified immunity); *cf. Malley*, 475 U.S. at 344 (applying an "objective reasonable" standard to determine whether qualified immunity should be granted); Mitchell v. Forsyth, 472 U.S. 511, 528 (1985) (characterizing defendant's claim of immunity as one raising a question of law properly addressed in the appellate court).

13. *See Harlow*, 457 U.S. at 806–07.

14. *See* Gehl Group v. Koby, 63 F.3d 1528, 1533 (10th Cir. 1995).

statutorily protected right.[15] Second, the plaintiff must show that the right violated was clearly established prior to the conduct in question.[16] Finally, the plaintiff must demonstrate that a reasonable official would have known that her conduct violated this clearly established right.[17]

The Immunity Test applies in all instances where qualified immunity is asserted as a defense to section 1983 claims. The Supreme Court, however, has expanded certain types of claims, particularly those arising under the First Amendment. In these cases, the third prong of the Immunity Test requires proof of an improper motive in order for a plaintiff's action to survive a motion for summary judgment based upon qualified immunity.[18]

Section 1983 claims requiring proof of improper motive are subjected to a heightened pleading standard. Examples of such claims include those alleging retaliation for the exercise of free speech in violation of the First Amendment,[19] race and gender discrimination in violation of the Equal Protection Clause,[20] and violations of the Eighth Amendment prohibition against cruel and unusual punishment.[21] The rationale behind subjecting these claims to a heightened pleading standard is that while improper motive is easy to allege, it is difficult for officials to disprove.[22] Since motive is a pure issue of fact, normally left for the trier of fact, the court must determine whether the defendant possessed the requisite state of mind for a plaintiff's claim to survive a motion to dismiss.[23]

Over the last few years, appellate courts have imposed the heightened burden of proof whenever improper motive is a required element of the claim.[24] The purpose for adopting this heightened burden of proof is

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15. *See* Pueblo Neighborhood Health Ctrs., Inc. v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988).

16. *See* Davis v. Sherer, 468 U.S. 183, 191 (1984) (stating that a defendant asserting qualified immunity prevails if, at the time of the conduct in question, there was no clearly established law to put her on notice that the conduct was unconstitutional); *Mitchell*, 472 U.S. at 530–34 (indicating that defendant is entitled to qualified immunity, even though his actions were unconstitutional, if at the time of the conduct it was not clearly established that the behavior was unconstitutional). This requirement serves to ensure that the defendant was on notice that the right existed. *See* Garramone v. Romo, 94 F.3d 1446, 1449 (10th Cir. 1996); *see also* Anderson v. Creighton, 483 U.S. 635, 639–41 (1987); *Mitchell*, 472 U.S. at 530; *Davis*, 468 U.S. at 191 (1984).

17. *See* Lawmaster v. Ward, 125 F.3d 1341, 1347 (10th Cir. 1997).

18. *See* Crawford-El v. Britton, 118 S. Ct. 1584, 1590 (1998).

19. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968).

20. *See, e.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976).

21. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825 (1994).

22. *See Crawford-El*, 118 S. Ct. at 1590.

23. *See id.*

24. *See* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 82 (1997). Courts adopting this approach typically require the plaintiff to produce "specific, non-conclusory factual allegations" to establish the official's state of mind before discovery takes place on a motion for summary judgment. *See*

to protect public officials from the costs associated with defending against civil actions.[25] "These social costs include the expense of litigation, diversion of official energy from pressing public issues and the deterrence of able citizens from acceptance of public office."[26]

During the present survey period, however, the Supreme Court decided *Crawford-El v. Britton*,[27] which addressed the propriety of a heightened pleading standard above and beyond that already required for qualified immunity. In *Crawford-El*, the D.C. Circuit created a heightened evidentiary standard requiring a plaintiff, prior to any discovery, to produce clear and convincing evidence of improper motive in order to defeat an official's assertion of qualified immunity.[28] This pleading requirement raised the original standard, which required only the production of specific, non-conclusory allegations of fact.

In beginning its analysis, the Supreme Court cited its holding in *Harlow*,[29] in which it determined that a "bare allegation of malice should not suffice to subject government officials either to the cost of trial or to the burdens of broad-reaching discovery."[30] The Court continued, holding that when reviewing a motion for summary judgment, the appellate court should focus only on the legal question of whether the official's conduct violated a clearly established law.[31] The Court indicated, however, that in situations where a plaintiff asserts a claim requiring proof of wrongful motive, the appellate court may require the plaintiff to put forward "specific, non-conclusory factual allegations that establish improper motive . . . in order [for the claim] to survive [a] defendant's pre-discovery motion for dismissal or summary judgment."[32] In doing so, the Court reasoned that this requirement does not rise to the level of a new heightened pleading standard, but relies on existing procedures that are available to federal judges handling claims that involve the examination of an official's state of mind.[33]

In reviewing a district court's grant of a motion to dismiss in a First Amendment case, the court must apply a modified version of the Immunity Test. As previously noted, the first part of the test addresses whether

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Sheppard v. Beerman, 94 F.3d 823, 828 (2d Cir. 1996); Gehl Group v. Koby, 63 F.3d 1528, 1535 (10th Cir. 1995); Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991).

25. *See* Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982).

26. *Crawford-El*, 118 S. Ct. at 1593 n.12.

27. 118 S. Ct. 1584 (1998).

28. *See* Crawford-El v. Britton, 93 F.3d 813, 815 (D.C. Cir. 1996) (en banc).

29. *Crawford-El*, 118 S. Ct. at 1591–92.

30. *Harlow*, 457 U.S. at 817–18.

31. *See Crawford-El*, 118 S. Ct. at 1592.

32. *Id.* at 1596–97.

33. *See id.* at 1596. The Court discussed two primary options open to a trial court prior to permitting any discovery at all. *See id.* The first entails ordering a reply to the defendant's answer. *See id.* (citing FED. R. CIV. P. 7(a)). The second involves granting the defendant's motion for a more definite statement. *See id.* (citing FED. R. CIV. P. 12(e)).

the plaintiff's pleadings allege sufficient facts to support a finding that the defendant violated a constitutionally or statutorily protected right.[34] In the First Amendment free speech context, a plaintiff will only prevail on this aspect of the qualified immunity analysis if it can be shown that the speech in question is protected. This analysis requires the balancing of four factors set forth in the Supreme Court's decision in *Pickering v. Board of Education*.[35] The plaintiff's speech must involve a matter of public concern; the violation must outweigh the employer's interest in maintaining an efficient workplace; the speech must have been a substantial factor in the detrimental employment action; and it must be demonstrated that the defendant, in the absence of the protected speech, would have taken the same action against the plaintiff.[36] The plaintiff will prevail on the first prong of the Immunity Test only with the satisfaction of each element of this four-part test (*Pickering* balancing test).

After the plaintiff successfully demonstrates that the governmental action was taken in disregard of a protected speech activity, the second prong of the Immunity Test requires the court to examine whether the First Amendment right was clearly established prior to the conduct in question.[37] Third, the court must analyze whether the defendant knew or should have known that her conduct violated the clearly established right.[38] Satisfaction of these three prongs allows a plaintiff to survive a motion to dismiss founded upon qualified immunity. The following case is illustrative of the judicial struggle to compensate victims for violations of their rights while continuing to defer to an official's discretion in carrying out her duties.

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34. *See, e.g.*, Pueblo Neighborhood Health Ctrs., Inc. v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988).

35. 391 U.S. 563 (1968).

36. *See Pickering*, 391 U.S. at 568. Matters of public concern are those of interest to the community, such as social or political concerns. *See* Lytle v. City of Haysville, 138 F.3d 857, 863 (10th Cir. 1998).

37. *See* Davis v. Sherer, 468 U.S. 183, 191 (1984) (stating that a defendant asserting qualified immunity prevails if, at the time of the conduct in question, there was no clearly established law to put her on notice that the conduct was unconstitutional); *see also* Mitchell v. Forsyth, 472 U.S. 511, 530–34 (1984) (indicating that defendant is entitled to qualified immunity, even though his actions were unconstitutional, if at the time of the conduct it was not clearly established that the behavior was unconstitutional).

38. *See* Lawmaster v. Ward, 125 F.3d 1341, 1347 (10th Cir. 1997). The Tenth Circuit has noted the difficulty in holding public officials accountable for violating First Amendment rights determined through the use of a *Pickering* balancing test. *See* Melton v. City of Oklahoma City, 879 F.2d 706, 728–29 (10th Cir. 1989) (stating that while public officials lose immunity in the face of clearly established law, "because a rule of law determined by a balancing of interests is inevitably difficult to anticipate, it follows that where *Pickering* balancing is required, the law is less likely to be well established than in other cases"), *reh'g granted on other grounds*, 888 F.2d 724 (10th Cir. 1989).

B. Dill v. City of Edmond[39]

1. Facts

In July 1991, Detective Dennis Dill raised concerns regarding the culpability of a suspect subsequently convicted of committing a double homicide.[40] Dill brought his concerns to his supervisor, but was told not to pursue the matter any further as it might cause problems with the case.[41] After Dill made additional attempts to provide facts that could exculpate the suspect, Dill's supervisor demoted him from detective to patrol officer.[42] Dill filed suit against the City of Edmond, the Chief of Police, and his immediate supervisor under section 1983, alleging violation of his First Amendment right to free speech.[43] The district court dismissed the claim, holding that Dill's speech was not constitutionally protected and that the defendants were entitled to qualified immunity.[44] On appeal, Dill asserted that the district court erred in dismissing his claim on the basis of qualified immunity.[45]

2. Decision

The Tenth Circuit began its analysis under the first prong of the Immunity Test by examining whether Dill's claim properly asserted a First Amendment free speech violation as informed by the four-factor *Pickering* balancing approach. Addressing the first two factors, the Tenth Circuit analyzed whether the speech involved matters of a public concern that outweighed the interest of the employer in promoting the efficiency of the public services.[46] The court observed that the district court improperly granted the defendants' motion to dismiss, even though it was unclear whether Dill's speech was disruptive to the operation of the Edmond Police Department.[47] In addressing this issue, the Tenth Circuit determined that the defendants' interests in maintaining efficiency did not outweigh Dill's interest in "discussing possible police misconduct

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39. 155 F.3d 1193 (10th Cir. 1998).

40. *Dill*, 155 F.3d at 1200.

41. *See id.*

42. *See id.* at 1200–01.

43. *See id.* at 1201.

44. *See id.*

45. *See id.*

46. *See id.* (citing Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)). In *Pickering*, the Supreme Court held that, in order to determine whether an employee's speech is constitutionally protected, a court must evaluate whether (1) the speech involves a matter of public concern, (2) the violation outweighs the employer's interests of public service efficiency, (3) the speech was a "substantial factor or motivating factor" in the detrimental action of the employer, and (4) in the absence of the protected speech, the same action would have been taken against the employee. *See Pickering*, 391 U.S. at 568; *see also* Lytle v. City of Haysville, 138 F.3d 857, 863 (10th Cir. 1998); Gardetto v. Mason 100 F.3d 803, 811 (10th Cir. 1996) (discussing the four-step test for reviewing a retaliation claim).

47. *See Dill*, 155 F.3d at 1203.

during a homicide investigation."[48] Next, with respect to the third factor of *Pickering*, the court held that Dill's statements concerning the existence of exculpatory evidence was a direct cause of his demotion from detective to patrol officer.[49] Finally, under the fourth factor, the court concluded that the defendants' actions were retaliatory and that they provided no evidence that the same action would have been taken had his speech not been protected.[50] Balancing these factors, the Tenth Circuit concluded that Dill successfully met the *Pickering* test and, therefore, Dill established the existence of a First Amendment right satisfying the first prong of the Immunity Test.

Having decided that Dill's pleadings asserted a First Amendment free speech claim, the Tenth Circuit evaluated the remaining two prongs of the Immunity Test—whether the right was clearly established prior to the governmental activity in question and whether a reasonable official would have known the conduct violated that right.[51] The court found that the "protected status of [Dill's] speech was sufficiently clear that the defendants reasonably should have been on notice that their actions would violate [his] First Amendment rights."[52] Relying on both its own precedent and relevant cases from other circuits, the court concluded that Dill's demotion from detective to patrol officer was unreasonable and violative of the First Amendment.[53]

C. *Analysis*

The Tenth Circuit began by examining the nature and scope of the First Amendment right to free speech. The court was careful to keep in mind the importance of balancing the need to protect individual liberties against governmental and social welfare concerns. The question of the

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48. *Id.* (citing Ramirez v. Oklahoma Dep't of Mental Health, 41 F.3d 584, 595 (10th Cir. 1994)).

49. *See id.* at 1205.

50. *See id.* at 1204.

51. *See id.* (citing Breidenbach v. Bolish, 126 F.3d 1288, 1293 (10th Cir. 1997) (determining that the heightened pleading standard required the complaint to contain "specific non-conclusory allegations of fact sufficient to allow the district court to determine that those facts, if proved [and construed in a light most favorable to the plaintiff], demonstrate that the actions taken were not objectively reasonable in light of clearly established law")).

52. *Id.* The Tenth Circuit relied on *Anderson v. Creighton*, 483 U.S. 635 (1987), which held that the unlawfulness of the conduct in question only has to be evident in light of pre-existing law, rather than declaring the specific right unlawful in previous precedent. *See Anderson*, 483 U.S. at 640. A clearly established right is apparent when there is a Supreme Court or Tenth Circuit decision on point, or when "the clear weight of authority from other courts . . . 'found the law to be as the plaintiff maintains.'" *Id.* at 1205 (quoting Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992)).

53. *See Dill*, 155 F.3d at 1204 (citing Rutan v. Republican Party, 497 U.S. 62, 72, 74 (1990) (holding that the denial of transfers or promotions because of employee's political affiliation can be a basis for a First Amendment violation) and Wren v. Spurlock, 798 F.2d 1313, 1317–18 (10th Cir. 1986) (holding that a First Amendment violation occurred when a public school teacher was harassed, reprimanded, and suspended because of her complaints about school conditions)).

extent to which the court may deny an individual a remedy for deprivation of a constitutional right to further the public policy goal of protecting officials from needless litigation underlies any determination of immunity. In this last year, the Tenth Circuit grappled with immunity issues and utilized the Supreme Court's view of sound public policy, adhering to the approaches set forth in *Harlow* and *Crawford-El*.[54]

In *Dill*, the Tenth Circuit tipped the scales toward the need to compensate individuals for their injuries over the desire to protect public officials. Applying the *Pickering* balancing test, the *Dill* court held that a person's interest in having their right to speak freely protected outweighed the public policy interest in shielding officials from excessive litigation.[55] In doing so, the Tenth Circuit focused more on the possible retaliatory behavior of public officials than on the employee's disruptive speech.[56]

D. *Other Circuits*

Other circuits have addressed similar First Amendment issues in a manner consistent with that of the Tenth Circuit. For example, the Second Circuit, in *Gubitosi v. Kapica*,[57] applied the analysis set forth in *Crawford-El* to determine whether the plaintiff was fired from her job in retaliation for the exercise of her right to free speech.[58] Before the court could determine that the plaintiff's right was clearly established and that the defendant violated that right, the plaintiff had to provide evidence from which a jury could conclude that the official engaged in retaliation against her.[59] In doing so, the Second Circuit noted that once the official has made a properly supported motion for summary judgment based upon qualified immunity, the plaintiff "may not respond [in her pleadings] simply with general attacks upon the defendant's credibility."[60]

The Second Circuit recognized that the pleadings evidenced a "total absence of evidence of retaliation," and noted that there were other significant reasons that could have resulted in termination of her employment.[61] The Second Circuit also concluded that the plaintiff failed to establish that the defendant violated a clearly established law prohibiting

54. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (lessening the standard used in determining if an official is protected under qualified immunity from a requirement to act both subjectively and objectively in good faith to merely whether a reasonable official would have been aware that he committed a constitutional violation); *see* Crawford-El v. Britton, 118 S. Ct. 1584, 1587 (1998) (sustaining the original pleading standard that requires a plaintiff to allege specific nonconclusory facts in determining whether a First Amendment right to free speech was established).

55. *See Dill*, 155 F.3d at 1203.

56. *Cf. id.*

57. 154 F.3d 30 (2d Cir. 1998).

58. *See Gubitosi*, 154 F.3d at 33 (quoting *Crawford-El*, 118 S. Ct. at 1598).

59. *See id.*

60. *Id.* (quoting *Crawford-El*, 118 S. Ct. at 1598).

61. *See id.*

such retaliation.[62] Thus, the plaintiff failed to show the defendant was objectively unreasonable in assuming that he did not violate the plaintiff's First Amendment right to free speech.[63]

The Eleventh Circuit, in *Martin v. Baugh*,[64] reversed the district court's denial of qualified immunity based upon the plaintiff's failure to allege facts sufficient to establish a violation of his right to free speech.[65] The plaintiff, a radio technician, claimed that his supervisor retaliated against him for criticizing the way in which the city awarded a contract.[66] The plaintiff argued that his statements constituted speech protected by the First Amendment and that his supervisor's disciplinary actions against him violated clearly established law.[67] The Eleventh Circuit, noting the inherent difficulty in establishing whether certain speech should be protected,[68] applied the *Pickering* balancing test to determine whether "(1) the speech at issue involve[d] a matter of public concern, and (2) the value of the speech outweigh[ed] its potential for disruption of government workplace efficiency."[69] Noting that the *Pickering* test requires legal determinations that are greatly fact-specific and does not provide a "clear, bright-line rule[],"[70] the court found that a reasonable person could not have known that the conduct at issue would give rise to a First Amendment violation.[71] The plaintiff failed to provide any case law that could have put the defendant on notice that his disciplinary actions were in violation of a First Amendment right.[72] Moreover, the Eleventh Circuit noted that "qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases."[73] Therefore, the court held that the law was not clearly established at the time of the defendant's conduct and reversed the decision of the lower court.[74]

The Eighth Circuit, in *Porter v. Dawson Education Services Cooperative*,[75] dealt with a case in which a public employee brought a section 1983 action against board members for her discharge based upon an alleged violation of her right to free speech. The district court set aside the jury verdict and entered judgment in favor of the board members.[76] The

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62. *See id.*
63. *See id.*
64. 141 F.3d 1417 (11th Cir. 1998).
65. *See Martin*, 141 F.3d at 1418.
66. *See id.*
67. *See id.*
68. *See id.* at 1420.
69. *Id.* (quoting Pickering v. Board of Educ., 391 U.S. 563 (1968)).
70. *Id.*
71. *See id.*
72. *See id.*
73. *Id.* at 1420–21 (quoting Lassiter v. Alabama A&M Univ., 28 F.3d 1146, 1149–50 (11th Cir. 1994)).
74. *See id.*
75. 150 F.3d 887 (8th Cir. 1998).
76. *See Porter*, 150 F.3d at 891–92.

Eighth Circuit determined that "when [the *Pickering* balancing test] is at issue, the asserted First Amendment right can rarely be considered 'clearly established' for purposes of the *Harlow* qualified immunity standard."[77] The Eighth Circuit, conducting the *Pickering* balancing test, held that "the government's interest as an employer in the effective functioning of the workplace outweighed appellant's interest in speaking on the issue of the confidentiality of student identification information."[78]

Notwithstanding its holding in *Porter*, however, the Eighth Circuit found that the plaintiff in *Campbell v. Arkansas Department of Correction*[79] met the requirements of the *Pickering* balancing test.[80] Once again, the plaintiff brought a section 1983 claim for violation of his free speech rights. The plaintiff, a prison warden, spoke out about unsatisfactory conditions at the prison.[81] In applying the *Pickering* balancing test, the court focused on the first factor, seeking to determine whether protecting the plaintiff's speech was considered a matter of public concern.[82] The court held that the plaintiff had a "right to bring [the complained of] problems to light both within the department and in a manner that attracted media attention"[83] and recognized that prior case law clearly established protection of this type of speech.[84] Moreover, the court concluded that the defendants were not entitled to qualified immunity because a reasonable person would have known that retaliating against the plaintiff for speaking out on issues of public concern violates the plaintiff's First Amendment rights.[85]

II. REVIEW OF DISTRICT COURT DENIALS OF QUALIFIED IMMUNITY

A. *Background*

Over the last several years, the Supreme Court has taken traditional rules of procedure and broadly expanded them at the appellate level.[86] For instance, it held that pretrial orders denying qualified immunity are im-

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77. *Id.* at 892 (discussing the application of the *Pickering* balancing test for determining whether an employer's termination of a public employee violated the First Amendment).

78. *Id.* at 895. In doing so, the Eighth Circuit affirmed the holding of the district court, which likewise found that the *Pickering* balancing test favored the public employer. *See id.* at 892.

79. 155 F.3d 950 (8th Cir. 1998).

80. *See Campbell*, 155 F.3d at 950.

81. *See id.* at 960.

82. *See id.*

83. *Id.*

84. *See id.* (citing Powell v. Basham, 921 F.2d 165, 167 (8th Cir. 1990) (noting that a "deputy sheriff's comments to superiors about concerns that touched on department operations and efficiency involved matters of public concern")).

85. *See id.*

86. *See, e.g.*, Behrens v. Pelletier, 516 U.S. 299, 305–07 (1996) (stating that appeals from summary judgment orders denying qualified immunity are not always precluded when material facts are in dispute and holding that, in certain instances, officials may take more than one interlocutory appeal).

mediately appealable.[87] This allows an appellate court to grant defendants qualified immunity based solely on the pleadings, without discovery or a trial.[88] As a result, an adverse decision at the appellate level can legally deprive victims of constitutional harms of their day in court. The Court, in *Behrens v. Pelletier*,[89] also expanded the appellate review process to allow for multiple appeals of the denial of qualified immunity.

When reviewing district court orders denying qualified immunity, the federal circuits adhere to the standards set forth in *Behrens*[90] and its predecessor, *Johnson v. Jones*.[91] Using these standards, the Tenth Circuit held that "orders denying qualified immunity before trial are immediately appealable to the extent they resolve abstract issues of law."[92] As justification for its holding, the court observed that orders denying qualified immunity are "collateral"—meaning that they are not the main issues in the case.[93] Accordingly, such orders are immediately appealable.[94]

In order for a denial of qualified immunity to be appropriate, the district court must determine that there is no abstract question of law at issue.[95] If the reason for appeal is to assert error in the district court's denial of qualified immunity because the law was not clearly established at the time of the alleged violation, then immediate appeal is appropriate.[96] An order denying qualified immunity is not appealable if the trial court merely determined that the facts asserted by the plaintiff are sufficiently supported by evidence in the record for the claim to survive summary judgment.[97]

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87. *See* Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (stating that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment").

88. *Cf. id.*

89. *See Behrens*, 516 U.S. at 308–09 (holding that an appeal from unfavorable qualified immunity ruling did not deprive jurisdiction over a second appeal on the same grounds).

90. *See id.* at 311–12.

91. 515 U.S. 304, 316 (1995) (finding jurisdiction lacking on the ground that no questions of law were presented where plaintiff had offered sufficient evidence for a jury to determine that officials had violated his constitutional rights).

92. Foote v. Spiegel, 118 F.3d 1416, 1422 (10th Cir. 1997) (citing *Behrens*, 516 U.S. at 312, and *Johnson*, 515 U.S. at 312–14)).

93. *Behrens*, 516 U.S. at 305 (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)).

94. Prior to *Johnson*, the Tenth Circuit held that review of denials of qualified immunity was available regardless of whether the appeal was based upon a question of law or fact. *See* Austin v. Hamilton, 945 F.2d 1155, 1158 (10th Cir. 1991) (determining denial of qualified immunity appropriate for appellate review where a genuine dispute exists between plaintiffs' and defendants' accounting of relevant facts), *overruled by* Johnson v. Jones, 515 U.S. 304 (1995).

95. *See id.* at 312–13; *see Mitchell*, 472 U.S. at 528 (indicating that jurisdiction was established on appeal because the issue focused on whether the law was clearly established).

96. *See Mitchell*, 472 U.S. at 524–25.

97. *See Foote*, 118 F.3d at 1422 (citing *Behrens*, 516 U.S. at 312 (providing a narrow interpretation of *Johnson* to allow review of certain orders for summary judgment in cases where the facts are still in dispute)). For instance, it has been noted that the appellate court, in reviewing this type of order, will review the disputed facts as well as case law determining whether the law was

B. *Tenth Circuit Cases*

1. *Clanton v. Cooper*[98]

a. *Facts*

Pursuant to a warrant issued by Jody Cooper, an Oklahoma Fire Marshal Agent, the plaintiff, Carolyn Clanton, was arrested for arson of her brother's trailer house.[99] The sole basis of the arrest warrant was an oral statement, which was subsequently proved to be false, made by Clanton's nephew who later testified that he was coerced by Cooper into making the statement.[100] Following Clanton's arrest, Cooper asked the police to hold her, without bail, due to her possible involvement in a homicide connected with the arson charge.[101] As a result, the police arrested Clanton and imprisoned her for one to three days (the duration of imprisonment was in dispute).[102] The trial court quashed the warrant for Clanton's arrest due to a lack of probable cause and the lack of a grand jury indictment.[103] Clanton then sued Cooper under section 1983 for deprivation of her liberty on a theory of false arrest and imprisonment.[104] Specifically, Clanton asserted three violations: (1) knowingly including false information in the affidavit supporting her arrest warrant, (2) knowingly providing false information supporting the charges against her, and (3) coercing her nephew into a false confession.[105] The district court denied Cooper's motion for summary judgment based upon qualified immunity.[106] On appeal of the qualified immunity denial, Cooper argued that "all of his actions were within the scope of his authority," and "that he did not violate any 'clearly established' law."[107]

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clearly established when the defendant's conduct occurred. *See* Kathryn R. Urbonya, *Interlocutory Appeals from Orders Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction*, 55 WASH. & LEE L. REV. 3, 21 (1998) (arguing that the appeals courts have misread the qualified immunity standard articulated in *Harlow v. Fitzgerald* by granting appellate courts the power to change procedural rules and expand their jurisdiction). If the law was clearly established then the review can take place even though disputed issues of material facts exist. *See id.*; *cf.* Achtenberg, *supra* note 2, at 548–49 (asserting that the standard set forth by the Supreme Court deprives citizens of a trial and overly protects public officials).

98. 129 F.3d 1147 (10th Cir. 1997).
99. *See Clanton*, 129 F.3d at 1151.
100. *See id.*
101. *See id.*
102. *See id.* at 1151–52.
103. *See id.* at 1152.
104. *See id.*; *see also* 42 U.S.C. § 1983 (1994).
105. *See Clanton*, 129 F.3d at 1154.
106. *See id.* at 1152.
107. *Id.*

b. *Decision*

The Tenth Circuit asserted jurisdiction because the denial of qualified immunity was based upon Cooper's violation of a clearly established law.[108] It first evaluated Clanton's allegation regarding Cooper's statements in the affidavit. The court determined that if Cooper produced intentionally false information, his conduct would constitute a violation of the Fourth Amendment's warrant requirement—a requirement the court recognized as clearly established law.[109]

As to the second claim, the Tenth Circuit held that Cooper's request that the arresting officer detain Clanton due to possible involvement in a homicide was unconstitutional,[110] since the conduct in question violated Clanton's right to due process of law.[111] The Tenth Circuit noted that Clanton failed to cite cases that clearly established the unconstitutionality of Cooper's conduct.[112] Instead of ending its analysis there, however, the court took it upon itself to determine whether such case law existed. Its inquiry unearthed *Franks v. Delaware*,[113] a case labeling as unconstitutional conduct that the court found was substantially similar to that at issue in the instant matter.[114] Accordingly, since the law was clearly established, the Tenth Circuit held that qualified immunity did not attach to Cooper.[115]

Lastly, the Tenth Circuit concluded that qualified immunity did not apply to Cooper with respect to his conduct in eliciting the nephew's confession.[116] In so holding, the court reviewed its earlier decision in *Griffin v. Strong*,[117] which stated, "[t]o be admissible, a confession must be made freely and voluntarily; it must not be extracted by threats in violation of due process or obtained by compulsion or inducement of any sort."[118] In the instant case, "Cooper falsely told [Clanton's nephew] that physical evidence connected him to the crime," and that "he would get a

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108. *See id.* (quoting Johnson v. Jones, 515 U.S. 304, 311 (1995) (stating that the appeals court has jurisdiction to review "where (1) the defendant [is] a public official asserting a defense of qualified immunity and (2) the issue appealed concern[s] not which facts the parties might be able to prove, but, rather, whether or not certain given facts show[] a violation of clearly established law" (alterations in original))).

109. *See id.* at 1154 (citing Franks v. Delaware, 438 U.S. 154, 155–56 (1978) (holding "that it is the deliberate falsity or reckless disregard of the affiant, not of any non-governmental informant that is unconstitutional"); *see also* Kaul v. Stephan, 83 F.3d 1208, 1213 (10th Cir. 1996) (stating that deliberate falsity or reckless disregard of the affiant is unconstitutional).

110. *Clanton*, 129 F.3d at 1157.

111. *Id.* at 1156.

112. *See id.* (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987) (holding that the burden lies with the plaintiff to show that a particular law is so clearly established that a "reasonable official would understand that what he is doing violates the law")).

113. Franks v. Delaware, 438 U.S. 154 (1978).

114. *See Franks*, 438 U.S. at 154; *see also Clanton*, 129 F.3d at 1157.

115. *See Clanton*, 129 F.3d at 1156–57.

116. *See id.* at 1158.

117. 983 F.2d 1540 (10th Cir. 1993).

118. *Griffin*, 983 F.2d at 1542.

twenty-five-year sentence if he didn't confess."[119] Noting that, in light of the factual circumstances, the possibility of an involuntary confession existed, and holding that the law in the area of confessions was clear, the Tenth Circuit concluded that qualified immunity was inappropriate.[120]

2. *Baptiste v. J.C. Penney Co.*[121]

a. *Facts*

Sylvia Baptiste filed a section 1983 action against Colorado Springs Police Officers Hernholm and Martin for violation of her Fourth Amendment rights.[122] Security guards detained Baptiste while shopping at a J.C. Penney store on suspicion of shoplifting a sterling silver ring.[123] The security guard's suspicions were aroused while viewing a videotape depicting Baptiste pulling out a ring she purchased earlier, comparing it to another which belonged to J.C. Penney, and placing it back in her bag.[124] A search of her purse did not produce the ring.[125]

J.C. Penney personnel called Officer Hernholm for assistance. He viewed the videotape and later requested the service of a female officer, Officer Martin, to conduct a pat-down search.[126] Martin viewed the last portion of the videotape, conducted the pat down, and found nothing.[127] The officers then informed Baptiste that she was free to leave.[128]

Following the incident, Baptiste filed a lawsuit alleging that the officers lacked probable cause to make the arrest and that they violated her Fourth Amendment right to be free from unreasonable searches and seizures. In response, the officers moved for summary judgment based upon qualified immunity—a motion the district court denied.[129] The officers appealed.[130]

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119. *Clanton*, 129 F.3d at 1157. The Tenth Circuit applied *Griffin* to evaluate whether clearly established law existed before the conduct took place. *See id.* at 1159 (quoting *Griffin*, 983 F.2d at 1543 ("Where a promise of leniency has been made in exchange for a statement, an inculpatory statement would be the product of inducement, and thus not an act of free will.")).

120. *See id.* Prior to this case, the Tenth Circuit did not specifically address the issue of whether a reasonable official would have known that using an involuntary confession of a suspect against another suspect may violate clearly established law. *Id.*

121. 147 F.3d 1252 (10th Cir. 1998).

122. *See Baptiste*, 147 F.3d at 1254.

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.* at 1255.

127. *See id.*

128. *See id.*

129. *See id.* at 1254.

130. *See id.*

b. *Decision*

The Tenth Circuit found jurisdiction pursuant to its ruling in *Clanton*.[131] At issue on review was the district court's determination that "the law allegedly violated by the defendant was clearly established at the time of the challenged actions," and that "under either party's version of the facts the defendant violated that law."[132]

In response to the plaintiff's first claim, the Tenth Circuit cited its ruling in *Anderson v. Creighton*[133] for the proposition that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[134] In reviewing the defendants' asserted entitlement to qualified immunity, the Tenth Circuit focused on whether the warrantless arrest violated Baptiste's clearly established rights under the Fourth Amendment.[135] The court evaluated the warrantless arrest under the probable cause standard[136] and determined that, even if the officers mistakenly concluded that probable cause existed, they were still entitled to qualified immunity so long as they were reasonable in making that conclusion.[137]

The officers relied on statements made by the security guards to assess probable cause.[138] The Tenth Circuit, noting that such an assessment is only necessary absent the officer's personal observations,[139] concluded that it was unnecessary to rely "solely on a security guard's allegations when the officers [had] before them an exact replication of all the information on which the guard's allegations [were] based."[140] Accordingly, the Tenth Circuit held that the officers were unreasonable in their finding of probable cause.[141]

In addressing the defendants' second claim, the Tenth Circuit noted that the law protecting an individual's right to be free from unreasonable searches and seizures was clearly established prior to the conduct in

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131. *See id.* at 1255 n.5 (citing Clanton v. Cooper, 129 F.3d 1147, 1152 (10th Cir. 1997) (stating that an order denying a defendant's motion for summary judgment based upon qualified immunity is reviewable to the extent that the order resolves abstract issues of law)).

132. *Id.* (citing Foote v. Spiegel, 118 F.3d 1416, 1422 (10th Cir. 1997)).

133. 483 U.S. 635 (1987).

134. *Id.* (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

135. *See Baptiste*, 147 F.3d at 1256.

136. *See id.* (citing Beck v. Ohio, 379 U.S. 89, 91 (1964) (indicating that the probable cause standard will determine the propriety of a warrantless arrest)).

137. *See id.*

138. *See id.* The officers relied on a Seventh Circuit decision which reasoned that it is sufficient for an officer to base probable cause on statements made by a witness who seemed to be telling the truth. *See id.* (citing Gramenos v. Jewel Cos., 797 F.2d 432, 439 (7th Cir. 1986)).

139. *See id.* at 1257.

140. *Id.* (citing BeVier v. Hucal, 806 F.2d 123, 128 (7th Cir. 1986) (stating that "a police officer may not close her or his eyes to facts that would help clarify the circumstances of an arrest")).

141. *See id.*

question.[142] In so doing, the court referenced its holding in *Lusby v. T.G. & Y. Stores*,[143] in which a guard failing to conduct an independent investigation as to whether a suspect actually paid for a specific item violated the constitutional or statutory rights of the plaintiff.[144] Noting the similarity of the facts in *Lusby* to those in the present case and reasoning by analogy, the Tenth Circuit held that the police officers violated the constitutional rights of Baptiste when they ignored easily accessible evidence.[145] Accordingly, the Tenth Circuit affirmed the district court's denial of qualified immunity.[146]

3. *Radecki v. Barela*[147]

a. *Facts*

While attempting to subdue a suspect, Officer Barela asked a bystander, Radecki, for assistance; specifically, the officer requested that Radecki strike the suspect with a flashlight.[148] As Radecki approached, the suspect gained control of Barela's gun and subsequently shot and killed Radecki.[149]

Radecki's survivors brought a section 1983 action against the officer for violation of Radecki's Fourteenth Amendment right to substantive due process of law.[150] The claim alleged that the officer, acting in reckless disregard for public safety, created a dangerous situation that resulted in Radecki's death.[151] The district court denied Barela's motion for summary judgment on qualified immunity grounds.[152] The Tenth Circuit reviewed the denial in two separate appeals.[153]

In his first appeal, Barela asserted that he did not act with "reckless intent." The Tenth Circuit remanded with an instruction explaining that "in order for the plaintiff to prevail on a substantive due process claim

142. *See id.* at 1257–58. The defendants argued that, under existing case law, officers were permitted to rely on the statements of security guards and that plaintiff failed to present any precedent to the contrary. *See id.* at 1257. In fact, the defendants believed that any law limiting the officer's reliance on statements would be considered "new law." *Id.* at 1258.

143. 749 F.2d 1423 (10th Cir. 1984).

144. *See Lusby*, 749 F.2d at 1432.

145. *See Baptiste*, 147 F.3d at 1259.

146. *See id.* at 1260.

147. 146 F.3d 1227 (10th Cir. 1998).

148. *See Radecki*, 146 F.3d at 1228.

149. *See id.*

150. *See id.*

151. *See id.*

152. *Id.*

153. *See* Radecki v. Barela, 146 F.3d 1227 (10th Cir. 1998) (second appeal); Radecki v. Barela, 77 F.3d 493 (10th Cir. 1996) (first appeal). The Tenth Circuit based the first appeal on *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), a prior decision that determined the standard for a plaintiff to prevail on a substantive due process claim. *See Radecki*, 146 F.3d at 1228–29 (citing *Uhlrig*, 64 F.3d at 567).

against an individual police officer, she must demonstrate that the officer acted in a manner that 'shocks the conscience.'"[154] In doing so, the court replaced the "reckless" standard with a more stringent one: namely, one that required the conduct to be "conscience-shocking." Notwithstanding this fact, the district court ruled that Barela's conduct did, indeed, "shock the conscience" and found for the plaintiff.[155] The second appeal resulted.

b. *Decision*

In the second appeal, the Tenth Circuit addressed the issue of whether the defendant's conduct violated clearly established law based upon the substantive component of the due process clause.[156] The substantive component of the due process clause protects individuals from actions of the government "regardless of the fairness of the procedures used to implement them."[157] While procedural due process provides "a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State,"[158] substantive due process goes further and protects individuals from behavior that "shocks the conscience," even when that behavior complies with the procedural due process requirements.

With this concept in mind, the Tenth Circuit evaluated whether Barela's conduct rose to a conscience-shocking level.[159] The Supreme Court's holding in *Sacramento County v. Lewis*,[160] provided the structure for this analysis: to trigger scrutiny of a due process violation, the conduct must have been motivated by harmful intent and fail to further a legitimate government interest.[161] Under this analysis, the Tenth Circuit concluded that Barela was not liable because the plaintiffs failed to allege that he acted with intent to do harm.[162] Accordingly, the Tenth Circuit upheld the district court's grant of qualified immunity.[163]

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154. *Radecki*, 146 F.3d at 1229 (citing *Uhlrig*, 64 F.3d at 571).

155. *Id.*

156. *See id.*

157. *Id.* (citing Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (providing the standard for determining whether an official's actions violate the substantive portion of the due process clause)).

158. *Id.* (citing *Collins*, 503 U.S. at 125).

159. *See id.* at 1230.

160. 118 S. Ct. 1708 (1998)). In *Lewis*, the Supreme Court addressed the issue of what degree of fault is necessary to make a constitutional claim against a police officer on substantive due process deprivation grounds. *See* Lewis, 118 S. Ct. at 1710. The violation in question involved a high speed chase. *See id.* The degree of fault necessary in this type of situation was one in which the police officer had the purpose "to cause harm unrelated to the legitimate object of arrest." *See id.* at 1711. In making its determination, the Supreme Court considered (1) the need for restraint in defining their scope, (2) the concern that section 1983 not replace state tort law, and (3) the need for deference to local policymaking bodies in making decisions impacting upon public safety. *See id.*

161. *See id.* at 1718.

162. *See* Radecki v. Barela, 146 F.3d 1227, 1232 (10th Cir. 1998).

163. *See id.*

C. *Analysis*

The Tenth Circuit's treatment of qualified immunity during the survey period illustrates the practical effects of the Supreme Court's holdings in *Behrens* and *Johnson*, which attempted to create a more stable body of immunity law. The Tenth Circuit, acting in accord with these cases, limited its review of qualified immunity to interlocutory appeals only where abstract issues of law existed.[164] This heralded a departure from the former Tenth Circuit treatment of qualified immunity which allowed interlocutory appellate review whenever a court denied to grant immunity to an official, regardless of whether the issue pertained to questions of law.

Additionally, the court's denial of immunity in *Clanton* and *Baptiste* demonstrated a strong Tenth Circuit intent to compensate victims for deprivations of their individual rights.[165] In *Clanton*, where the defendant official was alleged to have provided false information in an affidavit, the court's decision to deny immunity was relatively straightforward. The court's role in *Baptiste*, however, was more complex. The *Baptiste* court examined whether the law at issue was clearly established or whether it was advancing "new law."[166] The court distinguished the facts in the cases offered by the defendants from those in the present case.[167] This distinction obliterated any chance for the defendants to obtain immunity; however, the court did not characterize its holding as "new law." Rather, in observing the totality of the circumstances, the court merely recognized that the need to compensate a victim of an illegal search and seizure outweighed the interest in preserving police discretion to determine probable cause, and held accordingly. Even in *Clanton*, where the plaintiff was unable to offer precedent demonstrating that the defendant's conduct violated clearly established law, the Tenth Circuit boldly provided case law in its absence.[168] In both cases, the Tenth Circuit seemed acutely aware of the danger in granting immunity in situations where officials may use their power to further their own interests.

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164. *See* Austin v. Hamilton, 945 F.2d 1155, 1157 (10th Cir. 1991), *overruled by* Johnson v. Jones, 515 U.S. 304, 309 (1995). For procedural summaries of the Tenth Circuit's review of orders denying summary judgment based upon qualified immunity, see *Foote v. Spiegel*, 118 F.3d 1416, 1422 (10th Cir. 1997), and *Wilson v. Meeks*, 52 F.3d 1547, 1551–52 (10th Cir. 1995).

165. Congress' intent in the enactment of section 1983 was not only to remove the barriers to the federal court system that civil rights litigants faced, but also to provide a remedy against bad actors who in other circumstances would be immune. *See* Michael J. Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under § 1983*, 62 S. CAL. L. REV. 539, 548 (1989).

166. *See* Baptiste v. J.C. Penney Co., 147 F.3d 1252, 1259 (10th Cir. 1998).

167. *See Baptiste*, 147 F.3d at 1259.

168. *See* Clanton v. Cooper, 129 F.3d 1147, 1154 (10th Cir. 1997). The Tenth Circuit cited *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978), as demonstrating that the law was clearly established prior to the conduct in question. *See id.*

The Tenth Circuit offered some consolation to officials, however. In *Radecki*, the court expanded its procedural process to allow for multiple appeals of the denial of qualified immunity.[169] This provides officials seeking such immunity several chances to obtain its protections.[170]

Furthermore, the Tenth Circuit created yet another hurdle to plaintiffs in section 1983 actions by raising the standard for evaluating official conduct from "reckless disregard" to conduct that "shocks the conscience."[171] A requirement of conscience-shocking behavior, being more difficult to prove, will allow more officials to prevail on qualified immunity. This is unfortunate, since the proper place for evaluating conscience-shocking behavior should be with the fact finder and not the appeals court.

This problem, however, serves to illustrate the quandary courts are placed in when called upon to evaluate conduct resulting when an official is called upon to utilize his discretion in emergency situations. As was true in *Radecki*, the official may not have time to properly determine what consequences could arise from the conduct at issue, and necessity dictates in such situations that deference be given to such conduct when the actor makes a good faith mistake.[172] Accordingly, the Tenth Circuit, following the policy set forth by the Supreme Court, deferred to local policymaking officials whose decisions impact public safety.[173]

D. *Other Circuits*

While the other circuits appear to follow the Supreme Court's approach to evaluating denials of qualified immunity, there seems to be confusion as to when an interlocutory appeal is factual in nature rather than one concerning an abstract issue of law. For instance, the Fifth Circuit observed that, under certain circumstances, "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed."[174]

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169. *See Radecki*, 146 F.3d at 1232.

170. *See* Radecki v. Barela, 77 F.3d 493 (10th Cir. 1996) (applying Medina v. City and County of Denver, 960 F.2d 1493, 1494 (10th Cir. 1992) (stating that in order to be considered a constitutional violation, the plaintiff must prove that "the state actor directed his or her conduct toward the plaintiff")).

171. *Radecki*, 77 F.3d at 493 (citing Uhlrig v. Harder, 64 F.3d 567 (10th Cir. 1995) (ruling that to satisfy the shock the conscience standard, a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power)).

172. *Cf. Franks*, 438 U.S. at 155–56.

173. *See Radecki*, 146 F.3d at 1232 (citing County of Sacramento v. Lewis, 118 S. Ct. 1708, 1718 (1998) (discussing the need for restraint when defining the scope of substantial due process for the purpose of adhering to local officials policymaking power)).

174. Colston v. Barnhart, 146 F.3d 282, 289 (quoting *Johnson v. Jones*, 515 U.S. 304, 319 (1995), and holding a denial of qualified immunity based upon questionable facts as one not presenting a question of law).

Other circuits grappled with similar issues. For instance, the Fourth Circuit, in *Brooks v. Davis*,[175] dismissed an appeal for lack of jurisdiction when it determined that a denial order was not properly raised in a motion for summary judgment and was, therefore, not appealable.[176] The Fourth Circuit recognized that the appeals court exercises jurisdiction only over final orders and certain interlocutory and collateral orders.[177] In the present appeal, the order was neither a final order nor an appealable interlocutory or collateral order because the defendants failed to claim qualified immunity in their motion for summary judgment.[178] The Fourth Circuit concluded that dismissal of the appeal was proper because the facts and legal contentions were adequately presented in the materials before the court, and argument would not aid the decisional process.[179]

III. LIMITED LIABILITY UNDER THE DOCTRINE OF MUNICIPAL IMMUNITY

A. *Background*

In the last few decades, the Supreme Court has substantially altered municipal liability under section 1983. Prior to 1978, the Court interpreted section 1983 to provide a remedy for plaintiffs against individual state and local officials only.[180] In *Monroe v. Pape*,[181] the Supreme Court observed that Congress specifically rejected an amendment to the statute that would have included municipalities within its scope.[182] Thus, municipalities were not subject to section 1983 liability.[183]

The decision in *Monell v. Department of Social Services*,[184] however, overruled *Monroe* by expanding the statute to include municipalities.[185] In *Monell*, the Court determined that a municipality is not immune when its employee violates a constitutional right by carrying out an official policy of that municipality.[186] In reversing *Monroe*, the Court observed that

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175. *See* Brooks v. Davis, Nos. 97-7374, 97-7449, 1998 WL 196739, at *1 (4th Cir. April 24, 1998) (unpublished opinion).

176. *See id.* at *2.

177. *See id.* at *1 (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)).

178. *See id.* at *2 (citing Buffington v. Baltimore County, 913 F.2d 113, 120–21 (4th Cir. 1990) (stating that, to the extent that defendants challenged the district court's denial of summary judgment based upon their claim of qualified immunity, raised only in their answer, they waived this claim by failing to raise it in either their motion for summary judgment or their objections to the magistrate judge's report)).

179. *See id.*

180. *See* Monroe v. Pape, 365 U.S. 167, 170 (1961), *overruled by* Monell v. Department of Soc. Servs., 436 U.S. 658, 659 (1978).

181. 365 U.S. 167 (1961).

182. *See Monroe*, 365 U.S. at 190–91 (theorizing that Congress must have questioned its power under the Constitution to draft legislation imposing civil liability on state municipalities and, thus, rejected to do so).

183. *See id.* at 188–89.

184. 436 U.S. 658 (1978).

185. *See Monell*, 436 U.S. at 663, 690–91.

186. *See id.*

Congress intended for the statute to include municipal actions that were traceable to municipal policies.[187] Thus, *Monell* indicated that if a municipality's policy caused a constitutional violation, it would be held liable for that violation.[188] The Court noted that the concept of *respondeat superior* did not apply to a municipality, stating that liability must be based upon more than the relationship between an employer and an employee, liability must be attributable to a policy decision of the municipality.[189]

In *Board of County Commissioners v. Brown*,[190] the Supreme Court recognized that causation need not be proven when a municipality's policy is clearly unconstitutional.[191] There are certain situations, however, where a policy is lawful on its face, thus making the inquiry of causation and culpability much more difficult.[192] Cases that allege inadequate hiring and training policies fall into this latter category of review.[193]

The Supreme Court addressed the specific issue of inadequate municipal official training policies in *Canton v. Harris*.[194] There, the Court held that liability as a result of inadequate training required a showing of "deliberate indifference."[195] The following Tenth Circuit decisions reflect the inherent difficulties in determining municipal liability.

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187. *See id.* at 690–92 (concluding that the main issue in determining whether municipal liability exists is one of causation).

188. *See id.* at 691.

189. *See id.* at 693–94.

190. 520 U.S. 397 (1997).

191. *See Brown*, 520 U.S. at 406.

192. *Id.*

193. *See, e.g.*, Andrews v. Fowler, 98 F.3d 1069, 1077 (8th Cir. 1996) (determining that the training regimen of a police department need not include specific instruction intended to prevent officers from raping young women); Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87, 93 n.6 (1st Cir. 1994) (stating that there is no obvious need for extensive training of officers in how to deal with the mentally handicapped); *cf.* Kerr v. City of W. Palm Beach, 865 F.2d 1546 (11th Cir. 1989) (recognizing the inadequacy of training for the police force's canine unit); Doe v. Calumet City, 754 F. Supp. 1211, 1225 (N.D. Ill. 1991) (holding the city liable for failure to train officers regarding constitutional limitations on strip searches).

194. 489 U.S. 378 (1989).

195. *Canton*, 489 U.S. at 389. The Court determined that in order to satisfy the deliberate indifference standard, a municipality must have actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation and consciously or deliberately choose to disregard the risk of harm. *See id.* (citing Board of County Comm'rs v. Brown, 520 U.S. 397, 407 (1997)).

B. *Tenth Circuit Cases*

1. *J.B. v. Washington County*[196]

a. *Facts*

J.B. arose from a situation in which Pamela Humphreys, a Washington County Deputy, received an eyewitness report of a father sexually abusing his seven-year-old child.[197] After consulting with two judges, the county attorney, and the Utah Division of Family Services, Humphreys filed a petition with the juvenile court requesting an order to temporarily remove the child, L.B., from her home to conduct an interview.[198] The juvenile court granted the order and the child was removed for seventeen-and-one-half hours.[199] The interview revealed no evidence of child abuse and the juvenile court dismissed the case for lack of sufficient evidence.[200] L.B.'s mother, J.B., sued Washington County.[201] The district court entered summary judgment in favor of the county.[202]

b. *Decision*

In determining the constitutionality of the county's policy, the Tenth Circuit first analyzed whether the conduct was in accord with the county's policy or custom. The plaintiff maintained the burden of proving that the act of removing L.B. from the home in situations where sexual abuse is suspected conformed to the policy of Washington County.[203] The Tenth Circuit found that the decision to remove L.B. from her home to interview her was in accord with the County Sheriff's Office's policies and procedures and, therefore, met the first prong of the municipal liability test.[204]

The second prong of the analysis focused on causation. In determining whether the action taken caused a deprivation of a protected right, the Tenth Circuit first examined whether any such right was at issue.[205] In holding that one was, the court noted that the plaintiff argued violations of her right to procedural and substantive due process, her Fourth Amendment right to be free from unreasonable searches and seizures, and her right to equal protection of the law.[206]

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196. 127 F.3d 919 (10th Cir. 1997).
197. *See J.B.*, 127 F.3d at 922.
198. *See id.*
199. *See id.* at 923.
200. *See id.*
201. *See id.*
202. *See id.*
203. *See id.* (citing 42 U.S.C. § 1983 (1994)).
204. *See id.* at 924 (citing UTAH CODE ANN. § 17-22-2 (Supp. 1996)).
205. *See id.*
206. *See id.* at 923–31.

The Tenth Circuit next weighed J.B.'s interest in having her rights safeguarded against the interest of the state in protecting the interests of children within its jurisdiction.[207] Concluding that the state's interest outweighs that of J.B., and holding, accordingly, that the actions of the county did not result in a violation of the plaintiff's constitutional rights, the Tenth Circuit affirmed the district court's judgment.[208]

2. *Barney v. Pulsipher*[209]

a. *Facts*

Two female inmates alleged that their jailer, Gerald Pulsipher, sexually assaulted them in two separate incidents.[210] Both inmates were serving minor sentences—a DUI conviction and a shoplifting conviction.[211] Box Elder County Jail Procedures required two jailers to be on duty each shift; however, when the violations took place, Pulsipher was the only jailer on duty.[212] In both cases, Pulsipher took the female inmate to an unmonitored area and sexually assaulted her.[213]

Barney and Christensen filed a section 1983 claim against the county and its commissioners,[214] asserting that the county policy for handling female inmates was inadequate due to the county's failure to adequately staff, train, and supervise its jailers.[215] As a result, they were subjected to cruel and unusual punishment in violation of the Eighth Amendment.[216] The district court, in granting the county's motion for summary judgment based upon qualified immunity, held that the defendants did not act with deliberate indifference as required for an Eighth Amendment violation.[217] It further determined that, even had such indifference been established, the conditions of confinement did not rise to the level of cruel and unusual punishment.[218] Finally, the court held that placing women in solitary confinement for the purpose of providing separate housing for men and women furthered a legitimate governmental interest.[219]

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207. *See id.* at 925, 927, 929, 931.
208. *See id.* at 932.
209. 143 F.3d 1299 (10th Cir. 1998).
210. *See Barney*, 143 F.3d at 1303.
211. *See id.* at 1304–05.
212. *See id.*
213. *See id.*
214. *See id.* at 1303.
215. *See id.* at 1306.
216. *See id.* at 1303–04.
217. *See id.*
218. *See id.*
219. *See id.*

b. *Decision*

On appeal, the Tenth Circuit addressed the plaintiff's claim that the county should be held liable for failing to train Pulsipher.[220] Noting that causation was difficult to prove in the instant case because the county's training policy was "lawful on its face and the municipality therefore [had] not directly inflicted the injury through its own actions,"[221] the Tenth Circuit held that for liability to attach, the county must have had constructive notice of its failure to act, awareness that the failure resulted in a constitutional deprivation, and have consciously chosen to disregard the risk of harm.[222] The Tenth Circuit concluded that the failure to train claim failed because there was no evidence demonstrating that the municipality was on notice that such actions were conducted prior to the present incident.[223] The Tenth Circuit intimated that even if the training policies were inadequate, it would be unreasonable to assume that rape is an obvious consequence of a deficient training program.[224] Additionally, the Tenth Circuit focused on Pulsipher's background, which did not indicate any reason for the municipality to believe that he would be likely to sexually assault female inmates.[225] Therefore, the Tenth Circuit concluded that the county was not liable for its decision to hire him.[226]

3. *Myers v. Oklahoma County Board of County Commissioners*[227]

a. *Facts*

Tom Myers, intoxicated, suicidal, and armed with a .22 caliber rifle, locked himself in his apartment, prompting his wife to call for police assistance.[228] The officers spent all afternoon and evening in contact with Myers, attempting to prevent his suicide.[229] Ultimately, the county sheriff ordered entry into the apartment, Myers reacted by pointing a gun at the police officers, and the police officers responded by shooting and killing Myers.[230]

Suzanne Myers filed suit under section 1983, alleging that, in shooting her husband, the Oklahoma County Sheriff's Department and the Oklahoma County Board of County Commissioners violated his

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220. *See id.*

221. *Id.* (citing Board of County Comm'rs v. Brown, 520 U.S. 397, 406 (1997) (recognizing that when the policy is unlawful on its face, the causation element is easily ascertained)).

222. *See id.* at 1307 (citing *Brown*, 520 U.S. at 407).

223. *See id.* at 1308.

224. *See id.*

225. *See id.* at 1308–09.

226. *See id.* at 1309.

227. 151 F.3d 1313 (1998).

228. *Myers*, 151 F.3d at 1315.

229. *See id.*

230. *See id.*

Fourth Amendment rights.[231] In particular, Myers claimed that the officer's use of excessive force in attempting to apprehend her husband, in addition to the department's failure to adequately train its officers in the use of force, violated Myers rights.[232] Further, Myers claimed that her husband's Eighth Amendment rights were violated, asserting that the failure of the county "to train its officers in suicide prevention, counseling the mentally ill, or treatment for substance abusers" triggered liability.[233] The district court granted summary judgment on each claim in favor of the municipality based upon municipal immunity.[234]

b. *Decision*

The Tenth Circuit based its analysis on the decision set forth in *Monell v. Department of Social Services*,[235] which established that liability may attach to a county if an employee, acting pursuant to county policies, violates a constitutional right.[236] The court observed that the trial jury concluded that Myers was not deprived of either his Fourth or Eighth Amendment rights—a conclusion that possibly precluded the county from liability.[237] In so noting, the Tenth Circuit cited *City of Los Angeles v. Heller*,[238] where the Supreme Court held that if "a municipality is 'sued only because [it was] thought legally responsible' for the actions of its officers, it is 'inconceivable' to hold the municipality liable if the officers inflict no constitutional harm."[239]

Notwithstanding this holding, however, the Tenth Circuit observed that there are situations where a municipality is not precluded from liability even when the jury finds for the defendant official.[240] This situation arises when a jury concludes that the defendant official violated a constitutional right, but should have been granted qualified immunity

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231. *See id.* at 1316.

232. *See id.* (citing 42 U.S.C. § 1983 (1994)).

233. *Id.*

234. *See id.*

235. 436 U.S. 658 (1978); *see Myers*, 151 F.3d at 1316. In *Monell*, the Court determined that a plaintiff who sues under section 1983 must demonstrate that the municipal employee actually violated a constitutional or statutory right, and that it was the policy of the municipality that was the driving force behind the infringement. *See Monell*, 436 U.S. at 658.

236. *See Monell*, 436 U.S. at 690–91.

237. *See Myers*, 151 F.3d at 1316–17 (citing City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (noting that an employee who was acquitted of a charge of excessive force "precluded the imposition of liability on the City of Los Angeles for adopting a policy condoning the use of excessive force")). In *Webber v. Mefford*, 43 F.3d 1340, 1344–45 (10th Cir. 1994), the court held that "[b]ecause [defendant police officer] did not violate Plaintiffs' constitutional rights, the district court correctly dismissed Plaintiffs' claims against the [city] for inadequate training, supervision, and pursuit policies." *Webber*, 43 F.3d at 1344. The court went on to state: "A claim of inadequate training, supervision, and policies under § 1983 cannot be made out against a supervisory authority absent a finding of a constitutional violation by the person supervised." *Id.* at 1345.

238. 475 U.S. 796 (1986).

239. *Heller*, 475 U.S. at 799.

240. *See Myers*, 151 F.3d at 1317.

because he or she acted reasonably.[241] The Tenth Circuit noted that, in *Heller*, even though the district court denied the defendant's motion for summary judgment based upon municipal immunity, the record on appeal did not establish the basis of the verdict—consequently, the *Heller* rule did not preclude the municipality from suit.[242]

The Tenth Circuit found the evidence in the instant case, however, insufficient to establish that the county's officer training policy on the use of excessive force gave rise to a constitutional deprivation.[243] It concluded that that policy was "well within constitutional bounds,"[244] noting that Myers aimed his weapon in the police officers' direction despite the fact that the officers announced themselves upon entering.[245] The court likewise held that the county's training for dealing with armed persons who are suicidal, mentally ill, and/or substance abusers was adequate.[246] As to the allegation that the county violated the Eighth Amendment, the Tenth Circuit held there was insufficient evidence to show that not only did a constitutional violation occur, but that it was the county policy that caused the injury.[247]

4. *Pietrowski v. Town of Dibble*[248]

a. *Facts*

In January 1991, Chief of Police Jackson arrested Pietrowski for driving under the influence of alcohol (DUI) and speeding.[249] Town police detained Pietrowski until March 29, 1991, when he was released on bail.[250] He was acquitted of DUI in September of the following year.[251]

Pietrowski later filed a section 1983 claim against the Town of Dibble, arguing lack of care in the hiring and training of the chief of police, who allegedly subjected Pietrowski to malicious prosecution.[252] The dis-

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241. *See id.*; *see also* Anderson v. Creighton, 483 U.S. 635, 638 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

242. *Myers*, 151 F.3d at 1317–18.

243. *Id.* at 1318 (citing City of Canton v. Harris, 489 U.S. 378, 389 (1989) (holding that the only time a failure to train will serve as grounds for municipal liability is when it reflects a "deliberate" or "conscious" refusal by the municipality to rectify the failure)); *see also* Houston v. Reich, 932 F.2d 883, 888 (10th Cir. 1991) (holding that a municipality will be liable only for a complete failure to train or for grossly negligent or reckless training likely to result in future misconduct).

244. *Myers*, 151 F.3d at 1318; *see* Romero v. Board of County Comm'rs, 60 F.3d 702, 704 (10th Cir. 1995) (establishing that, for the purpose of self defense, an officer's use of excessive force is not constitutionally unreasonable).

245. *See Myers*, 151 F.3d at 1318.

246. *See id.* at 1319.

247. *See id.* at 1320.

248. 134 F.3d 1006 (10th Cir. 1998).

249. *See Pietrowski*, 134 F.3d at 1007.

250. *See id.*

251. *See id.*

252. *See id.* (citing 42 U.S.C. § 1983 (1994)).

trict court granted summary judgment in favor of the town on the claims.[253] An appeal followed.

b. *Decision*

The Tenth Circuit began its analysis by pointing out that "an action against a person in his official capacity is, in reality, an action against the government entity for whom the person works."[254] Noting Pietrowski's argument that the lower court should not have granted summary judgment in favor of the town because, in his malicious prosecution claim, he sought to hold the town liable for its lack of care in hiring and training the chief of police,[255] the Tenth Circuit suggested that, without the use of *respondeat superior*, the plaintiff's claim was more than likely insufficient.[256] Further, the court observed that the plaintiff did not present adequate evidence that the hiring and training procedures were insufficient to withstand summary judgment.[257] Thus, holding that a plaintiff must show that the policy or custom of the town contributed to the deprivation in order for the town to be held liable for a constitutional violation,[258] and that the town's decision "reflect[ed] deliberate indifference to the risk that a violation of a particular constitutional or statutory right [would] follow,"[259] the Tenth Circuit concluded that the plaintiff failed to make such a showing and was therefore not entitled to prevail. Accordingly, it affirmed the holding of the district court.[260]

C. *Analysis*

During the survey period, the Tenth Circuit handled several cases involving the municipal immunity doctrine. Each case dealt with the doctrine differently, depending on the type of claim asserted. In *J.B.*, it was apparent that the conduct at issue conformed with the policy of the county.[261] Thus, the court held the municipality free from liability after concluding that the policy of taking potentially abused children out of the home was constitutional and stating the Tenth Circuit's objective was to protect public welfare agencies from needless litigation that could take away from the efficiency of policing child abuse.[262] Similarly, in *Myers*, where the court upheld the adequacy of the defendant county's policy providing for the training of officers on excessive force, the county was

253. *See id.* at 1008.
254. *Id.* (citing Kentucky v. Graham, 473 U.S. 159, 165–66 (1985)).
255. *See id.* at 1009.
256. *See id.*
257. *See id.*
258. *See id.* (citing Board of County Comm'rs v. Brown, 520 U.S. 397, 403-04 (1997)).
259. *Id.* (quoting *Brown*, 520 U.S. at 411).
260. *See id.*
261. *See* J.B. v. Washington County, 127 F.3d 919, 923 (10th Cir. 1997).
262. *See id.*

likewise held free from liability.[263] And finally, in *Barney*, the court found that municipal training policies do not require education on how to abstain from sexually assaulting inmates, consequently holding the defendant municipality free from liability owing to the sexual misconduct of one of its jailers.[264]

The Tenth Circuit reviewed claims against municipalities conservatively, with clear deference to agency discretion, finding on several occasions that there was insufficient evidence to prove that the municipality both knew of an official's improper actions and failed to correct them. This approach occurred in *Barney*, where the court found that the evidence was insufficient to conclude that the defendant commissioners knew of the jailer's criminal conduct.[265] It also occurred in *Pietrowski*, where the plaintiff was unable to prevail on his claim against the Town of Dibble because the evidence was not sufficient to establish a lack of care in the hiring and training of its police chief.[266] Unfortunately, because the Tenth Circuit declined to indicate why the evidence was insufficient, we cannot determine why they came to that conclusion.

In general, the Tenth Circuit appeared reluctant to give deference to victims of constitutional harms where a municipality was involved. Despite the fact that, in some situations, justice can only prevail when a municipality is held liable for the criminal actions of its employees, the Tenth Circuit closely adheres to the view that *respondeat superior* does not apply.[267] Due to the Supreme Court's failure to recognize that the focus of the judicial inquiry should not be on the municipality and constitutionality of its policies, but on the conduct of those representing it, the victim is forced to carry the evidentiary burden of proving not only that the complained-of conduct took place, but that the municipality knew of its occurrence and failed to rectify it.[268] Consequently, the Tenth Circuit has no choice but to find for the municipality in most situations, thus "exposing the public to a tremendous risk of invasions of civil rights"[269] and ensuring that the only way a victim can prevail on a municipality claim is when the policymaker itself creates the constitutional wrong.

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263. *See* Myers v. Oklahoma County Bd., 151 F.3d 1313, 1318–19 (1998); *cf.* David Rudovsky, *How to Handle Unreasonable Force Litigation: Prosecution and Defense Strategies in Police Misconduct Cases*, 590 PRAC. L. INST. 259, 321–22 (1998).

264. *See* Barney v. Pulsipher, 143 F.3d 1299, 1307–08 (10th Cir. 1998).

265. *See Barney*, 143 F.3d at 1311.

266. *See* Pietrowski v. Town of Dibble, 134 F.3d 1006, 1009 (1998).

267. *See* Monell v. Department of Soc. Servs., 436 U.S. 658, 691 (1978).

268. *See* Susannah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The* Monell *Sketch Becomes a Distorted Picture*, 65 N.C. L. REV. 517, 532 (1987) (rejecting the Supreme Court view that the theory of respondeat superior is inapplicable to municipality litigation). Mead noted that Congress "intended to impose liability for constitutional harm on those who have not themselves done the 'subjecting,' but rather are responsible for those who have," thereby determining that even though the municipality did not actively cause the harm, the action of its employees falls within the causation theory. *Id.* at 532–33.

269. *Id.* at 533.

D. *Other Circuits*

While the Supreme Court's holding in *Monell* dictates the standard of review employed by circuit courts evaluating municipal liability in section 1983 actions, variations in fact patterns make the outcome of such actions anything but predictable. For example, the Eighth Circuit reviewed a case in which the main issue on appeal centered on county liability for unsafe prison conditions.[270] In determining whether the defendant county was deliberately indifferent to potential harms to prison detainees, the Eighth Circuit noted that substantial evidence of constitutional violations existed to support imposition of liability.[271] Absent such substantial evidence, however, the Eighth Circuit, in similar fashion to the Tenth, is unlikely to place liability on a municipality for the acts of its employees.[272]

CONCLUSION

From the *Harlow* and *Brown* Court's reformation of the heightened pleading standard in certain qualified immunity cases, to *Behrens'* expansion and distortion of the procedural process for appealing such claims, it seems that the Tenth Circuit's desire to protect government officials and the agencies employing them grossly outweighs the court's desire to protect the individual liberties set forth in the Bill of Rights. For more than forty years, the Supreme Court struggled with immunity under section 1983 and still it offers, at best, an unstable body of law. The purpose of section 1983 is not furthered when the federal courts create misguided policies to protect public officials from taking responsibility for their own actions. Until the Supreme Court recognizes the original intent behind passage of the civil rights statute, justice will forever be denied to those who have been constitutionally victimized.

Marisa A. Amin[*]

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270. *See* Doe v. Washington County, 150 F.3d 920 (8th Cir. 1998). The facts arose out of a situation where a fifteen year old was detained and, while awaiting trial, was brutally tortured, raped, and humiliated by other detainees for a period of five days. *See id.* at 922.

271. *See Washington County*, 150 F.3d at 922–23 (citing Farmer v. Brennan, 511 U.S. 825, 834 (1994) (recognizing that prison officials may be held liable under Eighth Amendment for denying humane conditions of confinement only if they know that inmates face substantial risk of serious harm and disregard that risk by failing to take reasonable measures to change it)).

272. *Cf.* Tesch v. County of Green Lake, 157 F.3d 465, 475–76 (7th Cir. 1998) (holding that arrestee could not satisfy deliberate indifference standard in claim based solely on plaintiff's placement in a cell designed to accommodate wheelchair-confined inmates); Doe v. Dallas Ind. Sch. Dist., 153 F.3d 211, 216–17 (5th Cir. 1998) (concluding that the district did not delegate policy making authority to school principal, and holding that district's failure to adopt official sexual abuse policy did not support municipal liability); Hayden v. Grayson, 134 F.3d 449, 456–57 (1st Cir. 1998) (dismissing claim of municipal liability based upon allegations of a selective law enforcement policy and general failure to train the town police chief).

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